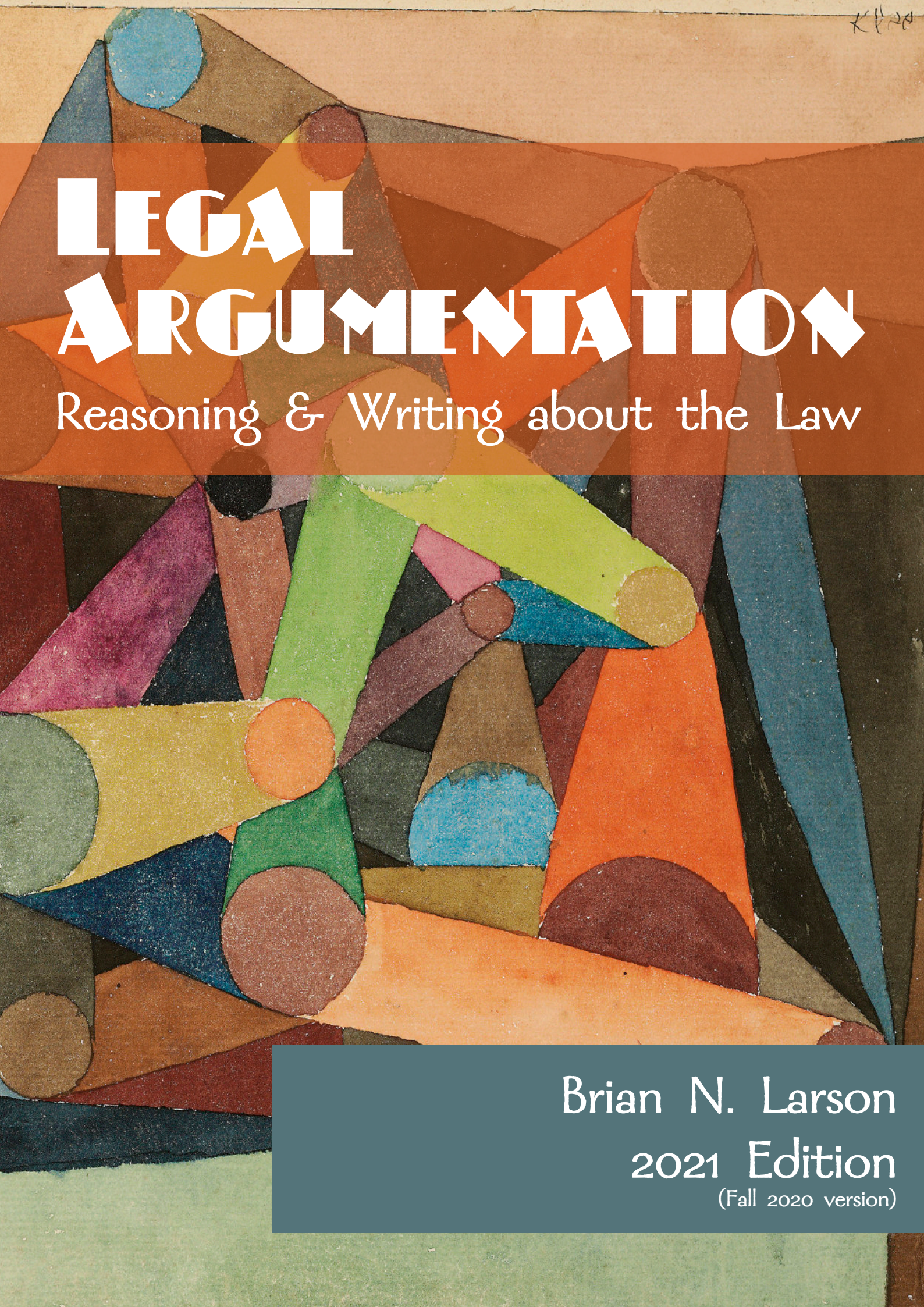

Legal Argumentation

Reasoning & Writing about the Law

Brian N. Larson

2021 Edition
(Fall 2020 version)

2021 Edition (fall 2020 final)

Legal Argumentation

Reasoning and writing about the law

Brian N. Larson, JD PhD

Compiled: August 11, 2020

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Colophon
This document was typeset with the help of KOMA-Script and LaTeX using the kaobook class. The source code of the kaobook class is available at:
https://github.com/fmarotta/kaobook (You are welcome to contribute!)

First printed in XXXX

Preface to 2021 edition

Teachers find themselves wondering whether they could write a better textbook than those available from academic publishers. We tend to make the following observations: The prices of textbooks are high, the electronic versions of textbooks are disappointing, and editions change often and sometimes on short notice. This is the first edition of my response. I don't want to make money from being a textbook author. I just want a book that works the way I want it to. I intend to publish a new edition of this book each year to update it for use in my own courses, but I'll leave the older ones available, so no one using the old one needs to update. (I designed the edition numbers so other instructors could review the '2021' edition during the 2020–21 academic year and assign it for the 2021–22 AY without the edition seeming outdated.)

Students can use the PDF version of this book and never buy a print copy. If they buy a print copy, what they pay covers the cost of production and nothing more. (In the event I end up with cash in my pocket, I'll donate it to my school.) If others want to use it, they can at no additional cost. As a consequence. I make no promises. My students get a bounty for finding typos. I welcome others to ID them as well—but with no bounty. If you have suggestions, I welcome them. Complaints? I'm not interested.

Many thanks are due to my students at Texas A&M University School of Law, who have contributed samples of their writing, assisted with editing this text, and provided helpful feedback on the materials here and on my teaching generally. Those directly involved as editing assistants and authors of examples in this text appear on the next page. (The writing samples here appear without attribution to individual student authors. I have a license from each student to include their sample(s) in this text.) Thank them if you see one; any remaining faults are my responsibility. I thank the authors of the excellent textbooks that have come before—I admire aspects of many of them, even if I have chosen to go my own way. I also wish to thank Professor Bradley Clary and Drs. Mary Lay Schuster and Lee-Ann Kastman Breuch for teaching me how to teach and how to think about teaching.

A note about citations in this book: This is a textbook for 1Ls, and I believe it's helpful for them to see citations that look like those they will encounter in practice documents. Unfortunately, some of the the in-line citations used in practice documents according to the *Alwd Guide* and *Bluebook* are ungainly. This text takes a hybrid approach: Citations to authorities appear in-line as if this were a practice document except where I think they make the text difficult to follow, in which case they 'fly out' into numbered sidenotes.

Brian N. Larson

Thanks to contributing students

Every true teacher learns from their students, and I owe so much of my understanding of legal communication and argumentation to my students. This page identifies students who are proof of that: Each contributed one or more samples of their writing that I have included in this or a previous edition of the text; provided proofreading work; offered editorial suggestions; or some combination of these things. From those who contributed writing, I have their permission to distribute their work as part of this text. All were students at Texas A&M University School of Law at the time of their contributions.

My warmest thanks to them all.

—*B.N.L.*

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1.1 Legal argumentation

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This book is designed for use in the first year of law school by students taking a course in legal analysis, research, reasoning, writing and speaking. The title 'legal argumentation' emphasizes the fact that every instance of legal communication you learn about in such a class either makes or anticipates an opposing argument. There are two main classes of legal writing taught in the first-year curriculum:

Predictive Given a set of hypothetical facts and a body of law, the instructor expects the students to predict the legal outcome for a hypothetical client. This type of communication is sometimes called 'objective,' because the analysis is not supposed to assume that the hypothetical client is right. In fact, learning to communicate bad news to a client is an important skill.

Persuasive Given a set of hypothetical facts and a body of law, the instructor expects the student to deliver persuasive communication to a hypothetical decision-maker (often a judge or panel of judges) to persuade them to rule in favor of the student's hypothetical client. In this type of communication, the conclusion for which the student argues is foregone: The hypothetical client is right. The student must make the best case.

This distinction is as least somewhat illusory, though. When predicting an outcome, you must consider the strongest argument that you can make for your client's position and the strongest argument the other side can make for its, then chose the stronger of those two arguments. When persuading a judge, you must make the strongest argument for your client, and you must anticipate, refute, rebut, and defuse the strongest argument from your opponent's side.

The analysis that underlies both types of communication is largely the same: Find the strongest arguments on each side. The presentation varies depending on whether you are trying to predict or persuade. This book addresses both the analysis and the presentation.

This book also spends a great deal of time addressing questions of fairly minute detail. Lawyers (and law professors and judges) are often quite pedantic people.[1] They concern themselves with fine details of grammar, punctuation, and word choice. Some of these objects of pedantry, like choosing words precisely and writing good citations, are essential for effective communication. Others, like preferences against contractions and peeves about prepositions ending sentences, are merely preferences of their adherents. Of course, if you are working for a judge who insists that there must be two spaces between sentences instead of one, you had better adhere to that preference.

1: I wish I could say that I am an exception, but sadly, no. For example, I get quite crazy when folks use the word 'utilize' where 'use' works perfectly well. And don't get me started about 'utilization' instead of 'use.' See Section 26.7 for my views on these matters.

1.2 The design of this book

You should not read this book cover to cover to make the best use of it. Instead, you may dip into and out of it, for advice on given issues. You should read the parts your instructor assigns when they[2] assign them.

2: I'm using 'they' to refer to a single person whose gender is unknown. I may occasionally use feminine pronouns ('she,' 'her,' etc.) as generic pronouns. I usually do so to counteract the default view that certain roles, like 'judge' and 'CEO,' are filled by men. You'll find guidance for using people's preferred pronouns in Section 12.3 and starting at page 155 in Section 26.5.

The book is divided into three major sections:

Legal Reasoning Analyzing a legal problem requires that you apply some body of law to some body of facts. The process is *rational* in that our system expects parties to offer good reasons—not just impassioned rhetoric—for the legal outcomes they desire. This section explains the major argumentative moves that are permitted and widely used in the law.

Legal Contexts Legal argumentation happens in the broad context of our legal system—the U.S. Constitution, federal statutes and regulations, state constitutions, statutes and regulations, etc., and even private contracts between parties. Legal argumentation also always happens in some kind of real-world context—within a law office or firm, within a business relationship between parties, in a courtroom, a before an arbitrator, etc. This section explains these contexts.

Legal Communication This section describes various ways of presenting your legal analysis. This might include writing an email to another lawyer in your firm, a 'demand letter' to a counterparty, a memorandum analyzing a legal question for a client, a brief to a court to persuade it to rule your client's way on an issue, an oral argument before the same court, and many other *genres* of legal communication.

Following these sections are several appendices, the first two of which tackle some key grammatical and mechanical issues, and the rest of which function as teaching aids.

1.3 What this book does not do

Here is a list of things that this book will not teach you or to which it will merely introduce you. You will need to look elsewhere for help with these types of information and skills.

Guide you to mastery. This book is the first step on a long journey to mastering legal argumentation. You will not master it in your first year.

Provide a clear answer every time. As this book often notes, there are varying perspectives on how lawyers and judges should use legal argumentation. Sometimes there is not a simple answer, even if there is often a safe answer. Other times, there is simply no clear answer at all. One of the skills you will polish as a law student is being comfortable with uncertainty.

Introduce you to every genre of legal communication. The *Legal Communication* section of this volume introduces you to genres with which you should be familiar after your first year in law school. There are many other genres of legal communication, such as policy

guides, investigative reports, specialized letter genres, and so on, that simply cannot fit in this volume.

Teach you how to communicate to laypeople. As a specific example of the last issue, learning to communicate with folks who are not law-trained is an advanced skill, one you can really master only after learning how to communicate to other lawyers. This text touches on some related genres, but you will learn much more later in law school and in your clinical and in/externships and clerkships.

1.4 How to succeed

Dedicate time to revision! Every year, first-year law students always wonder how best to succeed in legal communication. Every year, thousands admit at the end of their first year that they did not believe their professors at the beginning of the year when they said, "You will need to spend a long time writing, re-writing, editing, revising, and proofreading your legal writing—far more than you imagine."

> **You simply cannot succeed in legal communication by doing it at the last minute.**

A former student of mine, when reviewing this manuscript, recommended that I make this alert much more prominent. She wrote: "Even after my pre-law mentors, other law students, and you warned me not to procrastinate in legal writing, I had to learn this lesson on my own. I know many other 1Ls share this experience."[3]

3: For more on the planning process for writing and the required time, see Section 9.2.

Some folks estimate that the author of a good memo or brief spends 50–80% their time revising, with only the balance available for the first draft. On the bright side, that should be liberating in a way. Your first draft can be complete garbage if you have plenty of time to revise. If you plan to have that time, you can observe the adage: "Get it down . . . then get it right!" You may need to turn completely upside down what you initially put on paper or your computer, so don't worry too much about that first draft.

If you don't give yourself that time, your results will not be good. Your best first draft is unlikely ever to be better than a 'D' without careful revision. You cannot write a twelve-page memo or brief in law school the night before it's due and expect to get anything like an 'A.'

1.5 Ethics: Your success matters

At various points in this book, I'll point out how your duty to behave ethically intersects with your efforts to reason and write about the law. But there is a general duty for lawyers to be competent, and this seems like a good point to bring that up.

Let's begin with a basic: competence. You need to perform legal argumentation, and the underlying skills of analysis, research, and writing, well because you have a duty to your clients to represent them competently.

The very first substantive rule of the American Bar Association's Model Rules of Professional Conduct provides:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Model R. Prof'l Conduct 1.1 (Am. Bar Ass'n 2018).

I've said before that "Writing is the lens through which lawyers focus their legal knowledge." I believe it's fair to say that you do not really know the law at all unless you can express it in argumentative form, applying it to your client's facts. Legal argumentation encompasses all the key requirements—knowledge, skill, thoroughness and preparation—that the rule requires.

Heaven knows I'm not perfect, and you won't be, either. But colleagues, clients, and judges with whom you interact will come to trust you more readily and more completely if you ensure you are prepared and demonstrate that preparation in the quality of your communication.

Legal Reasoning

Overview of legal reasoning 2

Link to book TOC

Argumentation is a series of propositional sentences—called 'premises'—arranged in a form that supports the truth or acceptability of another propositional sentence, called a 'conclusion.' Two motivations govern legal argumentation: the *dialectical* and the *rhetorical*. Dialectical here just means that the argumentation aims to be rational or *cogent* and anticipates a response. Rhetorical just means that the argumentation aims to be persuasive.

The first, dialectical motivation—and our sense of how law should work—tells us that legal arguments should be rational or *cogent*; in other words legal argumentation should consist of "premises which are acceptable to the audience to whom it is addressed, relevant to its conclusion, and sufficient to warrant belief in its conclusion."[1] The arguments that an advocate makes before a judge are also dialectical in that they anticipate a verbal exchange, where both the other side and the judge will subject them to critical assessment to "move from conjecture and opinion to more secure belief."[2]

1: Trudy Govier, *The Philosophy of Argument* 119 (1999).

2: Frans H. van Eemeren & Peter Houtlosser, *Strategic Maneuvering: A Synthetic Recapitulation*, 20 Argumentation 381, 382–83 (2006).

Also dialectical is the expectation that argumentation anticipates a response. Even the argumentation that a court provides in an opinion justifying a decision anticipates a response. If the losing party does not accept a trial court opinion, it can often appeal. If the appeals court does not accept it, it may overturn the lower court's decision. Finally, even the Supreme Court faces the possibility that Congress or the states will not like the Court's opinion and enact legislation or even a constitutional amendment to reverse it. Of course, the argumentation in courts' opinions responds to a different situation than that in the advocates' briefs, but you get the idea.

All this highlights the second, rhetorical motivation in legal argumentation: Within the constraints of a cogent, dialectical model, every proponent of an argument wants to *win*. Legal argumentation is rhetorical because the authors of arguments mean to persuade their readers that their position and the outcome are correct.

When you present a legal analysis in the form of legal argumentation—in writing or orally—you are always trying to persuade, even your own client or supervising attorney, that your analysis is thorough and correct. To succeed, your presentation needs to make both *rational* and *tactical* argumentative appeals.

2.1 Rational appeals

A 'rational appeal' is a dialectical argumentative move that contributes to the cogency of the argument of which it is a part. In other words, a rational appeal is one that makes it more sensible or reasonable to believe the conclusion that the appeal supports. Every rational appeal

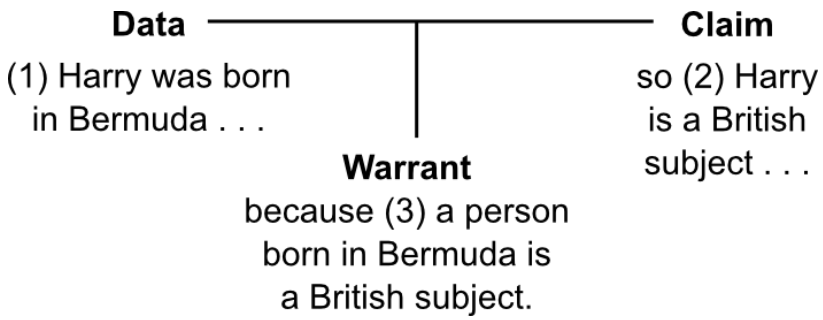

Figure 2.1: In Toulmin's model, a warrant licenses the move from data to some claim.

presents some facts and applies some legal standard to them to reach a conclusion. Professor MacCormick characterizes the latter as a rule where certain *operative facts* lead to some *normative conclusion*. Indeed, rule-based reasoning is probably the most popular among advocates and judges. But two other rational appeals, legal analogies and policy arguments, are also common.[3]

3: According to Brian N. Larson, *Precedent as Rational Persuasion* (forthcoming 2021), https://ssrn.com/abstract=3540538, in one set of court briefs and opinions, legal analogies were about half as common as rule-based arguments, and policy arguments were about half as common as legal analogies.

Rule-based argument

In principle, we could see MacCormick's model as a deduction.

> **MacCormick's rule-based model of legal argumentation**
> *Major premise:* If operative facts, then normative conclusion.
>
> *Minor premise:* Operative facts.
>
> *Conclusion:* Therefore, normative conclusion.

Not all reasoning in the law is deductive, however, so it may be helpful to think of the reasoning in terms of the argumentation model of philosopher Stephen Toulmin, who posited that a *warrant* supports the move from *data* to some *claim*, much as he depicted it in Figure 2.1.

This is a deductive pattern, and can be easily recast in MacCormick's deductive model.

> **Toulmin's example as a deduction**
>
> *Major premise:* If a person was born in Bermuda, they are a British subject. (Warrant)
>
> *Minor premise:* Harry was born in Bermuda. (Data)
>
> *Conclusion:* Therefore, Harry is a Briitsh subject. (Claim)

This is what lawyers, judges, and law professors often call 'rule-based reasoning,' and they prefer its use whenever possible. Deductive rules are those where, if you accept the premises, they *compel* the conclusion. Their appeal is thus obvious. In the dialectical environment of the law, however, you must always anticipate a counterargument that might destabilize, or even defeat, a deductive argument. Chapter 4 explains this more thoroughly.

Deductive rules are handy: Consider the example of parents who have a rule that they allow none of their children to drive an automobile until they reach the age of at least seventeen (despite the fact that they may obtain a license at sixteen). If their sixteen-year-old child approaches

them after obtaining a drivers' license seeking to drive the car, the answer is simply 'no.'[4]

Requiring deductive rules in the law would oversimplify legal reasoning in important ways, too, because there may not be a major premise articulated in terms of a clear deductive rule. A warrant or major premise may be articulated only in the outcomes of precedent cases where no clear rule emerges from them; this is what I will call a 'legal analogy' and practitioners sometimes just call 'analogizing' a case. Or the warrant may be expressed as a principle such as judicial efficiency; this is what folks call a 'policy argument.' Chapter 5 discusses legal analogy and Chapter 6 discusses policy arguments, but in their simplest form, this is how each looks.

4: Of course, this rule does not say what will happen when the child turns seventeen—the parents may still withhold permission on other grounds, as we shall see.

Argument by legal analogy

A second type of legal argument is the argument by legal analogy. Sometimes lawyers will just call it 'analogy,' and others refer to it as 'inductive' argument.[5]

> *Major premise:* A previous case is similar to this case in relevant ways.
>
> *Minor premise:* In the previous case, the court found for the plaintiff.
>
> *Conclusion:* Therefore, the court should find for the plaintiff in this case.[6]

5: Strictly speaking, it is not technically analogy *or* inductive, but lawyers use those terms to describe it anyway. *See, generally*, Brian N. Larson, *Law's Enterprise: Argumentation Schemes and Legal Analogy*, 7 U. Cin. L. Rev 663 (2018).

6: If the cited case went for defendant, then this one would, too.

On the 'flip side' is the disanalogy, which looks like this:

> *Major premise:* A previous case is *dis*similar to this case in relevant ways.
>
> *Minor premise:* In the previous case, the court found for the *plaintiff*.
>
> *Conclusion:* Therefore, the court should find for the *defendant* in this case.

Back to the example of our parents with licensed-driver kids. Assume that reacting to their second child, who just turned seventeen, the parents still do not allow the child to drive. The child complains, 'It's not fair! Your rule says I can't drive until I'm seventeen, and I'm seventeen now. When my older sibling turned seventeen, you allowed them to drive the car, so you should let me do it now.' This last sentence is an analogy, with the relevant similarity being the siblings' ages. The parents might deny the request, however, and reply, 'Yes, but your old sibling was getting straight "A"s in school and was only using the car to drive to a job. You have a "B-" average and don't have a job.' In this *disanalogy*, the parents highlight the difference between the two cases to justify a different outcome.

Of course, you can see just by looking that this is not quite so secure an argument as the rule-based one. Nevertheless, lawyers often make arguments of this kind, and as Chapter 5 explains, they are vulnerable to numerous criticisms, but they can be reasonable arguments in the legal context.

Argument from policy

The argument from policy usually does not stand alone, but it can occasionally. When it does, it takes a form something like this:

> *Major premise:* A legal outcome consistent with some principle *A* advances the public-policy goal *B*.
>
> *Minor premise:* A holding for plaintiff in this case is consistent with principle *A*.[7]
>
> *Conclusion:* Holding for plaintiff.

7: Of course, the argument could be that a holding for *defendant* is consistent with *A*, in which case the conclusion would favor the defendant instead.

Here, you can see that there are really two arguments: The first would show a causal connection between some pattern of facts and some public-policy goal; the second then shows that the instant case fits that pattern of facts. Though less common in legal reasoning than rule-based arguments and legal analogies, and hardly ever sufficient on their own, policy arguments are still important tools.

Consider Justice Kennedy's majority opinion in *Obergefell v. Hodges*, 576 U.S. ___ (2015). Kennedy spent a considerable amount of time explaining that "four principles and traditions" underlie the institution of marriage:

> A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. . . . A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. . . . A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. . . . Fourth and finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order.

Id. Each of these points corresponds so some policy goal—together forming the major premise for the policy argument. Kennedy proceeded to claim that each is also advanced by permitting same-sex marriage—forming the minor premise. The conclusion that same-sex marriage is a fundamental right followed.

Standing alone, such arguments are not as likely to receive wide approval as ones based more firmly in legal rules and analogies to precedent cases. Indeed, Justice Scalia in dissent described Kennedy's opinion as "lacking even a thin veneer of law," filled with "mummeries and straining-to-be-memorable passages."[8]

8: It is not uncommon for justices in dissent to accuse the majority of such peccadillos, and Justice Scalia's majority opinions were sometimes the objects of similar scorn. I had to look up "mummery" when I read this, and I'm still not sure what Scalia was trying to assert by using the term.

As a result, policy arguments are often woven into arguments grounded in the other two categories of rational appeal. Consider our example of the parents and the kids who want to drive. If, after the last exchange, the child demanded to know what difference it makes that they have lower grades and don't have a job, the parents might offer policy justifications. "If you can drive, you will spend more time doing that and less studying, so your grades may falter.[9] And your driving comes with costs like gas and car maintenance, which you unfairly foist unto us if you don't have

9: They might go further and argue that good grades are important for getting into college, etc.

a job to pay for them yourself." Here, the parents strengthen the legal analogy by combining it with policy arguments.

Learn more about policy arguments in Chapter 6.

These three rational appeals—rule-based reasoning, legal analogies, and policy arguments—often work together, and lawyers often combine them with tactical appeals.

2.2 Tactical appeals

This section is under construction, forthcoming in 2021.

Stating the question(s) 3

In life, there are well-defined problems and ill-defined problems. Well-defined problems are ones where you have an initial state, a set of "constraints," and a "goal state or condition."[1] Consider the game of chess, where the arrangement of the pieces on the board at the start of the game is the initial state, the rules of chess are the constraints, and checkmating the other king is the goal state.

Ill-defined problems are those where the "problem is largely being made up as it is being worked on."[2] Imagine two seven-year-olds with a chess set and no rulebook trying to make sense of the game. They would negotiate where to put the pieces; they might select winning conditions or decide that they will play a cooperative game instead. Without the rules, the problem of how to play (their version of) chess is ill-defined.[3] Legal problems are usually ill-defined: As a lawyer, you usually do not have a clear picture of the initial state—that is, you don't know all the facts. Though there are rules in law, these constraints can sometimes be bent, reinterpreted, combined, or avoided to produce different outcomes. And though your client may have goals, they may eventually need to be balanced against other goals.

Even if you were an extraordinarily good writer in your previous training or work, you may find that legal writing is quite different. What counts as good writing in *The Atlantic*, in poetry, in a literature course, in a science lab, etc., looks quite a bit different than what counts as good writing in the law firm and courtroom. Sometimes good writers find legal writing frustrating because the 'formulas' of legal writing can seem like straitjackets.

You should think of the legal writing formulas that you study in your first year instead as foundations on which you can build. It is possible to write legal prose and to have it also be good prose. But you have to know the basics first. Two formulas that will matter a lot are the predictive analysis structure, described in more detail in Chapter 10, and CREAC, which Section 10.2 introduces and which you will use throughout your first year.

These formulas or structures will look pretty well-defined to you. To a great extent, your first-year experience in law school will simplify problems so they, too, look more well-defined. But your experiences in practice will be anything but. Lawyers cope with this complexity in part by carefully defining the questions that they are trying to answer in their memos using CREAC.

So we need to think about how to refine legal problems into legal questions. Consider this hypothetical situation.

Link to book TOC

1: David Kirsch, *Problem Solving and Situated Cognition*, *in Cambridge Handbook of Situated Cognition*, 264, 265–66 (P. Robbins & M. Aydede eds. 2009).

2: *Id.* at 268.

3: I'm grateful to one of my research assistants for suggesting this connection to the previous example.

Scenario: Maria's brother the lawyer

After you are licensed to practice law and go to work in a Texas law office, Maria Patel—an old friend—approaches you about a legal matter. "My brother Michael is a lawyer," she tells you. "Michael is a jerk, always lording it over the rest of us that he is a lawyer. Last week, when we met for coffee, he said, 'It's too bad you never got beyond your English degree.' He's a complete ass!" She continues: "Michael and I were present when our dad signed his will last year. Dad had been a little shaky before, and he had some difficulty remembering things, but we all agreed that he seemed fine that day."

She pauses: "Dad died a couple months ago." You tell her that you are sorry for her loss. "Thank you," she says. "Anyway, Michael filed a complaint in Federal court against the estate contesting the will. He's representing himself and says that he plans to testify that Dad was incoherent the day he signed the will." She starts to cry a little: "During a hearing last week, he referred to me as 'retarded' in front of the judge." You acknowledge that she must have felt terrible when he did that. "I did! But I'd like to know whether it's unethical for him to be both a lawyer and a witness in the same case. If it is, I'm going to file an ethics complaint against him!"

As a lawyer, you might recognize a great many possible questions here:

- The competence of a testator—Maria's dad—at the time of the making of a will is an important issue. If old Mr. Patel was incompetent when he executed his will, the will may not be valid.
- There are court rules about whether a lawyer must be disqualified in a particular case before the court. Those rules operate independently of ethical rules about lawyer conduct.
- You wonder whether the use of insulting language in front of the judge violates ethics rules or local court rules.
- A case about a will would normally not be in federal court unless the parties—Michael and the estate, in this case—are residents of different states. The court might not have jurisdiction here.
- You know that it is sometimes practically unwise to file ethics complaints against lawyers in pending actions, as courts may regard it as harassing activity.

But Maria's question does not arise from these issues. Her question relates to the ethical consequences of Michael being both witness and lawyer in the same case. You might make a first effort at framing the legal question this way:

> Under Texas rules of lawyer ethics, is it permitted to be both lawyer and witness in the same legal proceeding?

Here are guidelines for when you initially frame a legal question:

1. If possible, frame it as a yes-or-no question. Your answer can still be "maybe" or "probably," but yes-or-no questions (and their answers) are the easiest for your reader to understand. In Maria's case, for example, the question posed above is better than this: "Under what circumstances, if any, can one be both a lawyer and witness in the same legal proceeding?"

2. Include in the question any facts that you think—at this stage—may be relevant to finding the answer to the question. This is tough when you are just getting started, because you have not yet done any research, so you don't know what facts are relevant. For example, is it relevant that Michael is representing himself in the estate case? If so, you might phrase the question this way: "... is it permitted *for a lawyer representing himself* to be both lawyer and witness...."
3. Carve away from the question any issues that you have not been asked to resolve. In Maria's case, for example, she narrowed her request of you in the last two sentences to the ethics of Michael being both lawyer and witness in the same proceeding. Do not spend your time answering questions relating to the other possible issues identified above.
4. But make note of any legal issues that you carved away in the previous step. Being a good lawyer means identifying issues of which your client should be aware and for which you can provide services. For example, you might ask her if she wants to you reach out to the lawyer for the estate (who probably does not represent her) to check on the disqualification and jurisdiction issues.

If possible, confirm with your client or the person assigning the work that your framing of the legal question will provide the answer they want. In the Maria example, you might send her an email later in the day:[4]

4: You may want to look at the examples of confirmation emails in Section 28.2, which arise under the hypothetical situation in Section 28.1.

Email confirming a legal question

FROM: [Your name/email address]
TO: Maria Patel
SUBJECT: Confirming scope of your question
DATE: August 4, 2020, 07:01

Dear Ms. Patel:

I enjoyed meeting you today in my office, and my condolences again for the loss of your father. Based on our conversation today, I understand you want me to determine, under Texas rules of lawyer ethics, whether it is permitted to be both lawyer and witness in the same legal proceeding. Is that correct? I need to confirm this with you before we do the research and analysis.

You have not asked me so far whether it would be wise in this case to file an ethics complaint, even if Michael's conduct warrants it. Courts sometimes dislike ethics complaints in pending matters, as they may look like harassment. For the time being, at least, you have also not asked me to consider Michael's underlying claims about the will or questions about whether his lawsuit is barred by applicable rules. We are happy to consider these matters, but will not move ahead on any of them without your direction.

Thanks for your confidence in us, and we look forward to serving your legal needs!

[Your email signature]

Legal rules 4

Chapter 2 noted that lawyers and judges prefer to use rule-based, or deductive, reasoning wherever possible. This is true for the simple reason that if a situation satisfies all the conditions of a deductive rule, the result dictated by the rule should be compelled.

Recall MacCormick's model from Section 2.1:

> *Major premise:* If operative facts, then normative conclusion.
>
> *Minor premise:* Operative facts.
>
> *Conclusion:* Therefore, normative conclusion.

Sometimes, the operative facts can be expressed as yes/no or true/false answers—sometimes called 'elements.' At other times, they may be arranged into 'factors' the legal reasoner must balance, or the legal reasoner may have to apply a 'totality of the circumstances' test.

This chapter considers the logical form of these ways of reasoning. Section 14.1 provides guidance on how to read and brief them in statutes and court opinions.

4.1 Deductive rules & their elements

The simplest type of rule is the deductive rule, the one where yes/no or true/false answers will determine whether the rule applies. Of course, as you will soon learn, things in the law are hardly ever that straightforward.

Consider a relatively simple example of a legal rule, the common-law rule for the tort of civil battery. Imagine that the court of last resort in your jurisdiction has formulated it this way: 'Anyone who intentionally touches the body of another person in a harmful or offensive manner without the other person's consent is liable to the other person for damages.'[1] The *operative facts* here are all the true/false statements that have to be evaluated as true for liability to apply in the instant case.

What are those facts here?

1. The defendant touched something.
2. The something they touched was the body of another person.
3. The touching was intentional.
4. The touching was
   - Harmful
     OR
   - Offensive.
5. The other person did not consent to the touching.

1: As expressed here, this is a common-law rule. In other words, it is a rule of law that developed over time from court opinions, rather than being a statutory rule. You can read an example of a common-law legal claim springing into existence in the *Lake v. Wal-Mart* case in Chapter 31. We'll talk a bit more about this below, but note that this rule could just have easily been embodied in a statute.

Thus, there are five factual statements that need to be true for the plaintiff's claim to be good. The rule is *conjunctive*, meaning every item in the list must be true. The fourth item, however, is *disjunctive*; that is, it is true if either of the alternatives surrounding the "OR" is true. Lawyers and judges often refer to such necessary operative facts as 'elements.' In the case of civil battery, the plaintiff must prove every element.

While applying a legal rule in case, a court might identify the elements in a way that is conventional in its jurisdiction. So, the court in your jurisdiction might do it this way:

1. The defendant intended to touch the plaintiff.
2. The defendant did touch the plaintiff.
3. The touching was
   - Harmful
     OR
   - Offensive.
4. The plaintiff did not consent to the touching.

But what if the case you consult does not offer the rule so neatly?[2] Consider this statement of the rule from the *Pechan v. DynaPro, Inc.*, 622 N.E.2d 108, 117 (Ill. App. Ct. 1993).[3] Imagine your assignment in the instant case is do determine whether your client has a claim against a stranger who walked up to your client and, entirely without warning, provocation, or explanation, punched them in the nose. Assume that the police arrested the defendant for the act on grounds that it was a criminal offense.

> Battery is defined as the willful touching of another person. *Parrish v. Donahue*, 110 Ill. App. 3d 1081, 1083 ((1982).[4] The touching may be by the aggressor or a substance or force put in motion by the aggressor. *Razor v. Kinsey*, 55 Ill. App. 605, 614 (1894). An action for battery does not depend on the hostile intent of the defendant, but on the absence of the plaintiff's consent to the contact. *Cowan v. Ins. Co. of N. Am.*, 22 Ill. App. 3d 883, 893 (1974). "To be liable for battery, the defendant must have done some affirmative act, intended to cause an unpermitted contact." *Mink v. Univ. of Chi.*, 460 F. Supp. 713, 717 (N.D. Ill. 1978). *But see Nicholls v. Colwell*, 113 Ill. App. 219, 222 (1903) (where the party inflicting the injury is not doing an unlawful act, the intent to harm is material). Moreover, actions may be brought against an employer for intentional injuries "expressly authorized" by the employer. *Meerbrey v. Marshall Field & Co.*, 139 Ill. 2d 455, 464 (1990).

First, note that the first sentence does not even mention the plaintiff's consent. Further down in the paragraph, however, the court referred to "the absence of the plaintiff's consent" and "unpermitted contact." So, is lack of consent an element in this version of the rule? Here, the court used two different phrases, "willful touching" and "affirmative act, intended . . . . " Are they they same or different? The second sentence, the parenthetical after the citation to *Nicholls*, and the last sentence seem to explain the rule, but are they elements of it? This discussion does not seem to mention "harmful" or "offensive" at all.

2: In addition to this example, you might find it instructive to read the *FIlippi* opinion in Chapter 30.

3: Stop a moment: What is the source of this opinion? Consult table T1 in the *Bluebook* or Appendix 1(B) in the *ALWD Guide*. Where is this court in its jurisdiction's hierarchy? Which other courts does this opinion bind, if any?

4: I've modified the citations in this excerpt to abbreviate them and make them consistent with current citation rules. Note which courts the Illinois Appellate Court cited here. Which of the opinions it cited are binding on it?

Figure 4.1: Is boxing a civil battery? Generally, no, because the boxers consent to the touching that happens. But what if, after a boxer goes down and the referee blows the whistle to indicate the fighting should stop, the other boxer keeps punching? "Kick boxing" ©2007 Hiroyuki Ishizawa. CC license https://flic.kr/p/zXPzt.

Taking into account the assignment, I might state the operative facts of of the rule in element form this way:

> [Operative Facts] A defendant who
>
> 1. intentionally
> 2. touches the plaintiff
> 3. without the plaintiff's consent
>
> [Normative Conclusion] is liable to the plaintiff for battery.

I omitted the discussion of "a substance or force put in motion by the aggressor," because in the instant case, the defendant touched our client with their own body. I did not include the "intent to harm" issue, because that arises only if the touching was otherwise a lawful act. Finally, I did not note the employer-liability issue, as that was not relevant here. You might have omitted the third element on grounds that if the defendant wants to claim they had the plaintiff's consent, they will need to assert that; the plaintiff does not need to raise the issue. I included it as an element because the court said "the action for battery . . . *depend[s]* . . . on absence of the plaintiff's consent . . . ," making it sound rather more like an element.[5]

5: In the Illinois case, the question of "harmful" or "offensive" contact is taken up separately as the question of damages; they were not at issue in *Pechan* because the lower court had dismissed the case before damages could be assessed.

More than one way to write a rule

It's important to understand that the example I just gave is meant as a general, theoretical one. As a lawyer, you must generally get used to *writing rules* in two different ways. In the first, described thoroughly in Section 14.1, you completely outline the rule or draw its shape to fully understand it. In the second, described in Section 10.3, you must present the rule in a manner useful for resolving your particular legal problem, where you may carve away from the rule bits that you do not need. Note that in the Illinois-battery example, I did a little of both, perhaps. You should use the other sections as your guides in practice.

So, articulating the rule as you will apply it in a given assignment is not a trivial task. Even if you get the rule right, you should be prepared for

the other side to push back. And not all rules are deductive like this one. The next sections take up these issues.

4.2 Critical questions

Normally, a deductive argument is compelling because the truth of the premises compels the truth of the conclusion. So, imagine this factual situation is your instant case:

> Your client is at work and goes outside to find a colleague, whom your client knows is in the "smokers' pen," a small area outside the office where smokers are allowed to light up. Your client and their colleague have a significant difference of opinion on a work matter, and after a brief exchange, the colleague puckers up and blows a whole lungful of cigarette smoke into your client's face. Your assignment is to decide whether your client has a claim for battery against their colleague.

The major premise of the deductive argument is the rule statement I created based on *Pechan* above. The minor premise is a statement to the effect that:

1. Here, the colleague intentionally blew smoke
2. into our client's face
3. without our client's consent.

Conclusion: The colleague committed battery on our client.

But legal argumentation is dialectical, so the colleague's lawyer will, of course, try to undermine this deduction. Here are the critical questions (CQs) that they may ask:

CQ 1 *Rule Question.* Is the legal rule advanced a deductive one? Does the rule that functions as the major premise actually say that the legal consequence applies in each and every case where the operative facts are present?

CQ 2 *Jurisdiction Question.* Does the body of law from which the major premise is drawn have authority over the persons or things in the instant case?

CQ 3 *Authority Question.* Does the particular provision of this jurisdiction's laws from which the major premise is drawn govern the affairs in the instant case?

CQ 4 *Exception Precedent Question.* Has any applicable legal authority identified an exception to the rule or is there any previous similar case where the rule was not applied?

CQ 5 *Exception Policy Question.* Does the policy underlying the rule suggest there should be an exception in cases like the instant case?

CQ 6 *Feature Qualification Question.* With regard to each of the operative facts, has any legal authority defined it or narrowed or expanded its definition?

CQ 7 *Instant Features Question.* Does the instant case exhibit each and every one of the operative facts in the major premise/rule?

Regarding CQ1, our rule appears to be deductive, as there are no stated exceptions. But for CQ2, did the facts say that our client's workplace is in Illinois? If not, does the *Pechan* rule apply? The *Pechan* case is a 1993 Illinois Appellate Court case; CQ3 asks whether some authority issued since then has overruled it or changed the law.[6] Such a change might include creating an exception (CQ4). Even if no court has yet created an exception, opposing counsel may argue there *should be* an exception based on the policy that underlies the legal rule (CQ5).

6: Stop a moment: What kinds of authorities could have changed the law from *Pechan*?

Often, the law develops to define elements in more detail, and CQs 6 & 7 call on the advocate to consider whether the current definitions apply in the instant case. For example, *Pechan* itself helped to define some of the elements a little further, noting that "The touching may be by the aggressor or a substance or force put in motion by the aggressor." Here, the opposing attorney might argue that cigarette smoke is not a "substance or force," so there was no touching. The opposing attorney might also note that our client voluntarily entered the smoker's pen and argue that the entrance constituted consent to exposure to smoke.

So, even if you think you have a simple deductive rule to apply, you should anticipate the other side will raise critical questions. And if your opponent presents you with a simple deductive argument, you should challenge it with critical questions, too.

But not all rules are deductive and element-based, and two other kinds of rules are quite common—factor-based rules and totality of the circumstances tests.

4.3 Factor-based rules

A factor-based or balancing test requires a court to consider two or more factors and balance their effect.[7] Consider copyright law: Normally, if you own a copyright in an original work, I'm not allowed to copy it—to make a secondary use of it—without your permission, but there is an exception to that general rule for *fair use*, "for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright." 17 U.S.C. § 107 (2012). Section 107 continues:

7: Section 14.1 provides practical guidance for reading and briefing rules of this kind.

> In determining whether the [secondary] use made of a[n original] work in any particular case is a fair use the factors to be considered shall include——
>
> (1) the purpose and character of the [secondary] use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the [original] copyrighted work;
> (3) the amount and substantiality of the portion used [in the secondary use] in relation to the [original] copyrighted work as a whole; and
> (4) the effect of the [secondary] use upon the potential market for or value of the [original] copyrighted work.

Id. To apply this rule, you must read cases to see how courts balance these factors. In this instance, for example, if the court assesses the first factor and finds the secondary use is a parody, it receives great protection, and

the other three factors become much less important. If the first-factor analysis shows the secondary use is commercial and not a parody, then the fourth factor gains added weight. In most cases, the second factor receives very little weight, but there are exceptions to that, too.

So this rule is deductive at the highest level: If a secondary use is a fair use, then there is no liability for copyright infringement. But to apply it, you will need to compare your instant case to other cases, something discussed in Chapter 5. Generally, you would assess each factor separately and then follow with a balancing of them, something discussed further in Chapter 11.

4.4 Totality-of-the-circumstances tests

A rule that considers the *totality of the circumstances* does not separate factors in the way that a factor-based test does.[8] Consider the case of *Illinois v. Gates*, 462 U.S. 213, (1983). There, the Court considered an Illinois case where a police investigator had obtained a search warrant based on a tip from an informant. The Illinois Supreme Court concluded that there was not *probable cause* under the Fourth Amendment of the U.S. Constitution for the search warrant to issue.[9] The Illinois court used an element-based test involving the veracity, reliability, and basis of knowledge of the informant's report. The U.S. Supreme Court reversed:

> We agree with the Illinois Supreme Court that an informant's "veracity," "reliability" and "basis of knowledge" are all highly relevant in determining the value of his report. We do not agree, however, that these *elements* should be understood as entirely separate and independent requirements to be rigidly exacted in every case, which the opinion of the Supreme Court of Illinois would imply. Rather, as detailed below, they should be understood simply as closely *intertwined issues* that may usefully illuminate the commonsense, practical question whether there is "probable cause" to believe that contraband or evidence is located in a particular place . . . . This totality-of-the-circumstances approach is far more consistent with our prior treatment of probable cause than is any rigid demand that specific "tests" be satisfied by every informant's tip.

Id. at 230–31 (emphasis added) (notes omitted).

To apply this rule, you must read cases to see how courts assess the *issues* the Court raised here. But you cannot merely weigh them and tally them. Again, this rule is deductive at the highest level: The search warrant satisfies the Fourth Amendment requirements only if the state had probable cause. But to apply it, you need to compare your instant case to other cases, something discussed in Chapter 5. Generally, you might assess each *issue* separately and then follow with an assessment of the totality, something discussed further in Chapter 11.

8: Recall that Section 14.1 provides practical guidance for reading and briefing rules of this kind.

9: Why is the U.S. Supreme Court reviewing the decision of the Illinois Supreme Court here? Be sure you understand these structural characteristics.

Legal analogies 5

Link to book TOC

In Section 2.1, we reviewed the deductive argument structure, one where the premises, if they are true, *compel* the conclusion. We noted, however in Chapter 4, and particularly Section 4.2, that deductive arguments in the law are subject to several critical questions. Consider the Bill Leung hypothetical problem in Appendix Chapter 28, where the question is whether attorney Leung formed an attorney/client relationship with Nur Abdelahi. If you read the court opinions in *Ronnigen v. Hertogs* (Appendix Chapter 33) and *Togstad* (Appendix Chapter **??**), you will see that there is not some clearly defined set of circumstances under which a reasonable person would rely on an attorney's advice, the touchstone for determining their relationship.

Often, to resolve these issues, you have to reason from analogy. Like rule-based reasoning, reasoning from analogy is also defeasible—it can be defeated—in the sense that your analysis might be entirely consistent with previous cases but still not persuade a court. Nevertheless, there are ways to make stronger and weaker arguments. Legal analogies have a structure or "argumentation scheme" much like the deductive rules discussed in Chapter 4.[1] Also like deductive rules, there are critical questions that can defeat an argument by legal analogy.

1: This is a much-reduced treatment of this subject that I take up in Brian N. Larson, *Law's Enterprise: Argumentation Schemes & Legal Analogy*, 87 U. Cin. L. Rev. 663 (2018). Available at SSRN: https://scholarship.law.uc.edu/uclr/vol87/iss3/2.

5.1 Argumentation scheme for legal analogy

To construct a basic legal analogy, you also use premises and a conclusion as you did with legal deductive arguments, but here, the premises take a different form. Here, "Cited Case" refers to the case you are citing, which probably has value as a precedent. "Instant Case" refers to the legal question you are trying to answer today.[2]

> *Major Premise*: Cited Case and Instant Case are relevantly similar in that (a) both have features $f_1 \ldots f_n$ and (b) features $f_1 \ldots f_n$ are relevant to legal category A.
>
> *Minor Premise:* Legal category A applies in Cited Case.
>
> *Conclusion:* Legal category A applies in Instant case.

2: Note that scholars of argumentation theory often refer to this type of argument as "argumentation from example," because these arguments are typically not true analogies. I may sometimes call them "exemplary arguments" or "arguments from example."

This is a very abstract representation of an argument by legal analogy. It may be helpful to consider an example. The email from Anne Associate on page 40 in Section 10.1 attempts to determine whether her client "operated" his vehicle under the Texas drunk-driving statute. The defendant, Mr. Smith, was asleep at the wheel of his car when the police officer detained him. His vehicle was not moving, though it was in the *Drive* gear. The question was whether Mr. Smith had taken action "to affect the functioning of his vehicle in a manner that would enable the vehicle's use."

After explaining the principal rule governing drunk driving, drawn from Texas statute and case law, Ms. Associate provides a case example: For *Barton*, she noted that the case involved a situation where the defendant was asleep with his feet on the vehicle's clutch and brake; the court found the defendant was operating the vehicle. She then uses a legal analogy to resolve her client's issue:

> A jury would likely conclude you were operating your vehicle, and a court would very likely uphold that verdict. By starting the vehicle and placing it into *Drive*, you very likely took action in a manner that would enable the vehicle's use. Your case is similar to the defendant in *Barton*, as in either case, the lifting of the driver's foot or feet—whether intentional or not—would have resulted in the vehicle moving.

We can map this argument onto the legal analogy argumentation scheme.

> *Major Premise*: *Barton* and the instant case are relevantly similar in that
>
> - In both cases
>   - f_1: An officer approached a defendant sleeping in his car.
>   - f_2: The car's transmission was situated so that if the driver's feet had slipped from one or the other of the pedals, the vehicle would have moved.
> - Features f_1 and f_2 are relevant to determining whether the defendant was operating the vehicle.
>
> *Minor Premise:* The defendant in *Barton* was operating his vehicle.
>
> *Conclusion:* The defendant in the instant case was operating his vehicle.

One question you might ask is whether Ms. Associate actually asserted the second part of the major premise, that is, that features f_1 and f_2 are relevant to determining whether a defendant was operating his vehicle. You find in many cases in legal writing that the authors leave that part of the major premise unstated. It is nevertheless implied by the fact that the author has described the reasoning of the judges in the Cited Case, noting that *they* referred to those facts in their analysis. The assertion of the relevance of f_1 and f_2 is implied or *enthymematic*.

An enthymeme is just an argument in a form where a premise or conclusion is left unstated. As an example, imagine a politician making the following argument:

> *Minor Premise*: Hillary Clinton is a Democrat.
>
> *Conclusion*: So she obviously wants to curtail Second Amendment rights.

Here, the major premise ("all Democrats want to curtail gun rights") is omitted, but it is certainly implied. There are many reasons why a speaker or writer might not provide a complete argument. Sometimes, an omitted premise is obviously false, or at least shaky (like the one in this example). Sometimes, a speaker or writer will want to be able to

deny having asserted a particular premise or conclusion explicitly, even though they implied it. And at least since the time of Aristotle, it has been believed that allowing the audience to supply a conclusion or premise will enhance the audience's belief in the argument.

You may find the enthymeme useful in your legal practice, but generally in your first year of law school, you should work to make all the premises and conclusions in your arguments explicit. When you move to persuasive or advocacy writing later in the year, you will encounter other situations where it may benefit your client for you to use an enthymeme, but until then, stay away from them in your own writing.

The key exception is here: When making arguments by legal analogy, you will typically leave the relevance part of the major premise unstated. That does not mean it as not there, though, as we shall now see.

5.2 Critical questions

There are critical questions for legal analogies just as there are for legal deductions:[3]

3: See Section 4.2.

CQ 1 *Acceptable scheme question.* Do the circumstances of this argument permit application of a Cited Case as a legal analogy?
CQ 2 *Similarity question.* Regarding each feature $f_1 \dots f_n$, is the feature present both in the Cited Case and the Instant Case?
CQ 3 *Relevance Question.* On what basis are features $f_1 \dots f_n$ relevant to legal category A?
CQ 4 *Precedent Outcome Question.* Did Cited case really assign legal category A?
CQ 5 *Relevant Dissimilarity Question.* Are there some dissimilarities $g_1 \dots g_n$ between Cited Case and Instant Case that are relevant to legal category A?
CQ 6 *Inconsistent Precedent Question.* Is there some other case that is also similar to Instant Case in that both have features $f_1 \dots f_n$, except that legal category A is not applied in that case?
CQ 7 *Binding Precedent Question.* To what extent is the Cited Case binding on the court in the Instant Case?
CQ 8 *Precedent Quality Question.* Was the Cited Case wrongly decided?

Here as in Section 4.2, CQ1 asks the threshold question for every argumentation scheme: Is it appropriate here? In theory, there may be some circumstances where appeal to a cited case is not tolerated, but it is difficult to identify common examples. Also as usual, CQ2–CQ4 test the accuracy of the premises. CQ2's reference to similarities between the cases refers both to factual similarities (like whether the defendant's feet were on the pedals) and similarities in terms of the body of law that each was applying. CQ3 considers whether the similar features between the cases are relevant to the present body of law. This question is important whenever a case-to-case comparison is made. Even though the argument might enthymematically omit this step, the arguer should generally be able to articulate the policy considerations that make the features relevant. CQ4 merely tests whether the proponent of the argument has correctly stated the outcome of the Cited Case.

CQ5 and CQ6 invite new information that might undermine or defeat the argument. CQ5 looks at dissimilarities between the Cited Case and Instant Case. These may be factual: For example, does it matter that the defendant's car in *Barton* had a manual transmission? The differences may also relate to the body of law: A legal arguer will sometimes use a case interpreting one aspect of the law as an example for how a court should interpret a different part of the law. CQ6 is related to CQ3 because if the answer to this question is 'yes,' it casts the relevance of features $f_1 \ldots f_n$ into doubt; if they can be present both when legal category A is assigned and when it is not, it is not clear that they are relevant to assigning the category.

Finally, CQ7 and CQ8 situate the Cited Case and its value within the legal system. If the answer to CQ7 is that the Cited Case is binding precedent, that is, the Cited Case comes from a higher court in the same court hierarchy and constrains the action of the court in the Instant Case, then the answer to CQ8 may be irrelevant. If the answer to CQ7 is 'no,' then an opponent of the argument has the option to try to dispose of the analogy by challenging the quality of the decision in the Cited Case.

5.3 A fortiori arguments

Think back to the discussion of copyright fair use in Chapter 4. There, we saw that the fair-use test has (at least) four factors, one of which is the amount and substantiality of the original work that the secondary user takes. If you have a 500-page novel and I copy five pages (1%) of it, that factor might come out differently than if I copied 100 pages (20%) of it. As it happens, though, there is no threshold percentage of the original work that ensures that something either is or is not fair use. In some cases, the secondary user copies the entire original work, and the court still concludes it is fair use.

But imagine this scenario. I'm a university teacher who copies five pages from a 500-page treatise (1%) and distributes them to students in my class each semester. The copyright owner, Big Academic Press, Inc., sues me for copyright infringement. I claim fair use. The following court opinions related to very similar circumstances (professor, copies distributed only to students, large treatise of similar kind):

- *Big Academic Press, Inc. v. Gupta*. The court concluded this factor weighed against fair use when the professor copied 15% of the treatise's pages.
- *Giganto School Books Co. v. Martinez*. The court concluded this factor weighed in favor of fair use when the professor copied 8% of the treatise's pages.
- *Giganto School Books Co. v. Jones*. The court concluded this factor weighed in favor of fair use when the professor copied 4% of the treatise's pages.

Of course, my lawyers would argue that if 8% and 4% of the original work do not tip the scales against fair use, then certainly 1% cannot.

This is an *a fortiori* argument. As *Black's Law Dictionary* (11th ed. 2019) notes, this term means by "even greater force of logic; even more so it

follows."[4] Thus, "if a 14-year-old child cannot sign a binding contract, then, *a fortiori*, a 13-year-old cannot." *Black's* example hints at a risk with these arguments: They are subject to the same critical questions as other legal analogies: For example, is *age* the basis upon which the fourteen-year-old could not sign a binding contract? Even if that was so, is age the *only* basis on which the court decided? Perhaps the thirteen-year-old here is a genius on her way to Yale, and the fourteen-year-old there was more run of the mill?

4: *Black's* counsels that you pronounce it AY for-shee-OR-eye or AH for-shee-OR-ee. I say it AY for-shee-OR-ee.

Some legal writers actually use the term '*a fortiori*' in their arguments. That's fine.[5] But it can also sound a bit pompous, and as my fair-use example showed, it's not necessary to make the point.

5: Do remember to italicize the term.

Legal policy 6

This chapter is under construction, forthcoming 2021.

Link to book TOC

Interpreting legal language

7

This chapter is under construction, forthcoming 2021.

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Tactical appeals 8

This chapter is under construction, forthicoming spring 2021.

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The analysis & writing process 9

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Remember those term papers you wrote in college courses where you could wait until the last week—maybe even the last day—before it was due to get started? That doesn't work in law school. Performing a legal-analysis assignment requires that you know your audience and what they expect from the analysis, plan a process most likely to satisfy their expectations, perform necessary research, and outline your analysis. You will then draft the components of your analysis, choosing appropriate authorities to cite and organizing your reasoning with the CREAC model, explained more fully in Chapter 10 and Chapter 11.

For a complex assignment, this is usually an *iterative process* that requires writing at every stage: You make notes about your audience's needs, you make notes about what you find in your research, and you write an outline of the analysis.[1] When you turn to writing, you reflect on your audience's needs and adjust what you have written; you may find you have to fill a gap in your research; you may discover that you can simplify your analytical outline or that you must extend it; and you might then have further adjustments to make to the components you have written. Once you have a complete) draft, you are ready to begin with revision. **Most experienced legal writers will tell you that you must expect to spend at least 50%, and as much as 80%, of your time *REVISING* your work! You simply cannot wait until the last minute.**

Depending on the project involved, you may go through many rounds of revision, including responding to the advice of colleagues and newly discovered circumstances.

After you are more experienced, and especially when dealing with legal problems that are run of the mill, you may find you can abbreviate this process. You should not expect the first year of law school to provide such opportunities.[2]

This text is designed for a course where—at least in the first semester—the professor scaffolds this process, requiring you to write and submit the components above and requiring you to revise your work, not just rely on a first draft. Probably by your second semester, and certainly by the time you begin internships or clerkships, everyone will expect that you will plan your writing tasks on your own.

This chapter addresses these phases.

1: See Chapter 14 for advice on outlining or 'briefing' legal rules.

2: One exception is in writing your final exams each semester. The analysis process there is probably considerably simplified from what you will do in this class.

9.1 Knowing your audience

Whenever you engage in communication, you are attempting to change the beliefs, emotions, or goals of your audience. To do that perfectly, you would need to know all your audience's beliefs, emotions, and goals—unfortunately, that's not possible, though there are ways to develop useful

hypotheses. If your audience is a regular consumer of legal analyses, you must also address their expectations for your communication—fortunately, that's generally fairly easily done. You must also think about how your audience's legal problem fits into a social and economic context—in short, you must be cognizant of the stakes.

Belief, emotions, goals

To get an audience to believe—or even to understand—something, you need to know what they currently believe, and with what level of conviction, what is their emotional state regarding the issue, and how does it affect their goals. This is the audience's "cognitive environment."[3] Anticipating someone's cognitive environment is easiest with someone who is as much as possible like you. Shared experience makes it easier for you to estimate what's in another person's cognitive environment. As a lawyer, though, you must be prepared to interact with folks very much *unlike* you.

3: Brian N. Larson, *Bridging Rhetoric and Pragmatics with Relevance Theory, in Relevance and Irrelevance: Theories, Factors, and Challenges* 69, 83 (Jan Straßheim & Hisashi Nasu eds., 2018).

We know that humans are subject to a great many cognitive biases that make reasoning difficult for them. For example, if a person already believes one thing, they will be more likely to see evidence that supports that view and less likely to see evidence that does not; this is the 'confirmation bias.' If they are looking for one thing, they will be more likely to find evidence relating to that thing than they will find evidence of other things; this is the 'attention bias.' There many other such biases, including tendencies to allow one's emotions or goals and objectives to interfere with rational consideration of one's beliefs.

Emotions and goals do not just *interfere* with good reasoning, however; they *motivate* it. The law is a social means of implementing a moral or ethical system. Such systems must always have goals, even if they are sometimes hard to articulate. And psychology research shows that we cannot even form goals without our emotions to drive us. These characteristics are essential to human existence—and to good reasoning.

So what must a lawyer do when they need to convince a client that the client's pet project is very risky or to persuade a judge who does not like the lawyer's client to rule in the client's favor?

The lawyer must first understand their own position and make sure that they are not missing the rational arguments because of their own cognitive biases. This means listening (or reading) carefully to, not making unwarranted assumptions about, and asking thoughtful questions of your audience and everyone else involved in the problem. If you do so, you can construct a picture of the audience's cognitive environment—not complete or perfect, but accurate enough—to determine how to reason with that audience.

Audience expectations & genres

If your audience is familiar or experienced with reading legal texts, one way you can estimate their cognitive environment is to look at the texts with which they are familiar to see what their *genre characteristics* are. Chew and Pryal have defined 'genre' as as "a recurring document

type that has certain predictable conventions."[4] They have predictable conventions because both writers and readers have seen them before, and they exhibit patterns that become the subject of "genre knowledge," the writer's beliefs "about communicative behaviors" they expect "to have a particular effect or effects on a reader based on knowledge about a typified situation in the writer's cognitive environment."[5] Genres in the law can be written, like the 'office memo' or 'trial motion,' or they can be oral, like the 'client interview,' or 'oral argument.'

4: Alexa Z. Chew & Katie Rose Guest Pryal, *The Complete Legal Writer* (2016).

5: Brian N. Larson, *Gender/Genre: The Lack of Gendered Register in Texts Requiring Genre Knowledge*, 33 Written Comm. 360, 364 (2016).

You will learn certain genres in this book starting at Chapter 17. But these are just models of the genres you will encounter in practice. When you are asked to perform a genre that is new to you, the best thing you can do to get started is to look at other examples of the genre. If your supervising attorney says, 'write me an office memo answering *question X*,' you should find examples of other office memos from your own office. They will teach you what conventions lawyers in your office observe. They may be like the examples in this text, or not. When you are writing in this class, you should assume that the examples and instructions in this text represent the genre conventions you are supposed to write.

But variations exist not just at the enterprise level; they also appear at the individual level. One senior attorney in your firm may like things one way, while another may prefer them a different way. To succeed in that environment, you must be sensitive to variations *within* the enterprise where you work. I have attempted at various places in this text to point out things that commonly vary from one office or environment to another—and from one person to another—but you must be attentive to see them yourself.

If someone asks you to write in a genre you have never heard of or seen before, you should review the advice in Chapter 25.

Context & stakes

Clients do not ask lawyers to answer legal questions out of curiosity. Lawyers are too expensive for that.[6] When you are answering a legal question, the client has in mind some social or economic stakes that they have in the answer. The economic stakes determine to some extent the lengths to which you must go to competently represent the client. A client contemplating a billion-dollar merger deal may expect you to spend however much time it takes to get the right answer. A client who asks you to review a $5000 contract that by its own terms limits the client's liability to that amount will probably not expect you to spend 100 hours at $300 per hour reviewing it.

6: Law *professors*, on the other hand, are renowned for answering obscure questions in their scholarship, entirely out of curiosity, it seems.

The social stakes also influence the lengths you must go to, but they are sometimes harder to evaluate. How much value can you put on a parent's desire to retain custody of their child? How much on the life of a defendant charged with capital murder? You must try to keep the stakes for your client foremost in your mind as you work on their legal problems.

9.2 Writing process

The introductory paragraphs of this chapter identified the key steps in your writing process:

- Know your audience and what they expect from the analysis.
- Plan a process most likely to satisfy their expectations.
- Perform necessary research.
- Outline your analysis.
- Write a first draft, synthesizing the previous steps.
- Revise the draft (perhaps returning to earlier steps).
- Edit and polish the final version.

As I noted in the introduction, these steps are iterative. When you revise the draft, you should first return to your notes about your audience to be sure that you have answered the question in a way that meets their expectations and addresses their cognitive environment. When you've completed the first draft, you often discover some additional research that would be useful to revise the draft. You may find that you can collapse your outline, simplifying it. You may instead conclude you must add a segment or segments. Finally, you will revise the writing you did in the draft.

You must not allow yourself to place too much significance on the completion of your first draft. In fact, my mantra is "Get it down. Then get it right." There are at least three reasons why you should follow this advice.

Author Anne Lamott provides one: "For me and most of the other writers I know, writing is not rapturous. In fact, the only way I can get anything written at all is to write really, really shitty first drafts."[7] Your first draft need not be shitty, but you should disabuse yourself of the idea that you will ever just be able to write something and not need to revise it two or three times. The greatest lawyers with whom I've worked continue to do so decades into their practice. All this work takes time, and you need to budget for it. You must especially allow for time between drafts. If you complete a first draft on Monday, you should wait until Tuesday before starting the revision, if possible, so that you have some *distance* from the first draft. Furthermore, if you expect a colleague to look it over and give you feedback, you will have to give them a little time. On a document with multiple authors, you must budget even more time.[8]

Lamott also summed up the second reason that you should get it down, and only then worry about getting it right: "Very few writers really know what they are doing until they've done it."[9] Writing is epistemic.[10] Legal analysts often do not fully understand the question until they've written the first draft of the answer. In fact, legal questions are usually 'ill-defined' problems, as that term is defined in Chapter 3. Writing about your legal problem is a way of learning about it, of rolling it around in your head to see how the pieces fit together. It is only then that many sticking points and gaps in the reasoning become obvious.

The third reason that you should not worry about getting that first draft right—just get it down—is writer's block.[11] The number one reason that folks struggle with getting started on their writing is a fear of writing

7: Anne Lamott, *Shitty First Drafts, in Writing About Writing* 527, 528 (Elizabeth Wardle & Doug Downs eds., 2d ed. 2014).

8: On a case on which I worked, five authors labored for more than a month on a motion for summary judgment under circumstances where we thought the judge was only 25% likely to grant the motion. The brief was great; but we still lost the motion.

9: *Id.*

10: With a nod to Robert Scott, who claimed more generally that rhetoric is epistemic. Robert Scott, *On Viewing Rhetoric as Epistemic*, 18 Cent. Sts. Speech J. 9 (1967).

11: *See* Richard K. Neumann, Jr. & Sheila Simon, *Legal Writing* 79 (2008).

something bad. Well, if you *know* the first draft is going to be bad—maybe even shitty—you can be a bit less worried about it when you are writing.

After you have satisfied yourself that the second or third round of revision has provided an excellent draft, you can shift to copy-editing your draft, polishing your prose and correcting grammar and punctuation mistakes. Do so earlier and you risk copy-editing something that you later delete.

Of course, these comments are all guidelines. Sometimes, you will be asked a legal question, and your audience will expect the answer on the spot. Sometimes, you will not have time for an iterative process. Sometimes, the stakes will be so low as to dictate that you should not spend the time on an extended process. Until you have the practice experience that allows you to make these judgments, you should assume that you must always do the iterative process.

9.3 Research

Legal research is quite unlike academic research in some ways. In other ways, it may seem somewhat familiar to you. This section provides only a beginner's guide to legal research. This model is adapted from Mark K. Osbeck.[12] There are many other approaches, and you should strongly consider taking an advanced research course during your time in law school.

12: *Impeccable Research: A Concise Guide to Mastering Legal Research Skills* (2d ed. 2016). There is also much good advice at https://libguides.law.illinois.edu/law792pp.

First, some key observations:

- It is unwise just to take your research question and type it into the natural-language search box on your favorite legal research website or on Google. You need a *strategy* to succeed at legal research. Throwing a bunch of stuff against the wall and hoping something will stick is not a great idea.
- In legal research, it's very important to find every primary mandatory authority relevant to your question. Missing something can cost you a case or the confidence of your client. In undergraduate research, you could afford to miss a leading authority when writing a paper; you could even intentionally pick an authority you liked and expressly restrict your discussion to it. That does not work in the law.
- The legal research tools you get for free in law school (Westlaw, Lexis, Bloomberg Law) are very expensive out in the practice world. For a small firm, they can cost thousands of dollars per attorney per year. We tend to lean on these tools during your law school training, in part because they are free now. But your access to them after law school may be non-existent or incomplete. Ideally, you'll take an advanced research course to learn some of the free and low-cost alternatives.[13]

13: Software provider MyCase has created a guide to using Google Scholar and other free tools for legal research, available at http://mycase.marketing.s3.amazonaws.com/eBooks/mycase_ebook_guide-to-using-google-scholar-ebook.pdf.

Steps for researching a legal question

Every time you research a legal problem,[14] you should follow these steps, each of which is discussed further below.

14: There will be exceptions of course. For example, perhaps a senior attorney asks you to find a particular thing, like a statute she has identified or all opinions that cite that statute.

1. Create a research log for the question.
2. Plan your research.
3. Review secondary authorities.
4. Search for primary authorities.
5. Analyze your results so far and retrace if necessary.

Keeping a research log

I strongly advise you to keep a research log for every legal analysis that you perform. You may be required to do it in your law-school classes, but you should continue the practice when you are a lawyer. It provides at least two benefits: First, on large projects, you will often read dozens or even hundreds of authorities, and a research log is the only way that you will be able to keep track of them all. The last thing you want to do is to reread a case that you read three weeks ago, only to conclude—again—that it is of no use. Second, a research log is evidence of the thoroughness of your research. In the event you arrive at the wrong answer and your client suffers adverse consequences, you want to be able to show that you were not negligent in your research. This is difficult to do absent a log of your activities.[15]

15: A log may be necessary to show that you covered all the necessary ground, but it may not be sufficient to show that you performed your analysis competently. *See* Model R. Prof'l Conduct 1.1 (Am. Bar Ass'n 2018).

But what should a research log look like? The answer depends on what works best for you. Osbeck recommends that you carry a legal pad with you at all times. Though some twenty-five years ago I was trained to track my own research by making notes in a yellow legal pad, I don't believe that's the best approach for today. Now, I keep my research logs either in a word-processing document or in a note-taking software.[16]

16: Common options include Evernote, OneNote, and Bear.

Why a paper notepad is handy

I still always carry a paper notepad, even though it's not the old yellow legal pad and I don't use it for research logs. Having one serves a dual purpose. First, you can write things down. Second, when you receive an assignment from a supervising attorney, they can *see you* writing things down. If you don't write it down, they may worry you won't get it right. (If the matter is complex, they will probably be right.) You may be typing notes on a laptop or tablet, which is fine. I don't recommend taking notes in front of a supervising attorney on your mobile phone, however, as that probably looks too much like their spouse and kids ignoring each other at the dinner table in favor of social media and texting friends.

Your initial research plan is closely connected to your understanding of what legal question(s) you are trying to answer. As a law student or lawyer early in your career, this can be a very difficult aspect of the project.[17] You may not know enough about the law today to know what the question is. Consequently, early in your career, you may need to employ two strategies: (1) If you have a supervising attorney (or instructor), you can ask for guidance as to what your legal question should be. (2) You should regard your legal question as tentatively established; you may need to refine it as you learn more. Answering the following questions at the top of your research log can help:

17: See Chapter 3 for further guidance.

- *An assignment title*. It's handy to have a short-hand for yourself to describe this assignment. You may use it when keeping a to-do list and even when referring to the assignment with colleagues.
- *Due date*. This should appear prominently at the top of your log. Whenever you open or view it, you will want to be reminded when you have to finish.
- *Assigning attorney or instructor*. If you work in an enterprise where many folks can assign work to you, you should note on your research log which one assigned this work to you. You might also note colleagues assigned to work on it with you.
- *Client file or identifier*. In many firms, there will be a matter or file number for tracking lawyers' activities and billing. You should record that on the research log.
- *People involved*. These are the people and legal entitites—like corporations and partnerships—involved in the problem. Identify them by name, e.g., "Ms. Nur Abdelahi," and by role in the problem space, e.g., "buyer of allegedly defective product."[18] The former is important for you to be able to talk about the problem with colleagues and the client. The latter will help you structure your research.
- *Things involved*. Note the material objects and intangible things involved in the problem. Perhaps an automobile in a car-accident case, or a play in a copyright-infringement case.
- *Simple timeline*. Place the facts that you have about the problem on a simple timeline. If you know dates, indicate them. If you are unsure, note the facts and highlight them. (Timing can be everything in legal problems, so it's best to know the dates, if possible.)
- *Initial list of potential issues.* List legal concepts/issues associated with the legal problem. This log may end up tackling only one of them.
- *Client's objectives*. Remember that advice above about knowing your audience. Here, you want to note what you understand to be the client's objectives for the legal problem to which your question relates. This is a reminder to focus your efforts on what matters to the client; it helps to keep you from going down research rabbit-holes (of which there are many).
- *Claims and remedies*. If your client already identified particular claims or remedies, note them here. Your research may take you elsewhere, but you will need to address these issues to satisfy your audience.
- *Jurisdictions, binding law, tribunals*. Identify jurisdictions for governing law, noting location(s) of events/parties. If the matter is before a court or tribunal, identify it. Governing law can be local, state, federal, tribal, foreign, international, or a combination of them. Use *Alwd Guide* Appendix 1 or *Bluebook* Table T1 to identify courts whose decisions will be mandatory authority. These will be your 'bullseye' authorities, as I describe them below.
- *Question presented*. This is the question you are actually trying to research for this project. You may shape and revise this as you proceed through the project. But it should be fairly specific, e.g., "Under Minnesota law, is an attorney client relationship formed where an attorney answers a legal question at a party, after expressing reluctance to discuss legal matters outside of her office and

18: This reference is to the sample problem and example student analyses in Appendix Chapter 28.

noting that she has no expertise in the applicable area of law?"[19]

19: This reference is to the simple problem and example student analyses in Appendix Chapter 28.

Chapter 14 provides detailed advice about reading primary authorities. In your research log, you should record every search you run online, and everything you read, or even just browse or scan. If it was not useful, note that in your log and note why. In a few weeks, you may have to revisit the same problem, and if you have not made notes of useless authorities, you may find yourself re-reading them accidentally. Sometimes, an authority you noted as useless early in a project will turn out to be helpful later, *if you can remember what it was about*.

The research bullseye: Primary & secondary authorities

When you research the law in a topic area new to you, you should rarely go immediately to the case law or statutes—primary authorities—relating to that law. Instead, you should start your research by looking at secondary authorities.[20] You will then look for the primary authorities. Interestingly, you will choose to cite authorities in your writing in exactly the opposite order: Prefer to cite binding primary authorities and avoid citing secondary authorities, except where necessary. You can think of this using the bullseye pictured in Figure 9.1: The binding/mandatory authorities are in the center of the bullseye, with persuasive primary authorities on the next ring out, and secondary authorities on further rings.

20: If you do not know the the distinction between *primary* and *secondary* authorities, see Section 13.1.

As for which secondary authorities you might consult, your professor will guide you early in your first year. Later, you will develop a personal list of preferences for useful places to start. The key is that you need to have a basic vocabulary for the concepts and principles in your area of law if you want to have any hope of doing an effective search in the primary authorities. Sometimes, though, you will find a *serendipity cite*, a citation to binding primary authority for your problem that you stumble on while generally orienting yourself to a topic in secondary authorities. If you find a serendipity cite, add it to your research log as something you may want to read.

As you gain more experience in areas of the law where you focus your practice, you will find you have less need to orient yourself in the secondary authorities. You will already have the appropriate vocabulary and understanding. But during your time in law school, they will be essential. For you, everything is new, and I cannot stress enough the value of these orienting steps to your training.

When you move to primary authority, you will want to keep in mind the hierarchy of authorities: constitutions, statutes, regulatory agency rules, and executive orders. In general, such enacted law binds and governs the courts, except to the extent that a court finds an enactment inconsistent with a higher authority.[21] So even if you think your problem arises from the common law, you may want to start with research in statutes to see if any govern your problem. (If the issue is potentially one of constitutional magnitude, you may start there.) If the statute authorizes agency regulations, you may move there. And finally, you will look at court opinions.[22]

21: For a discussion of these concepts, see Section 13.2.

22: See Chapter 14 for more detail on reading and analyzing primary authorities.

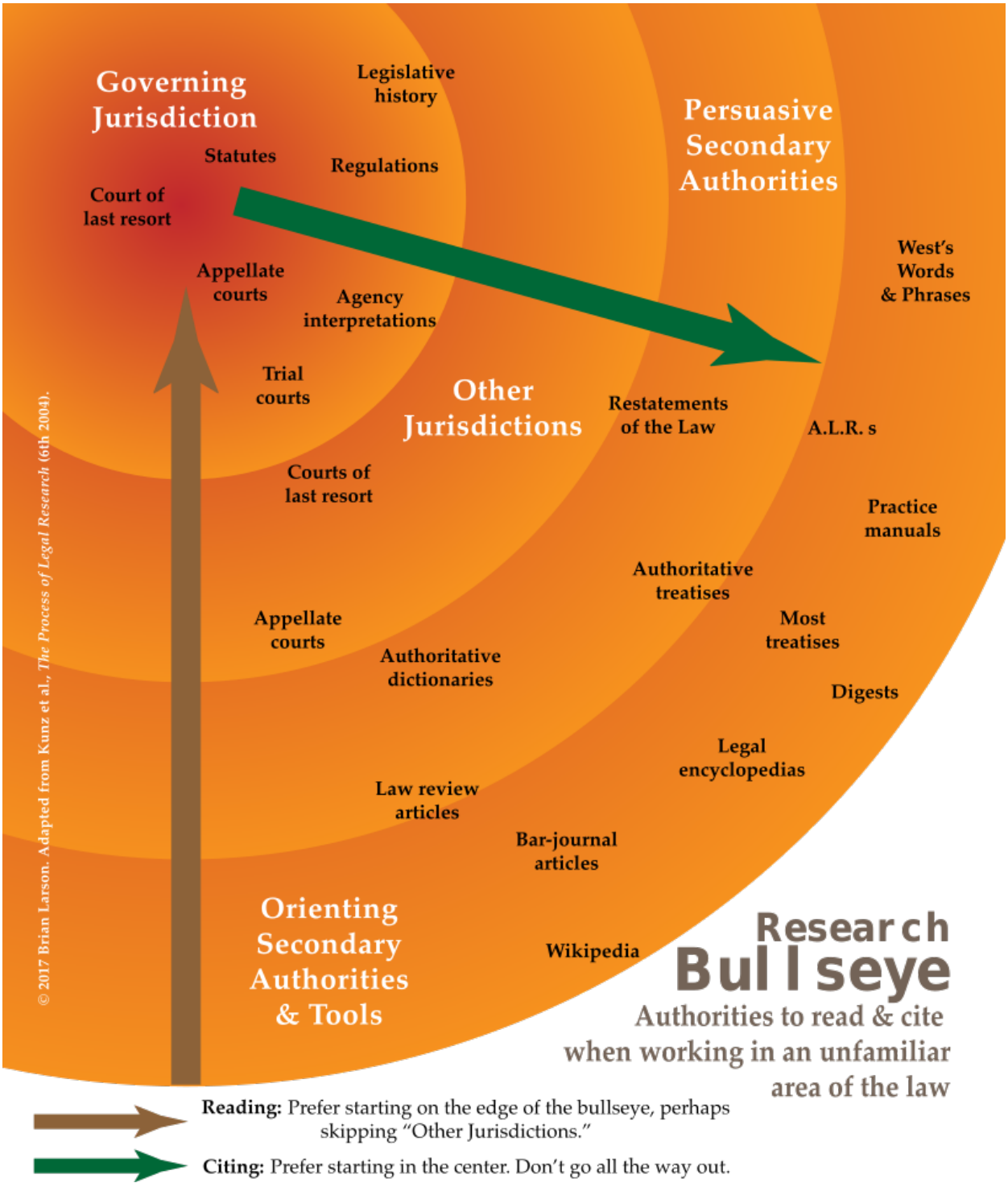


Figure 9.1: Research bullseye. Read from the outside in; cite from the inside out.

This is a very preliminary overview of research. But a couple of observations may be helpful:

- *Research does not always wrap up tidily*. In one problem, you may find the entire universe of cases that could have something to say about your problem, and read them all in a couple hours. For another problem, though, there may be hundreds or thousands of cases that could be relevant. You'll just have to stop at some point and hope you've found everything relevant. You'll practice that in your first year in law school and throughout your career.
- *Research takes time*. You should start the research as soon as possible after receiving an assignment, because only after you've started it will you have a sense of how long it will take. And you need to plan time to complete the research and still have time to write and revise your analysis.
- *This work will probably be invisible later*. Generally, you will not write a summary of your research steps and include them in your analysis. Your audience will *assume* that you have followed this procedure or one like it. It can be frustrating to invest a great deal of work in a research effort and not be able to tell anyone how hard and smartly you worked. That is sadly a feature of the profession.

You will have numerous chances to do your own research this year.

9.4 Outlines & headings

Before you get down to writing your first draft of the full analysis, you need some kind of outline to guide your work. Your briefs of the legal rules applicable to your legal problem can—and probably should—function as your initial outline. If you have only one main issue to resolve, and the rule governing it divides neatly into a small number of elements, none of which is difficult to analyze, you can use the simplest of legal analyses—shown in Chapter 10. Your outline consists of the elements of the rule as you have briefed them.[23]

23: See Chapter 14 for a fuller discussion of briefing rules.

If the rule is more complicated or more difficult to analyze, or if the legal problem asks you to answer questions about unrelated parts of the law, you will need a more complex structure, the kind described in Chapter 11.

In either case, you may have resort to writing headings for sections of your analysis, a matter addressed in Section 11.3.

Writing a simple analysis 10

This chapter is focused on how to write a simple legal analysis. As we shall see, the task is anything but simple. In fact, you'll find the chapter on writing complex analyses is shorter and simpler than this one, mostly because complex analysis requires the same skills as simple analysis but with a few additions. See Chapter 11 for details.

The next section describes the basic components of almost any legal analysis and starting at page 40, offers an example of an email that an attorney might write a client. In the reasoning part of that email, the attorney used a structure that you will use throughout your legal career: CREAC, pronounced 'CREE-ack.' Section 10.2 offers a basic explanation of CREAC. Section 10.3 explains the R (for "rule"), and Section 10.4 shows how to add the E (for "explanation") and briefly discusses how to synthesize cases in an explanation, though that is a task you will likely struggle with your whole 1L year. Section 10.5 explains how use roadmapping to structure an analysis, and Section 10.6 explains that you want to keep the *application* part of CREAC 'pure.' Section 10.7 explains the role and structure of counter-argument or counter-analysis. Section 10.8 then explains how and where to write conclusions in your analysis and Section 10.9 offers suggestions for writing the factual background; though it comes almost first in the overall analysis, you will often write the factual background last.

Let's consider the basic components of an analysis and then look at an example.

Link to book TOC

10.1 Basic components & example

This section describes the basic components of a legal analysis and then shows a simple example.

Basic components

Almost all legal analyses will consist of a combination of most or all of the following components, often in this order:

- *An introduction*. Like the introduction to an email, this text orients the reader to the question your are asking, states it, and provides a high-level answer.[1] The introduction may come in the form of a single paragraph at the beginning of an email, or it may come in the form of a 'question presented' and 'brief answer' in an office memorandum.[2] It may also alert the reader what you think the next steps are.

1: See Chapter 3 for a discussion of how to develop and confirm the legal question, and Chapter 18 for a discussion of email conventions.

2: See Chapter 19 for conventions for writing legal memoranda. The first paragraph of each simple analysis in Appendix Section 28.3 offers an introduction; as do the segments of the four sample memos in Chapter 28 with these markers:

- *Factual background*. An analysis usually presents the factual background of the problem before delving into legal reasoning. Such a factual summary should convey all the facts the reader needs to know to understand the analysis—the legally operative facts—and it should also convey any contextual facts necessary for the reader to make sense of the operative facts.[3]
- *The reasoning*.[4] This is where lawyers do the heavy lifting, showing in some detail—with the level of detail varying depending on the social, economic, and political context and the stakes—how they reached the conclusion in the introduction.
- *A conclusion*.[5] If the analysis is going to a client or colleague, the author in this section usually recaps the conclusion from the introduction and any assumptions the author has made; it is also a good spot for the author to summarize any recommendations they've made (or to make them, if they have not yet done so) and to identify any missing facts that could alter the analysis. In analyses going to a judge or opposing counsel, the conclusion usually just bluntly says what the author or their client wants.

You may have noticed that the introduction, reasoning, and conclusion all make reference to the answer to the question that the overall analysis is addressing. There are other, smaller components that may appear in multiple places as well: For example, the author *must* indicate at the beginning of their reasoning any assumptions they are making.[6] But depending on the circumstances, an author might include assumptions in the introduction, factual background, and conclusion. That may seem repetitive, but some readers turn immediately to the conclusion and expect in it a summary of the complete payload of the analysis. Others are prone to forget that you made assumptions in the first place, and they need to be reminded so they don't act on your advice without attention to the risks. Other readers are just forgetful, and they'll welcome reminders.

Finally, there is a special kind of reader that you want to cultivate: the skimmer. If your reader trusts you and your analysis, they may read only the introduction, the conclusion, or both, and then leave satisfied with your answer. For those readers, they trust that you've captured the factual background and performed the analysis correctly; they would read those parts of your memo only if they wanted to see your work on some point. Consequently, it's important for you to put everything that your reader absolutely must know in the introduction, the conclusion, or both, as well as anywhere else it belongs. Similarly, you need to organize your analysis so that the reader knows where to find the supporting facts and reasoning if they do want to see it.

Where do I put missing facts? . . . I mean . . . .

Right. You can't actually *put* missing facts anywhere, because they're missing, but you do need to identify them. You will often find that you do not have sufficient facts to analyze a problem with great confidence. Sometimes it will be obvious to you which facts you are missing. In that case, you should identify them in the factual background, at least, and note in your reasoning where they would make a difference and what difference they would make. If they are important, your recommendations in the conclusion might include following up on

3: Several parts of this text address the proper treatment of facts in your communication, which is highly context-dependent. The simple analyses in Section 28.3 do not provide factual background, as not all emails do; in the four sample memos in Appendix Chapter 28 the segments with this marker provide the factual background:

4: See Chapter 2 for an overview of legal reasoning and Chapter 4, Chapter 5, and Chapter 6 for details of various types of arguments. This chapter and Chapter 11 provide more detail on writing simple and complex analyses. For examples, reasoning makes up the bulk of the simple analyses in Section 28.3 and of the sample memos in Appendix Chapter 28.

5: The last paragraph of each simple analysis in Section 28.3 provides the conclusion; in the four sample memos in Appendix Chapter 28 the segments with this marker provide the conclusions:

6: We will ask you to make many assumptions in law school, because writing a hypothetical problem that has all the details fleshed out is hard work for us faculty. Having you write complete analyses of complex matters also results in a lot of long papers for us to grade. So, assumptions it is! But you will find that you often have to make them in practice, too, so we are still teaching you something important!

them. And if they are critically important, you should alert your reader in the introduction. You may also feel that there should be more facts without knowing exactly what they might be. In that case, you can recommend a more generalized inquiry. E.g., 'We should interview *X* to make sure we have all relevant facts.' When you write advocacy documents (briefs and the like), you will make use of missing facts (or avoid them) based on your advocacy strategy.

Example analysis

Imagine a lawyer sending the email below to a client. This email maps almost perfectly to the email conventions described in Chapter 18 and the outline for legal analysis provided in the last section, as the marginal comments show. The bracketed words here in bold are to indicate parts or sections of the email; they would not have appeared in the actual email.

FROM:	Anne Associate <SuperDuperLawyers.firm>
TO:	Chad Smith <chadrocksinhis84vette@gmail.com>
SUBJECT:	Police stop on August 5
DATE:	August 7, 2020, 10:15

Dear Chad,[7]

[Overall introduction] You asked me to determine whether you have any legal defense to the charge of drunk driving stemming from your arrest on August 5.[8] I conclude that you do not, absent some compelling fact or facts that you have not shared with me, though we may be able to assist you with this case.

[Factual background] You explained to me that on August 5, Officer Rita Mariano detained you after finding you asleep in your car on Oak Lawn Avenue in Dallas.[9] As you have no recollection of the events, the facts we have come from Officer Mariano's arrest report. According to it, the vehicle, your 1984 custom blue Chevy Corvette, was running, and you were in the driver's seat—the only person in the vehicle. The vehicle was in a legal parking spot. The vehicle's transmission was in *Drive*, but your foot was resting on the brake, and at no time did the officer see your vehicle move. After Officer Mariano roused you, you put the vehicle in *Park* and agreed to her testing you with her breathalyzer. You blew 0.3% and concede now that you were intoxicated.

[Reasoning in CREAC form][Conclusion] You would very likely be convicted on this charge, because your conduct very likely satisfies all the elements of the offense.[10] **[Rule]** "A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place." Tex. Penal Code § 49.04(a). There is no dispute that your Corvette is a motor vehicle, that Oak Lawn Avenue is a public place, or that you were intoxicated. Thus at issue here is whether you were *operating* your vehicle within the meaning of the statute.[11] **[Explanation, part 1]** "While driving involves operation,

7: The email header above is very conventional. Ms. Associate may not have wanted to be too specific with the subject, assuming Mr. Smith might be reading the email on his phone in a public place. This greeting is fine, as long as they are on first-name basis. See Section 12.2.

8: In this introduction, Ms. Associate provides context, as suggested in Section 18.1, states the legal question, provides the answer, and then hints at recommended next steps.

9: This paragraph provides the factual background. Note the cautious, clinical tone. See Section 10.9 for more on that.

10: This paragraph provides the legal reasoning. More on that below. But note that Ms. Associate states the overall conclusion two more times here, once at the beginning and once at the end of her reasoning 'section.'

11: This sentence and the previous one function as a roadmap, letting the reader know what issues Ms. Associate is going to handle.

operation does not necessarily involve driving . . . . In other words, the definition of operation does not require that the vehicle actually move." *Oliva v. State*, 525 S.W.3d 286, 294–96 (Tex. App.—Houston [14th Dist.] 2017), *rev'd on other grounds*, 548 S.W.3d 518, 519 (Tex. Crim. App. 2018). A defendant operates a vehicle when he takes "action to affect the functioning of his vehicle in a manner that would enable the vehicle's use." *Denton v. State*, 911 S.W.2d 388, 390 (Tex. Crim. App. 1995). **[Explanation, part 2]** In *Barton v. State*, 882 S.W.2d 456, 459 (Tex. App.—Dallas 1994, no pet.),[12] a driver asleep at the wheel in a motionless vehicle, with one foot on the clutch and the other on the brake, had taken action to enable the vehicle's use and was operating the vehicle within the meaning of the statute.

12: Some of these citations are not *Bluebook* style because Texas lawyers have a special set of rules for citing cases from the state's courts of appeal, and given the facts here, I'm assuming Ms. Associate is practicing in Texas. *See* Texas Law Review, *Texas Rules of Form: The Greenbook* (14th ed. 2018).

[Application] A jury would likely conclude you were operating your vehicle, and a court would very likely uphold that verdict. By starting the vehicle and placing it into *Drive*, you very likely took action in a manner that would enable the vehicle's use. Your case is similar to *Barton*, as in either case, the lifting of the driver's foot or feet—whether intentional or not—would have resulted in the vehicle moving.[13] **[CREAC Conclusion]** Unless you have any facts to suggest any irregularity in the stop, the breathalyzer test, or the arrest, you would very likely be convicted on this charge.

13: Here, the author compares the instant case and the cited case, identifying the legally relevant similarities.

[Counter-argument] You would very likely be found to have operated your car despite facts that distinguish your case from *Barton*. In that case, the defendant's car was sitting in the middle of the road. *Id.* In your case, in contrast, you were in a legal parking spot. The *Barton* court, however, referred to the location of Barton's vehicle only as evidence that he was in a public place; the situation of his feet on the pedals was enough to establish that he was operating the vehicle.[14] *Id.* Consequently, this difference will have no effect, and you will very likely be found to have operated the vehicle.

14: Why the difference between "Barton" and *"Barton"* in the second-to-last sentence?

[Overall conclusion] If you would like to talk to me about ways to mitigate the consequences,[15] judges frequently respond positively during sentencing if the defendant has been proactive in certain ways. We can definitely help you out there!

15: In this concluding paragraph, Ms. Associate does not repeat the conclusion, as it was the last sentence of the previous paragraph. She *does*, however, make a recommendation that Mr. Smith retain her firm for help in this matter.

Let me know if you have questions!

Sincerely,[16]

16: Simplified here for the sake of space, this closing is quite typical for an email. See Section 18.4 and Section 18.5 for more.

Anne Associate [Etc.]

Let's look at the CREAC structure in this email.

10.2 CREAC

The CREAC model represents what Romantz and Vinson called an "organizational paradigm."[17] They said that legal writers use such paradigms

17: David S. Romantz & Kathleen Eliott Vinson, *Legal Analysis: The Fundamental Skill* 120 (2d ed. 2009).

as a "guide or template when drafting legal analyses."[18] Of course, they warned readers, as I'll warn you, that you should not become too dependent on paradigms. Nevertheless, during your first year in law school, you should attempt where possible to conform to the CREAC paradigm. 'CREAC' stands for:

18: Id.

- Conclusion
- Rule
- Explanation or Example (and sometimes both)
- Application (though some will say 'Analysis')
- Conclusion

It's important to understand that you use CREAC only in the reasoning portion of your communications. It appears in the third and fourth paragraphs of Ms. Associate's email.

Why use this approach to presenting legal reasoning? Romantz and Vinson suggested one reason: It's helpful for the writer trying to organize their thoughts. That's true. In fact, after twenty years of practicing law, I still find that if I'm writing an analysis and am stumped about how to proceed, backtracking and reorganizing it according to CREAC helps me move ahead. Some argue that CREAC is logical, that it parallels the deductive syllogism. You may decide for yourself, but I'm not so sure. Look back to Section 2.1 if you want to consider that question.

The most compelling reason to use CREAC is that it is immediately clear to a legally trained reader what you are doing. The conventional use of CREAC as a reasoning paradigm is so widespread in the law that varying from it can confuse your reader, or at the least, slow them down. Using an organizational paradigm other than CREAC (or no organizational paradigm at all) is a bit like using a lot of rare vocabulary or foreign words in your text. Your reader may know those words, but they have to slow down to process them. They may need to re-read text to get the point, and—worst of all—they might have to stop and look something up. If your audience is the reader of *The Atlantic* magazine on a lazy Sunday afternoon, they won't mind: Be as sesquipedalian as you like. If your reader is a busy lawyer, judge, or business person, they will perceive that you are wasting their time.

Moreover, if your reader trusts you, they want to be able to skim your writing to get critical information. The critical information needs to be where a skimmer will find it. If the reader wants more than skimming provides, they need to be able to find the details where they expect them. If the reader is your opposing counsel, they will find subtle ways to highlight what the judge is likely to perceive as your disorganization—unless you demonstrate the expected organization.

So, I warned you this warning was coming: Don't be pedantic about CREAC. In fact, after the 1L year, I'm not pedantic about it with law students. There are many times that you can compress and stretch CREAC structure to suit your purposes, and we'll discuss some in this book. There are some times when it makes sense to abandon CREAC completely. Nevertheless, those times are more like the seasoning—and CREAC is the meat and potatoes.

The following sections consider the parts of CREAC and how they are put together.

10.3 Writing the rule(s)

Section 14.1 discusses how to *read* legal rules, but that task is a little different than *writing* them. When you are reading enacted law and decisional law to understand legal rules, you go deep in the process, briefing the rule and reviewing its context.[19] When you are writing the rule as part of an anlysis, you frequently will not include all the work you did in briefing it. Instead, you will include the portions of the rule that are applicable or likely or possibly applicable to your particular problem.

19: See Section 14.2 and Section 14.3 for detailed guidance.

Consider the disjunctive rule for employment discrimination described in Section 14.1 beginning at page **??**.

> It shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

If your client is complaining that they were not hired by an employer because of their age, your analysis of the potential claim could simplify the rule by expressing it this way:

> It is "unlawful for an employer to fail or refuse to hire . . . any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1).

You can remove references to discharge and other discrimination, because these are not possible in the case of your client, who was never hired in the first place. Of course, the only reason you know that you can redact those other elements is because you have carefully analyzed the rule to determine that it is disjunctive. Your client would need to prove only one of those things.

In contrast, when Ms. Associate wrote the rule for drunk driving in Texas, she could not edit out any of the elements, because the test is conjunctive: All those things must be true for there to be an offense.

The general approach then is that when you write the rule for an analysis, you will not include facets of the rule that are not useful for solving your legal problem. You must be careful not to strip away parts of the rule your reader would care about or would likely ask you about, however. There are a few other things to keep in mind when you are stating the rule portion of a CREAC.

First, if you are drawing your rule from court opinions rather than enacted law, cite the most authoritative opinion you have for the rule. Often, if you have several cases you are using in your analysis, the same rule might appear repeatedly in them. When you tell your reader what the rule is, though, you want to cite the rule from the highest court in the applicable hierarchy. You may cite the most recent case from the highest court, but sometimes you will instead cite a case that is older but well known and considered foundational. Ms. Associate cited her rule from the Texas statute.[20] But notice that she used opinions from the Texas Court of Criminal Appeals (Texas' court of last resort for criminal matters) when

20: Another example of this is in Student 6's memo in Section 29.1, starting at page 184. There the author cites the Supreme Court case *Campbell* for a rule and then uses two appellate cases, *NXIVM* and *Video Pipeline*, as examples at the point marked

providing explanatory definitions (in Explanation, part 1) and then used a lower-court case when providing an example (in Explanation, part 2).

Second, don't bother with attributive cues, words in the text of the sentence that indicate the source or weight of authority. Your citation does that work. It would have been a waste of words for Ms. Associate to write "Under Texas statutes, a 'person commits an offense if the person is intoxicated while operating a motor vehicle in a public place.' Tex. Penal Code § 49.04(a)." Her approach was more economical.

Third, do not weave the rule together with facts about our case or names of our parties. Ms. Associate did not write "You 'commit[ted] an offense if [you were] intoxicated while operating a motor vehicle in a public place.' " She used the conclusion at the beginning of the CREAC to connect the client to the analysis. She stated the rule as a universal.

Fourth, though it is not required, lawyers typically state rules by first identifying the consequences, the normative conclusion of the rule, and then the elements or operative facts. In both these examples, the rules did so, beginning "It is unlawful for . . . " and "A person commits an offense . . . . " One reason for this is that it makes a good transition from the preceding conclusion in the CREAC. Ms. Associate's first conclusion in the CREAC ends with "offense," and the next sentence—containing the rule—begins with "A person commits an *offense* . . . . "

Fifth, organize the rule with punctuation to help the reader. This sometimes warrants rearranging the order a little. Consider for a moment if your client were the potential representative of a class of older workers, and you were considering suing their employer for a broad range of discriminatory activities. You might state the rule for age discrimination this way:

> It is "unlawful for an employer," "because of [an] individual's age" to "fail or refuse to hire" the individual; "to discharge" the individual; "or otherwise [to] discriminate against [the] individual with respect to his compensation, terms, conditions, or privileges of employment." 29 U.S.C. § 623(a)(1).

Here, the rule statement puts the shorter of the two conjunctive elements—"because of such individual's age"—first, so that the list of disjunctive elements can appear last in the sentence. Semi-colons separate the disjunctive elements, the three possible routes to liability. The only reason that semi-colons instead of commas divide the disjunctive elements is that the third disjunctive element about other discrimination has commas within it. The semi-colons distinguish the elements from the parts of one of them.

In a rule like this drawn from a statutory regime with a complex, hierarchical numbering system, you should not use any form of enumeration to set apart the elements unless it comes from the original text.

> ***(Do not do this!)*** It is "unlawful for an employer," "because of [an] individual's age" (a) to "fail or refuse to hire" the individual; (b) "to discharge" the individual; or (c) "otherwise [to] discriminate against [the] individual with respect to his compensation, terms, conditions, or privileges of employment." 29 U.S.C. § 623(a)(1).

Using the the (a), (b), and (c) here could confuse the reader about whether those are official subparts of the statutory text or just your tools for organizing the elements. If, however, you are writing about a common-law rule, you may find it helpful to organize it with enumerated subparts.

Finally, make your rule a prose paragraph and not a bulleted or numbered list. Consider this example:

> ***(Do not do this!)***
>
> It is "unlawful for an employer,"
>
> - "because of [an] individual's age"
> - to
>   - "fail or refuse to hire" the individual
>   - discharge the individual or
>   - otherwise discriminate against [the] individual with respect to his compensation, terms, conditions, or privileges of employment.
>
> 29 U.S.C. § 623(a)(1).

Of course, this is exactly what you *should* do when you are briefing the rule as I suggest in Chapter 14, but legal readers in most contexts expext prose, not bullet points. I say 'most' contexts, because there are environments where it would be just fine to present the rule in this form—your first year in law school does not represent any such environments unless your professors tell you otherwise.

10.4 Adding explanation

The 'E' in CREAC represents an explanation of the law, sometimes accompanied by examples of its application or exposition of the polcy that underlies it. This is important for all the types of reasoning discussed in Chapter 2 through Chapter 6. The explanation part of CREAC is richly evident in Ms. Associate's email in Section 6. The explanation will generally go from the general to the specific. Thus, in the first part of the explanation, Ms. Associate establishes that the vehicle does not need to be in motion for the defendant to be operating—a very general conclusion. Then she goes to the more specific rule about "action to affect." Finally, in the second part of the explanation, she gives a very specific example.

Explanation general guidelines

Generally, with explanations in CREAC, you want to observe the following recommendations:

- Write about the rules as they are today. You generally do not need to explain their historical development, unless the rule you are using is subject to debate on that point.
- Use present-tense verbs to describe what the law *is*.

- Describe broad principles before narrower principles. Ms. Associate did that above by saying first that "operating" does not require driving and second more particularly what "operating" *does* require.[21] This is consistent with a general principle that you want to 'navigate' from more general conclusions and issues down to more specific ones, as you would with an outline.
- Avoid attributive cues except for case examples, which are explained further in the next section. Just as with the rules discussed above, you generally do not need to include attributive cues in the text of your sentences, as your citations do that work for you.

21: Each sample analysis in Section 28.3 does the same by first stating overall rules, then explaining applicable factors, and then giving examples of the application of those factors. See the samples starting at pages 172 and 173.

The two parts of Ms. Associate's explanation above represent two commonly used in rule explanations: introducing definitions that explain the rule and offering examples of the application of the rule in court opinions.[22] A third role for explanation, not evident in the Section 10.1, is the need to support a synthesized rule.

22: Note that these definitions can also function as rules in their own right, something we'll consider more deeply in Chapter 11.

The explanation is a key place to offer definitions or clarifications. In Ms. Associate's analysis, under different factual circumstances, the explanation is where she would have defined other terms and explained how courts have applied them in the past. In a statutory problem like this, the explanations sometimes come from other parts of the statute and sometimes from court opinions. For example, what if there is uncertainty about whether Mr. Smith was 'intoxicated'? You might cite the definition in section 49.01(2) of the Penal Code, which defines the term. What if the defendant was riding a bicycle with an optional motor assist. . . . Is that a 'motor vehicle'? Section 49.01(3) tells you to use the definition from section 32.34(a). What counts as a public place? Section 1.07(a)(40), which provides definitions applicable to the entire Penal Code, has the answer. Each of these statutory definitions is further refined in court opinions. On the issue of what counts as 'operating,' however, you will find the answers only in the court opinions.

Case examples

When you offer a case as an example, you will often be attempting to engage in reasoning by legal analogy.[23] You may use examples to clarify rules, to prove that what you assert is the rule really is, and to foreshadow your application of the rule. In this part of your explanation, you will describe one or more cited cases with sufficient detail to compare to the instant case.

23: See Chapter 5 for a fuller discussion.

Ms. Associate provides a simple model example in Section 10.1:

> In *Barton v. State*, 882 S.W.2d 456, 459 (Tex. App.—Dallas 1994, no pet.), a driver asleep at the wheel in a motionless vehicle, with one foot on the clutch and the other on the brake, had taken action to enable the vehicle's use and was operating the vehicle within the meaning of the statute.

Note that she did the following things you should always try to do with an example:

- She named the case in the textual sentence. This is the exception to the general rule that you should avoid attributive cues. You can then use the case name as a 'handle' to refer to the case in the A

(application) part of CREAC, which Ms. Associate did in the fourth and fifth paragraphs of her email.

- She told her reader what happened in the case with enough detail that they can understand the comparisons or contrasts that she later made with the problem case. Here is where you should describe all applicable details of the cited cases. You should not introduce any of them in the 'A' portion of your CREAC.
- She was succinct.
- When she narrated facts from the cited case, she used category terms instead of names. She did not say, for example, "Barton was asleep at the wheel." Using the names of the parties from cited cases can confuse your reader, while using their roles (like 'driver') allows your reader to see how the facts of the example align with your case.
- She told her reader the outcome from the cited case on the element, factor, or issue that she was analyzing. If you don't tell your reader how the cited case turned out, how can it function as an example?[24]
- She quoted any key phrases from the case that she wished to use in the analysis portion of her CREAC.
- She said nothing about *her* legal problem here. She saved that for the 'A' of the CREAC.
- When possible, she began her example with a *hook*, explained further below.

24: See Chapter 5 for an explanation of why this is so.

Ms. Associate briefly described the relevant facts in *Barton* and let the reader know the outcome there. She waited until her application portion to compare the facts from *Barton* to those in her problem.[25]

25: **Need to draw attention to some of the student examples in the Appendices here.**

Where possible, you should organize your examples around conceptual categories and provide *hooks* to interpret them. Consider the examples from Student 4's analysis of the Bill Leung problem in Section 28.3 starting at page 171. There, the author had previously stated the rule that an attorney-client relationship arises "when an individual receives legal advice . . . in circumstances in which a reasonable person would rely on such advice." Looking over the cases available to them, Student 4 decided that the circumstances could be grouped:

> *Courts have typically held that the setting in which the discussion occurs between the attorney and potential client must be a formal setting in order for there to be an attorney-client relationship.* In *Ronningen v. Hertogs*, the plaintiff sued the attorney for negligence in prosecuting a tort claim, stating that an attorney-client relationship was formed when the attorney met the plaintiff at the plaintiff's farm. *Ronningen* at 422. The setting of the meeting was not formal, and the court held that there was not an attorney-client relationship formed. In *Togstad v. Vesely, Otto, Miller & Keefe,* the plaintiff sued the attorneys for incorrect legal advice given during a meeting at the attorneys' law office. *Togstad* at 690. Due to the formality of the meeting's setting creating a circumstance in which a reasonable person would rely on an attorney's advice, the court found that an attorney-client relationship had been formed.
>
> *Also, courts have typically held that the substance of the conversation*

> *between the attorney and potential client plays a role in whether an attorney-client relationship is formed.* In *Ronningen*, although legal advice was sought and given, the attorney had told the plaintiff that the conversation was occurring due to his representing another client and the plaintiff had told the attorney that he may be interested in retaining the attorney at a later date. *Ronningen* at 422. Since the attorney and the client were clear in expressing the reasons behind this conversation, the court held that this meeting did not create an attorney-client relationship. Similarly, in the case of *In re Paul W. Abbott Company, Inc.*, since the attorney clearly told the plaintiff that he would not be able to answer her legal questions, the court held that there was no attorney-client relationship formed in this meeting. *In re. Paul W. Abbot* at 16. Alternatively, in *Togstad,* the attorney gave advice without any caveats. The attorney did not tell the plaintiff that their firm did not have expertise in this area of law and did not advise her to meet with another attorney. *Togstad* at 690. Due to this lack of information given to the plaintiff, the court ruled that an attorney-client relationship had been formed since the client had not been informed that this advice was not advice she should rely on.

Here, the italicized sentence in the first paragraph functions as a hook. The hook states an informal rule in terms of operative facts and normative conclusion. This rule is not necessarily stated in any case, but it is one that the author of the analysis has drawn from the cases. The author then uses the case examples in the paragraph to back up that rule. The author of the analysis will draw the rule in such a way that it helps to resolve the instant legal problem. The italicized sentence starting the second paragraph does not quite function as a hook, because it only describes the conceptual topic of the examples in it. We do not learn from this sentence what it is about the "substance of the conversation" that makes it more likely to result in an attorney-client relationship.

The alternative to this conceptual organization is what I call a 'case walk.' There, the author of the analysis steps through the cases without organizing them. We can rewrite Student 4's examples to look that way:

> In *Ronningen v. Hertogs*, the plaintiff sued the attorney for negligence in prosecuting a tort claim, stating that an attorney-client relationship was formed when the attorney met the plaintiff at the plaintiff's farm. *Ronningen* at 422. Although legal advice was sought and given, the attorney had told the plaintiff that the conversation was occurring due to his representing another client and the plaintiff had told the attorney that he may be interested in retaining the attorney at a later date. *Ronningen* at 422. Since the setting of the meeting was not formal and the attorney and the client were clear in expressing the reasons behind this conversation, the court held that this meeting did not create an attorney-client relationship.
>
> In *Togstad v. Vesely, Otto, Miller & Keefe,* the plaintiff sued the attorneys for incorrect legal advice given during a meeting

> at the attorneys' law office. *Togstad* at 690. The attorney did not tell the plaintiff that their firm did not have expertise in this area of law and did not advise her to meet with another attorney. *Togstad* at 690. Due to the formality of the meeting's setting and the fact that the client had not been informed that this advice was not advice she should rely on, the court found that a reasonable person would rely on the advice and that an attorney-client relationship had been formed.
>
> In the case of *In re Paul W. Abbott Company, Inc.*, since the attorney clearly told the plaintiff that he would not be able to answer her legal questions, the court held that there was no attorney-client relationship formed in this meeting. *In re. Paul W. Abbot* at 16.

This is not exactly *bad* writing, but you can see that the reader has to work much harder to determine the importance of the formality of the setting and the nature of the conversation in these cases when the author just walks through them without organizing them conceptually.

Student 3's effort to analyze the same problem, appearing in Section 28.3 starting at page 172, might look like a case walk, because the student used only one case as an example. But in the sentence immediately before describing *Togstad*, the student did identify the factors they thought the case illustrated. The flaw in that student's analysis is really that they used only the one case, when other cases, like *Ronnigen* and *Abbott* were available to them to flesh out the analysis.

Sometimes, you may be unable to avoid the case walk, as you can find no organizing concepts or principles in the cases. This may be especially true when you are dealing with certain totality-of-the-circumstances rules. See how that type of rule differs from others in Section 4.4 and Section 14.1 starting at page 95.

You can compare the ways students used examples in Appendix Chapter 28 and Appendix Chapter 29 to get a better sense of your options when performing analysis.

When selecting which cases to use as examples, consider the following. Ideally, you will choose mandatory authorities and factually analogous or disanalogous cases. You should not cherry pick cases—that is, cases that favor only your client's position. You do not need to pile on; if one case example clearly illustrates your position, you do not need to give the reader three. One key point about selecting cases as examples: **Just because you cited a case for your rule does not mean you need to use it as an example.** Ms. Associate cited *Oliva* and *Denton* for the rules for operating a vehicle, but she used a third case, *Barton*, as her example. The reasons are simple: The cases she cited for the rules are from the Texas Court of Criminal Appeals, the court of last resort for criminal matters in Texas. They are thus authoritative for establishing what the rule is. They were not, however, factually simlar to Ms. Associate's problem. For that, she found an opinion from the intermediate Court of Appeals in Texas.

Another important aspect of explanations is their use in *rule synthesis*.

Explaining rule synthesis

Your work as a lawyer will often require you to *synthesize* a rule. For example, you might read three different court opinions, each of them mandatory authority for your problem but each of them giving a slightly different formulation of a legal rule. In fact, that problem sometimes appears in a single case. Consider the opinion in *Filippi v. Filippi* in Appendix Chapter 30.[26] There, in a single opinion, the court offers at least three formulations for the rule for promissory estoppel, as well as some reasoning that might suggest another element, and the differences are potentially material to the rule.

26: I am grateful to Professor Bradley Clary for this example.

The legal analyst using *Filippi* or working with a group of opinions, each with a different rule formulation, has to decide which of these rule formulations to apply, or has to *synthesize* from them the rule that they will apply. *Synthesis* just means to put something together, as opposed to *analysis*, which means to take it apart. You must start with analysis though, taking apart each rule formulation as recommended in Chapter 14, briefing it, outlining or describing its rule shape, and then comparing it with the others.

It's nearly impossible to *describe* how to do this task. Instead, you will practice it and get feedback (comments, grades, successes and failures) throughout your career. There are a few things you must keep very carefully in mind while attempting it:

1. Successful synthesis requires careful analysis. Follow the guidelines in Chapter 14 for reading and briefing the variations of the rules. *Read very carefully!*
2. Policies motivate most rules. A court's discussion of the policies underlying its rule formulation(s) provides critical guidance to how it may construe that rule in the future.
3. Your own client's interests will motivate you to look for a synthesis beneficial to the client. That's fine, but you must be attentive to the possibility that another synthesis may also be reasonable.
4. A common problem is deciding how broadly or narrowly to construe the rule. Perhaps a court, in a case with quite peculiar facts, announces a very broad rule when resolving the case in its opinion. Perhaps the court announces no rule at all in resolving the case. Does the case stand for the broad rule or any rule? Would a case with slight factual differences have offered a different outcome?

Carefully consider whether you need to spend time in the *Explanation* part of your CREAC to explain how you synthesized your rule. If the synthesis was complex, if there are strong competing syntheses, or if you feel doubts about the synthesis, you may need to make that clear to your reader. If you are writing to a senior attorney or to your client, explaining the synthesis process allows you to show your work and share your reasoning. A senior attorney may offer feedback on how they think the courts would view the synthesis. The client may be able to point up some important factual matter that would change the balance of the synthesis. Of course, if you are writing a persuasive brief to a court, you will likely not want to show your opponent or the judge any doubt in your analysis, so for those audiences, you would choose a different approach. Chapter

21, Chapter 22, and Chapter 23 provide advice on creating persuasive rule statements in advocacy contexts.

You will have many chances to practice synthesis in your 1L year, and you will also receive feedback on your efforts.

10.5 Roadmapping

An important tool in legal communication is what some folks call 'roadmapping' and others refer to as 'signposting.' The sign and map metaphors regard your text as a landscape and your reader as a traveler. You may want to guide your reader to a particular destination from a particular starting point, or you may just want to provide orientating cues—like signposts—so they can find their own way. In simple analyses, like those discussed in this chapter, roadmapping functions as an alternative to using section headings. In theory, the email Ms. Associate wrote in Section 10.1 could have section headings in it, setting off, for example, the factual background, the analysis, and the conclusion. But that seems like a little overkill for such a short text. Instead, Ms. Associate used some roadmapping to make it clear what she was doing.

There are at least three places that you may choose to use roadmapping in a simple legal analysis: To set some material aside; to signal a different order of discussion than you reader might expect; and to signal that you are shifting from the overall rule to a discussion of individual factors or elements.

Just after stating the rule, before explaining it, you may need to indicate to that you are setting aside some elements or factors. Ms. Associate did so to indicate that she would discuss only one of the elements of the offense because there is no meaningful basis to dispute three of the elements. Sometimes (especially in law school) you will be told to make certain assumptions about elements and factors. This is also where you would indicate that.

You also need roadmapping after the rule but before delving into the analysis, especially if you will be discussing the elements or factors of the rule in an order different than the way you have presented them. When you present a rule from statute or court opinion, you should usually leave the elements or factors in roughly the same order as they appear in the primary authority.[27] When you analyze the elements or factors, you should generally do so in the order in which you presented them. If, however, one of them is the central problem, and the others are of secondary importance, you might want to prioritize it. If you do so, you need to explain to your reader that you are reordering elements or factors in your analysis, and probably why. You need a roadmap.

27: You should expect that other law-trained readers and judges will possibly know the rule, and they'll know it in that order.

In the explanation, when you move from a broad rule to discuss individual elements or factors, you should cue your reader. See the example in Appendix Chapter 28, where Student 4 did this in the second paragraph of their email to Mr. Leung, beginning on page 173. At the end of that paragraph, the student identified two factors to look at, "the setting of the meeting" and "the substance of the conversation." This functions as a roadmap for the reader, who now expects that the next two topics will

be explanations of these factors, perhaps with examples, which is exactly what the student provided.

Another place you will use roadmapping is as an introduction to subsections, but we'll save this topic for Chapter 11.

There are more and less effective ways to do roadmapping. The examples from Ms. Associate and the second paragraph of Student 4's analysis on page 173 are good. Some moves would have made them less effective. For example, either of the students could have used language like 'I will now analyze . . . ' or 'This memo will now analyze . . . . ' These additional words tell your reader nothing. They already know that you are going to analyze the rules, elements, and factors you bring up, unless you tell them you are *not* going to analyze something. Even if you do that, you don't need this surplus language. Note that Ms. Associate in Section 10.1 said 'There is no dispute that your Corvette is a motor vehicle, that Oak Lawn Avenue is a public place, or that you were intoxicated. Thus at issue here is whether you were *operating* your vehicle within the meaning of the statute.' The reader of these two sentence knows full well that the analysis will take up the *operating* issue and say little more about the other elements.

You should think of roadmapping in every case as setting up an expectation in your reader—about what topics you will discuss and in what order—so that you can then satisfy that expectation in your reader. This is a form of what I refer to as 'tactical appeals' in Section 2.2 and Chapter 8. Roadmapping uses human cognitive biases—particularly the confirmation bias—to intensify the reader's likely agreement to what you are saying.

10.6 Pure application

For now, you should attempt to do as the examples in this chapter and Appendix Chapter 28 do: When the authors reach the *Application* portion of their CREAC analysis, they do not introduce any new law or citations into it. All the legal authority that the application requires should already have appeared in the *Rule* and *Explanation* portions. The only reason to cite a case in the *Application* section is if you quote it there. Such citations are unnecessary, however, if you introduce the quotation in the RE of your CREAC.

Consider Ms. Associate's analysis in Section 6. There, she quoted in *Explanation, part 1* the rule from *Denton* that what matters is whether the defendant takes action "in a manner that would enable the vehicle's use." She cites *Denton* at that point, both because it is the source of the quotation and because it is the source of the rule. In the application, she uses identical language without quoting or citing it. That is acceptable, because she has already introduced the exact language with the quotation marks and citation. As you can imagine, if you repeat the quotation marks and citation for a legal rule every time you use language from it, your application sections could become difficult and unpleasant to read. There are times, however, particularly in persuasive writing, when you may wish selectively to repeat certain citations as a tactical appeal.

Pure application (no new law) does not, however, mean you cannot refer to the law that you've laid out in your *Rule* and *Explanation*. In fact, effective application must always refer back to the law, especially if your *Explanation* offered examples of the law's application that you intend to use as legal analogies.

You must be explicit in your comparison/contrast of facts from your problem and the cases you cited in your explanation. Ms. Associate did not stop merely by saying "Your situation is like the defendant in *Barton*." She drew the very explicit comparison between the position of the drivers' feet on the pedals and the consequences of them slipping.

You should also be sure that your application proceeds in the same order as your explanation. If you used cases to illustrate three aspects of your rule in the *Explanation* portion, you should apply those three aspects to your problem in the same order.

As you become more experienced as a legal writer, you will find yourself varying somewhat from the pure-application approach, and perhaps you will introduce new law into the application for some tactical purpose. Generally, at the beginning of your career as an analyst, however, you should stick with the pure-application approach. One place where the pure-application principle does not apply, even for new legal analysts, is in a *Counter-argument*, the subject of the next section.

10.7 Counter-argument

The counter-argument or counter-analysis is where the author raises a potential weakness in their argument. This is usually the strongest argument that the opposing side could make, which the author here has to raise, explain in fair terms, and then dispose of it with further argument. Note that the counter-argument in Ms. Associate's email in Section 10.1 is a mini-CREAC in its own right. It illustrates one of two general approaches to counter-argument. One is to do it as Ms. Associate has there—tack a mini-CREAC with the *Counter-argument* onto the reasoning just after the main CREAC. The second is to closely interweave the counter-argument with the main argument. Ms. Associate could have done that, explaining the middle-of-the-street fact in her *Explanation, part 2*, and then going back and forth in her *Application* paragraph, comparing *and* contrasting her client's situation.

Whether you should choose one or the other approach is often a matter of style, but here it seemed to Ms. Associate better to have the separate mini-CREAC. You can compare the ways students used counter-arguments in Appendix Chapter 28 and Appendix Chapter 29 to get a better sense of your options when performing analysis.[28]

28: In the sample memos in Appendix Chapter 28, you might check particularly the segments with this marker:

You will not always offer your reader a counter-argument: First, in advocacy writing (which you will most likely tackle your second semester in law school), you may refrain from presenting counter-arguments for strategic purposes. Second, the matter is sometimes clear-cut enough that the counter-analysis is unnecessary. If the best argument that can be made against your position is terrible, you do not need to provide it space. In your first year of legal writing, however, your professor will

likely to expect you to present all plausible counter-arguments in your predictive analysis. At that stage, your professor needs you to *show your work*.

10.8 Conclusion statements

Your reader will always want to know what conclusion you draw from your analysis. You must remember two important things about conclusions: how you phrase them and where you put them.

How to phrase conclusions

What does it mean for a lawyer to say that her client will 'likely' or 'probably' prevail? Students often struggle with the degree of certainty or confidence with which they should communicate a conclusion in an objective or predictive analysis.[29] Confusion about standards of proof and confusion of them with these more routine communications of probability compound the problem.

29: Of course, in advocacy writing, the author will almost always insist that their client's position is almost 100% correct.

First, consider the standards of proof:

- *Preponderance of the evidence*. This standard means that the conclusion is more likely true than not. It is satisfied if a thin majority of the evidence ("50% plus a feather") weighs in favor of the conclusion.[30]
- *Clear and convincing evidence*. "Evidence indicating that the thing to be proved is highly probable or reasonably certain.[31]
- *Beyond a reasonable doubt*. This is proof "that prevents one from being firmly convinced of a defendant's guilt, or the belief that there is a real possibility that a defendant is not guilty."[32]

30: "This is the burden of proof in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be." *Preponderance of the Evidence, Black's Law Dictionary* (11th ed. 2019).

31: *Evidence, Black's Law Dictionary, supra* ("This is a greater burden than preponderance of the evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials.").

32: *Reasonable doubt, Black's Law Dictionary, supra*.

Set aside these definitions, because they are ***NOT*** the basis upon which you will determine your confidence when doing predictive analysis. First of all, these standards of proof are themselves things about which you may be required to make assessments of probability. For example, you might be asked 'Will a judge sustain a guilty verdict against the defendant based on the evidence entered in this case?' You might answer, 'It is unlikely that a judge will permit a guilty verdict, because even if the state's evidence were believed, it would still not prove the defendant guilty beyond a reasonable doubt.' Here, you would be making a statement of probability—'unlikely'—about a standard of proof that includes a statement about probability—'a real possibility that a defendant is not guilty.'

Second, these phrases do not very meaningfully communicate to your audience. Preponderance of the evidence suggests just a feather more than 50%—not useful if your client wants to know whether to make a million-dollar business investment. Beyond a reasonable doubt really only shows up in criminal cases. And I've seen no clear and convincing evidence for what clear and convincing means—courts almost always look to similar cases and perform legal analogies.

Nevertheless, you must communicate probabilities to your clients, though probably not quantitatively. The "probability lexicon" that Professor Joe Fore recommends for lawyers in general practice is this one:[33]

Term	Quantitative probability
Almost certain	90-100%
Very likely / Very probable	75-90%
Likely / Probable	60-75%
More likely than not	50-60%
Unlikely / Improbable	20-50%
Very unlikely / Very improbably	10-20%
Almost no chance	0-10%

33: Joe Fore, *"A Court Would Likely (60-75%) Find . . . " Defining Verbal Probability Expressions in Predictive Legal Analysis*, 16 Legal Comm. & Rhetoric 49, 81 (2019), https://www.alwd.org/lcr-archives/fall-2019-volume-16/539-a-court-would-likely-60-75-find-defining-verbal-probability-expressions-in-predictivelegalanalysis. I recommend that students read this article.

Professor Fore first notes that most lawyers are not comfortable with numerical statements of probability, as they sound too exact.[34] But he also urges that lawyers should disclose what probability they assign the first time that use a term. So, in Ms. Associate's memo in Section 6, Professor Fore would have liked her to express the first conclusion 'You would very likely (75–90% probability) be convicted on this charge, because your conduct very likely satisfies all the elements of the offense.' You may try this in practice if you like, though your supervising attorney may push back against it.[35]

34: In fact, that's why I support his decision to include the ends of his ranges in two ranges. Thus a theoretical probabiliy of exactly 50% would be both 'unlikely' and 'more likely than not.'

35: You might share a copy of Professor Fore's article, but don't count on your supervisor being persuaded on this point.

Even if you don't use the percentage ranges from Professor Fore's lexicon, I suggest that you adopt the word choices for your own guidance. So Ms. Associate would think it's 75–90% probable Mr. Smith would be found guilty under the analysis in Section 6, because she used the "very likely" language. She might not communicate the percentages to Mr. Smith, but they would be guiding her vocabulary.

Professor Fore's lexicon is not symmetrical, and that's for a reason. If you cannot support your client's position to at least 50% probable in your own mind, then it is at best improbable. The 50%–60% range is a mere 'more likely than not' because you cannot make a very strong commitment there. Note, too, that it will be fairly rare for you ever to say 'almost certain' or 'almost no chance.'

Two more recommendations about how you express your conclusions: First, use the same language everywhere. If you say 'very likely' in the introduction to your analysis, that should be the language you use at the beginning of your CREAC, at the end of your CREAC, and in the conclusion of your analysis. It is very common for students to vary that language in ways that make it unclear whether the student is clear about what they are writing. Second, don't mix 'likely' and 'probably.' If you describe your conclusion is 'very likely' in one spot and 'very probable' in another, you run the risk that the reader will think these are different probabilities.

Where to put conclusions

As for where to put conclusions, you should tell the reader at the beginning of the overall analysis and at its end. Readers who trust your analysis may not read anything more than the introduction, the conclusion, or

both. You should also provide a conclusion at the beginning and end of every CREAC. This is an instance of the old business communicator's strategy: 'Tell 'em what you're gonna tell 'em. Tell 'em. And then tell 'em what you told 'em.' Repetition encourages your reader to remember what you said, and it functions on a cognitive level to build their belief in what you are saying.

You might also provide a conclusion at the beginning of the *Application* part of a CREAC, especially if you offered a comparatively lengthy *Explanation* part. Consider Ms. Associate's choice in Section 10.1: There, she asserted the conclusion on the subpoint about the 'operating' question at the beginning of the *Application* part of her analysis and the overall conclusion at its end. She also reiterated the the conclusion on the 'operating' question at the beginning of the *Counter-argument* part and again at its conclusion.

All this repetition—can it really be useful to the reader? Yes. Note how Ms. Associate wove the conclusion together with some kind of signposting or roadmapping in almost every case. At the beginning of the CREAC, she connected it with the elements of the offense. At the beginning of her *Application*, she connected it to the element that she was about to apply. In the end *Conclusion* to the CREAC, she wove it with a suggestion that there might be more to investigate. At the beginning of the *Counter-argument*, she signaled that she was in fact making a counter-argument by saying at the outset that it would not prevail. In each of these cases, the conclusion reiterates the outcome but also serves some roadmapping function.

10.9 Facts

When you are writing the factual background to support a legal analysis, you have a few decisions to make, including which facts to include, how to characterize them, and where to put them. This section considers these questions for a simple objective or predictive analysis. Though these recommendations are quite similar for a more complex predictive or objective analysis, the recommendations for other genres are quite different, and for them you should see the applicable genre chapters later in this volume. The factual background for an advocacy document—like a trial or appellate brief or a letter to opposing counsel—often requires a different strategy. But note that you will still usually start with a full, predictive or objective analysis when writing advocacy to ensure that you have identified the legal points you need to make and the strengths and weaknesses of your opponent's position. For that analysis, this section still provides important guidance. For advocacy writing, you will generally provide a subset of the facts that you would use for objective writing.

As a preliminary matter, you might ask *when* should you write the facts? The answer of many legal writers is two-fold. You need a summary or notes of the facts to organize your thinking while you are performing the analysis. But the factual background section is something that many writers wait until the end to write. That stems from the fact that they don't know what they need to include in the factual background until the analysis is written. See the next section on that point.

Which facts to include

As you know from Chapter 9 and the examples above, generally, the factual background appears before the discussion of the law. This makes sense, really, because without some understanding of the facts that give rise to the legal problem, any discussion of the law seems untethered. But which facts?

When you are writing a predictive or objective factual analysis, your factual background must include every fact that is relevant to your analysis. These are the 'operative facts' or 'legally relevant facts' as some folks call them. The fact section must also include any facts necessary to provide context for the operative facts. How many you provide is a judgment call: If you provide the operative facts and *no* context, it may be difficult for your reader to follow. But if you provide a surfeit of contextual facts, your reader may get lost among them and lose sight of the operative facts.

In a predictive or objective analysis, you should include negative facts that might bear on your problem. The fact section is also a good place to identify any unknown facts that might materially affect the analysis. In a persuasive analysis, you may include negative facts, but you will likely attempt to minimize their impact.

The last part of the facts, especially in a longer document, usually tells the reader what the current status of the problem is. 'Our client has asked us to determine . . . ' or 'We are determining whether the client should move for summary judgment on damages.' These facts about the problem tell the reader why you wrote the analysis they are about to read.

One critical tip is to avoid making inferences, drawing conclusions, or using legally conclusory language in the fact section. If Ms. Associate's factual background had said, 'Officer Mariano arrested you while you were operating your vehicle,' there really would be no point for her to answer the 'operating' question in the analysis.

How to characterize the facts

When you are writing the factual background, you must think about organization and about the language you use to describe the facts. For organization, consider the following advice:

1. Start with some context. Tell us how everyone got where they are.
2. Attribute facts to their sources. In Section 10.1, for example, Ms. Associate made it clear that all the facts derive from the arrest report.
3. Organize the facts. The main options are chronological, topical, or perspectival.
    - Chronological is just what it sounds like.
    - Topical refers to organization that centers on various topics. In a complex business dispute, for example, there might be several claims, each of which has its own set of facts.

- Perspectival refers to the perspectives of the actors on the scene. For example, if Mr. Smith had been conscious and not blacked out, Ms. Associate might have described the facts in a more nuanced way, pointing out in particular where Mr. Smith's account of operative facts differed from those of Officer Mariano.

4. Consider 'nesting' the organization. You might use a chronological organization at the high level, stopping along the way to describe the perspectives of each party in turn. You might use a perspectival approach at the high level, instead, giving the whole chronology from one person's perspective and then from the other's.
5. Use concrete details. In Section 10.1, Ms. Associate was specific about certain facts, but she omitted certain others. For example, does the make of the car matter? Does the time of day matter? Why would she make these choices the way she did?
6. Make the facts flow. Unless they are quite simple, you will probably need to organize them into paragraphs. You might consider using some roadmapping at the end of the first paragraph so your reader knows how they will unfold. Use topic sentences and transitions for the paragraphs.
7. Identify the status and categories of folks. 'Mr. Gonzalez, the butcher, negotiated with Mr. Smith, the baker, and Ms. Qi, the candlestick maker. These tradespeople formed a partnership to serve the Fort Worth market.' Thereafter, you can refer to 'the tradespeople' or 'the partners.' It's important to establish these terms, as this is how you will connect your facts to the law.

When you are writing the facts, you should describe things that happened in the past in the past tense, those going on now in the present tense, and those planned or expected in the future in the future tense. Avoid using the present tense to describe events in the past.[36]

36: If you need a primer or refresher on verb tenses, check out Section 26.1, starting at page 144.

Finally, in objective writing, you should describe the facts fairly clinically. Imagine in the scenario described in Section 10.1 that Mr. Smith had talked to Ms. Associate on the phone and that he made the following claims to her:

> Officer Mariano must have beaten me when she arrested me. When I woke up in the jail, I had bruises and a black eye, and nothing in the arrest report indicates that I had those injuries *before* she arrested me.

Now, in the first place, Ms. Associate might omit these facts when analyzing the drunk-driving charge, because they have nothing to do with whether he is guilty of the offense. (She might raise them in a conclusion paragraph, though, as something they should investigate further.) But even if she were to include these facts, she should avoid buying into the unsupported inferences that Mr. Smith is drawing. She might write, 'You sustained injuries the evening of August 5, and you do not recall doing so. Because Officer Mariano's report does not mention those injuries, you have concluded that she must have beaten you.' Here, Ms. Associate would not be contradicting her client, but neither would she be accepting his inferences about what happened.

Where possible, you should avoid adopting the positively or negatively valenced language that your client uses for events. In an automobile accident case, for example, your client might say their car *bumped* into the plaintiff's car, and the plaintiff might say it *crashed* into their car. For the objective analysis, you would use language somewhere in the middle, perhaps 'collide,' 'struck,' or 'hit.'

Where to put the facts

One last point, though it has in part already been made: With most genres described in this book, the factual background will appear very near the beginning, as it did in the example in Section 10.1 earlier in this chapter, and I've already noted that the factual background should include all the operative facts necessary for the analysis. A corollary of these two facts is that when you are writing CREAC-based analysis, you should not introduce any new facts in the *Application* parts of your CREACs. All the facts you need to do the analysis should already have appeared in the factual background.

Writing a complex analysis 11

Link to book TOC

NOTE: This chapter remains under construction as of fall 2020, but it has essential information for students in my classes in that semester. I'm sorry it may be a bit difficult to follow in this form, but just ask me if you have questions. —*B.N.L.*

There is no standard boundary between legal analysis that is simple and legal analysis that is complex. A legal question with one issue and only a few court opinions to help resolve it can be conceptually very complex. A legal question addressing a rule with multiple elements, each with sub-elements, can be conceptually very simple.

When this text refers to complex analysis, it refers to analysis where there are issues, sub-issues, and even sub-sub-issues. In these situations, three differences from simple analyses become readily apparent, and this chapter addresses each: the need for 'nested' CREACs, the increased need for roadmapping, and the need for point headings. Very complex analyses may also require different treatment of the factual background for a problem.

11.1 'Nested' CREACs

The easiest way to understand the concept of 'nested' CREACs is to observe them in action. Consider the example from Student 7 in Section 29.2, starting at page 190. Here, in outline form, is what Student 7 did in the discussion section of their memo.[1]

Student 7 presents their legal analysis in the DISCUSSION section of their memo.[2] The discussion section of the memo consists of a single CREAC:

- The *conclusion* in the first sentence of the discussion is that Ms. Connor's use was not fair use.[3]
- The *rule* is the four-factor rule for fair use, in the first paragraph of the discussion section.
- There is not much *explanation*, just a preview in the first paragraph of how the rest of the analsysi will go.
- The *application* is everything in the subsections with the Roman numerals, except the very last sentence.[4]
- The conclusion re-appears in the last sentence of the discussion.[5]

That's all fine, as far as it goes, but the application of this one big CREAC is itself divided into CREACs. First, in the introductory paragraph of the discussion section, Student 7 set aside consideration of the second and fourth fair-use factors, because the supervising attorney had instructed that they do so. That left three tasks for Student 7, assessing factors one and three and balancing all the factors. Check out the three high-level headings within the discussion section:

1: For more on the formal characteristics of a memo, see Chapter 19.

2: Though some call the discussion it 'ANALYSIS' instead.

3: Indicated in the example with this marker:

5

4: Indicated in the example with markers:

7 through 11

5: Indicated in the example with this marker:

12

- I. Because Ms. Connor's secondary use was not transformative and it was commercial, the *first factor* will most likely go against fair use even though her use was in good faith.
- II. Ms. Connor's sizeable use of the most fundamental scenes of each movie most likely tilts the *third factor* against her.
- III. *On balance*, the factors of fair use will most likely weigh against Ms. Connor.

Looking at Student 7's section (I.), we can see that it, too, is a CREAC:

- The *conclusion* appears in the heading itself.[6]
- The *rule* is in the first paragraph of the section, where Student 7 spells out the three subfactors of this first fair-use factor.
- The *explanation* here is really just a preview of the content of the subsections under section (I.).
- The *application* is in the subsections.
- The *conclusion* appears at the end of section (I.).[7]

In subsections (A.), (B.), and (C), Student 7 analyzes the three sub-factors of the first fair-use factor and in subsection (D.) balances those sub-factors before reaching a conclusion on the first factor.

This process continues for one more iteration, as each subsection in section (I.) also consists of a CREAC. Let's look at subsection (A.), relating to the 'transformative' sub-factor of the first fair-use factor:

- The first sentence of subsection (A.) provides the *conclusion*—Ms. Connor's use is likely not transformative.
- The rest of the first paragraph provides the over-arching *rule*, drawn from an authoritative Supreme Court case.
- The second and third paragraphs provide *explanation* in the form of case examples.[8]
- In the first part of the fourth paragraph, Student 7 *applies* this law to the facts of Ms. Connor.
- Student 7 wraps up the fourth paragraph by reiterating the *conclusion*.

It is this 'nesting' of CREACs into a structure that resolves each element, factor, or issue and allows the author to build up to the overall conclusion. For this nesting to work, you must have three things:

- Your analysis must be organized. In other words, you need an outline.
- You must have effective roadmapping at each level.
- You must use well written headings.

The next sections take up these issues.

6: Indicated in the example with the marker:

7: Just before the point in the example with the marker:

8: See Section 10.4, starting at page 46 for advice on using examples in the explanation portion of a CREAC.

11.2 Critical roadmapping

Section 10.5 introduced and discussed roadmapping for simple analysis. All the same principles apply for complex analysis. The frequency with which you roadmap is generally much greater, however, when you write complex analysis.

Here are two places where you should always roadmap:

- At the beginning of the reasoning section of any complex analysis, and this includes the beginning of the discussion or analysis section of a memo, you should always preview the analysis, telling your reader what you will and will not consider, identifying the things you will be analyzing, and previewing your conclusions on each.
- In the first paragraph of any section that has subsections, you should always preview the analysis that will appear in the subsections, previewing your conclusions on each.

The roadmap here does at least two things: First, for the reader who will actually read the whole analysis, the roadmap tells your reader what to expect. When you deliver on those expectations, you satisfy your reader and improve your credibility. Second, for the reader who is a skimmer, the roadmap for your discussion or some section of it provides them all the information they need. If they trust that your analysis will be thorough and correct, they don't need to read any further. Of course, sometimes a skimmer will wish to follow up on one or another of the points previewed in the roadmap. For example, perhaps a reader of Student 7's memo was only interested in the third-factor analysis. In that case, the roadmap tells the reader to find what they are looking for if they want more detail.

A third place you may use a roadmap is within a section that does not have subsections but that does have a lengthy explanation. Consider Student 4's analysis of the Bill Leung problem in Section 28.3 starting at page 173. In the second paragraph of their email, Student 4 gives the rule for forming an attorney-client relationship, which is a totality-of-the-circumstances rule.[9] At the end of the same paragraph, Student 4 has identified two factors—"the setting of the meeting . . . and the substance of the conversation at this meeting." In this way, she cues the reader that the two paragraphs that follow will will include case examples that address these two factors.

9: Check out Section 4.4 for an explanation of this type of rule and Section 14.1, starting at page 95 for advice on reading and briefing them.

In fact, the roadmapping that Student 4 did in that early paragraph carried through to their application, where they discussed first the setting and then the conversation.

11.3 Point headings

As you can see in the examples in Appendix Chapter 29, complex analysis benefits from the use of point headings. Unlike the fixed headings in a memo, discussed in Section 19.2, which are often the same for every memo written in a business enterprise, the point headings in an analysis are there to guide the reader to understand flow of the argument.

There are many perspectives on what a good point heading should look like. Referring again to Student 7's example memo in Section 29.2, starting at page 190, we can see that they have chosen a full style of heading, where each is a sentence that states a legal consequence and some factual cause for it. Of course, this hearkens back to the *operative facts lead to normative conclusions* thing that we have spoken frequently about. Here are the headings for the whole memo, with operative facts in bold face and normative conclusions in italics:

- I. **Because Ms. Connor's secondary use was not transformative and it was commercial**, the *first factor will most likely go against fair use* **even though her use was in good faith**.
  - A. *Ms. Connor's compilation of SCP's movies is most likely not considered transformative* **because she no longer added commentary**.
  - B. *Ms. Connor's use is commercial* **as she sells $15 tickets for audience members to attend her lecture**.
  - C. Ms. *Connor will most likely prove that her use of SCP's films was in good faith* **because she purchased DVDs of the movies**.
  - D. **On balance**, *the three subfactors of the first fair-use factor will weigh against Ms. Connor*.
- II. **Ms. Connor's sizeable use of the most fundamental scenes of each movie** *most likely tilts the third factor against her*.
- III. **On balance**, *the factors of fair use will most likely weigh against Ms. Connor.*

Because the author uses complete sentences, they are capitalized like normal sentences and end with periods.

Other writers prefer a more spare style of heading, and the same memo might have the following headings:

- I. First Factor: Purpose and Character of Use
  - A. Transformative Use
  - B. Commercial Use
  - C. Good-faith Use
  - D. Balance of Subfactors
- II. Third Factor: Amount and Substantiality of the Portion Used
- III. Balance of Fair-use Factors

Notice that because these headings are not sentences, there are no periods at their ends and they are in 'title case,' meaning the main words are capitalized. As the examples in Appendix Chapter 29 are from my students, you can guess which style of heading I prefer. The more informative headings do at least two things: First, they make it easy for the reader to know what is happening in each section and subsection of the document, not just the general topic, but the outcome and key fact on which it turns. Second, they can function as the initial CREAC conclusion for the section, eliminating the need for a conclusion in the first sentence of the section. Student 7 did this in at least one instance, but not in others. Can you see where she did so?

There is a middle ground where the author gives the normative conclusion without indicating the operative facts. Imagine Student 7's headings with just the italicized words.

Your supervising attorney may have (strong) preferences about how to do this. Conform to them. They may prefer wordy headings, very brief ones, or the middle style. Even if they like wordy headings, they may still expect the first sentence of a section to repeat the conclusion.

Regardless of the preferred style of headings, consider the following points:

- Do not use all-caps and underlining unless that is the format required by your employer. The exception is for fixed headings of the kind discussed in Section 19.2.
- Resist the temptation to write lots of point headings. For example, unless your memo is quite long (longer than five single-spaced or ten double-spaced pages), you should not need more than two levels of heading.
- You do not need sub-headings under a heading if there is only one sub-heading at that level. In other words, you do not need a 'I.' unless you have at least a 'II.' You do not need an 'A.' unless you have at least a 'B.' An you do not need a '1.' unless you have at least a '2.'

11.4 Facts

The factual background for a complex predictive analysis is not that much different than for a simple analysis, so consider the advice in Section 10.9. A complex analysis can call for two techniques of which you should be aware.

First, if the factual background is long and complicated enough, you may need point headings to break it up clearly. Don't forget to use roadmapping before moving to a subheading, so you reader knows what to expect. In these cases, the headings will tend to be shorter, though they may still be sentences.

Second, in a very long analysis, you may find that it's better to break the facts up, placing a factual background at the beginning of different sections of the analysis. If you do so, you should be sure that the facts you place in one section of an analysis are not also needed in other sections.

Finally, writing facts for persuasive documents can be quite different than writing them for predictive analyses. You'll find advice regarding that in Chapter 21 and Chapter 22.

Legal Contexts

Humans in the legal context 12

This chapter considers some of the human contexts in which lawyers practice. It begins with a premise that lawyers in their professional capacities should respect those with whom they interact. This involves using the appropriate level of formality when addressing people with (or without) formal titles and using the pronouns that folks prefer to have used in reference to them. In law school, you must learn to disagree with each other while still showing respect—even if you regard the views of others as reprehensible. You should also have an understanding of best practices when it comes to guiding others and correcting their errors. Finally, you should be aware of cultural differences that can affect the success of your communication.

12.1 Respecting one another

Every major western branch of cultural ethics suggests that people owe other people a basic level of respect, if not love. The Texas Lawyer's Creed requires that lawyers "treat counsel, opposing parties, the Court, and members of the Court staff with courtesy and civility."[1] Lawyers are expected to be "committed to [the] creed for no other reason than it is right."[2]

But something like the Golden Rule is a regular feature systems of ethics: "Do unto others as you would have them do unto you." The Golden Rule makes an appearance in the Abrahamic faiths—in the Talmudic scholarship of Judaism, in *Matthew* 7:12 and *Luke* 6:31 in Christianity, and in the haddith of Islam. According to the Parliament of the World's Religions, the Golden Rule is a universal obligation: "We must treat others as we wish others to treat us."[3]

12.2 Titles & names

Working in the law requires you to be sensitive to others in a variety of ways, and one is in terms of how you refer to and address other people. Referring to a person is talking about them to third parties. Addressing a person is speaking to that person. Certain circumstances demand formality, where you will refer to or address people with their titles and last names. Others demand informality, where you refer to or address people by their first names. Consider these scenarios:

- You are a new associate in a law firm. You notice that second-year associates all refer to and address other lawyers in the firm by first name in the office. You should do the same.
- Same as the previous example, but there are two elderly partners to whom everyone refers as 'Mr. Duggie' and 'Ms. Nell.' You should do the same.

Figure 12.1: Ronald McDonald Wais. In Thailand, respectful greetings come in the form of the *wai* (pronounced like 'why' in English). Here, the American fast-food icon adapts his conduct to Bangkok, where this photo was taken. For more on cultural differences, see Section 12.7. Photo © 2007 Mike McC. CC license: https://flic.kr/p/zxhcS.

1: *Texas Lawyer's Creed—A Mandate for Professionalism*, Order (Tex. Nov. 7, 1989; Tex. Crim App. Nov. 7, 1989).

2: *Id.*

3: Parliament of the World's Religions, *Declaration Toward a Global Ethic* 3 (Sept. 4, 1993).

- Same as the previous example, except you notice that when folks in the firm refer to each other to folks outside the firm, they usually use formal titles. You should follow that practice.
- You are appearing in court in an action involving a claim for damages in a business dispute or taking the deposition of an opposing party in the same court action.[4] When you refer to or address witnesses and opposing counsel, you should use title and last name. (A judge may actually reprimand you if you do not do so.)
- You are appearing in a child-protection hearing regarding seven-year-old Shree Gupta. Because child-protection hearings are less formal in this jurisdiction—for example, the judge does not wear robes, the room is arranged almost like a classroom, etc.—everyone refers to and addresses Shree by his first name. You should do the same.
- You are a research assistant for Professor Edna St. Vincent, who has asked you to call her by her first name. You should do so while meeting with her, etc., but outside of one-on-one interactions with her, you should refer to her as 'Professor St. Vincent.'
- Same as the previous example, except that you have a seminar with Professor St. Vincent where she has asked all students to refer to her as 'Edna.' In that class and when talking with other students in the class, you may call her 'Edna.' But outside of the seminar, you should still refer to and address her as 'Professor St. Vincent.'
- Professor St. Vincent is promoted to associate dean for student affairs. You should now refer to and address her as 'Dean St. Vincent,' the higher title.
- Professor St. Vincent is appointed to a federal circuit court of appeals as a judge. You should now refer to her as 'Judge St. Vincent,' and you should address her as 'Your Honor.'[5]
- You are introducing a speaker—Marshall Jones—who is a law professor visiting from another school. He also has a PhD, which is less common for law professors than other types of professor. You might introduce him as 'Dr. Jones,' arguably the higher title, but 'Professor Jones' will also do. You might alternate between the two titles.

4: A deposition is a long interview of a witness taken under oath, with a written or video transcript in which every word is recorded.

5: Not all judges are addressed as 'judge.' See the box on page 79.

As a general rule in the law, err on the side of formality. You can always get more informal. It is important for you to be comfortable switching between formality and informality. Be conscious of whether you are going informal only with certain types of people. For example, do you use first names with female colleagues and formal address with male colleagues? Do you think that represents a problem?

You should also be sensitive to people's names. Use the name that someone tells you they prefer. If you find a name difficult to pronounce, work your way through it. Do not make a fuss about its difficulty, and do not use an alternative that you have cooked up. How would you feel if were Chinese and your name was 'Xiyao,' and someone you met said, 'Wow. That's hard to pronounce. Can I just call you "Sheila"?' If you are not sure how to pronounce someone's name—perhaps if it has what you regard as an unusual spelling—just ask: 'I'm sorry, can you pronounce your name for me?' Make a note for yourself how to pronounce it. If someone uses a name with which you are unfamiliar, or one that has a

wide variety of spellings in English, it's also fine to ask them, 'Could you please spell your name for me?'

And here is one more possibility with names, one that occurs commonly with Chinese students who come to the U.S. Because they are concerned their names are hard to pronounce for Americans, they sometimes adopt an American name to use in conversation. So my former colleague Shuwen Li might introduce herself and say, 'Everyone calls me Molly.' If that is her preference, you should call her 'Molly,' and not make a big affair out of trying to call her by her Chinese given name.

Family names and given names

In some cultures, the family name comes first in the full name. For example, the family name of China's president Xi Jin Ping is 'Xi,' and his given name is 'Jin Ping.' That's why the media refers to him as 'Mr. Xi.' It's not the same is referring to me as 'Mr. Brian.' Sometimes, when a Chinese person works in the U.S., they will reverse the order of names and concatenate the given-name syllables to make it easier for Americans. Mr. Xi, might, for example, go by 'Jinping Xi' while here in the States. If you are unsure which part of someone's name is the family name and which the given, you can use the whole name: 'Mr. Jinping Xi' and 'Mr. Xi Jin Ping' should both be acceptable.

In some other cultures, the given name comes first, but there are two family names, one a patronymic and one a matronymic. For example, a Latino man named 'Jorge Rodriguez Fontana' may have had a father with last name 'Rodriguez' and mother with last name 'Fontana.' Americans may be prone just to use the last last name—'Jorge Fontana'—but Jorge might prefer either the first, 'Jorge Rodriguez,' or his whole name. He might even prefer that the two family names have a hyphen between them: 'Jorge Rodriguez-Fontana.' The only way you can know is by asking. You should do so.

12.3 Preferred pronouns

You may have noticed that some folks sign their emails indicating what their preferred pronouns are. This practice serves two functions: First, if you are a person who expresses your gender identity in a way that might leave doubt in others about how you would like to addressed, it removes the doubt. Second, even if folks tend to get your gender 'right' when addressing you, indicating your preferred pronouns lets those around you know that you are sensitive to variations in gender identity.[6]

Most folks prefer feminine pronouns ('she,' 'her,' 'hers') or masculine pronouns ('he,' 'him,' 'his'). Of those who prefer other pronouns, many prefer the third-person plural ('they,' 'them,' 'theirs').[7] You should be prepared to honor the preferred pronoun requests of other persons in professional contexts.[8]

6: For an example of how to indicate your preferred pronouns and gender-related title in your email signature, see Figure 18.1.

7: These plural pronouns take plural complements, including verb forms. So, you might say, 'When my friend comes over, they bring [not 'brings'] their dog.'

8: For a fuller discussion of this and related issues, see Brian N. Larson & Olivia J. Countryman, *What's Your Pronoun? Contemporary Gender Issues in Legal Communication*, Rhetoricked.com (Jan. 16, 2020), https://www.rhetoricked.com/2020/01/16/gender-legal-communication/.

12.4 Civil discourse in law school

One challenge in any academic environment is providing a safe environment for students to explore and debate ideas. For lawyers, this problem is a professional one that relates both to how we speak and to what we hear. As a lawyer, you will find that you must sometimes speak respectfully to people around whom you feel either disrespect or at least discomfort. For example, if your firm has a transgender male client who prefers to be called 'Mr. Jones,' then your obligation to your firm and client is to respect the client's wish—even if you are uncomfortable with transgender folks and believe you have a right not to have to interact with them. You will always refer to a judge as 'Your Honor,' even if you feel she has unfairly ruled against you out of personal malice.

Similarly, you must be prepared to hear things you are uncomfortable with. For example, if you experienced sexual abuse as a child, you might feel very distressed to read a case about sexual abuse. Nevertheless, if the case relates to a legal problem you must solve, you will have to read it. If you are a lesbian attorney and the constitutionality of same-sex marriage comes up in a legal problem, you will have to listen to opposing counsel and perhaps judges make arguments that you think are wrong, perhaps even evil. Out of respect for you, your instructors might like to issue 'trigger warnings' before you discuss such topics, but in recognition of their roles as law teachers, they have to help you come to grips with the fact that such warnings will not be forthcoming in your career. Most instructors are willing to talk to you, though, before, during, or after class, about your response to what happens in the classroom.

As a consequence of the speaking and listening that lawyers must do, your grades may depend in part on your adherence to one simple guideline: No matter what issues you discuss in law school classes, you should speak and listen with respect. If you believe that anyone in class (whether another student, the TA, or instructor) is failing to comply with this guideline, you should reach out to the instructor to discuss it. If your instructor is the problem and has not responded to your efforts to reach out—or you fear retaliation—ask your advisor or the office of your dean of students.

12.5 Guiding one another with peer review

You should look forward to opportunities to perform review of your peer's work in legal communication. According to Seneca the Younger (c. 4 BCE – 65 CE): *Homines dum docent discunt.* "People learn while they teach."[9] The wisdom of this classical author is borne out by contemporary research.[10]

Chew and Pryal[11] argue that giving peer feedback provides the feedback *giver* at least four specific advantages: First, it builds your communication skills. Learning how to give respectful and constructive criticism and sometimes how to deliver bad news with a good bedside manner is critical to being a good lawyer.

Second, it enhances your analytical skills. Peer review gives you a chance to see how others have approached the problems on which you are

9: *Letters to Lucilius*, Book I, letter 7, section 8.

10: Consider the following: E. Shelley Reid, *Peer Review: Successful from the Start*, 20 The Teaching Professor 3 (2006); Kwangsu Cho & Charles MacArthur, *Learning by Reviewing*, 103 J. of Educ. Psychol. 73 (2011); Lan Li, Xiongyi Liu & Allen L. Steckelberg, *Assessor or Assessee: How Student Learning Improves by Giving and Receiving Peer Feedback*, 41 British J. of Educ. Tech. 525 (2010).

11: Alexa Z. Chew & Katie Rose Guest Pryal, *The Complete Legal Writer* 408–09 (2016).

working. In legal communications, there are many right (and wrong) ways to solve a problem. Seeing how other students have approached a problem that you, too, must solve provides you insights into the alternatives available to you. As the creators of the Eli Review online peer-review software note:

- "Reading others' work lets you see what choices they've made. That gives you more options as a writer.
- "Checking to see if other writers have met the criteria will help you bring those criteria into better focus in your own work. You'll have a clearer sense of how to succeed by using the criteria on peers' work and your own."[12]

12: Melissa Meeks, *Making a Horse Drink*, The Eli Review Blog (Nov. 10, 2016), http://elireview.com/2016/11/10/making-a-horse-drink/.

Third, peer review trains you to identify genre characteristics and variations in them. One thing you must frequently do as a legal communicator is write (or perform) in some new genre of communication. Perhaps you are assigned to write, for example, a human resources manual for a company. You probably won't have had a class in law school on how to do that. Instead, you will find examples of HR manuals and study them to determine what the conventional approaches are to writing one.[13] Doing frequent peer-review work teaches you how to look for the important variations in structure and style that help to make the HR manual you would write recognizable and useful to your clients.

13: See Chapter 25 for guidance on how to approach new genres that you are not familiar with.

The fourth benefit Chew and Pryal note is that:

> peer feedback develops workplace skills. . . . [E]mployers have identified four skills they consider to be *essential* for law students or recent law school graduates who are entering the workplace. These skills are directly developed by peer feedback: proofreading, accepting criticism and changing behavior accordingly, working collaboratively, and editing others' written work. Indeed, at least 85% of employers expect law students to be able to execute the first three skills. And a majority of employers expect recent law school graduates to execute all four skills.[14]

14: Alexa Z. Chew & Katie Rose Guest Pryal, *The Complete Legal Writer* 408–09 (2016) (citing Alexa Z. Chew & Katie Rose Guest Pryal, *Bridging the Gap Between Law School ad Law Practice* 13, SSRN (January 1, 2015), https://ssrn.com/abstract=2575185.

Most importantly to your development as a professional, you should recognize that great leaders give great feedback. Next year, when you are a teaching assistant for this course, or fifteen years from now, when you are a law partner giving feedback to a new associate, your ability to give valuable developmental feedback will be a measure of your value as a leader.

Accordingly, the point of peer feedback in law school assignments is not so much for you to *get* feedback to improve your own writing, but to *give* feedback to develop and demonstrate your knowledge of the course skills.

12.6 Correcting others' errors

You will often witness those with whom you work making mistakes. You will make a few yourself. When you correct them, you may find it helpful to recall these words from the Christian Bible:

> If your brother sins against you, go and tell him his fault, between you and him alone. If he listens to you, you have gained your brother. But if he does not listen, take one or two others along with you, that every charge may be established by the evidence of two or three witnesses. If he refuses to listen to them, tell it to the [community].

Matthew 18:15–17. The world's religious texts embody a great many principles for how we should deal with each other. You can appreciate them whether you actually hold the underlying beliefs or not. I interpret this particular text as guidance for how to correct others. First approach them privately to raise your concern. If they correct their ways, you've solved the problem without embarrassment. Second, bring someone along with you (figuratively, if you are 'copying them up' on an email).[15] Only if they then refuse to amend their ways to you take them to task in public.

15: See Section 18.2.

This strategy has benefits to you: First, if you publicly call someone out, you potentially embarrass them and make an enemy. Second, sometimes you might be wrong, and by calling out someone privately, you can avoid embarrassing *yourself*. Finally, if you create a culture around yourself of this kind of correction, then when you make mistakes, you will not be publicly embarrassed either.

12.7 Cultural differences

Much like personal greetings, whether hand-shaking, bowing, or making a *wai*,[16] excellent communication is not necessarily the same the world over. As Oates and Enquist note:

16: See Figure 12.1 above.

> Discourse patterns vary from language to language and from culture to culture. The way an expert writer makes a point in one culture is often quite different from how an expert writer in another culture would make the same point. Indeed, what one culture may consider a good point in a given context, another culture might consider irrelevant in the same context.[17]

17: Laurel Currie Oates & Anne Enquist, *The Legal Writing Handbook: Analysis, Research, and Writing* 850 (4th ed. 2006).

If you grew up speaking a different language than English, or even if you grew up speaking English in a different country, you are doubtless already aware of this fact, given your presence in an American law school.

American law students who grew up in the U.S. speaking only English might fail to understand, however, that the success of their communications with multi-lingual and multi-cultural audiences depends in part on their sensitivity to cultural assumptions and preferences—assumptions and preferences that often seem quite *invisible* to those who grow up with them.

A few areas where there may be significant differences are in affiliative practices, directness, tendency to cite sources, and plagiarism. Before we discuss these potential differences, though, it is important to recognize that generalizations about cultures may not apply in a given case.

Consider affiliative practices: These are social and linguistic customs designed to connect people on some personal level, like asking about the reader's family or other personal matters, referring to your previous interactions with them, etc. I call these 'affiliative practices,' because they emphasize the affiliation between you and the reader and their family or community. In cultures that are sometimes described as 'high context,' it might be considered rude to begin a business letter to a client by launching into the letter's subject matter. Instead, high-context readers may expect you to connect on some personal level, asking about the reader's family or other personal matters, referring to your previous interactions with them, etc. But dealing with cultural differences it best not left to careless generalizations.

Imagine your client is an executive in Bogotá, Colombia—a Latin American country with a reputation for being a high-context culture. You might be tempted when writing to them to use an affiliative greeting, asking about their family or favorite football team. But many businesses around the world that interact with the U.S. and Europe have adopted their more direct style, and your client may have been educated as an MBA at an American university. Parroting an affiliative style in your communication with them may seem condescending or silly.

So what's an American attorney to do? The answer is simple: Pay attention and take it easy. If you have correspondence from this client, you can often see what level of affiliation they use in their correspondence with you, and you can roughly match it. If you do not have previous communications from them, you can take a middle approach, beginning with some mildly affiliative comment and then moving to the more direct American style. If you show openness and adaptability, most readers will be generous with you.

The same is true with directness generally. Americans have a preference for directness, for providing a main point and an overview early in an email, for example. (Some professional communication pundits will tell you to 'Tell 'em what you are gonna tell 'em [in the introduction], tell 'em [in the body], and then tell 'em what you told 'em [in the conclusion].' In some other cultures, such directness is regarded as rude, and the repetition of the main point is regarded as insulting, as if you do not believe the reader is smart enough to get the main point.

The American legal community is obsessive about citing sources. In your first year writing in law school, you may be told that you need to cite every assertion you make unless you reason your way to it from assertions that you have already cited. Even in the U.S., there are communicative cultures in other disciplines where this citation-heavy approach seems comical or downright annoying. Consider your audience when deciding to what degree you will back up your assertions with citations. Looking at examples of other writing successful with your audience is a good way to orient yourself.[18]

Finally, plagiarism may not be regarded as a significant problem in some cultures. There, students may be trained to read and even memorize certain key texts in their cultures. When quoting such texts, they do not need quotation marks or a citation; they can count on their readers to recognize the source of the words. Some other cultures also do not see writing as some kind of individual property. In such a culture, *borrowing*

18: And if you are writing in a new genre or context, you may want to consider the advice in Chapter 25.

something that someone else has written without citing the original might not be considered a problem at all. In the American law school, and to a certain extent in legal practice, you have an obligation to cite the original when you borrow words or ideas from another source—even if that source is something *you* previously wrote.

The American legal system 13

This chapter describes critical components of the American legal system, and particularly the legal authorities (texts) and sources of law (like legislatures and judges) that you must understand during your first year in law school and the basic structure of federal civil litigation. It is a gross simplification of some of the subject matter in it. Your learning during law school will extend, complicate, and perhaps even contradict things in this summary chapter. Try not to freak out about it!

This chapter first introduces the sources of law in the U.S.—like legislatures and administrative agencies—and the courts that determine their meaning. It then discusses claims (or what some folks call "causes of action"), the cases and controversies that can bring private parties into the courtroom, and the bases for court jurisdiction. It then describes the timeline of a civil court case. Finally, it identifies the binding and persuasive effects court opinions have on courts and parties.

Link to book TOC

13.1 Sources & authorities

This book makes a distinction between 'legal authorities' and 'sources of law' that may be different than what you learned as an undergraduate. Here, a 'legal authority' is a text that says something about what the law is or ought to be. A 'source of law' is a body or entity that can create these kinds of texts.[1]

Legal authorities consist of texts of two kinds: *primary* and *secondary* authorities. *Primary authority* just means that a text is binding as law, at least over some people. In other words, it creates legal obligations or consequences. *Secondary authority* consists of everything else, including commentaries, model statutes, restatements of the law, etc. There is also a distinction between *mandatory* and *persuasive authority*. Mandatory is primary authority that potentially governs your problem, question, or client in this case; persuasive authority is everything else. Some folks refer to mandatory authority as 'binding'—either term is fine.

For example, in a Texas hit-and-run case, mandatory primary authority would probably be Texas statutes and court opinions. Persuasive primary authority might be court opinions from other states; those opinions are binding on folks in those other states, but Texas courts may or may not find them persuasive. In the same situation, all secondary authority is, at most, persuasive.

For most purposes during your first year in law school, you will be concerned with these sources of law: constitutions and the legislative, judicial, and executive branches of state and federal governments in the U.S.; and the private parties who enter into contracts. In Civil Procedure, for example, you will consider federal statutes and the U.S. Constitution; in Contracts and Property, the statutes and common law of the states.

1: As an undergraduate, you may have used the terms 'authority' and 'source' interchangeably to refer to the things you cited in your writing. Or you may just have used 'sources' to refer to them. You may have thought of 'authorities' as referring to people or organizations with authority over something, like a police officer or government functionary. This book the terms slightly differently, as indicated in the text.

You may also have some experience with the laws of sovereign tribal nations within the U.S. and its territories.

13.2 Sources: Governmental

There are two (major) levels of government in the United States—the *federal* or *national* government and the *state* governments. In each of those jurisdictions in the U.S., there is a constitution or other organizing document—it is sometimes called a 'charter' or by another name at the county or local level—and there are usually three branches of government. At the federal level, under the United States Constitution, each branch is a source of primary authority. Similar situations exist at other levels. As a result, there are interlocking hierarchies of authorities, a simplified depiction of which appears in Figure 13.1. The following subsections consider these sources.

The people

A constitution, depicted in gold in Figure 13.1, is a document adopted at the inception of a state or national government, and sometimes amended thereafter, that establishes the basic, highest legal rules of the jurisdiction.[2] A constitution is a **primary authority** and **binding** in any dispute arising under the laws of its jurisdiction. There is a philosophical sense, probably arising from the American founders' familiarity with Enlightenment thought, in which government at each level in the United States is said to obtain its power from the people. In the case of the U.S. Constitution, it's a bit of a stretch to say that you and I consent to the form of government it details, as we have little or no opportunity to vote on its provisions. Just beginning the process of amending the federal Constitution requires a two-thirds vote of both houses of Congress or a constitutional convention called at the request of at least two-thirds of the states. U.S. Const. art. V. Three-quarters of the states (thirty-eight of them as of this writing) must ratify the amendment for it to become effective. *Id.*

2: Other levels of government, including cities, counties, and other bodies, may have their powers described in documents with other names, like 'charters' and the like. Tribal nations in the U.S. may use written constitutions or traditional knowledge as their organizing authority.

In some states, amending the constitution is a little easier and more democratic. In Texas, for example, a simple majority of votes cast can amend the Constitution, though any amendment must first receive a two-thirds majority of votes in both houses of the legislature. Tex. Const. art. XVII. Others provide a flavor of more direct democracy: In California, for example, a petition signed by a number of registered voters equal to eight percent of the number who voted in the last gubernatorial election can put an amendment on the ballot; and only a simple majority of voters is required to pass it. Cal. Const. art. II, § 8; art. XVIII, § 3.

In each jurisdiction, the constitution is the highest authority. Any other authority within that jurisdiction must be consistent with it. Constitutions of the states and other jurisdictions must also be consistent with the U.S. Constitution, which is in this sense 'the highest law in the land.'

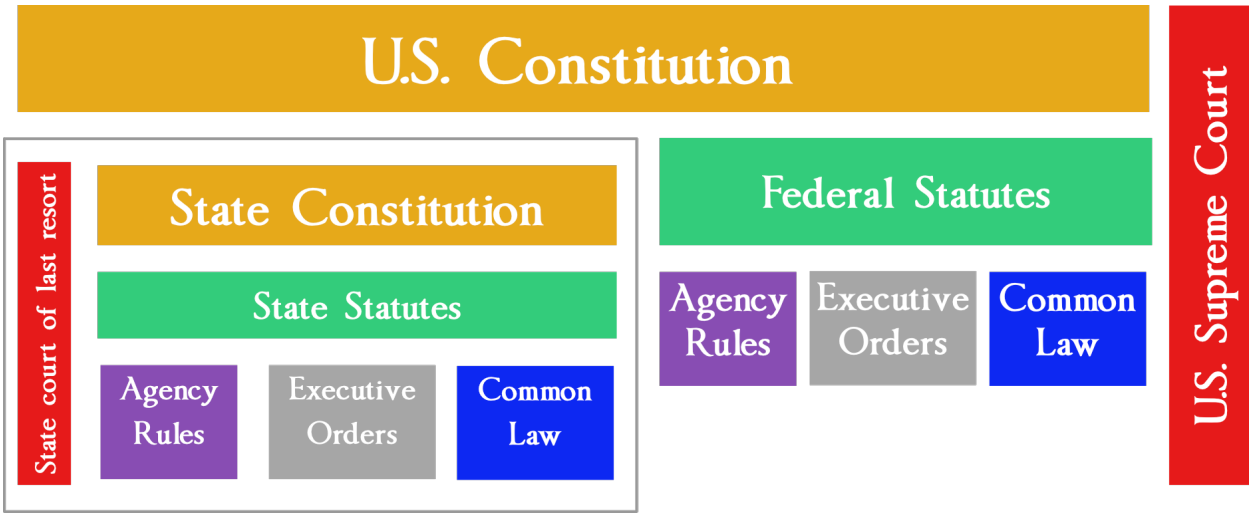


Figure 13.1: Hierarchies of legal authorities, federal and state. Each authority must be consistent with dictates of those above it. Courts interpret authorities at every level. Gold bars indicate highest interpretive authorities for each hierarchy. The figure is not quite right in that it depicts state laws as being subject only to the federal constitution, but in fact, they are subject to federal laws under the Supremacy Clause.

The legislature

Each level of government has a deliberative body, like Congress and state legislatures, that can pass statutes, depicted in green in Figure 13.1, though they usually require assent of the chief executive. So, for example, the President signs or vetoes the acts of Congress. As long as they are consistent with the applicable constitution(s), statutes are the highest law of the jurisdiction. All authorities in that jurisdiction other than its constitution must be consistent with the statutes and are subject to them. A statute is a **primary and binding authority** in any issue arising under its subject matter within its jurisdiction.

The executive

The President or governor is the head of the executive branch, which is responsible for carrying out the laws. But the executive branch often *makes* laws in the form of *regulatory agency rules* and *executive orders*.

An agency rule, depicted in purple in Figure 13.1, is adopted by an administrative agency (a part of the executive branch) that has received some delegated authority from the legislature to make laws. For example, the federal Food and Drug Administration makes regulations that have the force of law with authority it receives under the Federal Food, Drug, and Cosmetic Act, a statute passed by Congress and signed by the President. As long as they are consistent with the statute that authorized them and adopted according to correct administrative procedures, rules and regulations are binding on everyone in the jurisdiction. They are **primary and binding authorities** regarding any matter arising under their subject matter within their jurisdiction.

At the federal level and in most states, the president or governor can promulgate executive orders, depicted in gray in Figure 13.1. They are binding on the operations of the executive branch of the government so long as they are not inconsistent with statutes or regulations. They are

primary and binding authorities regarding any matter arising under their subject matter within their jurisdiction.

The judiciary

The courts are responsible for interpreting the laws and applying them in specific cases where there are disputes. Courts are responsible for interpreting legal authorities from all the other sources of law and for resolving apparent inconsistencies among them. Courts, too, make *decisional* laws in the form of their *opinions* or *decisions*. These decisions may create legal rights or may establish *binding precedent* in the interpretation of authorities from the other branches.

Many folks refer to all decisional law as 'common law.' A key distinction is whether the source of the law is judge-made or some enacted law, like legislation or regulations. At the state level, the common law—depicted in blue in Figure 13.1—can be a rule that creates legal rights or obligations and is adopted by a court with power to bind lower courts. For example, in a 1998 case, *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 235 (Minn. 1998),[3] the Minnesota Supreme Court determined that a plaintiff could bring a claim for certain invasion-of-privacy torts that previously did not exist in Minnesota. No legislative action authorized the creation of this new legal right; but it immediately existed in all Minnesota state courts.

3: This opinion appears in Appendix Chapter 31.

At the federal level, however, there are no common-law bases for filing a lawsuit. Rather, 'federal common law' refers to the federal courts' interpretations of authorities from other sources of law and of prior court opinions. For example, there is no federal *common law* that permits a plaintiff to sue defendants for forming a cartel to gain a monopoly over the sale of a product. There is a federal statute, however, the Sherman Antitrust Act, 15 U.S.C. § 1, that provides "Every contract . . . in restraint of trade or commerce among the several States . . . is declared to be illegal." Later federal court decisions—federal common law—read the word "unreasonable" into the statute, so that it would prohibit only unreasonable restraints of trade. *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238–39 (1918).[4] State courts also create this kind of common law regarding authorities in the states when, for example, they interpret state statutes.

4: The distinction is important, because any contract between two parties theoretically restrains trade, at least between them and at least relating to the substance of the contract. The Court concluded that Congress could not have meant to outlaw all contracts, only those that had a tendency to reduce competition.

Courts are called on to interpret all the types of primary authority, so court opinions may relate to any of them.[5] The highest, final interpretive source for each authority depends on which hierarchy the authority appears in. The U.S. Supreme Court has final interpretive say over the U.S. Constitution, federal statutes, and federal rules, and its decisions are **primary binding authority** over them. It does not have interpretive authority over state constitutions or other laws, except if they are challenged as violating the U.S. Constitution. The court of last resort in each state (often called the 'supreme court') has final interpretive authority over the state constitution, state statutes, and state common laws, so long as all are consistent with the U.S. Constitution.

5: **Make sure that you figure out what primary authority a court's opinion relates to first thing when reading an opinion.**

The federal court system is structured according to the United States Constitution and statutes, consisting of federal trial courts (see the discussion of *trial courts* below) and appellate courts. The trial courts are

called 'district courts'—each covering a state or territory or part of one—and their opinions are **primary authorities but usually not binding**. Above them are circuit courts of appeal, each usually covering a group of states. See Figure 13.2 for the circuit-court 'breakdown.' Opinions of circuit courts of appeal are **primary authorities and usually binding** within the circuit's territory. Appeals from circuit courts are to the U.S. Supreme Court, which is the highest court or *court of last resort* in the United States. Its opinions are **primary authorities binding throughout the country**. There are several other courts and court-like entities in the federal government. We'll discuss them if and as they come up.

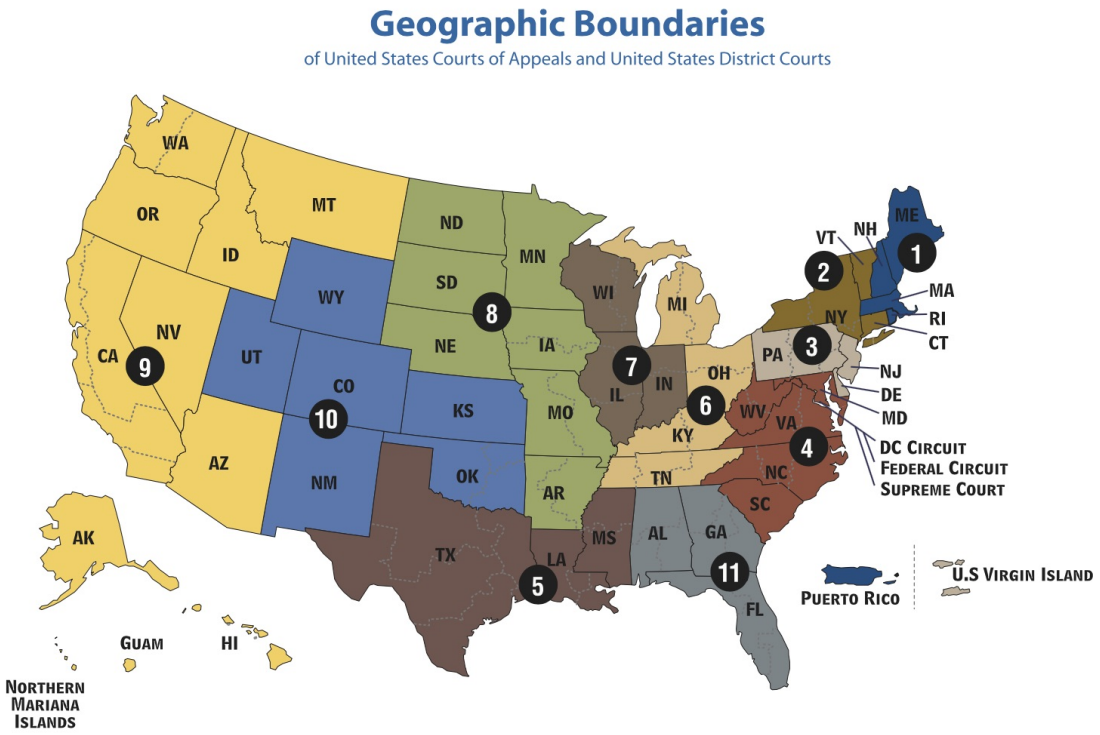


Figure 13.2: At the federal level, the courts of appeal cover groups of states. For example, Texas is in the 5th Circuit. Map courtesy U.S. federal courts, `http://www.uscourts.gov/about-federal-courts/federal-courts-public/court-website-links`.

The state court systems are structured according to their own constitutions, but are usually similar in many ways to the federal, including trial courts, appellate courts, and a courts of last resort. For example, in Minnesota, there are 'district courts,' a 'court of appeals,' and a 'supreme court.' Georgia is similar, but calls its trial courts 'superior courts.' In New York, trial courts are called 'supreme courts,' there is an intermediate level for appeal, and the highest court is called the 'New York State Court of Appeals.'[6]

Texas has *two courts of last resort*, a 'Supreme Court' for civil and juvenile matters and a 'Court of Criminal Appeals' for criminal matters. Under them are fourteen 'Courts of Appeals,' which hear both civil and criminal

6: **Make sure you understand when reading a court opinion where the court stands in its own hierarchy!**

appeals, and beneath them are thousands of district courts, county-level courts, justice courts, and municipal courts. [7]

Note that some states—usually with smaller populations—do not have intermediate appellate courts. Wyoming, for example, has a Supreme Court, its court of last resort. But litigants appeal directly to it from the state's district courts.[8]

Does this court have 'judges' or 'justices'?

Be sure you use the right title when referring to magistrates, whether writing to them or about them. The titles that magistrates who are members of a court hold vary in surprising ways. For instance, judges in some of the smallest state courts are called "justices of the peace," and members of the U.S. Supreme Court are called "justices of the United States." In the federal system, no one else is called "justice." But states have peculiar rules. For example, Texas has two courts of last resort, one for criminal matters—the Texas Court of Criminal Appeals, which has "judges"—and the Texas Supreme Court, which has "justices."

Note that courts may interpret laws outside their hierarchies (federal courts interpreting state law and vice versa, and states interpreting other states' laws)[9] and systems at the state and federal levels sometimes interact in other ways, but we'll save those discussions for when they happen in our cases.

For further discussion of what courts do, and how, see Section 13.7. Before we proceed to discuss private parties' sources, we need to consider one more public source of law.

7: If you would like to learn more about the Texas judicial system, see the Texas Judicial Branch's online brochure *The Texas Judicial System*. Available at `http://www.txcourts.gov/flipbook/texas-judiciary/judicial-system/index.html`. Adobe Flash Player required.

8: And to confuse things a bit, it calls courts that handle smaller disputes "circuit courts," not to be confused with the federal circuit courts, which have appellate jurisdiction.

9: Opinions in which they do so are primary authorities, but they are hardly ever binding.

13.3 Sources: Tribal nations

For thousands of years before Europeans arrived in the Americas, there were people living here. According to a recent examination of a wide range of estimates, it is likely there were between fifty-five and sixty million people living in the Americas in 1492, at the first European contact. Probably between twenty-three and twenty-six million persons lived in North America, including what is now Mexico, the United States, and Canada. This compares to estimates of between seventy and eighty-eight million in Europe at the beginning of the 16th Century. The arrival of the Europeans occasioned disease, war, and famine, and by the 1930s, there were as few as a half million indigenous people remaining in the United States and Canada.

American Indian and Alaska Native peoples did not disappear, however, and neither did their laws and cultures. As far back as the 1100s, five nations—Mohawk, Oneida, Onondaga, Cayuga, and Seneca—had formed the Iroquois League of Five Nations, a union that was to last until the American Revolution. The Iroquois league's form had some influence on the framers of the Articles of Confederation and the U.S. Constitution, though there is debate as to when, through whom, and how much.

Between 1778 and 1871, the United States signed hundreds of treaties with American Indian nations. These treaties, and a few important Supreme Court cases, ensure the sovereignty of the American Indian nations, meaning they are entitled to govern themselves. "Tribal citizens are citizens of three sovereigns: their tribal nations, the United States, and the state in which they reside."[10] Whether tribal law governs a particular situation relating to an American Indian or Alaska Native person or events on Indian Lands is often a complicated question, however, as different nations have different treaties with the United States and different relations with the U.S. states in which their members reside and their lands lie.

10: Nat'l Cong. of Am. Indians, *Tribal Nations and the United States: An Introduction* 18 (Feb. 2020).

We will identify these issues if and as they arise this during this year. You should be attentive to them in your practice. If you wish to learn more about the law of American Indian nations and Native Alaskans, you should consider a course in Indian law.

13.4 Sources: Private parties

Generally, only one kind of authority created by private parties is primary authority: A contract. Most other authorities written by private parties are secondary authorities, and binding on no one.

Contracts

A contract is a bargained-for exchange between two or more *parties*. In this case, the private parties[11] who create the contract are the source of the authority. Generally, the contract creates legal rights and obligations only for the parties, and only the parties can go to court (or another kind of dispute resolution, like arbitration) to enforce those rights and obligations. Contracts are most frequently interpreted under the statues and common law of a particular state.

11: The parties are not always private. Governments can enter into contracts as well, but as a default, we'll consider contracts to involve only private parties.

Secondary authorities

There is a vast amount of secondary authorities relating to the law, including law-review articles written by legal scholars, handbooks written by practicing lawyers to guide other lawyers in their practices, model statutes written by associations of lawyers and scholars who hope to encourage uniformity across the states, digests and 'restatements' of the law, summaries of the law meant for use by scholars and practitioners—the list goes on. The key point about all these authorities is that they are *about* the law, but they are *not* the law.

Secondary authorities may nevertheless be useful to you in the following ways:[12]

- Providing an overview of the law in a new area in which you are not familiar, including acquainting you with domain-specific vocabulary. For example, in U.S. immigration law, what is commonly known as 'deportation' is called 'removal,' and there are rules

12: For more on how to use secondary authorities in your research, see Section 9.3.

under which deportation can be prevented, including 'cancellation of removal.'
- Offering citations to primary authorities that may be binding for the problem you are researching.
- Identifying arguments that you (or your opponent) might make regarding the matter you are researching.
- Explaining nuances or complexities in the law that only a reader across many primary authorities could synthesize.

* * *

Having identified the principal sources of law and the legal authorities they create, we need to consider how legal disputes get resolved.

13.5 Claims & jurisdiction

This section provides an overview of the kinds of legal claims that can appear before courts and other tribunals and how legal jurisdiction works. Note that a great many legal disputes (probably the vast majority) are resolved through negotiation or other appropriate (or alternative) dispute resolution, including mediation and arbitration. The next section takes up the timeline for a civil case, one of the two major kinds of court cases you will learn about this year.

Claims

The person, company, or government that brings a lawsuit or defends against one is called a *party.* A party has a *claim* if it has some legal basis for seeking *relief* from a court for the actions of another party. In a *civil case*, the claim usually arises from:

- A *common-law tort,* where the defendant has allegedly failed to behave toward the plaintiff in a way the common law expects.
- A *contract*, where the parties in the case had an agreement that the defendant allegedly breached or with which the defendant failed to comply.
- A *statute* that gives the plaintiff a right of private action against the defendant.

In a civil case, the party seeking relief from the court is the *plaintiff,* and the party against which the plaintiff seeks a judgment is the *defendant.* In the other major type of dispute you will learn about this year, a *criminal case,* the party seeking the court's action is the government (usually in the person of a prosecuting attorney), and the other party is still the *defendant*. Criminal cases arise from the defendant's alleged violation of a statute or agency rule. The relief sought by plaintiffs in civil cases is either money damages (sometimes called *remedies at law*), or court orders or *injunctions* (sometimes called *remedies at equity*), or both. The relief sought by the state in a criminal case is imprisonment of the defendant, payment of a criminal fine, or both.

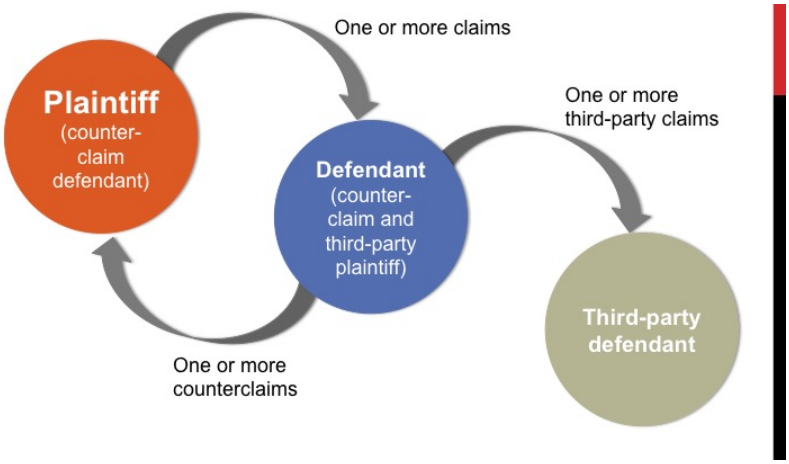


Figure 13.3: A court case can have dozens of parties. Here is a simplified view of one way that a case could develop.

When a plaintiff brings a claim against the defendant, the defendant can bring other claims, too. As a result, there can be many parties in a civil lawsuit:

- *Plaintiff* (almost always present). The party that initiates the suit and makes the initial claims. There can be more than one plaintiff.
- *Defendant* (almost always present). The party against which the plaintiff seeks relief. There can be more than one defendant.
- *Counterclaim plaintiff and defendant* (optional). The defendant sometimes makes claims against the plaintiff arising from the same transaction or occurrence giving rise to the plaintiff's claims. So for example, if the plaintiff says the defendant breached a contract, the defendant (as counterclaim plaintiff) may accuse the plaintiff (now also a counterclaim defendant) of breaching it, too, and seek remedies of its own.
- *Third-party plaintiff and defendant* (optional). Sometimes, the defendant in a case will seek to bring in a third party involved in the same transaction or occurrence that is the source of the claim against the defendant. For example, if the plaintiff says the defendant breached a contract between them, the defendant might argue that a third party interfered in the contract. The defendant then becomes a third-party plaintiff and the third party becomes the third-party defendant.
- *Other parties*. Sometimes there is not a plaintiff or defendant; the plaintiff is bringing the case on behalf of a minor child or other person incapable of acting in court on her own; or the court is adjudicating the estate of someone who has died. Sometimes an insurance company will be listed as a party when its customer sues or is sued. At other times, there is an *intervenor* or *interpleader*. In these cases, the caption may indicate the lack of a plaintiff by having a case name like *In the Matter of Paper Antitrust Litigation*, or *In re Estate of Miller*. ('In re' is just Latin for 'In the matter of.')[13] We'll discuss who those parties are when we find them.

Figure 13.3 illustrates a quite-simple suit where there are three parties, a plaintiff (who is also a counterclaim defendant), a defendant (who is also a counter-claim and third-party plaintiff), and a third-party defendant. As long as any of the claims made by plaintiff has not been disposed of, the lawsuit is still alive.

13: For a discussion of other uses of Latin and French in the law, see Section 19.

Jurisdiction

A court has *jurisdiction* over a claim if the court has the power to determine the outcome and rights and obligations of the parties. [14] Courts that can hear testimony and review documents to determine the facts in a case are called courts of *original jurisdiction.* We'll often refer to them as *trial courts.* Courts that review the decisions of trial courts are called *appellate courts.* Courts that can hear any claim are called courts of *general jurisdiction*. Many state trial courts are courts of general jurisdiction, but many states have special courts for things like family law (divorce and child custody), housing (landlord/tenant disputes), etc.

14: There is both geographical and subject matter jurisdiction. You will learn more about them in your civil procedure class.

In most cases, statutes determine or limit the jurisdiction of courts. For example, federal courts have limited jurisdiction and can generally hear only those cases where there is a *federal question,* that is, a claim arising under federal law; or where there is *diversity* between the parties, that is, where the plaintiff and defendant are residents of different states. Generally, state courts can hear such cases as well (because they are courts of general jurisdiction), but the parties—or one of them—will sometimes choose to remove a case to federal court. There are some cases where state courts never have jurisdiction: For example, *only* federal courts may hear copyright cases under the federal Copyright Act. As noted above, courts at the state and federal levels sometimes interact, but we'll save that discussion for later.

With a basic understanding of claims and jurisdiction, you are ready to understand the timeline for a typical civil claim.

13.6 Civil claim timeline

Remember that a lawsuit can be made up of many claims (including counterclaims and third-party claims). Thus, a civil case can have a life of many years (though most do not last as long as *Jarndyce v. Jarndyce* in Dickens' *Bleak House*).[15] Each claim must thus be disposed of. Two broad phases during which that can happen are the trial phase and the appellate phase, described briefly here, after which each is described in more detail.

15: Spoiler alert (if you have not read Dickens): That fictional case, introduced in the first chapter of the book, went on for generations until the inheritance over which the parties fought was consumed by legal costs in Chapter 65. Lest you think Dickens was overstating the state of the English legal system at the time, see if you can find information about the estate of William Jennens, "the Acton miser."

- *Trial phase.* Generally, every claim has a trial phase. In its full expression, the parties create a record of *evidence* regarding the claim, and the *fact finder*, either a judge or a jury, evaluates the evidence and reaches conclusions about the facts. The evidence takes the form of testimony by persons and documents obtained during the discovery process (see below). The trial court decides in favor of the plaintiff or the defendant on the claim, applying the law to its findings of fact.
- *Appellate phase.* Sometimes one or both of the parties who took part in the trial phase are dissatisfied with the results. In that case, they may be able to appeal. Generally, the appellate court relies entirely on the record of the trial phase and the arguments of the parties; it does not take new evidence. Before the appellate court, the parties may challenge the legal determinations of the lower court. They less frequently challenge the trial court's conclusions about the

facts, because appeals courts tend to defer to trial courts' factual determinations.

Trial phase

The trial phase comes in roughly three segments: pleading, production or discovery, and proof or trial, with the possibility of activity in pre-suit and post-trial periods. Figure 13.4 on page 85 shows a timeline of submissions (pleadings and motions) that parties to a claim might make. Note that this describes one claim; a suit may consist of many claims, and in that case, the parties may coordinate filings about multiple claims.

Pre-suit

The parties may negotiate, cajole, and threaten each other before proceeding to a law suit. They may submit to mediation in hopes of reaching a settlement before litigation.

If parties cannot work out a solution, they may proceed to litigation. Note, though, that most lawsuits never go to trial. For example, according to the Florida Office of the State Courts Administrator,[16] of the nearly 164,000 civil cases disposed of in Florida trial courts in 2017–18, only 0.45% of them involved a trial before a jury and 4.7% a bench trial. The cases were disposed of this way:

- Disposed after jury trial: 0.45%.
- Disposed by judge after bench trial: 4.7%.
- Disposed by judge without trial: 20.3% (as with a summary judgment).
- Dismissed (whether because of settlement, mediation, or as result of motion to dismiss): 65.2%.
- Default and other: 9.4%.

16: Florida Office of the State Courts Administrator. *Trial Court Statistical Reference Guide FY 2017–18*. Retrieved from https://www.flcourts.org/Publications-Statistics/Statistics/Trial-Court-Statistical-Reference-Guide

Pleading

To start a lawsuit, the plaintiff files a *complaint* in which it alleges facts, namely that the defendant committed acts which taken together constitute the offense the plaintiff has named as its cause of action or claim. Note that the plaintiff does not have to *prove* anything at this point.

The defendant has some options.

The defendant may move the court to *dismiss the complaint* on the grounds that even if all the plaintiff's allegations were true, the plaintiff would still not be entitled to relief.[17] The defendant claims that the plaintiff has not met its *burden of pleading*. This is either because the law provides no relief for the plaintiff's complaint or because the facts the plaintiff alleged are not sufficient to support the claim. The defendant may thus ask the court to dismiss the complaint "for failure to state a claim upon which relief can be granted." Note that the defendant cannot challenge the plaintiff's factual allegations at this point; it must accept all the plaintiff's factual claims as true.

17: In some jurisdictions, including California, this motion is called a *demurrer*. You will likely read appellate cases in your other courses in law school where there are references to demurrers.

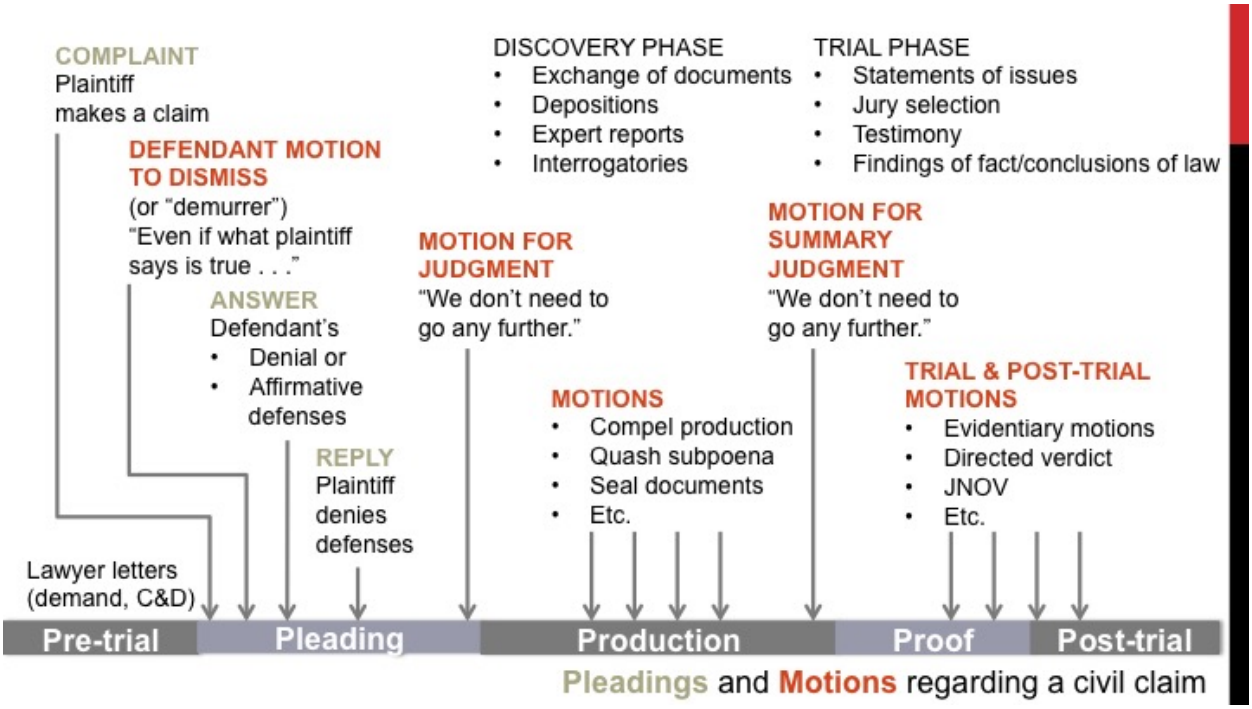


Figure 13.4: Life of a civil claim. Any of the possible motions, shown in orange, can result in an opinion from the court explaining its decision.

In a simple example, if a plaintiff claims the defendant infringed the plaintiff's copyright, noting only that the defendant copied a particular work and distributed it, the defendant could move to dismiss on the grounds that the plaintiff did not allege that it actually owned the copyright. Without satisfying that *element* of the offense of copyright infringement, the case could not sustain the claim.[18]

18: See Section 14.1 for a fuller discussion of how rule *elements* work.

If the defendant wins this motion, the claim is disposed of, unless the plaintiff appeals to a higher court.

If the defendant does not move to dismiss the complaint, or if it does so but the court denies the motion, then the defendant must file an *answer* in which the defendant *admits* or *denies* each of the plaintiff's factual allegations. The Defendant may also make its own factual allegations and may offer *affirmative defenses.* An affirmative defense is a principle of law that excuses the defendant from liability she would otherwise sustain. For example, 'I admit I hit the plaintiff, but it was in self-defense.' We will discuss examples when they arise. The defendant will later have the burden of proving the factual allegations it makes in support of its affirmative defenses.

Remember that the defendant may also make *counterclaims* against the plaintiff arising from the same transaction or occurrence that gave rise to the plaintiff's claim(s). The defendant can bring in other defendants through *interpleader* or *third-party complaints*, etc. We'll discuss these when they come up. *But each of these claims constitutes a new cause of action, and the counterclaim defendant or third-party defendant has the same options for responding to it as the original defendant did to the claim(s) against it.*

If the defendant pleads affirmative defenses or counter-claims, the plaintiff will file a reply pleading in which it admits or denies the allegations

the defendant made in its own defense or complaint.

It is possible that one or the other of the parties will move for judgment on the pleadings at the end of this phase. In short, this means that the moving party believes that there is no meaningful factual dispute between the parties, and the claim can be decided just on the allegations and denials of the parties. Where there remain factual disputes, the court must consider the allegations in the light most favorable to the non-moving party. For example, a plaintiff's motion cannot rely on plaintiff's denial of the defendant's factual allegations in the defense; on each of those, the court will take the defendant's allegations as true. If a party prevails on a motion for judgment on the pleadings, it wins on that claim before the trial court; the other party may challenge the trial court's grant of summary judgment before an appellate court.

If the parties don't move for judgment on the pleadings, or the court does not grant it, the next phase is production or discovery.[19]

19: In the federal courts, discovery could have begun earlier, while motions to dismiss and motions on the pleadings were pending.

Production or discovery

In discovery, each party can request documents from the other, submit written questions called *interrogatories* to the other that the other must answer, and conduct interviews under oath—called *depositions*—of the other party and of third parties to produce admissible evidence.

At least in federal court, there will be a *scheduling conference* with a judge and the parties soon after the complaint to discuss the discovery process and set a preliminary date for trial, which may be more than a year into the future.

Either party may make motions to direct the discovery process, including motions to compel the other party to produce evidence, to quash a subpoena—to prevent its operation—and to seal documents revealed to the other side. (Sealing them prevents them from inclusion in the public record of the lawsuit.)

At the end of discovery, either or both parties may move for *summary judgment* on a claim. This motion requires the court to consider the evidence gathered during discovery and treat it all in the light most favorable to the non-moving party. In other words, if the defendant moves for summary judgment against the plaintiff, the court must decide whether any jury could decide in favor of the plaintiff based on the evidence the plaintiff has produced during discovery; the court makes this decision considering the plaintiff's evidence in the light most favorable to the plaintiff. Sometimes, this is described as a determination of whether the non-moving party has met its *burden of production.* That is, has the party produced enough evidence to support its claim or defenses? If a party prevails on a motion for summary judgment, it wins on that claim before the trial court; the other party may challenge the trial court's grant of summary judgment before an appellate court.

Proof or trial

If the case survives this far, the parties will present their evidence in a trial before a jury, or before the judge if it is a *bench trial* where the judge is acting as fact-finder.

At trial, the parties have a *burden of proof*. In civil trials, the plaintiff must prove every element of its claim generally by a *preponderance of the evidence,* meaning that the evidence makes it more likely than not that the plaintiff's factual claims are true. The plaintiff must prove that its claims are at least slightly more than 50% likely to be true. Some claims or motions require a higher standard of proof, called *clear and convincing evidence.* And criminal trials require the highest burden of proof: *beyond a reasonable doubt.* These standards do not reduce easily to percentages.[20]

20: See the discussion of these burdens and how you communicate to clients a likelihood of success in Section 10.8, with the advice about phrasing probabilities in the subsection beginning on page 54.

At the end of the trial, the jury will issue a verdict or the judge will issue findings of fact and conclusions of law. In either case, the rights of the parties are determined by the outcome.

Post-trial maneuvering

More procedures are available after trial, with the parties making motions for 'judgment as a matter of la" (JMOL), *directed verdict*, *judgment notwithstanding the verdict* (also called 'judgment *non obstante veredicto*' or JNOV), and others. We will discuss these as we find them.

Appellate phase

Any party whose rights were adjudicated in the trial phase may appeal a determination by the trial court. Usually, the party has a limited amount of time after the trial court's decision to file a *notice of appeal,* which sets the appeal process in motion. The party making the appeal is called the *appellant* or *petitioner*, and the other party is the *appellee* or *respondent*. A new party sometimes shows up in appeals proceedings: the *amicus curiae.* The Latin name literally means 'friend of the court,' and refers to an entity or group that is not a party to the litigation but that wishes to file a *memorandum* or *brief* in the appeal on one side or the other. *Amici* (the plural of *amicus*) usually make arguments grounded in public policy because they are concerned that the appeals court's decision will function as *precedent*.

In some systems, there is only one level of appeal: For example, in Wyoming, if a party is unhappy with the trial court's determination, it appeals directly to the Wyoming Supreme Court, the court of last resort in that state. In other systems, there are two or more levels of appeal. So, for example, the judgments of federal district (trial) courts can be appealed first to the circuit courts of appeal; from there, they can be appealed to the U.S. Supreme Court.

An appeals court reviews the judgment of the lower court and either *affirms* it, allowing the lower court judgment to stand; *reverses* it, changing the outcome of the lower court's judgment; or *remands* it to the lower court with instructions for further proceedings. Often, the appeals court

will take a combination of these steps, for example, 'affirming in part, reversing in part, and remanding for proceedings consistent' with the appeals court's opinion.

13.7 How precedents work

Technically, the things we read in the law are not 'cases,' though they are often called that. Instead, we read *opinions* and *decisions* that courts write to dispose of claims or motions made by parties regarding claims in cases. An opinion is a written explanation by a judge or court of a decision in a case. Many opinions can be associated with a case: The trial court judge may write opinions in response to parties' motions to dismiss and for summary judgment or she may write a text called 'findings of fact and conclusions of law' (or something similar) to explain the final outcome of the case at trial. There may be multiple levels of appellate review; and if an appeals court remands a case for further proceedings, the whole process can start over. All written opinions can function as authority in future cases, though their weight—for example, whether they are mandatory or not—may vary.

An important principle governs the use of precedents in the American legal system: Courts should decide new cases the same way they have decided relevantly similar past cases. Such an approach can be seen as having two important consequences. First, it should be *just* in that the law should treat two persons in similar circumstances similarly. Second, it should be *efficient* in that citizens can predict the legal consequences of their actions and plan accordingly. The latter is important because courts generally don't issue 'advisory opinions' to say what they would do if a citizen took a particular action in the future. So deciding what you want to do in life or business often requires that you make an educated guess what a court would do; the more predictable the courts, the better for your guessing.

As a result of those principles, most courts are bound to a greater or lesser degree to follow precedents, an attitude sometimes referred to as *stare decisis*, which means to stand with what has already been decided. Trial courts are bound to follow the precedents set by the appeals courts that have jurisdiction over them. Appellate courts are bound to follow the precedents set by courts of last resort, and all courts in the U.S. are bound by the precedents of the U.S. Supreme Court. In theory, even the U.S. Supreme Court is bound by its previous decisions, though the Court has a number of ways around that restriction, and sometimes it simply ignores it.

But what part of a previous decision is binding? That's a tricky question. Often court opinions will spend a great deal of time discussing facts of the case, including facts that may not be essential for resolving the case. Sometimes, the courts will consider hypotheticals, what the court might have done if the facts or law had been different. *What is important for an opinion's precedential value are the facts and legal reasoning that mattered to the court in making its decision regarding a claim.* Law teachers use two Latin terms to describe these concepts:

The '*ratio decidendi*' (Lat. *the rationale of the decision*) describes only those facts and reasoning essential for the court to explain that particular decision in that particular case. This is the only part of an opinion that has value as a precedent; it is the only part binding on lower courts or future sittings of the court writing the opinion.

'*Obiter dictum*' (Lat. *something said by the way*; pl. *obiter dicta*; sometimes just 'obiter,' 'dictum,' or 'dicta') describes all other facts, hypotheticals, and arguments. Dictum is not binding on any court, but it can nonetheless be persuasive to later judges.

Sadly, it's not always possible to figure out whether something is dictum or not. What's more, dictum in one case opinion can signal the court's likely attitude regarding a topic in later cases. Attorneys thus do not ignore dictum, and they often use it in their arguments before courts.

Courts can respond to precedents in several different ways. When considering a binding precedent in a present case, a court has as many as four choices: (1) It can *apply* the precedent to the present case, on the grounds that the *ratio decidendi* of the precedent is relevantly similar to the present case. This is sometimes called 'analogizing' the present case to the precedent. (2) It can *distinguish* the precedent from the present case, arguing that the *ratio decidendi* of the precedent is relevantly different from the present case. This is, not surprisingly, sometimes called '*dis*analogizing.' (3) It can *criticize* the precedent on the grounds that it does not provide coherent guidance to the court. This might allow the court in the present case to ignore (or at least seem to ignore) the precedent. Lower courts sometimes do this to prompt higher courts to reconsider or clarify precedents. (4) It can *overrule* the precedent, if it is the court that wrote the precedent opinion or a higher court.

We will watch for instances of these phenomena in the opinions we read.

13.8 Recap

Whenever you assessing a legal situation, you should be thinking about all these things.

- Know which authorities from which sources govern this legal situation.
- If you reading an authority, know whether it is primary or secondary.
- If the authority is primary:
  - Know whether it is mandatory for the situation you are considering.
  - Know what kind of authorities it is subject to. So, if it's a state statute, you know it's subject to the state constitution and to interpretation by the state court of last resort. You know it's also subject to the U.S. Constitution and federal statutes.
  - Know when it came out. Later authorities trump earlier ones.
  - Read and brief it according to the advice in Chapter 14.
- If you are reading about a lawsuit, make sure you know the structure of it:

- Who is the plaintiff and who the defendant?
- Are there counterclaims or third-party claims?
- What is the nature or basis of each claim?
- At what stage is the lawsuit: pleading, production, proof, appeal?

Reading legal texts 14

Link to book TOC

Practically the only way to know the content of the law is to read legal texts. As Chapter 13 explained, there are numerous authorities you might read to understand the law. When you learn research, your teachers may advise you to begin first with secondary authorities—especially when researching a problem in an area of the law with which you are unfamiliar.[1] These are texts that people write *about* the law, but they are not themselves the law.

This chapter gives advice about how to read primary sources. It begins with a section on how to 'brief a rule' when you find it in any type of legal text. The chapter continues with advice specifically for reading and briefing enacted law and then for decisional law. Finally, the chapter concludes with a discussion about legal citations and their role in legal texts.

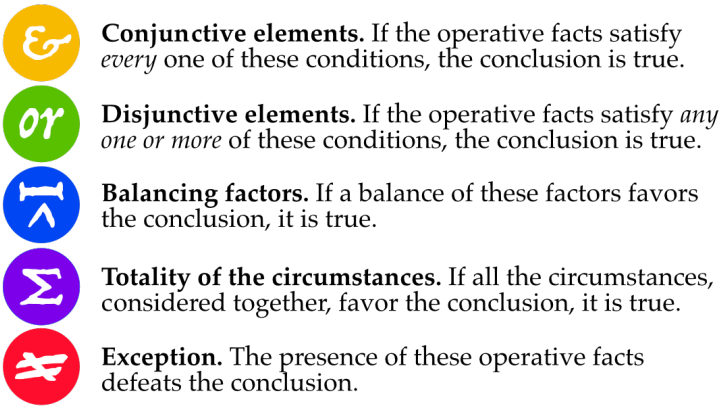
1: For a discussion of secondary authorities, see Section 9.3 and Section 13.4.

14.1 Briefing legal rules

You may or may not like outlining as a *writing* practice, but you simply *must* use it as an *analytical* practice for legal rules. If the idea of outlining is offensive to you, there are other ways to describe the contents of a legal rule. You may, for example, find it helpful to think of rules as having certain 'shapes,' and that is the approach that this section takes. Here, the five icons in Figure 14.1 mark different kinds of rules, one each for conjunctive-element, disjunctive-element, factor-based balancing, and totality-of-the-circumstances rules, and a fifth icon for exceptions to rules.

Two very common kinds of rules are conjunctive and disjunctive "element based" rules. An element is just a condition that must be true of the operative facts for the normative conclusion to apply.[2]

2: See Section 2.1 for a discussion of the 'operative facts lead to normative conclusion' formulation of legal reasoning.



Conjunctive elements. If the operative facts satisfy *every* one of these conditions, the conclusion is true.

Disjunctive elements. If the operative facts satisfy *any one or more* of these conditions, the conclusion is true.

Balancing factors. If a balance of these factors favors the conclusion, it is true.

Totality of the circumstances. If all the circumstances, considered together, favor the conclusion, it is true.

Exception. The presence of these operative facts defeats the conclusion.

Figure 14.1: Icons for types of rules.

Conjunctive element rules

Consider the Texas drunk-driving statute:

> A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place.

Tex. Penal Code § 49.04(a). This is a conjunctive rule, and we convert it to a list of conditions or statements that must be true of the operative facts for the normative conclusion—that the person has committed an offense—to be true.

- The person was intoxicated . . .
- . . . while operating . . .
- . . . a motor vehicle . . .
- . . . in a public place.

You must test each of these conditions to determine whether the person committed the offense, and the facts much satisfy all of them.

In effect, this rule has a shape as shown in Figure 14.2, consisting of a gray rectangle for the overall rule and one white rectangle for each element. The conjunctive-rule icon indicates that the operative facts must satisfy the conditions in all four white rectangles, *I–IV*.

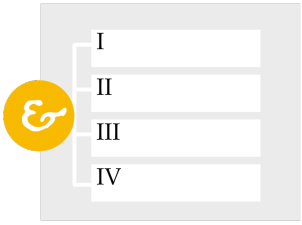


Figure 14.2: Rule shape of the statutory drunk-driving rule in Texas, which is a conjunctive element-based rule.

Disjunctive element rules

Let's consider a disjunctive rule, relating to the legal terms applicable to bids made at an auction:

> [B]ids at an auction embody terms made known by advertisement, posting, or other publication of which bidders are or should be aware.

Washburn v. Thomas, 37 P.3d 465, 467 (Colo. App. 2001).[3] The normative conclusion here is that a bid will embody (that is, be subject to) terms or conditions—like how and when the buyer will make payment—if the operative facts satisfy the condition. The condition is disjunctive, so if the terms are communicated by any one or more of the means specified—advertisement, posting, or other publication—those terms govern the bids.

3: The story here may slightly more complicated. Does the phrase "of which bidders are or should be aware" modify just "other publication," or does it modify all three types of communication? What effect does the answer have on the shape of this rule?

The shape of this rule is very similar to the conjunctive one, except that is has only three elements, and the operator that connects them is now an 'or' rather than an 'and.' The result is Figure 14.3. If the condition in any one of the white rectangles *I–III* is satisfied, then so is the condition in the disjunctive rule that the gray rectangle symbolizes.

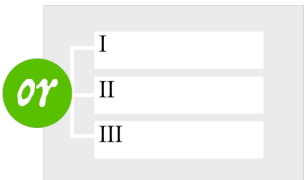


Figure 14.3: Rule shape of the common-law rule for auction terms in Colorado, which is disjunctive.

When is an 'or' also an 'and'?

The 'or' in legal rules like this is what is called an 'inclusive "or."' That just means that the 'or' is satisfied as long as *at least one* of its elements is satisfied. You can be clear about this by saying, 'The rule is satisfied if any one or more of the following is true.' The alternative is an 'exclusive "or."' which is where the condition is satisfied if *one, and only one* of the elements is satisfied. When a child's parent says

'You can have cake or ice cream for dessert,' that is (probably) an exclusive 'or.' You can be clear about this by saying, 'You can choose one of the following: cake or ice cream,' or by saying 'You can have cake or ice cream, but not both.' There is a role for exclusive 'or' in legal communication, and you should be attentive to the possibility that one arises. When you write about rules with inclusive 'or,' do not be tempted to use 'and/or.' See the discussion of 'and/or' in Section **??**.

Of course, it's rare for rules to be this simple. Consider the rule against age discrimination in federal statute:

> It shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

29 U.S.C. § 623(a)(1). Here, we have some *nesting* of issues going on. The normative conclusion, that the employer has behaved unlawfully, depends on a conjunction of two conditions: The first is that the employer did one of a long list of things; the second is that the employer did the first thing because of the plaintiff's age. That's a simple conjunctive rule, as both these things must be true. But the list of things that would satisfy the first element is *disjunctive*. The plaintiff needs to show at least one (but can show two or three) of these three things: failure to hire, firing, or discrimination in some other way. And that last condition—some other kind of discrimination—can take place in any one of four ways.

The resulting rule shape in Figure 14.4 shows the nesting. Here, the overall rule, represented by the larges gray rectangle, is conjunctive, requiring that both the conditions in the wider white rectangles *I* and *II* must be satisfied. But the white rectangle *I* has three disjunctive elements, the gray rectangles *A*–*C*. *I* is satisfied as long as any one of those three elements is satisfied. Further, the third of these, *C*, can itself be satisfied if any one of the conditions in the four white rectangles *1*–*4* is satisfied.

So far, so good: We have conjunctive and disjunctive elements. There are two other kinds of rules, balancing or factor-based rules, and totality-of-the-circumstances rules.

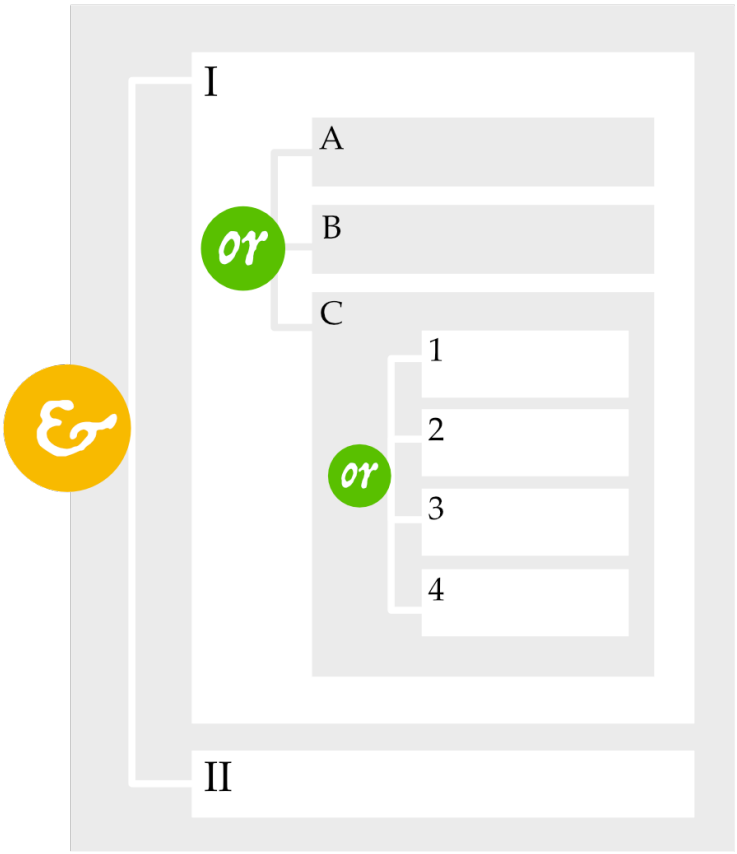


Figure 14.4: Rule shape of the Federal rule against age discrimination, which is disjunctive.

Factor and balancing rules

In balancing or factor-based rules, there will be a list of things that you must consider, and then you must balance them together. Consider the rule for copyright fair use. If you hold a copyright and someone else makes a secondary use of part or all of your work—by copying it, adapting it, etc.—they can escape copyright liability if they show their use is a fair use.

> In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107.

You might read this as a balancing test with four factors, but in fact, the use of "include" in the first clause opens the door for courts to consider other factors, though they *must* consider at least these four. If you read

fair-use cases, you will discover how courts assess these factors. For example, there are two, or maybe three subfactors of the first factor: whether the secondary use transforms the original work, giving it new meaning, whether it is commercial, and possibly whether the secondary user acted in good faith.

Reading cases will also show you how the courts weight the factors and subfactors. You can't just tally up the factors and look for a majority. When you brief a factor-based rule, it is often helpful to add one more section to your notes, that is, any notes about how the courts weight the factors. Courts sometimes offer helpful observations, like "If the secondary use is heavily transformative [first subfactor of the first factor], then the other fair-use factors are given less weight." In fact, the first subfactor of the first fair-use factor can sometimes be so powerful that the court will find fair use even though the other three factors (*II–IV*) weigh against it. If you do not note that in your brief of the rule, your analysis may be blind to a critical issue.

The result of this analysis might be a rule shape like Figure 14.5. Note that there are two levels where balancing takes place: At the rule's top level, the factors in the white rectangles *I–IV* must be balanced. To determine the factor in *I*, the three gray rectangles *A–C* in it must be balanced. Note, too, that the shape indicates the relative weight courts give these factors and subfactors, and the white box *V(?)* is just a reminder that courts can consider other matters, something to look for as you read cases.

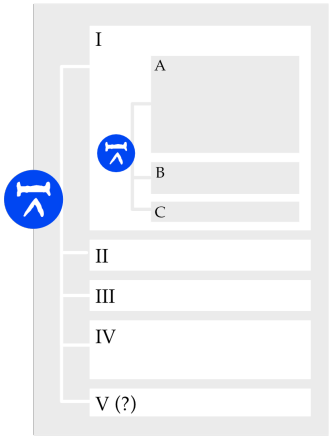


Figure 14.5: Rule shape of the federal statutory rule for copyright fair use, which is a balancing test.

Totality-of-the-circumstances rules

The final type of rule is the totality of the circumstances.

> [T]he voluntariness of a confession by a juvenile must be judged on the totality of the circumstances.

People v. Gray, 410 N.E.2d 217, 218 (1980). As a lawyer, you obtain no guidance from this rule by itself about what counts as a voluntary confession. You must read previous cases and decide what kinds of facts courts care about in assessing this totality.

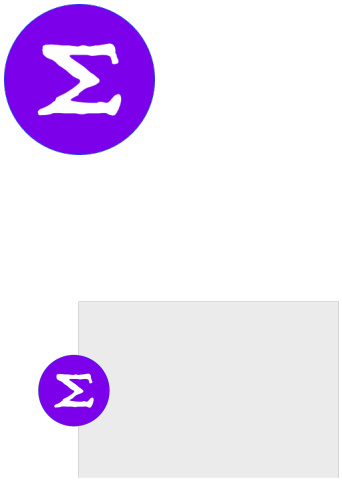


Figure 14.6: Rule shape of the common-law rule for admissibility of a juvenile confession, which is a totality-of-the-circumstances rule. The symbol I use here is the Greek letter *sigma*, which is used in mathematics to signify a sum—from there, I extrapolate to 'total' and 'totality.'

Courts use a wide variety of ways of referring to this type of rule—they do not always say 'totality of the circumstances.' But in any case where enacted law or court opinions fail to expressly identify factors or elements that accompany a legal rule, it is probably a totality-of-the-circumstances type of rule.

You might find that such a rule breaks informally into factors that you can balance as if it is a factor-based balancing test. The rule for the formation of an attorney-client relationship in Minnesota, which is the focus of Bill Leung's legal question in the example analyses in Appendix Chapter 28, is not overtly described there as a totality-of-the-circumstances, but the sample student analyses in Section 28.3 teased out of the prior cases potential factors: the formality of the meeting's location, and the purpose for the meeting.

This will not always work. You might find instead that you must use previously decided cases to draw legal analogies to your case, making the kind of "case walk" I discouraged in Section 10.4 when discussing

case examples starting at page 46. You would describe a couple cases and then compare and contrast them with your problem point by point.

Assuming you cannot analyze it into factors, this type of rule does not have much of a shape—it is a single box, as shown in Figure 14.6, larger to represent the work that you should expect will go into assessing the situation, probably requiring you to read more court decisions interpreting the rule.

Rules with exceptions

Finally, many rules have exceptions. In those cases, perhaps all the conditions required for the rule to apply are present, but the exception carves out some cases where it does not apply. Consider this rule from Ohio Statutes:

> The publication of a fair and impartial report of the return of any indictment, the issuing of any warrant, the arrest of any person accused of crime, or the filing of any affidavit, pleading, or other document in any criminal or civil cause in any court of competent jurisdiction, or of a fair and impartial report of the contents thereof, is privileged, unless it is proved that the same was published maliciously, or that the defendant has refused or neglected to publish in the same manner in which the publication complained of appeared, a reasonable written explanation or contradiction thereof by the plaintiff, or that the publisher has refused, upon request of the plaintiff, to publish the subsequent determination of such suit or action.

Ohio Rev. Code Ann. § 2317.05 (West). This time, let's look at it as an outline instead of a rule shape:

> I. The publication is privileged if the defendant proves all the following are true:
>
> A. It was fair and impartial
>
> B. It reported any one of the following
>
> 1. the return of any indictment,
>
> 2. the issuing of any warrant,
>
> 3. the arrest of any person accused of crime,
>
> 4. the filing of any one of the following in any criminal or civil cause in any court of competent jurisdiction
>
> a. any affidavit,
>
> b. pleading, or
>
> c. other document,
>
> 5. the contents of anything in items 1-4

II. But the rule in (I) does not apply if plaintiff proves any one of the following

A. the report was published maliciously,

B. the plaintiff proves all the following

1. the plaintiff provided defendant a reasonable written explanation or contradiction of the report

2. the defendant has refused or neglected to publish the explanation or contradiction in the same manner in which the publication complained of appeared

C. the plaintiff proves all the following

1. there is a subsequent determination of such suit or action

2. plaintiff requested that the publisher publish the subsequent determination

3. the publisher has refused to publish the subsequent determination

Notice a couple things here. First, exceptions usually shift burdens. So, in this rule, the defendant needs to prove the conditions in *I* because that permits them to escape liability for defamation (libel or slander). If the defendant proves *I* and the plaintiff does nothing, the defendant wins. If, on the other hand, the defendant does not prove *I*, the plaintiff has no burden to prove the conditions in *II*.

Second, this outline is a bit of a cheat in the way it breaks down the rule. In theory, at least, part *II(B)(2)* could be further broken down into elements. As an analyst, you would do that, for example, if the legal problem you are researching might hinge on this issue. Even in the main part of the rule, part *I(A)* might be broken into two sub-elements—(1) fair and (2) impartial—if your later reading reveals that courts interpret them as two separate conditions.

If we place the exception alongside the main rule, we get a shape something like Figure 14.7. Here, gray box *I* shows the shape of the main rule and *II* shows the exception. The main rule is conjunctive with elements *A* and *B*; *B* itself is disjunctive, with five different ways to be satisfied, one of which—*4*—is itself disjunctive. The operation of the gray box *II* is to cancel the effect of main rule if the exception's conditions are satisfied. The exception contains a disjunctive rule that can be satisfied in any of three ways, two of which—*B* and *C*—are themselves conjunctive rules with two or three elements apiece.

REALITY CHECK! Isn't Figure 14.7 hopelessly complicated?

Looking at Figure 14.7 and the outline of the same rule on the previous couple of pages, you might say to yourself: 'This is just too much. It's too complicated!' You would be half right: It *is* complicated. Nevertheless, can you imagine answering—thoroughly and

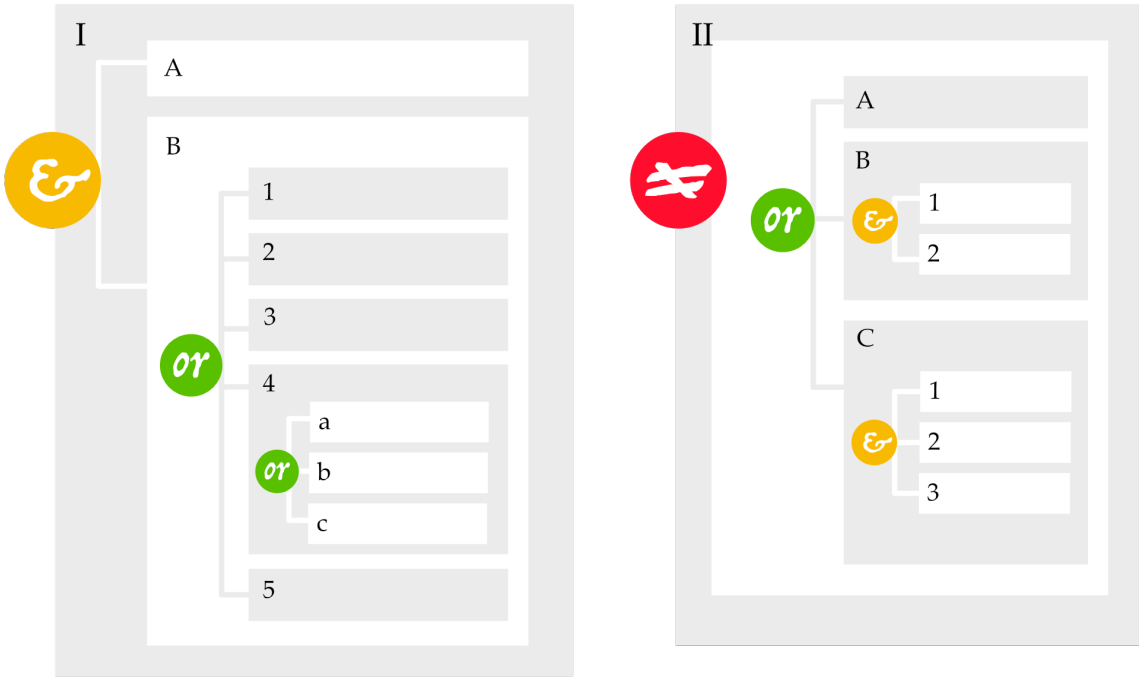


Figure 14.7: Rule shape of the statutory rule excusing certain publications from liability for defamation, which has an exception.

with confidence—any question about the application of this rule or its exceptions without having outlined the rule, either verbally or graphically? After some twenty years of practice experience, the answer for me is 'no.'

Briefing alternatives

A final point about briefing, outlining, or drawing the shapes of rules: As the the Ohio statutory rule we discussed in the previous subsection demonstrated, there is often not just one right way to do it. We saw that part *II(B)(2)* could potentially have been broken into two conjunctive elements. There are also other ways we might have outlined part *I(B)* of the rule: Because each of the sub-items *a–c* of item *4* could really be read as a separate option, we could instead have listed them as peers to the items *1–3*. Note, too, that sub-item *5* really brackets all the previous ones. Part *B* in effect refers to the existence or documentary content of any of the listed events. So, we might re-outline this rule in the following way.

> B. It reported the existence or content of any one of the following
>
> > 1. the return of any indictment,
> >
> > 2. the issuing of any warrant,
> >
> > 3. the arrest of any person accused of crime,
> >
> > 4. the filing of any affidavit in any criminal or civil cause,

5. the filing of any pleading in any criminal or civil cause

6. the filing of any other document in any criminal or civil

This revision simplifies the shape of the rule and thus may simplify your analysis. It might also simplify the structure of your written analysis, but see Chapter 9 for more on that.

What you may have discovered already is that thinking about rule shapes is really just a way of thinking about how to outline a rule. What you will discover is that you will revise your rule outlines as your research progresses. The next two sections suggest how.

14.2 Reading enacted law

Our legal system tends to privilege the language used in enacted law, like statutes and regulations. In other words, the exact formulation of the words often matters in an analysis. As a result, it is very important that you read the texts of enacted laws carefully. But statutes, especially federal statutes, can have very complicated structures, so it pays to read the texts wisely.

For example, the passage in the federal statute against age discrimination discussed in Section 14.1 starting at page 92 is just a small fragment of that part of the statute.[4] The section of statute from which is comes, § 623, is more than 4500 words long! If you will spend time reading it, you will want to spend that time wisely. But if you miss a key provision, your client could pay dearly.

4: It is simplified there for purposes of illustrating a disjunctive rule.

With any any statute or other enacted law you discover in your research, to read it wisely, use this four-step process:

1. Explore its context.
2. Explore its organization.
3. Consider its status in subsequent legislation and court decisions.
4. Brief it, creating an outline or argument shape.

You should make careful written notes of what you find during all these stages.

Statutes always appear in context. Most statutory provisions appear in statutory compilations. When you find a section of a statute, you will find that it appears near other sections relating to similar subject matter. Often, statutory sections are arranged into a chapter of the statutes, and chapters themselves might be organized into a 'title.' So it is with the federal statute against age discrimination discussed in *Disjunctive elements* in Section 14.1. It is part of Chapter 14 of Title 29 of the U.S. statutes.

This context can tell you much about your own statutory provision: First, it can tell you the purpose of the statute. The legislative purpose, if it is part of the enacted law, can readily function to help you interpret provisions, especially ambiguous or vague provisions. Second, the context can provide definitions for key terms. Often, a title or chapter of a statute will have a set of definitions that apply to all the sections in that title

or chapter. Third, the statute should inform you if any executive or administrative agency has rule-making authority over the subject matter of the statute. Sometimes, the statute itself is an incomplete picture; if the statute delegates rule-making authority to the executive, the rules the executive branch makes have the effect of law. You need to know whether they are out there.

The organization of the section you are reading can help you decide where to focus your attention. Each part of it potentially governs some activities, actors, or objects of action. Sometimes, you can carve away whole chunks of a statute from your analysis because they are inapplicable to your problem. You can tell this because they refer to actors not present in your case or because they refer to kinds of events not present in your case. The organization also helps you to identify sections that may have exceptions. Sometimes a rule is stated categorically and without exception in one part of a statute, only to be subjected to an exception in a quite different part of the statute.

Finally, a section of statute has a status based on later legislation and on court decisions interpreting it or even potentially invalidating it. In most cases, it will be pointless to interpret a statutory provision if the courts have already found it unconstitutional.

These preliminary steps allow you to proceed to actually briefing and outlining (or drawing the shape of) the statutory provision at issue in your problem.

How you perform the steps described in this section will depend a great deal on what research tools you have at your disposal. Commercial legal research tools like Westlaw, Lexis, and Bloomberg Law are designed to provide enacted law with links to related texts and formatted so that they can speed the work of the legal researcher. They are also quite expensive. You can usually find statutory compilations online for jurisdictions that are free to use but that may not integrate as well with other resources. During law school, you should try to access such authorities in a variety of ways to make sure that you will be able to function in the work context where you practice; don't assume the free access to the commercial services will represent your practice experience.

14.3 Reading legal decisions

Decisional authority, usually in the form of court opinions, is central to resolving common-law issues—those where the law at issue is judge-made law. But it is also critical for understanding enacted law. If a statute does not define one of its own terms, it is up to the courts to do so. Once one court has done so, others tend to pay attention to its decision. Once an authoritative court has done so—the Supreme Court, for example—there may be no further debate about the meaning.

The steps for reading a court decision are very similar to those for reading enacted authority:

1. Explore its context.
2. Explore its organization.
3. Consider its status in subsequent court decisions and legislation.

4. Brief it.

If you intend to rely on a case in your legal analysis or argument, you need to understand it very thoroughly. A case brief is both a tool for understanding the case and evidence (should you ever face a malpractice claim) that you made reasonable efforts to understand it. *Do not assume that you can get what you need from a case in one reading*. Some authorities suggest that you need to go through a case at least three times to engage with it critically.[5] I concur.

5: *See, e.g.*, Christine Coughlin et al., *A Lawyer Writes* 56 (3d ed. 2018).

Keeping your legal dictionary handy

As a preliminary matter, understanding a court opinion means understanding the words in it. 'Which new words should I look up?' My advice: During your first year in law school, look up every word that you don't know and every word you *think* you know that seems to be used in a special, legal way. If you fail to do this as you are doing the other efforts described below, you risk misinterpreting the opinion and its effect on your problem. For example, in a case about defamation (the tort where the plaintiff claims the defendant said something false and injurious about the plaintiff), a court might make reference to 'actual malice.' Most of us think of 'malice' as meaning a desire to do harm or evil, and 'actual' just makes it sound real. But 'actual malice' has a particular meaning in defamation law: "Knowledge . . . that a statement is false, or reckless disregard about whether the statement is true." *Malice, Black's Law Dictionary* (11th ed. 2019).

In terms of the opinion's context, you must answer at least the following for yourself:

- When was this opinion written?
- Is it a trial or appellate opinion?
- Is this opinion mandatory authority for your problem?
- What kind of primary authority since the date of this opinion could have changed or overruled this opinion?
- What was the cause of action in the trial court? Does this opinion address legal issues or legal questions relating to your legal problem?
- Is the case civil, criminal, or in some other form?
- Does this opinion make common law or does it interpret enacted or statutory law? If the latter, what provision(s) does it interpret?
- Identify the plaintiff(s) and defendant(s). Identify the appellant /petitioner(s) and appellee/respondent(s). When you describe the facts in your brief below, it's best to refer to people not by their names but by their roles in the case, in the dispute that gave rise to it, or both.
- How far did the case get in the trial court? Pleading stage, discovery stage, trial stage? This tells you the status of the facts reported in the opinion—did the plaintiff prove them or merely allege them?
- If this in an appellate opinion, what was the outcome at earlier stages of the case?

You may, after reaching this point, determine that the opinion is not useful to you, or at least not yet. For example, if the opinion is only

persuasive authority for your problem, you might wait to read it carefully until after exhausting the mandatory authority available to you. Do not just set the opinion aside. Note in your research log that you reviewed it and are setting it aside because it's not mandatory.[6] You may want—or need—to find it again later.

6: See the discussion of research logs—and their importance—in Section 9.3 starting at page 33.

In terms of an opinion's organization, you should identify all of the following (recording in your brief at least those written in bold face):

- **What is the citation for the opinion?** Note that an opinion may appear in more than one reporter and may thus have more than one citation. To decide which to use for your problem, you will consult your citation guide.
- Is there a syllabus of the opinion before the official opinion? Courts' clerks and commercial research services sometimes prepare these summaries. ***Note:*** *You should never quote or cite to a synopsis* of a case prepared by the court's clerk or by a commercial service such as Lexis or Westlaw. Always find support in the text of the official opinion.
- Has the publisher provided 'headnotes,' short summaries of particular points of law from the opinion? You may use these as a guide for finding key material in an opinion, but you should never cite to or quote from the headnotes.
- **Who is the author of the opinion?**
- What part of the opinion provides the facts of the case? You can think of the facts as falling into two categories: The facts surrounding the dispute—including the plaintiff's claims about how defendants' conduct gave rise to liability—and the fact surrounding the court proceedings—including what motions or other dispositions this opinion addresses.
- **Are there any concurring or dissenting opinions?** Who are their authors?

You can see examples of court opinions and their organization, along with some explanatory notes, in Appendix Chapter 31 and Chapter 33. Different research services provide different formats for reports of opinions, and you should learn them in law school.

Again, you have a decision to make after grasping an opinion's organization: Do you need to read it thoroughly? Perhaps it is not analogous to your situation or is otherwise not as useful as you'd like. If so, record it in your research log with an explanation of why you moved on.

Regarding the status of the decision text you are reading, there are certain research tasks that you should engage in if you plan to use the opinion in your analysis or argument. These involve checking to see whether a later court subsequently overruled or modified the opinion and whether any statute adopted after the opinion affects its operation. This is commonly called 'updating your research.' Your brief should include a space for you to record whether (and when) you updated your research on the decision.

Again, if the opinion is abrogated by later opinions or statute, you may choose not to spend much time analyzing it. If that's where you are, record that information and move on. Otherwise, you will proceed to reading and briefing the case thoroughly.

If, after the preceding steps, you believe the opinion may be helpful for your problem, you should analyze it carefully and brief it.

Briefing a court opinion is summarizing it in a way that is useful for a particular purpose. You have no doubt seen many examples of opinion briefs during orientation week and in materials for other classes. You may have purchased commercial briefs of cases for the textbooks in some of your classes. You may also have poked around the internet to find advice about what format of brief works best. But the form of brief that works best is *the one that works best for you*. Just remember that summarizing a case for a particular purpose might mean that you brief the same case differently depending on what your purpose is.

When you brief a case that you are reading to potentially help you solve a legal problem, you should gather about it and include in your brief the following information, in addition to the information noted above:[7]

- Does the court here apply, distinguish, criticize, or overrule any precedents? If so, which ones?
- What facts relevant to the legal problem you are working on appear in the opinion? It's best to err on the side of including facts at this point, but be careful not to waste too much time on facts that cannot be relevant to your problem. Emphasize the relevant facts that are *similar to* and *different from* those in your problem.
- Does the court discuss any policies that underlie its reasoning? These can be very important in identifying facts about the case that are relevant.
- For whom does the court rule overall? For whom does it rule on your legal issue? (They don't always turn out to be the same party.)
- What reasoning does the court give for its holding(s)?
- Does the court adopt an express rule of law relevant to your legal problem? Does it offer a policy rationale for that rule?
- If the court does not adopt an express rule, or even if it adopts one but you realize there's more to it than meets the eye, can you synthesize a rule that explains the holding in the case?

7: These questions build on Christine Coughlin et al., *A Lawyer Writes* ch. 3 (3d ed. 2018) and Bryan A. Garner, *The Redbook* § 15 (4th ed. 2018).

14.4 Understanding legal citations

In legal texts, citations to other texts, particularly statutes and court opinions, play an important role in constructing the meaning of a text.[8] Often, they provide premises to legal arguments in the form of rules, examples for legal analogies, or policy concerns; without such premises, legal arguments cannot stand.[9]

As a preliminary matter, you may note as you read court opinions that some judges put their citations in-line in the text and others prefer to put them in footnotes. In fact, the opinion in Appendix Chapter 31 does both, with the majority opinion using footnotes and the dissent using inline citations. There's a debate among some scholars which is preferable. However, in a recent study of fifty-six federal district court opinions and 144 of the advocate's briefs that led to them, I found only one advocate's brief that used footnotes instead of in-line citations and no more than a half dozen of the court opinions did the same. All the rest of the documents used in-line citations. Many of these documents did also have

8: The discussion in this section benefits significantly from the perspective of Professor Alexa Chew. *See, generally,* Alexa Z. Chew, *Citation Literacy*, 70 Ark. L. Rev. 869 (2018).

9: See Chapter 2 for an overview of the premise-and-conclusion structures of legal arguments.

some footnotes that included some citations, but these were generally addressing matters not central to the author's main point.

During your 1L year, you should always put citations in-line in your text, as in the example in the next subsection.

Weight? Date? Can I locate?

Most citations forms in legal writing satisfy the reader's need for three pieces of information, which I summarize with this phrase: *Weight? Date? Can I locate?*[10]

10: To be honest, it was my students who coined this way of describing my expectations. I originally offered a more cumbersome way of remembering them.

Weight? Because of the hierarchical nature of laws, you know that authorities from a state's court of last resort have more weight than those from its trial courts. When a writer cites a court opinion, the reader needs to know how much weight to give the opinion. *Date?* Because later authorities can nuance, abrogate, or overrule older authorities, the reader needs to know how recent a cited authority is. *Can I locate?* And finally, because the reader may be a judge or opposing counsel planning either to oppose you or at least challenge your argument, they need to be able to find the authority you've cited with minimum difficulty.

How does that look in practice? Consider this paragraph from an opinion by Judge Katherine Polk Failla:[11]

11: This excerpt comes from *BWP Media USA, Inc. v. Gossip Cop Media, Inc.*, 196 F. Supp. 3d 395, 405 (2016).

> The first of the fair use factors, which has been described as "[t]he heart of the fair use inquiry," *Cariou*, 714 F.3d at 705 (quoting *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir.2006)) (internal quotation marks omitted), asks in part whether the new work "merely 'supersede[s] the objects' of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative,' " *Campbell v. Acuff–Rose Music, Inc.*, 510 U.S. 569, 579, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994) (quoting *Folsom v. Marsh*, 9 F.Cas. 342, 348 (C.C.D.Mass.1841) (Story, J.) (internal citations omitted)); *see also* Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990). The Second Circuit has recognized that
>
> > [i]n the context of news reporting and analogous activities . . . the need to convey information to the public accurately may in some instances make it desirable and consonant with copyright law for a defendant to faithfully reproduce an original work without alteration. Courts often find such uses transformative by emphasizing the altered purpose or context of the work, as evidenced by surrounding commentary or criticism.
>
> *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 84 (2d Cir.2014).

Now read it stripped of citations to (and quotations from) cases:

> The first of the fair use factors, which has been described as the heart of the fair use inquiry, asks in part whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is transformative. The Second Circuit has recognized that in the context of news reporting and analogous activities, the need to convey information to the public accurately may in some instances make it desirable and consonant with copyright law for a defendant to faithfully reproduce an original work without alteration. Courts often find such uses transformative by emphasizing the altered purpose or context of the work, as evidenced by surrounding commentary or criticism.

The latter version is perhaps easier to read for a layperson, but no law-trained reader would be satisfied that Judge Polk Failla had established any of the points of law she maintained here in the second version. Of course, the first version, with the citations and quotations, could still be subject to criticism on a wide variety of fronts. But the second version is simply not recognizable as legal writing in the professional sense.

Pincites and "can I locate?"

Note one thing right out of the blocks. When lawyers cite to a document that has numbered pages, they almost always include the page number for the material they are citing. This is called a "pinpoint page," "pincite," "jump citation," "jump cite," or "jump page." *Alwd Guide* 5.2 (6th ed. 2017). Some other citation styles permit the author just to name the work, requiring a page number only for quotations. ***That is not the legal style of citation. Plan ALWAYS to give a page number, unless the document you cite is not paginated or uses section numbers (§) or paragraph numbers (¶) instead.*** In the latter cases, give the section or paragraph number. Judges and their clerks can get quite cross when your pincites are not correct. Note that a pincite for a court opinion is not necessarily its page number in the volume in which you are reading it. For example, the *Ronnigen* opinion begins in this book on page 231. If you were to cite the case, you would not use the page numbers from this volume; instead, you would use the page numbers from the case as it appeared in volume 199 the *North Western Reporter*.

Compared to other citation systems

In the original version, the citations serve to satisfy the reader's "Weight? Date? Can I locate?" expectations. But they also replace attributive cues the author would have needed with another type of citation system. Consider this alternative presentation of the paragraph, revised to conform to the APA citation style.[12]

> In *Cariou v. Prince* (2013, p. 705), the Second Circuit quoted its earlier case, *Blanch v. Koons* (2006, p. 251), when it described

12: You may have used Chicago, APA, MLA, IEEE, or AMA citation styles as an undergraduate. 'APA' stands for 'American Psychological Association,' the organization that maintains that style guide. The other intialisms in the previous sentence also refer to professional or scholarly associations.

> the first of the fair use factors as the "heart of the fair use inquiry." As the Supreme Court concluded in *Campbell v. Acuff–Rose Music, Inc.* (1994, p. 579), quoting Justice Story's opinion in *Folsom v. Marsh* (1841, p. 348), the first factor asks whether the new work "merely 'supersede[s] the objects' of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative,' " (see also Leval, 1990). The Second Circuit recognized that
>
> > [i]n the context of news reporting and analogous activities . . . the need to convey information to the public accurately may in some instances make it desirable and consonant with copyright law for a defendant to faithfully reproduce an original work without alteration. Courts often find such uses transformative by emphasizing the altered purpose or context of the work, as evidenced by surrounding commentary or criticism (*Swatch Group v. Bloomberg*, 2014, p. 84).

First, the APA style of citation does not provide the 'Can I locate?' information. Instead, the reader has to turn to Works Cited at the end of the text. Though legal authors sometimes provide a 'Table of Authorities,' usually at the *beginning* of a legal document, they should not impose the burden on their readers of having to search many pages forward or backward in the text to find key information.

Second, because the APA form of in-line citation does not provide enough information for the reader to understand the weight of the authority, the author is reduced to reminding the reader with attributive cues like "In *Cariou v. Prince*," "As the Supreme Court concluded," and "The Second Circuit recognized."[13] These attributive cues have the effect of making the statements of law here sound more contingent ('according to so-and-so'). Legal writers (and to a great extent, readers), just expect you to say what the law is, without these attributive cues. Legal citations are designed to do that work.

13: Actually, Judge Failla used that last one in her version, though there was no need, given the citation that followed the indented quotation.

Neither overstating nor understanding citations' importance

For many lawyers, citation according to the rules in the *Bluebook* or *ALWD Guide* seems nothing short of alchemy. The details can be maddeningly complicated. For others, they serve as a shibboleth, a signal that you are another practitioner of that alchemy and are worthy. Fail and they may smirk behind your back and complain that you do not consistently italicize the period after "*Id*" in your citations. In fact, getting the key components of a citation—*Weight? Date? Can I locate?*—is not terribly hard, and you will learn peculiar details of the citation conventions in the areas of law where you work quite quickly. The finicky details still matter: On the one hand, if you want to fit in with the *better sort* of lawyer—as some no doubt think themselves—you had better get the details right. On the other hand, you can be a better human if you refrain from picking

on other writers (even your opponents) for lacking citational perfection. As long as their citations satisfy the three requirements, you should relax and go about your work.

Of course, your legal writing professor may be quite strict, so that your training permits you to satisfy the expectations of *all* legal readers.

Citation styles and manuals

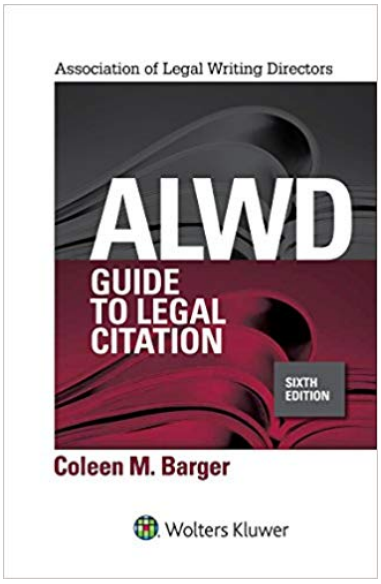
Generally, most folks will talk about legal citations needing to conform to the *Bluebook*.[14] The problem is that references to 'the *Bluebook*' are really to two different things. There is the style of citation that the *Bluebook* describes, and there is the *Bluebook* itself. What matters to most legal readers is that your citations conform to the *Bluebook* style of citation; if your citations do so, it will not matter what guide you used to create them. One exception is if you find yourself on the staff of a law review or journal. If that publication has settled on a particular citation guide as its North Star, the editors will expect you to refer to *that* citation guide when justifying a decision about how something should be cited.

14: *The Bluebook: A Uniform System of Citation* (Columbia Law Review Ass'n et al. eds, 21st ed, 2020).

The two best-known citation guides are the *Bluebook* and the *Alwd Guide*.[15] Another popular—and free—option is the *Indigo Book*.[16]

15: Colleen Barger, ed., *ALWD Guide to Legal Citation* (6th ed. 2017).

16: Sprigman et al., *The Indigo Book: An Open and Compatible Implementation of A Uniform System of Citation* (2016), https://law.resource.org/pub/us/code/blue/IndigoBook.html.



You should address two concerns when choosing which citation guide to use: Your purpose and the issue of *edition lag*. As for purpose, different citation guides serve different purposes better. For example, the *Alwd Guide* works very well for legal practitioners, because it's designed as a finding tool for them. It backgrounds the kind of special rules applicable only to editors and authors in law reviews. The *Bluebook*, on the other hand, is easier to use for legal academic writing, because it's designed as a tool specifically for that purpose. In editions before the 21st, at least, it has made finding rules for citing in court briefs and other practice documents unnecessarily difficult. The *Indigo Book* is ideal for practitioners on a budget, but it also provides particularly cogent and useful explanations that neither the *Bluebook* nor the *Alwd Guide* does particularly well. For example, its Rules 37–40 provide a cogent explanation of how to use quotations (and edited quotations) in your writing; its explanations and examples are superior to those in the other guides.

The second concern is edition lag. The *Bluebook* comes out in a new edition every five years or so. In fact, at this writing the twenty-first edition is coming out, and I do not have a copy. With each edition, the *Bluebook*'s editors make some changes to the citation styles in addition to changing the text of the *Bluebook* itself. As a result, the other citation guides may lag behind the *Bluebook* in terms of their descriptions of the *Bluebook* style of citation. For example, the current edition of the *Alwd Guide* is the sixth, and it is based on the twentieth edition of the *Bluebook*. A new edition of the *Alwd Guide*, reflecting changes in the latest edition of the *Bluebook*, is expected in summer 2021. As of this writing, the *Indigo Book* was last updated in 2016; it is unclear when an updated version of it would be prepared, or even whether any changes will be necessary.

Fear not! If you use the most-recent-but-one edition of the *Blueook* or any citation guide based on it, you should be fine. Most practitioners will

take a while to absorb the substantive changes from a new edition of the *Bluebook*.

One final note: If your legal writing professor assigns a particular citation guide for your course, you should acquire it. That's because *learning* citations is different than *using* them in practice, and your professor knows how they want you to learn citations.

Practice contexts 15

Forthcoming 2021.

Link to book TOC

Material contexts 16

Forthcoming 2021.

Link to book TOC

Legal Communication

Overview of correspondence 17

This chapter provides a brief overview of the three that follow it, explaining the major differences between memo, letter, and email genres, and offering advice about when to use one or the other—or when to prefer an oral conversation or meeting instead. This chapter also briefly discusses ethical concerns with some communication technologies. Three subsequent chapters take up the three genres separately.

17.1 Defining correspondence genres

There are formal differences between letters and memoranda. These differences are conventional and arise from the history of the use of these types of documents. Letters are the traditional form for communicating official business. At the top of the first page is the sender's address, which may sometimes appear at the bottom or elsewhere as a printed part of the paper or electronic form or 'letterhead.' It appears at the bottom of the example in Figure 17.1 on page 113. Also near the top of the first page is the date of the letter, sometimes on the left margin, sometimes indented toward the right. The 'inside address,' the mailing address of the recipient, appears next. Sometimes a subject line, as shown in Figure 17.1 here, appears before the salutation.

The text of the letter opens and closes formally. It begins with a salutation from the sender to the recipient, usually 'Dear' followed by the recipient's title and family name. See Section 12.2 for more on salutations. It ends with a formal closing, often 'Sincerely,' followed by the sender's signature and printed name and title beneath. There are, of course, variations, and when you work at an organization, you should see how others prepare their letters and prepare yours accordingly.

This structure for a letter has been largely unchanged since the early 1800s (except in that they used to be hand written, were later typed, and are now word processed).[1] Letters were usually used to communicate among individuals and businesses, and within a business enterprise over longer distances.[2]

The memorandum or memo as we know it now appeared around the beginning of the 20th century.[3] It was a response to new technologies, like the typewriter and filing systems, and a new impulse in businesses to document processes and activities internally.[4] As business concerns grew larger, they used memos for correspondence within a firm, and management engineers designed their formal characteristics to make them easy to produce and organize into paper files.[5]

As Figure 17.2 on page 114 shows, the memo dispenses with the polite salutation and formal closing, instead placing all information about sender and recipient near the top. Senders of memos did not sign them, as senders of letters did, though in the era of printed memos, the sender

1: JoAnne Yates, *The Emergence of the Memo as a Managerial Genre*, 2 *Mgmt. Comm. Q.* 485, 489 (1989).

2: *Id.* at 488.

3: Note that 'memo' is just a short form of the word 'memorandum.' The plural of 'memo' is 'memos,' but the plural of 'memorandum' is 'memoranda.' For more on Latin expressions in the law, see Section 26.5 beginning at page 156.

4: *Id.* at 493–95.

5: *Id.*

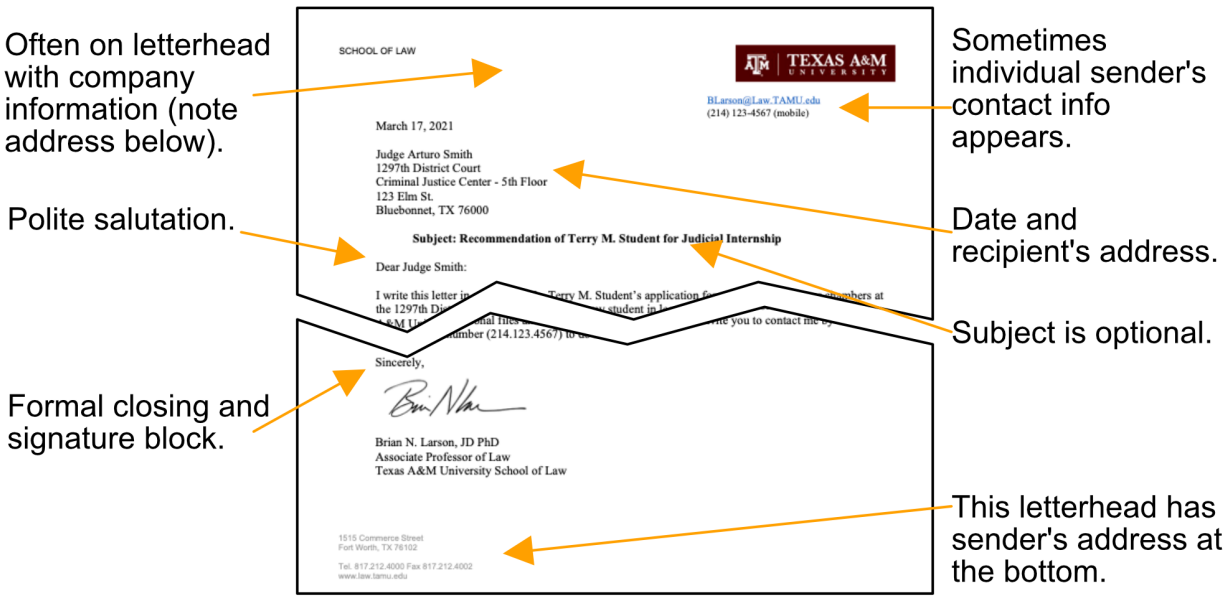


Figure 17.1: A letter is the most formal correspondence, with salutation and signature, often on letterhead.

might put their initials next to their name on the 'From:' line. For memos, the subject line is mandatory, and it was necessary for the filing systems of the time, which would have placed printed copies of the memos in paper file folders stored in metal file cabinets.[6]

6: *Id.* at 497.

Law firms fully embraced the memorandum as a genre, because they often needed to document the details of the analyses they carried out for clients. The letter to the client with legal advice might contain only a summary of the analysis, but the firm's professional liability depended on it having a thorough analysis in the file. In fact, in many cases, lawyers expected to 'write a memo to the file,' documenting some analysis or process related to a client's file.

By the latter years of the 20th century, firms were creating memoranda in electronic form, and 'filing' them in electronic 'folders' on computers and servers.

Finally, in the 1990s, the business email arrived on the scene. It was unlike the letter or the memo in that it was not used solely for internal or external communications. It thus ended up acquiring a certain hybridity, with its appearance looking more like a memo, but its politeness conventions looking more like a letter. As Figure 17.3 on page 115 shows, the heading information, including recipient, 'carbon copy' or 'courtesy copy' recipients, and 'blind copy' recipients, looks like the top of a memo. The subject line is conventionally mandatory in email, like the memo and unlike the letter. But note, too, that the email starts with a polite salutation, though it is commonly followed by the less-formal comma in an email rather than the more-formal colon in a business letter. Finally, the email concludes with a signature block, though not a physical signature. As Figure 17.2 shows, the closing in the email—'Thanks!' and the sender's name—is less formal than in the letter, where 'Sincerely,' etc., is the common sign-off.

The hybridity of electronic genres has worked its way back into the traditional print ones. So now, it is not uncommon for an author to prepare

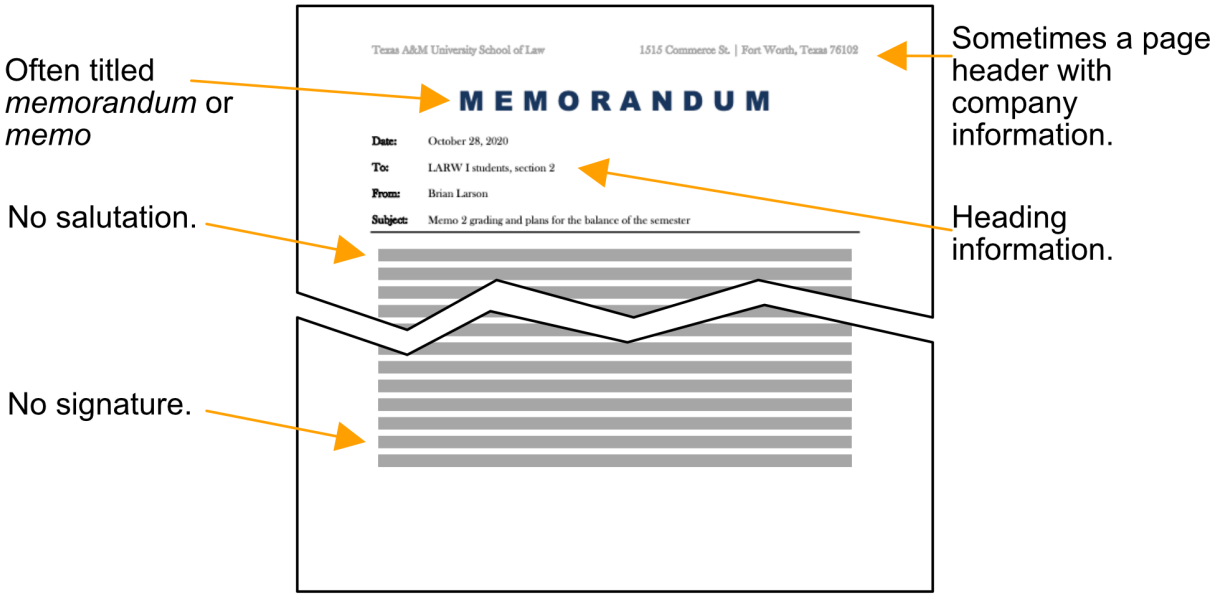


Figure 17.2: A memo is more informal, with no salutation or signature.

a letter, save it as a PDF file, and email the PDF to the recipient.[7] This happens generally when the sender wants to communicate something formally outside their own organization. Similarly, an author might write a memorandum and email it; they do so with the expectation that the recipient—generally someone inside the same organization—will 'file' the memo with other related documents, either in print or electronic form.

Conventionally, folks expect that the prose style of a letter will be the most formal, with the memo being slightly less formal, and the email being least formal of all. As a lawyer, however, you should write them all professionally, generally with the same level of formality.

7: 'PDF' is short for 'portable document format.'

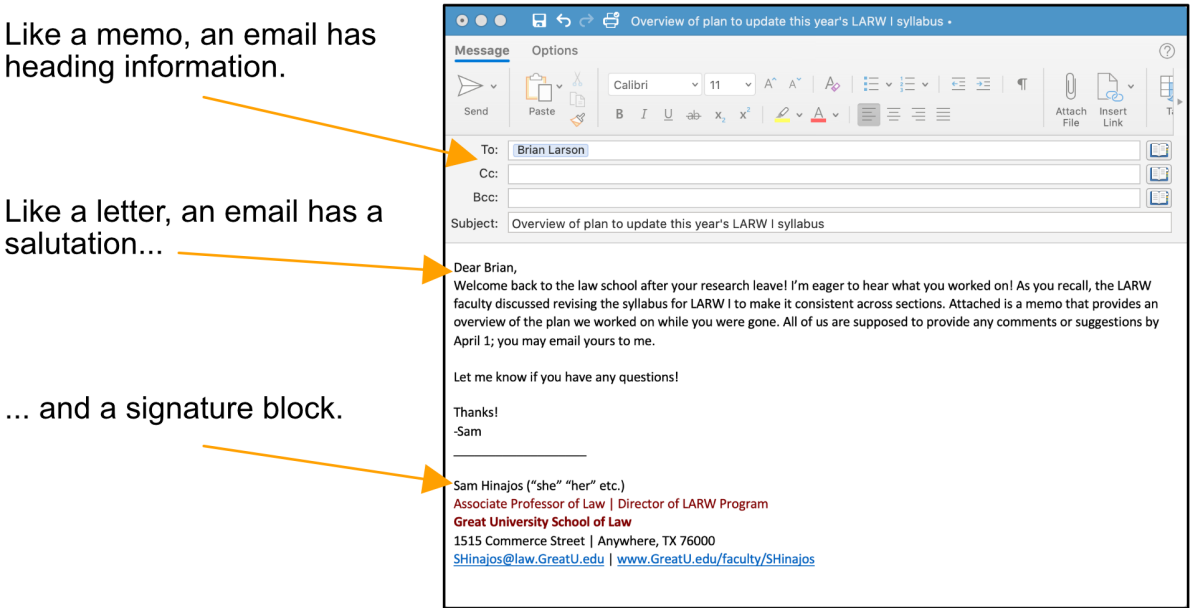


Figure 17.3: An email combines some features of letters and memos.

17.2 Choosing a genre

Before you write correspondence, you should choose which genre you are writing. And that decision will depend, in turn, on what your goals are. The first, and simplest, piece of advice you need is to look around you. If others within your organization are using a particular genre or form of communication to achieve some purpose, you should consider doing the same. That provides the greatest chance that you will meet your audience's expectations.[8] If it is not obvious what form of communication you should use based on what others are doing, ask someone who is more senior than you. If you are on your own, the following guidance may help.

8: For a general guide to knowing your audience, see Section 9.1.

For communications that affect the legal relations of your organization or your client, consider the following:

- If the communication is going to someone outside your organization, a letter is probably best; for example, a letter explaining an issue to a client, a letter demanding that a party pay your client, or a letter to opposing counsel asking for an extension of time to file litigation papers. It is not unusual, however, for a communication like this to be an email.
- If the document is a policy for internal use, then a memo is more appropriate. Lawyers are often involved in creating company policy documents; though these are sometimes in memo form, they often have their own genres (human resource or HR handbooks, financial policies, etc.).
- Some internal communications might be important enough to warrant using a letter, as when an employee is promoted or fired. Letters often seem more personal than emails or memos.
- If you are communicating difficult or bad news internally or to a client, you may wish to make the initial communication orally. It

often makes sense, though, to follow up with a letter (external) or memo (internal) to document the conversation.

When communicating a legal analysis, consider the following:

- Legal advice to a client will commonly be in the form of a letter.
- It can also be appropriate in email form if (a) the client sought the advice via email and (b) your email system allows you to locate emails relating to particular clients and matters later. (The latter requirement ensures that your files can back you up if later there is a difference of opinion about what you advised your client and when.)
- If you have prepared a comprehensive legal analysis of an issue, but the client requires only the answer and an overview of the analysis, you may wish to put the comprehensive analysis in a memo and save it in your file (electronic or paper) for the client.
- Sometimes, you will prepare a legal analysis for another attorney inside your firm who will use it to advise others. This will commonly be in memo form (and is sometimes called an 'office memo'), but it may be in email form if (a) the other attorney sought the analysis via email and (b) your email system allows you to locate emails relating to particular clients and matters later. (The latter requirement ensures that your files can back you up if later there is a difference of opinion about what you advised your client and when.)

Some matters require sensitivity in their delivery. For example, if your client has suffered a debilitating injury because of the actions of another, but your legal analysis concludes that your client will not be able to recover anything, you may wish to deliver that news in person. Some clients are also not very careful about how they handle electronic communications and documents. For example, a client may routinely forward your legal advice to persons outside their organization, endangering the attorney/client privilege and exposing your client's legal strategies to others.[9] For these cases, you may wish to conduct most of your communications orally, in person or by telephone, but you should retain some written notes (or a memorandum to your files) that document what you communicated.

9: The attorney/client privilege protects communications between a client and their attorney providing legal advice from being discovered in litigation and turned over to opposing counsel or the court.

Almost any other kind of communication can take place via email, provided the recipients use email. Keep in mind that some folks do not have email accounts and cannot make use of your communications in that form. Keep in mind, too, that you will often transmit letters and memos via email, so those genres are not mutually exclusive.

17.3 Communication ethics

Lawyers have a variety of ethical responsibilities when it comes to their communication generally and to correspondence in particular. First, "[a] lawyer shall provide competent representation." Model R. Prof'l Conduct 1.1 (Am. Bar Ass'n 2018). Second, a lawyer must work not to "reveal information relating to the representation of a client" without permission. *Id.* 1.6. Carrying out these requirements means you must maintain

appropriate skills, including "keep[ing] abreast of . . . the benefits and risks associated with relevant technology." *Id.* 1.1, cmt. 8.

You must consider how to keep communications with clients and about their matters confidential. Contemporary technology makes possible communication in so many ways, and this text highlights a few concerns about them, but you should always consider how the method you use to communicate could compromise the confidentiality of your client's information or the attorney/client privilege.

People routinely communicate via SMS texting, iOS messaging, Facebook and its messaging platform, WhatsApp, etc. The best advice this text can provide you is *Never use informal communication tools—such as social media—to communicate* with *your clients or* about *their legal matters!* The stories of lawyers getting into hot water for using these methods are myriad.[10]

Sometimes, however, your client will push you into using these tools. Perhaps your client insists on texting you with legal questions. One approach you can take is to reply by saying 'Please give me a call, and we can discuss it.' Or call the client and leave a message saying that you can't discuss legal matters via text for security and ethical reasons. Perhaps your client has a team working on a project and they have invited you to join the Slack channel where the project team is working.[11] Team members there may routinely ask you legal questions, but you must be sure you understand who can see the answers before you provide them. Sometimes, it may be necessary to use these channels. For example, if you have an immigration client in India who can only safely and reliably communicate with you via WhatsApp, do so, but make sure you understand the security characteristics of the platform.

No matter how you communicate with clients and third parties, you should be aware that there are several requirements relating to the *what* of your communications, particularly your honesty. For example, Rule 4.1 provides "In the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person. . . . " When dealing with a court or arbitrator, "[a] lawyer shall not knowingly . . . make a false statement of fact or law . . . or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." *Id.*, 3.3. And finally, when dealing with clients or prospective clients, "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." *Id.*, 7.1.

In addition to *how* you communicate as a lawyer, you also have to be careful about *to whom* you communicate. If you represent one party in a matter, and the other party has their own attorney, you *must not* communicate with the other represented party unless you have permission from their attorney. *Id.*, 4.2. So if you send a letter to the attorney on the other side, you may not copy their client on it. It's their responsibility to forward or summarize your communication to their client; similarly, when you receive a communication from the attorney on the other side, you must keep your client reasonably informed of it. *Id.*, 1.4(a)(3).

10: For just a taste, see John G. Browning, *Facing Up to Facebook—Ethical Issues With Lawyers' Use of Social Media*, Bloomberg Law (Aug. 4, 2014, 11:00 PM), https://news.bloomberglaw.com/us-law-week/facing-up-to-facebookethical-issues-with-lawyers-use-of-social-media; Tom Kulik, *To Text, Or Not To Text, Clients: An Ethical Question For A Technological Time*, Above the Law (Feb. 11, 2019, 2:47 PM), https://abovethelaw.com/2019/02/to-text-or-not-to-text-clients-an-ethical-question-for-a-technological-time/.

11: Slack is an instant messaging tool used by teams in some companies.

18 Professional email

Link to book TOC

This chapter explains how to write a professional email. Like many of the chapters in this section of the book, it takes a fairly formulaic approach to its topic. While you are in this class, you should follow the formula. As you become more experienced and skilled, you will know when and why you should vary from the formula. You should also be attentive to how your colleagues in the work context write their emails and decide whether you should conform to their practices or your own.

As a preliminary matter, make sure you understand the formal differences between email and a letter on the one hand and between email and a memorandum on the other hand. And make sure you know why you are choosing one over the other for a particular task. Section 17.1 and Section 17.2 may be particularly useful.

This chapter first considers what the body of your email text should look like, and why. It then reviews technical details about addressing them, writing subject lines, signing them, and adding some other contents, if they are applicable. In addition to this chapter, you should consider the proofreading and copy-editing advice in Chapter 26 and Chapter 27 before sending any email.

18.1 The email text: Think of your reader

As Section 9.1 explained, with all communications, you should imagine yourself in your reader's shoes. What do they want? What do they know about the situation about which you are communicating? How much of that information is *top of mind*, and about how much of it might you have to remind them? This is particularly true with emails, which many people tend to write hurriedly and with little thought (or compassion) for their readers.

Imagine you are a junior lawyer in a company sitting in a meeting with other staff and more senior attorneys. During the meeting, you speak up on a topic in your area of focus, and in response you receive a question from one of the senior attorneys—someone above you in the chain of command, but not someone you work with regularly—in fact, you're pretty sure they don't know your name. Let's assume the question is 'Given the sensitive technology embedded in our widgets, does federal law allow us to produce them in our factory in mainland China?' At the moment the senior attorney asks that question, they are motivated to hear an answer, and perhaps a particular answer, because of their business goals, they have some facts about the situation, and they may have some feelings about the question or answer. All these things are *top of mind* for them. These are things in their cognitive environment.[1] Chances are, it is pretty easy for you to guess all this from the context—in

1: If you want to learn more about the theory of communication that underlies these observations, see Brian N. Larson, *Bridging Rhetoric and Pragmatics with Relevance Theory*, *in Relevance and Irrelevance: Theories, Factors, and Challenges* 69 (Jan Straßheim & Hisashi Nasu eds., 2018), available at https://ssrn.com/abstract=3288065.

other words, it's pretty easy to read the senior attorney's mind, to read their cognitive environment.

If you can answer the question in the meeting, you will, and there will likely be no confusion about your answer because the senior attorney's actual cognitive environment and the cognitive environment you imagined for them are likely pretty similar. The subject of the question is top of mind for everyone in the meeting, the senior attorney's question followed a comment you just made, and you may be able to sense from their tone of voice and body language what their emotions and goals are surrounding the question.

Now imagine that you don't know the answer, and you say, 'I'll have to check on that and get back to you.' If you leave the meeting at its conclusion, run back to your desk, and find the answer, you may want to send the senior attorney an email right away. Assuming the senior attorney gets back to their desk a bit later and is still thinking hard about the question they asked you, your email may be the first thing they read. Again, there will likely be no confusion about your answer, because the senior attorney's cognitive environment has not changed much, and you don't expect it to. You might write an email like this.

Email Approach 1

FROM: [Your name/email address]
TO: [Senior attorney's name/email address]
SUBJECT: Your question in today's meeting

Dear [Senior attorney's name]:

I checked on your question from today's meeting when I got back to my desk, and the answer is 'no.'

[Your email signature]

Now imagine that you don't send your email right after the meeting, because you have to run down some information to answer the senior attorney's question. You figure that's fine, because the senior attorney is off to watch their kid play in a lacrosse game that afternoon, and they don't read email during kids' events. Instead, you send them an email at 7:00a.m. the next day, after you have had a chance to do some research. You don't know that the other attorney's kid got a nasty broken leg during the game, and they were at the emergency room and hospital much of the afternoon and evening.

Next morning at 9:00, after dropping off the injured kid at school, the senior attorney returns to the office, confronted by about 100 emails, including yours. What's in their cognitive environment? Do they remember what question they asked you or why? Do they even remember your name? Less than twenty-four hours after the meeting and the posing of the question, *Email Approach 1* seems like a pretty poor response to it because it assumes that certain things are top of mind in the senior attorney's cognitive environment, when in fact they've been pressed out by many other things.

Worse yet, imagine that three or four weeks down the road the attorney wants to see how you answered that question and whether you offered a rationale for your answer. Would they even be able to find your email? Searching the email inbox for 'widget China' would not locate this email. Even if they found it, what value would it offer them? You can't even tell what the answer means if you don't know the question.

The solution to this problem is to write each email to do the following in its first paragraph:

1. (Optional, but recommended) Begin with some kind of affiliative comment, something that humanizes your communication. See *Email approach 2* for an example, which also illustrates the risks of these comments.[2]
2. Set the stage to make any necessary beliefs, goals, thoughts, and feelings clear and accessible to the reader, including why they wanted you to write this email. This motivates them to read the email and reduces the frustration of not being sure what it's about.
3. Briefly say what they will learn from this email. This further motivates them.
4. Briefly say what you expect them to do, if anything. This focuses them on their goals so that they can act (or direct you to act). Do not wait to tell your reader this until the end of the email: Forcing your reader to read through three or four paragraphs of text to learn whether and what you want them to do is foolish. If the email requires no action, you can say, 'This just an update and requires no further action from you.'

2: See Section 12.7 for some guidance on the need or wisdom of affiliative comments based on your audience's cultural background, but be cautious about making assumptions based on the limited information you may possess.

Email Approach 2

FROM: [Your name/email address]
TO: [Senior attorney's name/email address]
SUBJECT: Manufacture of widgets in mainland China

Dear [Senior attorney's name]:

I hope Chris had a great lacrosse game yesterday! In our meeting of the Whatever Committee yesterday, January 10, I noted that federal law might prohibit our company from manufacturing widgets in mainland China, given the sensitive technology embedded in the widgets. Though I sensed that you would like us to be able to move in that direction, unfortunately, federal regulations would require us to get an exemption from the Department of Commerce before manufacturing them there. I provide a little more detail below. I'm happy to look more deeply into this if you like, but I'll assume that you have what you need unless you reach out to me.

[Details: You provide your analysis, citing the regulations, difficulties of getting an exemption, etc. This might be a couple sentences or several paragraphs depending on the complexity of the issue.]

[Your email signature]

Note that you acknowledge the exec's feelings in your answer, indicating that you have probably done your best to find the answer that they wanted.

In fact, the only reason not to put the actual answer in the email's subject line—e.g., 'Manufacture of widgets in mainland China not permitted'—is that you might want to break it more gently and include the possibility of the exemption. You remind the reader of the informational context of the question, and you provide the answer requested. Finally, you let them know that they don't need to do anything else, and that you won't do anything else, either, unless they tell you to the contrary.

In this case, the reader does not need to go beyond the first paragraph of the email unless they want to see the substantiation that you provide for your answer (in the bracketed 'Details' section here), whether that's one more paragraph or ten. And if they fail to read to the end, they will not miss any action items, which people sometimes tuck into the last paragraph before their signatures.

But note the risk that the writer took with the first sentence. Normally, win or lose, the parent would be satisfied that you took the time to call out the lacrosse game. But as Chris has had a nasty leg break—unbeknownst to you, of course—you may just be pouring salt into the senior attorney's metaphorical wound. You may also want to be more cautious when using affiliative comments with folks you do not know well or with American readers who will expect a more formal tone from you. Nevertheless, these affiliative comments generally pay off in terms of establishing a human connection between you and the reader, and in some cultures, they may be essential.[3]

3: See Section 12.7 for a further discussion of this issue, but be cautious about making assumptions based on the limited information you may possess.

One question you have to ask when writing an email is whether it should be formal or informal in tone. As you can imagine from the discussion above, my answer would be that you should vary it based on your reader's likely expectations. For instance, the salutation line might be 'Howdy, Ahmed,' if you know the recipient well. But if you are writing a judge to ask for an internship, you will undoubtedly start with 'Dear Judge Contreras.' If you don't know the gender of someone, use their whole name: for example, 'Dear Chris Smith.'[4]

4: Check the advice in Section 12.2 and Section 12.3, too.

You will find that if you follow the advice in this section, many emails can do all the work they need to in one paragraph. If you need more paragraphs, for example, to deliver a legal analysis, you will write them in a tone appropriate to your audience and the situation, and you will organize them according to principles discussed elsewhere in this text.[5]

5: See particularly the discussion of constructing legal analyses in Chapter 9 and Chapter 10 and the examples in Appendix Section 28.3.

18.2 Addressing emails

One tip that can save loads of embarrassment: Don't address your emails until you have completed writing them and carefully proofed them. Many times in a long business career, you will receive an email that's only half-written, followed by another that says 'Sorry, I hit "Send" prematurely.' You can avoid this problem by adding addresses last.

There are typically three address lines for any email, though not all these lines are always visible, depending on the software you use for email and the settings in it:

- **To:** This is the person or list of persons to whom the email is addressed. They should be the same people you greet in the salutation.
- **CC:** This abbreviation used to refer to "carbon copy," a very primitive way of making a copy of a letter. Today, many folks refer to it as a "courtesy copy," because its function is to provide to recipients a courtesy copy of the email being sent to the *To:* recipients.[6] When *To:* and *CC:* recipients receive an email, they can see names and email addresses of all other *To:* and *CC:* recipients.
- **BCC:** This abbreviation refers to a 'blind courtesy (or carbon) copy.' Each *BCC:* recipient receives a copy of the email and knows who the sender and the *To:* and *CC:* recipients are, but only the sender knows who the *BCC:* recipients are.

6: Christine Coughlin *et al.*, *A Lawyer Writes* 310 (3d ed. 2018).

If you expect a recipient to take action on the email or to be aware of its contents, it's best to put that recipient in the *To:* line. Any other person you think might be interested should be in the *CC:* line. For example, often you might address an email to a senior attorney at your firm and send a courtesy copy to a junior attorney, paralegal, or assistant of that addressee who often works with them on matters. However, you should generally avoid 'copying up,' as it's regarded as passive-aggressive. For example, if you are working regularly with a junior attorney at another firm and you send them a message copying their supervising attorney, everyone involved will perceive it as you essentially asking the senior attorney to keep an eye on the junior. Folks often do this when they feel they've received an unsatisfactory response from the recipient and want the courtesy recipient to do something about it. It is generally seen as passive-aggressive. You should first try to reach out to the person from whom you are not getting what you need privately before 'copying up' to their bosses.[7]

7: See Section 12.6 for more on this point.

Set your email so that 'reply all' is not the default.[8] 'Reply all' can be dangerous if you say something you intend only for some of the original recipients. Even if you choose to 'reply all,' don't leave everyone who was originally a recipient or courtesy recipient on the address if you really only need to work with one of those people or a small number of them. That can result in folks' email boxes becoming full of things that neither require their action nor pique their interest. You can either delete unnecessary recipients or 'Forward' the email you want to send only to the small number of folks who need it.

8: If you are not sure how, search the internet for instructions.

Don't courtesy copy internal parties on an external email, and don't use blind copies at all. Consider this example: A young associate at a firm sent a demand letter to the attorney on the other side of a dispute; the young associate either courtesy copied or blind copied their own client. The client, who was a little hot, hit 'reply all' and said something very indiscreet, intended only for their own attorney, but unfortunately now in the hands of opposing counsel. This actually happened in a case in which I was involved and resulted in drawing out litigation that could have been much more simply resolved. If you have an internal audience for an email you send externally, first send the external email, and then forward a copy of the sent email to the internal audience. Then they cannot accidentally 'reply all.'

According to Garner, another reason to avoid blind copies is that they

create in the *blind-copy recipient* a lack of trust in the sender, as the *BCC:* recipient "may wonder whom you're silently including in your correspondence with *them*."[9]

9: Bryan A. Garner, *The Redbook* 412 (4th ed. 2018).

18.3 Writing subject lines

Writing the subject line for an email is harder than you might think. There is a tension between making it sufficiently informative and making it too long. The key is to imagine yourself looking at an inbox full of unread emails: Would the subject you have written allow the reader to pick out your email if they were seeking it? Bryan Garner recommends that the subject line be no longer than ten words.[10]

10: Bryan A. Garner, *The Redbook* 412 (4th ed. 2018).

Some law firms and other employers have automated systems that associate emails to particular clients and matters. This assists them in billing clients and in responding to certain kinds of requests from clients. If this is true in your firm, your subject line can usually be focused very particularly on the matter that your email handles. In other employment contexts, you may want to include the names of the client and key counterparties, if any. Here are some good examples:

1. `Manufacturing widgets in China prohibited [LAWDOCS.FID1740999]`
   (The client and file identities are coded in the information at the end of the line.)
2. `Widget Co. will need DoC exemption to make widgets in China`
3. `Smith v. Jones: Jones' offer of settlement 5/14/20`
   (Email from one party in a dispute to the other; the date is helpful to distinguish this from other offers, assuming this email gets forwarded.)
4. `Smith: Review of Jones' 5/14 offer of settlement`
   (Email within Smith's law firm reviewing Jones' offer of settlement.)

Here are bad examples for the same emails:

1. `Widgets question [LAWDOCS.FID1740999]`
   (Almost all emails about the Widget Co. will involve widgets.)
2. `Making widgets in China`
   (The client is not identified; neither is the nature of the question.)
3. `Offer of settlement`
   (Your reader does not know who your client or theirs is.)
4. `Offer of settlement`
   (To which client does this email relate? To which dispute?)

18.4 Email signatures

You already know from Chapter 17 that emails are a little like traditional letters in that they have signature blocks at the bottom. There are many views about how these should look. A moderate view is that they should contain each of the following:

- Your full name.
- Your full title.
- Your company name or affiliation.

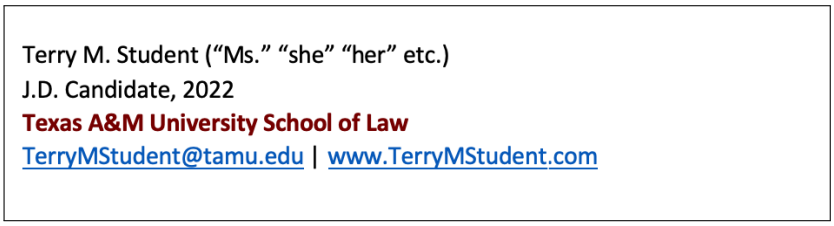


Figure 18.1: A student’s email signature

Figure 18.2: My email signature

- Your email address. This may seem strange, because when you send an email, the recipient automatically has your email address. But if your recipient forwards the email, some email software ‘down the line’ may display only your name and not your email address.

Additional candidate components include these:

- Your preferred title and pronouns.
- Your mailing address.
- Your telephone number, if you are comfortable being contacted there. (I do not include mine.)
- A link to your web page.
- Other key information. In no event, however, do I recommend that you allow your signature to exceed five lines.

Figure 18.1 is the signature I recommend for first-year law students (with the year indicating the year you expect to graduate). Figure 18.2 shows my signature block. I build the “Thanks, –Brian” and dividing line into the signature block because I almost always want to thank my recipients.

You should not include any graphics files in your signature, as they can play havoc on mail servers that handle them as separate attachments.

The standard practices of your employer, if any, trump all these views. In other words, if you work in a company or office with a required email-signature structure, you should comply with it exactly.

If you do not know how to make a standard email signature that is saved in your email software and automatically attached to each of your outgoing emails, you can learn about that by doing an internet search for ‘[your email software] signature.’[11]

11: For example, ‘Mac OS mail signature’ yields a number of helpful videos and blog posts.

18.5 Other contents

There are a few other things to consider when writing an email. These include explaining any attachments, adding a polite closing, and including

appropriate disclaimers and warnings.

Attachments

If you are attaching a document with an email, it's important first to make sure that you are attaching the correct version of the document. If the document is open in another window on your computer—for example, in your word processing software—be sure to save and close that window, otherwise the version you attach to your email may not be the most current version.

Second, if you are sending a word-processing attachment to the opposing side or counterparty in a matter, you should be sure that the attachment shows tracked revisions only if you want the other side to see them.[12]

Finally, the text of your email should identify any attachment you are sending and why.

12: You can search the internet for 'remove tracked revisions' to learn how to get rid of them.

Polite closing

Just before your signature block, it's customary to invite your reader to contact you with questions and to let you know if there is anything else you can do for them.

Disclaimers

Some emails include at their bottoms a set of disclosures or disclaimers. For example, some firms have a disclaimer at the bottom of emails about confidentiality, attorney/client privilege, etc. They are automatically part of the signature blocks of users. Thus, if I'm emailing a client to set up a tennis date, and there is no confidential information in the message, it might still look like this:

Personal email to client

FROM: [My name/email address]
TO: [Client's name/email address]
SUBJECT: Available for tennis on Saturday?

Dear [Client's name]:

You have time for a couple sets of tennis on Saturday morning?

Thanks!

-Brian

CONFIDENTIAL: ATTORNEY-CLIENT PRIVILEGED; ATTORNEY WORK PRODUCT: Emails and attachments received from us may be protected by the attorney-client privilege, as attorney work-product or based on other privileges or provisions of law. If you are not an intended recipient of this email, do not read, copy, use, forward or disclose the email or any of its attachments to others. Instead,

immediately notify the sender by replying to this email and then delete it from your system. We strictly prohibit any unauthorized disclosure, copying, distribution or use of emails or attachments sent by us.

As the blog post that offered this example disclaimer notes, it is not clear in many cases whether these disclaimers have any legal effect, and it is very likely that readers ignore them, if they notice them at all.[13] They are probably victims of their own ubiquity—ignored because they never stand out. Nevertheless, if your practice or employer suggests or requires a disclaimer, you can add it at the bottom of your signature block so that it appears on all emails.

13: *Email Confidentiality Disclaimers: Annoying but Are They Legally Binding?*, CenkusLaw, https://cenkuslaw.com/annoying-email-confidentiality-disclaimers/ (last visited May 28, 2020).

My own preference is to put something at the *beginning* of an email—before the salutation—if the email warrants it. Thus, if I'm emailing a client to set up a tennis date, and there is no confidential information I could include the disclaimer above . . . or not.

If, on the other hand, the email has sensitive information about an ongoing lawsuit, I might do it this way:

Confidential email to client

FROM: [My name/email address]
TO: [Client's name/email address]
SUBJECT: Settlement offer (5/18/21) from Widget Co.

*****CONFIDENTIAL LITIGATION MATERIAL*****
FORWARD ONLY AS NECESSARY—see details below

Dear [Client's name]:

We received an offer of settlement from Widgets, Co. this morning. I've attached it here, and in the balance of this email, I provide an analysis. Please let me know if you have questions. We should try to reply before the end of the week.

[Balance of email . . .]

Thanks!

-Brian

CONFIDENTIAL: ATTORNEY-CLIENT PRIVILEGED; ATTORNEY WORK PRODUCT: Emails and attachments received from us may be protected by the attorney-client privilege, as attorney work-product or based on other privileges or provisions of law. If you are not an intended recipient of this email, do not read, copy, use, forward or disclose the email or any of its attachments to others. Instead, immediately notify the sender by replying to this email and then delete it from your system. We strictly prohibit any unauthorized disclosure, copying, distribution or use of emails or attachments sent by us.

My approach requires that you give a moment's thought on each email you send about warning the recipient that the contents are sensitive. A

recipient who receives an email with an unusual, bold-text alert at the top will be more likely to notice it.

You are ethically responsible for not disclosing sensitive and confidential client information of your clients, but you are generally not responsible for mistakes clients make that result in disclosures. Nevertheless, your reputation as a professional depends on you helping clients to help themselves. I've often received calls from clients after sending them emails like this; they prompt discussions about how and why to keep the enclosed information confidential.

19 Memoranda

Link to book TOC

NOTE: This chapter remains under construction as of fall 2020, but it has essential information for students in my classes in that semester. I'm sorry it may be a bit difficult to follow in this form, but just ask me if you have questions. —*B.N.L.*

This chapter explains how to write a professional memorandum. Like many of the chapters in this section of the book, it takes a fairly formulaic approach to its topic. While you are in this class, you should follow the formula. As you become more experienced and skilled, you will know when and why you should vary from the formula. You should also be attentive to how your colleagues in the work context write their memos and decide whether you should conform to their practices or your own.

As a preliminary matter, make sure you understand the formal differences between a memorandum and a letter on the one hand and between a memorandum and an email on the other hand. And make sure you know why you are choosing one over the other for a particular task. Section 17.1 and Section 17.2 may be particularly useful.

It will be helpful while reading this chapter to refer to Appendix Chapter 29, which contains four examples of memos written as I expect them to be written, keeping in mind that your supervising attorney or teacher may have different expectations.

19.1 Formal characteristics

Section 17.1 describes typical formal characteristics of memos and Appendix Chapter 29 provides one example format, based on a template that I provide students in my classes, and used to resolve the hypothetical problem of Bill Leung. In the workplace, variations are fairly common. As usual, look around, see how others in your enterprise are creating them, and follow their pattern, at least initially.

Whether you are in charge of your own enterprise or under someone else's supervision, you should consider whether the formal characteristics of your memos are well suited to the needs of their readers. You can make—or at least suggest—changes, though folks sometimes resist changes of any kind.

The 'office memo,' a genre that law students have learned for decades, takes a particular form that is perhaps unusual in other circumstances. It may even be 'on the outs' in law firms.[1] The structure still has pedagogical value, which we can consider now.

The introduction portion of the analysis may include a couple introductory sentences,[2] followed by a statement of the question presented,[3] and a brief answer.[4]

1: Cite KKD's article.

2: Marked in the examples in Appendix Section 28.3 with this marker:

1

3: Indicated with this marker:

2

4: Indicated with this marker:

3

Like the structure in the simplest of legal analyses, the office memo begins by stating a question and providing an answer.[5] If you do these steps well and your reader trusts you, they may choose to proceed no further into your memo, unless they have a question or some curiosity about some aspect of the. It's important for the rest of your memo to provide a structure that makes it easy for such a reader to *skim* the rest of the text.

5: See the discussion of the basic structure of legal analysis in Section 10.1 and of stating legal questions on Chapter 3.

The remaining major sections of the memo are the factual background,[6] the discussion or analysis,[7] and the conclusion.[8]

6: Indicated with this marker:

7: Indicated with this marker:

8: Indicated with this marker:

Different legal employers use different conventions, like naming the question presented and brief answer other things. When you arrive in a new environment, look at how the attorneys around you are doing things and emulate them.

Because law students need to learn the techniques necessary to construct the parts of the office memo so that they can use them in other legal-writing genres, the office memo would be a relevant genre for teaching legal analysis and writing, even if it were true that no law firm still uses this form.

The examples in Appendix Chapter 29 show how students constructed these components in two related analysis and writing assignments. This chapter provides some advice regarding each component.

As a preliminary matter, whether you include a sentence or two before the question-presented section is a matter for your judgment.[9] Some folks use it as an orientation for the reader, just as I've recommended that you make the first paragraph of an email perform certain orienting functions.[10] The memo should probably *not*, however, begin with an affiliative comment, at least in the typical American workplace.[11] This can be a good spot to re-iterate your important recommendations and re-identify any key missing information or assumptions. I say, reiterate, because you will be presenting them elsewhere in the memo, too.

9: Indicated in the examples with this marker:

10: See Section 18.1 for details.

11: Again, look to see how others in your enterprise are doing this to determine whether this advice is applicable there.

19.2 Fixed headings

If you review the example memos in Appendix Section 28.3, you will note that all have exactly the same fixed headings for the parts that are common to all memos:

- Question presented
- Brief answer
- Factual background
- Discussion
- Conclusion

These headings are in all-capital letters.[12] The use of all-caps here is justified because the headings are very short and thus easier to read whatever their typography.

12: See Section 27.1 for my views on the use of all-caps generally—long story short: avoid it.

In the hypothetical law office where these memos were written, these headings would not change from memo to memo; they are always the same. Two sections of the office memo might themselves need headings to break up their content: The factual background and the discussion. Those headings would vary, of course, depending on the content of the

sections in question. For advice on writing headings to break up longer and more-complex content, see Section 11.3.

19.3 Question presented

The question presented in an office memo[13] must:

- Identify the governing law/jurisdiction.
- Present the legal question.
- Identify determinative facts in concrete detail. How much detail is a matter of judgment.

It usually takes one of two forms: 'statements and a question' or 'under-does-when.' Both memos in Appendix Section 29.1 use the statements-and-a-question approach; both in Section 29.2 use the under-does-when approach. You should study these formulations, especially with the advice of Chapter 3 in mind.

13: Indicated in the examples with this marker:

19.4 Brief answer

The brief answer in the office memo[14] must:

- Answer the question.[15]
- Offer a degree of certainty in the answer consistent with the conclusions that appear at the beginning and end of the discussion section and in the conclusion section of the memo.[16]
- Specify the legal point or rule on which the answer turns. This is not necessarily the main rule used to resolve the legal problem but is instead the key element or factor upon which the matter rests.
- Link to the question presented by using the same language or terms to refer to the parties and entities involved.
- Be concise. Again, the level of detail will depend on the circumstances and your judgment.

14: Indicated in the examples with this marker:

15: You'd be surprised how often students forget that bit.

16: It should also be consistent with the advice in Section 10.8.

19.5 Factual backgrond

The factual background section[17] must conform with the advice in Section 10.9.

17: Indicated in the examples with this marker:

19.6 Conclusion section

Understand first that this conclusion section is different than the conclusion part of a CREAC analysis. The conclusion section of a memo has multiple purposes, described here. The conclusion in a CREAC analysis presents the legal conclusion on the issue discussed in that CREAC. Section 10.8 provides advice on how to construct such conclusions. Your memo will likely have many CREAC conclusions, two for each CREAC or mini-CREAC you write. There will be only one conclusion section in your memo, and it's the last part.[18]

18: Indicated in the examples with this marker:

In a predictive or objective memo, your goal is to advise your client (or the senior lawyer who will be advising the client) regarding a legal matter. The conclusion section of your memo is where you sum up what you have found. Often, you can do so in one paragraph. It should rarely be more than two paragraphs, unless the memo itself is tens of pages long.

Start it with the bottom line: What is the answer to the legal question posed in the first page? This may seem strange to you, given that you have just given the final CREAC-conclusion in the discussion section. Nevertheless, you repeat it here because if your reader is a skimmer, they may read selectively and not consume every paragraph and sentence you have written.

Second, the conclusion is also usually the spot where it pays to be very clear about what you were and were not trying to achieve with your memo. So, if you have set aside certain legal questions relating to your client's problem or made certain assumptions, you should point them out here. If you think the client should explore those questions, you should note that and say why. You should have done this elsewhere in the memo, too, but again, you cannot be sure the reader has read every word.

Third, in this class as in actual practice, you will often have gaps in your factual knowledge about your client's problem. This is a good place to point out what missing or uncertain facts could significantly change the outcome of your analyses.

Finally, you should consider adding practical advice. Given what you now believe to be true, what might the client's next move be? In your first year in law school, that might be harder to do than it will later become. Just try.

One question to ask yourself is this: 'If the reader reads only the first page and conclusion of my memo, what do I *need* them to know?' The conclusion should encapsulate that information.

19.7 WP or PDF?

You will almost certainly write your memos using word-processing software. When you get ready to send the memo, you will have to decide to leave it in word-processing form or convert it to PDF. 'PDF' stands for 'portable document format,' a file type invented by Adobe in the 1990s to permit documents to be saved to a standard format the any computer could open and view using a PDF-savvy reader like Adobe Acrobat or Apple Preview.

A PDF file offers two significant advantages over word-processing files:

- Generally, almost any device can open and read such a document with its formatting intact. If you do not know who will be opening and reading your document, putting it in PDF form ensures they will still be able to do so.

- Generally, saving a word-processing document as a PDF reduces the amount of metadata from the word-processor that is retained. Metadata is information about the author of a document, the circumstances of its composition, and other information that is not visible on the face of the document to the reader. It is visible or easy to discover, however, for a savvy computer user. Saving your document in PDF form reduces the metadata available to such savvy users, protecting potentially confidential or sensitive information.

The major downside of PDF format is that the file is much harder to edit once in PDF form

As a consequence of the pros and cons of PDF, generally, you'll save a memo as a word-processing file if it's for internal use within your enterprise, and you know that the audience has the same word-processing software. This is true particularly if you want later users to be able to edit it, copy and paste from it, etc.

If you don't know whether the audience has the same word-processing software, if the document is for use outside your enterprise, or you don't wish it to be easily modified, then PDF is a better choice.

Letters 20

This chapter is under construction and will be available in 2021.

Link to book TOC

Trial briefs 21

This chapter is under construction and will be available in 2021.

Link to book TOC

Appellate briefs 22

This chapter is under construction and will be available in 2021.

Link to book TOC

Oral arguments before a tribunal 23

This chapter is under construction and will be available in 2021.

Link to book TOC

Other oral genres 24

Link to book TOC

Legal communication is not just about writing and oral arguments before courts. There are other genres of oral communication that are quite common in the law. This chapter describes some of them, including the personal *elevator pitch*, interviewing for information, client counseling meetings, *hot seats* (like sitting in on a client's board meeting), and information presentations.

But before proceeding with this chapter, you may find it helpful to review the ethical concerns addressed in Section 17.3.

24.1 Elevator pitches

You should always have an *elevator pitch*, a brief statement about who you are that you will use when introducing yourself in professional contexts. Consider this scenario: You are at the federal courthouse in your city. Riding down in the elevator, you are standing next to a person in a long black robe. She notes that you look young, eager, and perhaps a little nervous and recognizes you as a law student or maybe a young attorney. She brightly introduces herself with her name. After you do the same, she says 'Tell me about yourself!'

Your elevator pitch helps a listener in a professional context know where you 'fit' in that context. It should quickly identify your current role and where you hold it. It should tell us something about how you fill that role. In the case of a law student, that usually means saying either what kind of law you are interested in or what kind of job you want to take after law school. Of course, you may very well not know the answer to that yet. You should nevertheless express some kind of interest. If you do express an interest in a particular area of law, make sure you have an answer to the common follow-up question: 'What got in you interested in X?' It's embarrassing not to have an answer to that one, if it's asked, but you don't need to explain that in the pitch itself unless you think it achieves some other objective.

Your pitch will tell us something about your background and perhaps about you as a person. This might be as simple as saying what your undergraduate training or previous work experience was. Ideally, though, it will tell us something memorable. It should do all this in thirty seconds or less.

Here's an artificial example:

> Howdy! My name is Martin Frankel, but everyone calls me "Gus."[1] I'm a first-year law student at Texas A&M University. I'm most interested in securities regulation,[2] but I'm still pretty open to other possibilities. Law school is a nice change from last year: I spent six months in the Amazon collecting

1: If Gus were frequently misgendered or otherwise thought the context appropriate to note it, he would say "My pronouns are 'he,' 'him,' etc."

2: If asked, Gus would say he got interested in securities regulation while following the trial of a childhood neighbor for securities fraud. The neighbor was acquitted.

> monkey urine on a research expedition for Cornell's College of Biology.[3] What kind of work do you do?

Gus's pitch is short, informative, and memorable. It's also a nice touch that he asked his listener to reciprocate. Sometimes a conversation like this between a law student and an attorney will result in a networking opportunity. In many circumstances, he might not get through the whole thing before his interlocutor interrupts with a comment. This judge might note 'I'm an Aggie, too,' as he finishes his second sentence, or 'I was at the SEC before private practice,' as he finishes the third. You should welcome these interruptions and take them where they go. In such, cases you may or not get to finish the elevator pitch; whether you try to do so will depend on judgment you can best develop by practicing.

Your elevator pitch will change over time as your interests and experiences develop. You will want to tailor your elevator pitch for different audiences, too. Whenever you are going into a new situation where you expect folks to want to understand who you are, you should think first about what impression you want to make and then adjust your pitch accordingly.

3: Though this example elevator pitch is artificial, I actually *did* have a student who collected monkey urine as part of a research expedition! That was a memorable part of *her* elevator pitch.

24.2 Interviews for information

This section is under construction. Look for it in spring 2021.

24.3 Client counseling meetings

This section is under construction. Look for it in spring 2021.

24.4 Hot seats

This section is under construction. Look for it in spring 2021.

24.5 Informal presentations

This section is under construction. Look for it in spring 2021.

Working in new genres

25

This chapter is under construction and will be available in 2021.

Link to book TOC

Appendices

Appendix: Grammar and language 26

NOTE: This chapter remains under construction as of fall 2020, but it has essential information for students in my classes in that semester. I'm sorry it may be a bit difficult to follow in this form, but just ask me if you have questions. —*B.N.L.*

It's not quite fair to say that the law has its own language. It certainly has its own professional vocabulary. To use it correctly, you need to understand how verbs work and then how to structure them into sentences, and the sentences into paragraphs. Through it all, you want to keep your word-count low, and make sure you are using only the correct words. You will also want to avoid common problems that everyone regards as errors, along with certain choices that may set off the pet peeves of your more pedantic readers.

Link to book TOC

26.1 Verbs

Your sentence acts or moves through its verbs. This section explains some terminology important for discussing verbs: for understanding feedback from your instructor and for giving feedback to your peers. It also explains some common problems with verbs.

Verbs have several characteristics that control the forms they take and the purposes they serve. First, it's helpful to know that verbs have *infinitive* and *base forms*. The infinitive is simply the word *to* in front of the base form. So, *be* is the base form and *to be* the infinitive form. The base form can change based on the person and number of the subject of the verb. For example, 'I eat' but 'She eats.' This is the *agreement* of the subject and the verb. Some verbs—the *transitive* verbs—can take objects, that is, things to which the verb's action applies. For example, in 'The man bit the dog,' 'dog' is the object of the verb 'to bite,' which is a transitive verb. Verbs also have *tense*, a way to talk clearly about things that happened in the past, are happening now, or will happen in the future.

Most people who grow up speaking English at home know how to deal with all of these things quite naturally. They did not need to learn grammar rules explicitly—they just grew up using them.

But there are a few verb issues that are particularly significant in the law that you might not understand, even if you've had a course in English grammar. These are the verb's *voice* and *mood* and the problem of *nominalization*.

Person, number & pronouns

When we speak of *first person*, what do we mean? In English, we categorize a pronoun based on its relation to the speaker and listener and the number

Table 26.1: Common pronouns in English

	Singular	Plural
First person	I (*acc./dat.*: me; *poss.*: my, mine)	We (*acc./dat.*: us; *poss.*: our, ours)
Second person	You (*acc./dat.*: you; *poss.*: your, yours)	Y'all (*acc./dat.*: y'all; *poss.*: y'alls)
Third person	It (*acc./dat.*: it; *poss.*: its) She (*acc./dat.*: her; *poss.*: her, hers) He (*acc./dat.*: him; *poss.*: his)	They (*acc./dat.*: them; *poss.*: their, theirs)

of persons or things to which it refers. So, first person means the speaker (or writer) or the group the speaker represents; second person, the hearer (or reader); and third person, anyone or anything that is not the speaker or hearer.

Table 26.1 provides a summary of the three versions of the pronoun for each person and number:

- The nominative or subject form is the subject of the verb: *I* wrote the book.
- The accusative/dative form is the object of a verb or a preposition.
  - The dog bit *him*.
  - William sent the book to *her*.
- The genitive or possessive form, not surprisingly, indicates possession or ownership: This is *their* book.

Test yourself: What is the first-person plural accusative pronoun in English?

"Y'all"? Really? Is that even *grammatical*?

Modern English does not have a formal second-person plural pronoun. It needs one, as proved by the presence of many informal forms. I write in Texas, where 'y'all' plays that role well. There are peculiar regional variants, about which you may read online. In some parts of the country, 'you guys' is fairly common, but I try to avoid it—even though I grew up with it—as 'guys' seems unnecessarily gender specific to me. In formal writing, you will almost always just write 'you' for second-person singular *and* plural. For more on second-person plural pronouns in English, check out Dan Nozowitz, "Y'all, You'uns, Yinz, Youse: How Regional Dialects Are Fixing Standard English," Atlas Obscura (Oct. 13, 2016), https://www.atlasobscura.com/articles/yall-youuns-yinz-youse-how-regional-dialects-are-fixing-standard-english.

Agreement

A verb must agree in number and person with its *subject*, which is a pronoun, noun, or phrase. In many languages, the verb changes for each

	Singular	Plural
First person	tomo (*I take*)	tomamos (*we take*)
Second person	tomas (*you take*)	tomáis (*y'all take*)
Third person	toma (*it*, *she*, or *he takes*)	toman (*they take*)

Table 26.2: Agreement for the verb *tomar* in Spanish

possible combination of the subject's number and person. For example, in Castilian Spanish, the present indicative[1] form of the verb *tomar*, 'to take,' has six forms, as shown in Table 26.2.

1: More on what 'present' tense and 'indicative' mood mean in a moment.

Spanish then has a set of six forms for the past tense,[2] another six for future tense, etc. English is not so complicated as that. In most cases, there are two forms of the verb in the present tense and one in the past. Consider the verb *walk:*

2: Actually, Spanish has *two* past tenses.

- Present tense
  - Third-person singular: *It/she/he walks.*
  - All other forms: *I/we/you/y'all/they walk.*
- Past tense, all forms: *I/we/you/it/she/he/they walked.*

The verb *be* is unusual in English in that it has three forms in the present and two in the past tense:

- Present tense
  - First-person singular: *I am.*
  - Third-person singular: *It/she/he is.*
  - All other forms: *We/you/they are.*
- Past tense
  - First- and third-person singular: *I/it/she/he was.*
  - All second-person and plural forms: *We/you/y'all/they are.*

What is the present tense, first-person, singular form of the verb *to be*? Past tense?

Problems sometimes arise when it's unclear whether a subject is singular or plural. For example: 'A number of options [is *or* are] available.' Here, agreement with 'number'—a singular noun—suggests 'is' and agreement with 'options'—a plural noun—suggests 'are.' Bryan Garner provides extended advice and many examples of which forms to use.[3] The challenge is that sometimes only one possible answer *sounds* natural, while another is the only apparently *logical* choice. For example, for many speakers of English, only 'A number of options are available' sounds correct here. But grammatically, 'number'—a singular noun—is the subject of the verb 'to be,' and consequently the only grammatical choice is 'A number of options is available.' For this problem, my advice is simply to avoid it: 'Several options are available' is correct under both standards.

3: Bryan A. Garner, *The Redbook* §§ 11.23–11.26 (4th ed. 2018).

Transitivity and intransitivity

A verb is transitive when it can take an object. The subject of the verb is the noun, phrase, or pronoun that governs the verb's form; the object is

	Subject	Verb	Object (indirect)	Object (direct)
a.	I	give	her	the book.
b.	I	wrote	her	a letter.
c.	He	gives		gifts.
d.	I	ring		the bell.
e.	The bell	rings.		
f.	I	left.		
g.	I	left		my job.

Table 26.3: (In)Transitive verbs and objects

another pronoun, noun, or phrase that complements the verb, often as the target of the verb's action. Table 26.3 shows labeled examples.

Which of these examples are transitive? Which intransitive?

Just because a verb *can* take an object does not mean it always will. For example, 'leave' can take an object as in (g), 'I left my job.' Or it can go with out an object as in (f), 'I left.' Some verbs can have *two* objects, as in (a) and (b). In these cases, the indirect object usually indicates the direction or purpose for the verb's action. They can almost always be transformed into a verb with a single object and a prepositional phrase, like 'I give the book *to her*' or 'I wrote the book *for her*.' Some verbs can have a different sense depending on whether they appear with or without an object, as in (d) and (e).[4] So in the examples, "The bell rings" probably focuses more on the sound, with the bell being the agent in making a sound, while "I ring the bell" focuses more on the action, with me being the agent in striking the bell.

4: They are called *labile,* if you really want to geek out on this stuff.

Verb tense

Indicative verbs in English have two simple tenses (*present* and *past*) and several compound tenses (*future*; *past*, *present*, and *future perfect; progressives*). *Compound* just means that it takes more than one word to make the verb. Table 26.4 provides a comprehensive review of the common tenses in modern English.

Avoid the 'historical' or 'narrative' present in writing

Since ancient times, authors have recognized that narrating past events can give them a sense of immediacy or excitement. Here's an example: 'I went to the Wal-Mart yesterday, and there's this lady there who doesn't want to wear a mask and is pushing over the product display of masks. When the police come, she's already outside, screaming about how they'll pay big time if they arrest her.' In legal writing, you should never do this. If events happened in the past, narrate them in the past tense. In *oral* genres, on the other hand, it *may* sometimes be appropriate and persuasive to use the historical present. ***Use it with caution there!***

As a general rule, keep it simple. Don't use a compound tense form when a simple one will do. Nevertheless, in legal communication, you should be strict about using the precise tense that is applicable; make sure that

Table 26.4: Verb tenses in English

Tense	Examples	What it communicates
Present	She *sings* for a living. I *walk* the dog at noon.	Action, continuous and ongoing or completed on an ongoing basis.
Past	She *sang* for a living. I usually *walked* the dog at noon. I *walked* the dog at noon Monday.	Action that took place continuously in the past or that was completed in the past.
Future	She *will sing* for a living. I *will walk* the dog at noon tomorrow.	Action certain to take place continuously or to be completed in the future.
Present perfect	She *has sung* for a living. I *have walked* the dog at noon. I *have written* three books.	Action that started in the past but continues or has a likelihood of continuing into the present or future.
Past perfect	I *had written* two books when I **met** her. I *had* already *walked* the dog when she **asked**.	Usually in relation a **simple past-tense** verb, *past perfect* represents an action that was just completed or was ongoing at the time the **simple past-tense** event interrupted it.
Future perfect	When she **arrives**, I *will have been* there for two hours. I *will have published* three books before he **publishes** his first.	Usually in relation a **simple present-tense** verb that represents a future action, *future perfect* represents an action that will just be completed or will be ongoing when the future action interrupts it.
Progressives	I *am walking* the dog. I *was watching* TV. I *will be writing* a book.	Represents an act that was, is, or will be taking place but not completed.

the tense you choose represents the event exactly as it happened, happens, or will happen. Table 26.4 provides examples and explanations.

Active & passive voice

Verbs in English can generally have one of two voices, *active* or *passive*. Though the passive voice has appropriate uses, many writers (and writing professors) strongly prefer the active voice. For a start, though, how do you recognize active and passive constructions?

Voice is concerned with the relationship between a noun's *grammatical role* and its *thematic role*. We have already discussed the grammatical roles in the material surrounding Table 26.3: The *subject* of a verb is the noun (or noun phrase or pronoun) that governs the verb, with which the verb must *agree*. The object of the verb is is another noun (etc.) that is a complement of the verb, usually as the target of the verb's action. In 'That dog chases cars,' 'dog' is the subject of the verb, because the verb agrees in number with 'dog.' If 'dogs' had been the subject, the verb form would have been 'chase.' For example, 'Those dogs chase cars.'

Thematic roles are about the *meaning* of the relation between the noun and the action of the verb: The *agent* of the verb is the person or thing that performs the action. The *patient* of the verb is the person or thing that

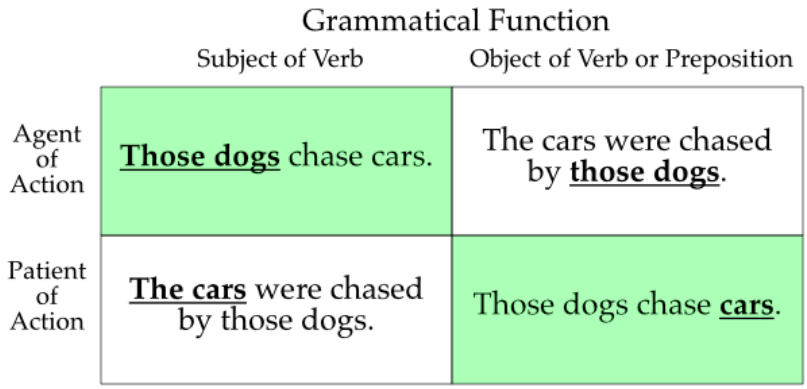


Figure 26.1: Active and passive voice. The shaded rectangles highlight active voice, where the thematic agent is the grammatical subject and the thematic patient is the grammatical object.

receives the action. In 'That dog chases cars,' the agent is 'dog,' because it performs the action of chasing, and the patients are the cars, because they receive that action.

In active voice, the thematic *agent* is the grammatical subject. In passive voice, the thematic *patient* is the grammatical subject.[5] Figure 26.1 illustrates this. There, the shaded rectangles present sentences in active voice, where the thematic agent (the dogs) are also the subject of the verb.

5: There is a actually a seldom-used third possibility in English, the *mediopassive* voice. Meriam-Webster, *The Mediopassive Voice: Does It Read Strangely to You?*, https://www.merriam-webster.com/words-at-play/mediopassive-middle-voice-usage-verbs (last visited July 11, 20202) (for word nerds only).

Consider these examples:

- I rode the bus. (Active, because *I* is the subject and also the agent, the one doing the riding.)
- The bus was ridden by me. (Passive, because the *bus* is the subject, but the agent is the object of the prepositional phrase *by me*.)
- Lack of language skills has been determined to be an important concern. (Passive, because *Lack of language skills* is the subject, but we don't really know who the agent is. Who has done this determining?)

The passive voice saps the energy from your prose and produces longer sentences. Many writing guides and writing teachers will tell you to avoid it, or more strongly, to eliminate it. But the passive voice has important uses, particularly when you want to conceal the agent, when you don't know who or what the agent is, and when you want the patient to be the focus of the attention.

Consider this narrative:

> *A woman is accused* of knocking down the product displays of masks at two different Wal-Marts. Eyewitnesses positively identified the woman and testified that she toppled the first one, but only grainy surveillance video showed someone in similar clothing knocking down the second. The woman's attorney speaks to the jury: "If my client was in the first Wal-Mart when *the product display there was damaged*, she could not have had time to travel to the second Wal-Mart, where *the display was toppled* only ten minutes later."

There are three instances of passive voice here, highlighted in italics. In the first, I could have written 'The state accused a woman . . . ' or 'The prosecution accused a woman . . . ,' but perhaps I did not want to

introduce another actor into the story. I used passive voice to keep the focus on the woman. In the second instance, the woman's lawyer could have said 'If my client damaged the display in the first Wal-Mart . . . ,' but that creates an image in the jury's mind of his client committing the act, something he wants to avoid. He used the passive voice to conceal or de-emphasize the agent of the verb's action. Finally, the lawyer used passive voice the third time, because we do not know who toppled the display in the second Wal-Mart.[6]

In fact, some research in cognitive science has shown that when you use constructions like the passive voice to describe action, the audience ascribes less responsibility to the agent of the action. So the defense attorney's approach here makes sense. The prosecutor would take a different tack: 'The defendant had plenty of time after she destroyed the display at one Wal-Mart to drive along Route 12 and trash the display at the second Wal-Mart.' That's all active voice.[7]

Of course, cases where you wish to conceal the agent or you don't know the agent are relatively rare. Thus, you should observe the following rules:

- Use the passive voice only if you can explain why it is particularly valuable at the point where you are using it.
- Do not use the passive voice in a way that makes you seem evasive. For example, when an executive says 'Mistakes were made,' we know they are trying to obscure their own responsibility.
- Avoid the passive voice in your writing *in all other circumstances*.

Using *anastrophe* to shift the focus

The rhetorical figure of *anastrophe* results from changing the natural word order of a sentence. You can use it instead of the passive voice to keep the focus on one party or other. Consider this example: 'Maria saw a woman and a man together at the cafe. The woman she knew from her book club; the man she had not met.' Here, by putting the objects of the verb 'to know' at the beginnings of the sentences, the writer keeps the focus on the man and the woman. If you use rhetorical figures like this, you should probably do so infrequently, as they can seem gimmicky. How often is it safe to use them? That I cannot say. For more on anastrophe, including further examples, check out the rhetorical dictionary *Silva Rhetoricae*, `http://rhetoric.byu.edu/Figures/A/anastrophe.htm`.

Knowing that you should reduce the use of passive voice is the first step, but finding it is another. If you use Microsoft Word, you can have its grammar checker highlight things it identifies as passive voice for you. Be warned that it is both over- and under-inclusive. It marks some things as passive that are not and fails to mark all the passive voice.

One cue for the passive voice is forms of the verb 'to be' ('be,' 'is,' 'are,' 'was,' 'were,' 'being,' 'been') combined with a past participle (usually a verb in the past-tense form that acts like an adjective). Another thing to look for is the word 'by.' It very commonly appears in those prepositional phrases where the verb's agent goes in a passive construction.[8] All the

6: The attorney here was also careful to use less dramatic language—*damaged*—to describe the act proved against his client and more dramatic language—*toppled*—to describe the act of the stranger at the other Wal-Mart.

7: Note her choice of very different verbs to describe the action, too.

8: In fact, it's pretty easy to write your own macro in Microsoft Word that will highlight all instances of these forms of 'be' and 'by.' You can check which ones are passive, fix them, and then remove the highlighting.

passive examples in this section so far exhibit either or both of these characteristics:

- The bus *was ridden* ***by*** *me*.
- Lack of language skills has *been determined* to be an important concern. (Note, though, that 'to be an important concern' is not passive. There is no hidden agent.)
- A woman *is accused* of knocking down . . . .
- If my client was in the first Wal-Mart when the product display there *was damaged*, she could not have had time to travel to the second Wal-Mart, where the display *was toppled* only ten minutes later.

Sometimes, it is unclear whether something is in passive voice if the verb in question could be either a past participle or a past-tense verb. Consider these examples.

a. *They were married by the bishop.* (Passive: The bishop is the agent of the action.)
b. *They were married for four years.* (Active: 'Married' here functions as an adjective. There is no hidden agent.)
c. *They were separated by the referee only once.* (Passive: The referee is the agent of the action.)
d. *They were separated for three months.* (Active-ish: 'Separated' again functions as an adjective. There is no hidden agent, except perhaps for the subject. Of course, the author could save a word by saying 'They separated for three months.'
e. *The window was broken.* (Active or passive, depending on the circumstances: If the author is describing a state of affairs, 'broken' is just an adjective. If the author is describing a series of events, one of which was the breaking of the window, then they are concealing the agent.)

To recap: Minimize use of passive voice, saving it for those cases where there is real value in using it.

Mood

Verbs in English come in three moods: indicative, imperative, and subjunctive. The first two are pretty easy. *Indicative* verbs are those that describe the world as it is, was, or will be. All the verbs above are in indicative mood. *Imperative* verbs are commands. They take the base form of the verb:

- Be honest!
- Go forth and multiply!
- Give me that book!

The subjunctive mood is the subtlest. We use it to express counter-factual situations, demands, and requirements and in certain other places.

One way to use it is to take the plural form of the past tense of the verb and use it to express a counter-factual state, usually followed by a conditional verb describing likely consequences. Sometimes you might form it with *were* plus an infinitive to express a future possibility. Note

that the subjunctive can function across verb tenses as it has no tense itself. Consider the following examples:

a. If I were a sculptor, but then again, no . . . .
b. If the truck is eighteen feet high, it will not clear the bridge ahead.
c. If the truck were eighteen feet high, it would not clear the bridge ahead.
d. If she assisted the defendant, she would be his accomplice.
e. If she assisted the defendant, she was his accomplice.
f. If she worked three weeks, where is the money?
g. If she worked three weeks, she would only clear about $1,000.
h. If she were to work three weeks, she would only clear about $1,000.

In examples (a), (c), (d), (g), and (h), antecedent *If*-clause refers to an event that is not true (at least not yet)—that is, it is counter-factual. Of course, you can't always tell from that clause alone whether a verb is in the subjunctive. Compare examples (b) and (c). In (b), the author is not expressing any view about whether the truck is eighteen feet high. In (c), the author is making it clear that they believe the truck is *not* eighteen feet high.

These may seem like very fine distinctions, but in the law, precision is critically important. Consider this pair:

- If my client had stabbed the victim, there would have been forensic evidence on my client.
- If my client stabbed the victim, he managed to do it without leaving forensic evidence.

In the first of these sentences, the author is using the subjunctive to deny the proposition that their client stabbed the victim. In the second, the author is expressing uncertainty about whether their client stabbed the victim. As an advocate, which do you think is the better approach?

You should consider using the subjunctive whenever you introduce counterfactual assertions or speculations about uncertainties in the future.

You also use the subjunctive in one other place in the law: If you follow a verb of request, order, wish, or demand with a *that*-clause, the verb in the *that*-clause should be subjunctive. Sometimes, you will form this subjunctive with the plural past-tense form and sometimes with the base form. See these examples.

a. I wish that she *were* here.
b. I requested that he *release* her.
c. The court ordered that he *be released*.

You know the verbs after the *that* are in the subjunctive mood mood here because they would otherwise not agree with their subjects: 'She were here'? 'He release her'? 'He be released'?

Nominalizing verbs

The final subsection in this long section about verbs is, in a way, not about verbs at all. It's about making nouns from verbs or *nominalizing* verbs. Writers often combine semantically uninformative verbs with the

verbs they nominalize to make the expressions sound more officious. Like the passive voice, *nominalizing* a verb takes power from the action and usually makes the sentence longer.[9] Consider these examples.

9: Bryan Garner calls these "nominalizations," itself a nominalization, or "zombie nouns." Bryan A. Garner, *The Redbook* § 14.3(c) (4th ed. 2018). The latter seems a little harsh to me.

a. The *action* and *motion* of your sentence is in its verbs.
b. Your sentences act and move through their verbs.
c. She *used a nominalization* of the verb.
d. She nominalized the verb.
e. He *shared information* with her about the matter.
f. He informed her about the matter.
g. They *reached an agreement* to merge.
h. They agreed to merge.
i. The parties *came to a failure to reach an agreement*.
j. The parties failed to agree.
k. You should *keep its use* to a minimum.
l. You should use it rarely.
m. He had knowledge of these facts.
n. He knew these facts.
o. They made allegations that we committed defamation against them.
p. They alleged that we defamed them.

In general, you should avoid nominalizing your verbs. Garner suggests looking for certain endings to nouns that can be converted to verbs: *-tion*, *-ment*, *-ence*, *-ance*, *-ity*, etc.[10]

10: *Id.*

The following section offers some guidelines for constructing sentences that may be helpful to keep you focused on using active verbs and writing lively prose.

26.2 Sentence structure

This section contains several tips for writing better sentences and explains parallel construction and "dangling modifiers."

Sentence tips

First, write short sentences, keeping the subject and verb close together and both of them near the beginning of the sentence.

Second, avoid long dependent clauses, especially at the beginning of sentences. Before you can understand that advice, you must know the difference between a dependent and an independent clause. An independent clause can stand by itself, while a dependent clause cannot.

Consider the two preceding sentences, shown here with independent clauses in bold face and dependent clauses in italics:

- *Before you can understand that advice*, **you must know the difference between a dependent and an independent clause**.
- **An independent clause can stand by itself**, *while a dependent clause cannot*.

You could delete the italicized clauses, and the bold-face ones would still be complete sentences—they are thus independent. Delete the bold-face ones and the italicized ones cannot stand alone—they are dependent.

These two sentences also show the alternatives, dependent clause first or independent clause first. In the first sentence, I began with a dependent clause, but I justify that using the *given-new* strategy. I had just given a piece of advice (" . . . avoid long dependent clauses . . . "), and I tied that to the next sentence by beginning it with "Before you can understand that advice . . . " This approach helps the reader follow the flow of your paragraph.

Third, avoid what Neumann and Simon call "lawyer noises," the tendency to imitate judges (and other lawyers).[11] They note that "[s]ome of the opinions in your casebooks are hard to understand . . . because they're badly written. Before you imitate something you've seen in an opinion, ask yourself whether you want to do so because you feel safer doing what a judge has done—which is *not* a good basis for a professional decision—or because it would actually accomplish your purpose." Making lawyer noises is usually an effort by a novice (or by a veteran who should know better) to be recognized as an *insider* in the legal profession, but it comes at the cost of obfuscating and annoying readers. Neumann and Simon offer this example"

11: Richard K. Neumann, Jr. & Sheila Simon, *Legal Writing* §§ 22.2, 22.4 (2008).

1. Elvis has left the building.
2. Elvis has departed from the premises.
3. It would be accurate to say that Elvis has departed from the premises.[12]

12: *Id.* § 22.4.

Fourth, use transitional words to show relationships between the sentences and clauses, but avoid what Neuman and Simon § call "throat-clearing phrases" and "long windups"; they give these examples;[13]

13: *Id.* § 22.4(5).

- It is significant that . . .
- The defendant submits that . . . (This might not be a long windup if it is the plaintiff's lawyer writing. In that case, this attributive cue is a way to distance the writer from the perspective being identified.)
- It is important to note that . . .

Parallel construction in lists of clauses

Use parallel construction in lists of clauses. You should be able to [bracket] clauses and have it make sense so that each clause works with what came before the first. Consider this problematic sentence:

> The couple **[1]**[had pooled their assets to pay bills], **[2]**[had joint shares at a credit union], and **[3]**[he had made her the primary beneficiary on his life insurance policy].

The problem is that the first two clauses makes it seem that 'The couple' will be the subject of all the clauses in this sentence: 'The couple had pooled . . . ' and 'The couple . . . had joint shares . . . ' But the third clause brings in a different subject: '*he* had made.'

There are two equally satisfactory ways to fix this:

1. **[1]**[The couple had pooled their assets to pay bills], **[2]**[they had joint shares at a credit union], and **[3]**[he had made her the primary beneficiary on his life insurance policy].
2. **[1]**The couple **[a]**had pooled their assets to pay bills and **[b]**had joint shares at a credit union, and **[2]**he had made her the primary beneficiary on his life insurance policy.

Sentence (1) is a list of three items, with commas separating them and 'and' before the last. Sentence (2) consists of two complete sentences separated by a comma and 'and,' and the first sentence has two clauses with 'the couple' as subject, while the second has only one clause with 'he' as subject.

Let's consider another example, this time without the brackets:

> In 2003, fifteen years ago, Mr. Nelson built a fourteen-by-sixteen camping platform, a fire pit to grill fish, and nailed boards to trees so his children could climb the trees.

Here are three satisfactory solutions. Make sure you understand why they are preferable to the original:

1. In 2003, fifteen years ago, Mr. Nelson built a fourteen-by-sixteen camping platform, installed a fire pit to grill fish, and nailed boards to trees so his children could climb the trees.
2. In 2003, fifteen years ago, Mr. Nelson built a fourteen-by-sixteen camping platform and a fire pit to grill fish and nailed boards to trees so his children could climb the trees.
3. In 2003, fifteen years ago, Mr. Nelson built a fourteen-by-sixteen camping platform and a fire pit to grill fish, and he nailed boards to trees so his children could climb the trees.

Dangling modifiers

Watch out for initial dependent clauses where it is unclear what they modify. These phrases are often called 'dangling modifiers. The problem arises when the initial clause has a verb in it, usually an infinitive or the past-tense or *-ing* form of the verb. The past-tense form of the verb, which is usually used to make the passive voice,[14] and the *-ing* form of the verb, which also called a 'gerund' and is used to make the progressive verb tenses,[15] are called *participles* of the verb. The past-tense form is the *past or passive participle* and the *-ing* form is the *present or active participle*.

14: As explained in Table **??** beginning on page 145.

15: As shown in the table on page 145.

When a verb form appears in a dependent clause at the beginning of the sentence—called an 'infinitive' or 'participial' phrase—the reader expects the first noun in the next clause to be the subject (or agent) of that verb. Consider these examples:

1. *To examine* this issue more clearly, *the factors* are separable into three broad categories.
2. If *examined* clearly, *we* must separate the issue's factors into three broad categories.
3. After *reading* the underlying data, *the article* remains unconvincing.

In sentence (1), the reader expects the first noun in the independent clause to be who- or whatever will do the examining, but those factors are not going to examine themselves. Sentence (2) is doubly ugly, because it's a dangling modifier in passive voice. The reader expects the first noun in the independent clause to be who- or whatever will be examined clearly; that is clearly not 'we,' however, as we are the ones doing the examining. Finally, in sentence (3), the reader must expect that the first noun in the independent clause will be who- or whatever did the reading; the article clearly did not read itself. Here are some sentences that remedy these problems.

- To examine the issue more clearly, we must separate the factors into three broad categories.
- Examining the issue clearly requires us to separate the factors into three broad categories.
- After I read the underlying data, the article still did not convince me.
- After reading the underlying data, I remained unconvinced by the article. (Less attractive because of the passive voice.)

26.3 Paragraph structure

Paragraphs exist in writing for a reason. They group sentence that share a common theme or purpose. Every paragraph should have a topic, sentence, one that lets you reader know what is going to happen in it. You can indicate this without telling your reader that is what you are doing. Consider these first sentences in the context of Student 4's analysis in Section 28.3, starting at page 173, relating to the Bill Leung problem. She begins her second paragraph this way:

> In Minnesota, an attorney-client relationship is formed in one of two ways, commonly known as the contract theory and the tort theory. In the contract theory, an attorney-client relationship is formed when an attorney "either expressly or impliedly promised or agreed to represent" the client. *Ronningen* at 422.

The first sentence signals what the paragraph is about. Either of the following approaches would be poorer choices:

1. This paragraph will examine the rule for forming an attorney-client relationship in Minnesota.
2. In the contract theory of attorney-client relationships, the relationship is formed when . . .

The first of these adds words without adding value. Student 4's first sentence signaled the same thing. The second of these dives into one of the two ways a relationship can be formed without signaling that this paragraph will address both.

Second, a corollary to the first piece of advice is that a paragraph should contain only material related to the topic signaled in the topic sentence.

Third, it's perfectly fine to have a paragraph that consists of a single sentence, as the previous paragraph shows. Usually, however, you will

have two or more sentences in a paragraph. Varying paragraph lengths is one way to help the reader overcome fatigue while reading many or long documents.

Finally, consider using the final sentence of the paragraph to transition from this topic to next. If you've provided a good roadmap before a series of paragraphs, this is less necessary, but some times you must make a fairly abrupt or fairly large change in direction between paragraphs. A transitional sentence that wraps up one paragraph and positions the reader for the next can be very helpful.

26.4 Concision

Writing concisely means using only the necessary number of words. That sounds easy. Unfortunately, there is no simple recipe to achieve this. Here are some tips.

First, follow the advice in Section 26.1 regarding passive voice, starting at page 145, and nominalizing verbs, starting at 149. Avoiding passive voice and nominalizing verbs will help you write more concisely.

Second, replace wordy phrases that do little with shorter alternatives. The following examples are the most common, and getting rid of them is a sign of basic legal-writing competence:

- *With regard to*, *in regard to*, and *in regards to* become 'regarding.'
- *In order to* becomes 'To.'
- *In order for* becomes 'For.'
- . . . *so as to* becomes 'to.'
- . . . *as well as* becomes 'and.'
- . . . *has the ability to* becomes 'can.'
- *All of the* becomes 'All the.'
- *Due to the fact* that becomes 'because.'
- *In view of the fact that* becomes 'because.'
- . . . *is (un)able to* becomes 'can' or 'cannot.'
- . . . *Whether or not* can often (but not always) just be 'whether.'

Garner provides a list of dozens more of them, and you should familiarize yourself with them, though probably not all at once.[16] Knowing them and fixing them will add polish to your writing and keep your word-counts down.

16: Bryan A. Garner, *The Redbook* § 12.2(c) (4th ed. 2018).

Avoid words that redundantly identify the present time in sentences using the present tense, except when contrasting the current time to another time.

- Good
  - Daniel Snyder is chief executive officer and president of SDS.
- NOT good
  - Daniel Snyder is currently chief executive officer and president of SDS.
  - Daniel Snyder is president of SDS at this time.
  - Daniel Snyder is president of SDS at this point in time.
  - Daniel Snyder is now president of SDS.

- OK
  - Daniel Snyder is *currently* president of SDS; if SDS loses this suit, he may soon be unemployed.

26.5 Precision

Using the right words and not the wrong ones is as important in legal writing as everywhere else. This section highlights common problems for law students.

Contractions

A contraction is the combination of two or more words into a single word, usually with the use of an apostrophe ('). Examples include 'can't,' 'don't,' 'couldn't,' and 'we've.' Many legal readers and writers prefer to avoid contractions in formal writing. Others (including me) don't mind it at all. You should look around and make your choices consistent with what others in your enterprise are doing.

You may always use contractions when quoting evidence or an authority that did. Note that 'cannot' is one word.

- Good
  - Defendant did not justify its fees to plaintiff as required by the Act.
  - Defendant cannot justify its fees.
  - The plaintiff said, "You ain't seen nothin' yet!'
- OK—if your enterprise is cool with contractions
  - Defendant didn't justify its fees to plaintiff as required by the Act.
  - Defendant can't justify its fees.
- NOT good
  - Defendant can not justify its fees.

Personal pronouns

When you are referring to or addressing people, you will generally use the pronouns in Table 26.1 on page 142. Some persons use pronouns that are not traditionally associated with their apparent sex or gender. So, a person classified as male at birth who identifies as female may prefer pronouns of the feminine gender. Or a person who does not identify with either gender—who is *non-binary*—might prefer that you use third-person plural pronouns—'they,' 'them,' 'theirs.' To show respect for these folks, you should honor their choices.

Note that as a general matter, this text uses the third-person plural pronouns for individuals of unknown gender. For example, 'In the example in Appendix Chapter 29, Student 5 makes *their* purpose clear.' This is not yet common usage, and your teacher or supervising attorney may expect you to edit the text to remove the need for the pronoun or use

a construction like 'his or her.' For example, 'In the example in Appendix Chapter 29, Student 5 makes *his or her* purpose clear.'

When you refer to a corporation, company, or group made up of people, like a committee or a board, you should use the third-person singular neuter pronoun: 'it,' 'its.' Say 'The committee meets today,' not 'The committee meet today.'[17] Say 'SDS, Inc., makes widgets,' not 'SDS, Inc., make widgets.'

17: In British English, it is more common to refer to entities made up of people using the plural pronouns—'they,' 'them,' etc., but that is not the norm in American legal English.

Some legal readers and writers prefer to avoid first-person pronouns, and particularly first-person singular pronouns. I don't mind them, if you keep them to a minimum. You should see what your supervising attorneys prefer.

The right words

When you writing or talking about what a court did, you should think about which verbs are appropriate. If you are explaining what happened in a court opinion, you will generally not use the words 'assert,' 'say,' 'state,' or 'argue.' 'Argue' may be appropriate for a dissenting or concurring opinion.

Generally, the majority opinion does only two things: It *finds* certain facts and it *holds* that the law applies in some way. It may also reverse, remand, and make other orders.

The wrong words

Generally, you should avoid phrases that are stuffy and 'legalese.' Bryan Garner provides a list of dozens of legalistic phrases and their more everyday substitutes.[18] Substitute them wherever you can.

18: Bryan A. Garner, *The Redbook* § 12.2 (4th ed. 2018).

Garner also provides a glossary of nearly seventy pages of "problematic expressions," words and phrases that many folks get wrong.[19] You should (gradually) familiarize yourself with them too.

19: Bryan A. Garner, *The Redbook* § 13.3 (4th ed. 2018).

Law French & Latin

Lawyers commonly use many Latin and French words. Generally speaking, you should italicize foreign words when you use them in your writing, and this includes law-French and law-Latin words. *Bluebook*-style writing, however, offers a list of words that are so common in the law, that they need not be in italics. *Alwd Guide*Chart 1.2.

My advice is to leave out the stuffy Latin and French.

26.6 Other common grammatical errors

26.7 Common pet peeves

Here are some common pet peeves that readers have. You should try to avoid triggering the negative responses they fire up in some readers:

- Do not say 'utilize' when you can say 'use' (or 'utilization' when you can say 'use'). Fair warning: This is one of my pet peeves.
- Do not say 'based off' or 'build off' when you mean 'based on' or 'build on.' This 'mistake' is becoming so common however, that I think 'based off' will soon be the Queen's English.
- Do not say 'try and think' when you mean 'try to think.'
- Do not say 'A and/or B.' Say, 'A, or B, or both.' Fair warning: This is one of my pet peeves.
- Do not say 'Since' when you mean 'Because.'
- Do not begin sentences with the word 'However.'

Appendix: Writing mechanics 27

Link to book TOC

NOTE: This chapter remains under construction as of fall 2020, but it has essential information for students in my classes in that semester. I'm sorry it may be a bit difficult to follow in this form, but just ask me if you have questions. —*B.N.L.*

The role of correct punctuation and citation early in your legal career is hard to overestimate. Professors, peers, and potential employers will judge you on details that may seem quirky. I offer you two principles and an anecdote that emphasizes them.

1. Be obnoxiously detail-oriented in examining your own work (and the work of your team members, if you are in a law firm) for compliance with grammar, punctuation, and citation rules.
2. Do not be pedantic about the legal writing of others.

Years ago at the University of Minnesota, we had outside folks come in to judge our students' oral argument performances. One of the outside judges was a young-ish clerk for a federal district court judge. These clerks are often the first to read a lawyer's brief before the judge and may be responsible for writing a *bench memo* to the judge, evaluating the arguments of each side on a motion or some other issue. Depending on the judge's work load and work ethic, they may more or less rely on the clerk's bench memo in making a decision.

During a break in the judging, this clerk was talking to one of our other judges, and he was complaining about how lawyers do not follow the requirements of the *ALWD Guide* and *Bluebook*, one of which is that when one uses "id." to identify a previously cited source, one should underline or italicize the period after it, thus: id. or *id.*[1] I heard our young judge exclaim: "If I see one more brief without the periods after 'id' underlined, I'm going to *blow my top*!"

Given the power that readers like this may have over you and your clients, you need to observe principle (1). But the failure to underline periods after "id" likely has no bearing whatsoever on the quality of the arguments made in a brief. So please observe principle (2) and don't be like this young fellow!

Many citation, grammar, and punctuation rules and guidelines appear in Garner's *Redbook* (4th ed. 2018) and in the *Alwd Guide* and the *Bluebook*, but it's not always easy to find out how to do something. This chapter provides a guide to finding some mechanics answers and points to answers to the most common errors that 1Ls have. It's designed especially to help you avoid those things about which many advocates and judges seem to have pedantic fetishes.

As you work on your writing this year, your professor will note places where you make decisions that would be considered errors by at least some legal readers. You should work to correct them. Your instructor

1: *See ALWD Guide* rule 11.3(b) and *Bluebook* rule B4.2. Note that underlining has become an anachronism. It originated with old typewriters that could not make italic characters, it is harder to read than italics, and in my classes, I prefer that students use italics instead of underlining. You should hardly ever use both in the same document. Bryan A. Garner, *The Redbook* § 3.2 (4th ed. 2018).

will also note if you persist in making the same mistake after they have corrected it; most legal employers will find that annoying.

27.1 Typography

Bluebook-style citations for practice documents require only two type faces: normal (sometimes called 'roman') and italic.[2] You should avoid use of bold face except in headings.

You should at most two fonts in most practice documents.[3] A common reason for a second font is for headings.

You should not use all-capital text, except in very short headings and titles.[4] Some lawyers use it frequently, and if you work for them, you will, too. But it is hard to read and quite ugly.

Unless local rules or your supervising attorney requires it, don't fully justify text—meaning that the text has a smooth right and left margin, like this book. Instead, allow for a 'ragged' left margin.[5] Do not underline text. Use italics instead. Underlining also makes it harder to read text, and it's especially ugly when used with text that is not in all-capitals, as the underline tends to cut across the descending parts of characters like 'g' and 'y.'

2: For *scholarly writing*, they also require the use of SMALL CAPITALS. You do not need to worry about that during your first year in law school.

3: *See* Bryan A. Garner, *The Redbook* § 4.4 (4th ed. 2018).

4: *See* Bryan A. Garner, *The Redbook* § 2.19 (4th ed. 2018).

5: Bryan A. Garner, *The Redbook* § 4.10 (4th ed. 2018).

27.2 Numbers & symbols

Dates

In the text of your memo (including the memo header lines – addressee, date, etc.), indicate dates by spelling out the month followed by the cardinal numeral, a comma, and the year. Military and international usage prefers day, month, year ordering, e.g., "12 November 2008." (The *Chicago Manual of Style* prefers this as well.) But those provisions of the *Bluebook* and *ALWD Guide* that address exact dates prefer the month, day, year ordering, e.g., "November 12, 2008." Set the date off from succeeding text with a comma. You do not need a comma between a month and year when there is no date. You should abbreviate month names according to the citation guide rules in citation sentences/clauses according but not in textual sentences.

- Good
  - On October 21, 2008, the defendant resigned.
  - In October 2008, the defendant resigned. (Some folks feel the comma is unnecessary.)
  - On November 4, we will vote. (Again, some folks do not believe comma is necessary.)
- NOT good
  - On October 21st, 2008, the defendant resigned. (Don't use ordinal "st.")
  - On October 21, 2008 the defendant resigned. (Missing comma after "2008.")

- On 21 October 2008, the defendant resigned. (Military/international order.)
- In October, 2008, the defendant resigned. (First comma unnecessary.)

Where you have choices or options, or can vary punctuation based on personal preferences, be sure you do it consistently.

Numbers vs. numerals

According to the legal citation guides, you must spell out all numbers zero to ninety-nine in your text. You must also spell out any number that begins a sentence. (The alternative to spelling out the numbers is using numerals; the numeral '6' is spelled out as 'six.') You must spell out 'percent' where you have to spell out a number; if you can write numerals, you can use the % sign. The rules are pierced with exceptions: You can spell out 'round' numbers like 'hundred' and 'thousand'; use numerals and percent signs frequently even if the numbers would normally have to be spelled out.

- Good
  - Steven Snyder owned sixty-five percent of SDS's stock.
  - Steven Snyder owned 65% of SDS's stock; Bill owned 5%; and Mary owned 3%.
  - Steven Snyder owned 100% of SDS's stock.
  - Snyder Corp. invested $3,300,000 in SDS. (Would "$3.3 million" be ok? I am not sure.)
  - SDS still owes Snyder Corp. $200,000. (The rules might permit "two hundred thousand dollars," but it is much easier to read $200,000.)
  - SDS owns 1456 trucks and ships 14,567 crates of product per month. (I understand that a change in the 21st edition of the *Bluebook* now requires the comma in 1,456.)

Again, if you have options, just be consistent.

27.3 Quotations

You often *must* quote authorities when you are writing legal texts, but you should use quotation in general no more than you must, and you should be especially wary of using many block quotations. Research suggests that readers tend to skip over them. The *ALWD Guide* recommends using quotations only for "statutory language, for language that must be presented exactly as represented in the original, and for particularly famous, unique, or vivid language."[6]

6: *ALWD Guide* §38.1.

The rules in this section are for legal writing in general. You should check the local rules of any courts where you intend to file papers or correspondence, and you should even check the individual judges' websites, to see if they have local or judge-specific requirements for handling quoted material.

There are two broad problems with which you must deal when working with quotations: how to format them, and how to make alterations to them. Sections 38–40 of the *Alwd Guide* handle this issue quite well. You should read them and review the examples there. The *Indigo Book* provides a particularly succinct explanation with good examples.[7] This section provides some additional thoughts.

7: Sprigman et al., *The Indigo Book: A Manual of Legal Citation* Part I. (Public Resource 2016), https://law.resource.org/pub/us/code/blue/IndigoBook.html.

Formatting

How you format quotations depends on how long they are: A block quotation is 50 words or more.[8] An in-line or 'short' quotation is forty-nine words or fewer.[9] You can always tell how long a quotation is by selecting its text and using your word processor's word-count function. If you don't know how to do that, search for it on the Internet. Because block quotations are in some ways easier, this summary treats them first.

8: *Alwd Guide* § 38.5; *Bluebook* Rule 5.1(a); *Redbook* §§ 1.29–1.34.

9: *Alwd Guide* § 38.4; *Bluebook* Rule 5.1(b); Bryan A. Garner, *The Redbook* §§ 1.29–1.34 (4th ed. 2018).

For details on formatting block quotations, see the *Alwd Guide*, *Bluebook*, and Garner's *Redbook*.[10] Some key points are worth mentioning here: First—and most importantly—except as noted here, the block quotation should look exactly like it does in its original source. You do not need to make any changes. If the original has footnotes or endnotes and you do not wish to reproduce them, you can omit them and explain that in the citation.[11] Second, a block quotation is indented, probably one-half inch or so, on left *and* right sides. Because this indentation signals that the material is a quotation, you use no quotation marks on the outside of the quotation. You should retain all quotation marks inside the block as in the original.

10: *Alwd Guide* § 38.5; *Bluebook* Rule 5.1(a); *Redbook* §§ 1.29–1.34.

11: The advice appears below.

Third, the block quotation should be the same font and font size as the rest of your text. There are varying opinions about whether block quotations should be single-spaced or double-spaced when they appear in a double-spaced document; my preference is for single-spaced. Finally, in practice documents—which is all you are likely to write your first year in law school— the citation goes on an un-indented line immediately *after* the block quotation.

The *Alwd Guide*, *Bluebook*, and Garner's *Redbook* also provide details for in-line quotations.[12] There are key points you should not miss: First, you run an in-line quotation into the text without indenting it or setting it off with formatting. Of course, you use the same font and font size as the rest of your text.

12: *AWLD Guide* § 38.4; *Bluebook* Rule 5.1(b); *Redbook* §§ 1.29–1.34

Second, you should use double quotation marks on the outside of the quotation, and make sure your word processor is set to convert them to "curly" quotes, like the ones around the word *curly* in the last clause. They should not be "straight" quotes like the ones around the word *straight* in the last clause.

Example 1, Citation sentence

> Smith claims that "by writing the lyric 'God save the Queen / the fascist regime,' the Sex Pistols offered a powerful critique to a generation still feeling the effects of German fascism in **Europe." H.A. Smith**, *Anti-Fascist Critique and Censorship Law*

> *in the U.K.*, 25 J. of L. and Human. 345, 360 (1998) (citation omitted).[13]

13: Strictly speaking, there should be a citation here indicating what Smith was quoting in his text. I've left it out for simplicity's sake. Ignore the text in bold in the example for the moment.

Third, when you quote text that itself is quoting text, you must change the interior quotation marks. So, in *Example 1*, Smith's original text would have read:

> [B]y writing the lyric, "God save the Queen / the fascist regime," the Sex Pistols offered a powerful critique to a generation still feeling the effects of German fascism in Europe.[14]

14: This is also how Smith's text would look in a block quotation in your writing. Why would this quotation not normally be displayed as a block quotation?

The author of *Example 1* had to swap single quotation marks for the original doubles so that those interior quotation marks were distinguished from the ones on the outside of the larger quotation. Of course, if the authority you are quoting is quoting another quoting yet another, etc., you'll have to swap single for double quotation marks, or vice versa, all the way down. You should definitely avoid doing that, and there is advice for doing so below.

A fourth and rather complicated point deserves another example: For a citation sentence, the citation goes after the closing quotation mark and final punctuation; but for a citation clause, the citation is set off by a comma that lies *inside* the quotation mark with the citation placed just after the quotation mark. Compare *Example 1*, which shows a single authority placed in a citation sentence just after the quoted material, and *Example 2*, which shows two authorities, each supporting one clause of a sentence. In the examples, the words to either side of boundaries between the quoted matter and the citations appear in bold type.

> **Example 2, Citation clauses**
>
> Smith claims that "by writing the lyric 'God save the Queen / the fascist regime,' the Sex Pistols offered a powerful critique to a generation still feeling the effects of German fascism in **Europe," H.A. Smith**, *Anti-Fascist Critique and Censorship Law in the U.K.*, 25 J. of L. and Human. 345, 360 **(1998),**[15] **but** the UK courts nevertheless upheld the censor's ban on radio play of the **song, *Rotten* v. Crown** [1977] AC 391 (HL) 31(appeal taken from Eng.).

15: Strictly speaking, there should be a citation here indicating what Smith was quoting in his text. I've left it out for simplicity's sake.

I recommend that you avoid sentences like *Example 2*. It can be quite difficult for your reader to follow and to know when the text of your sentence resumes. In this case, I would probably just start a second sentence: 'The UK courts nevertheless . . . "

The rules for punctuation near quotation marks are fairly simple:

- Commas and periods *always* go inside the quotation marks. (See Example 1, Example 2.)
- Colons and semi-colons *always* go outside the quotation marks.
- Question marks and exclamation marks go inside or outside the quotation marks, depending on whether they are part of the quoted text.

Note that the rules in the preceding three bullets are really conventions that vary in other contexts. For example, in English-language publications outside the U.S., commas and periods may appear consistently *outside*

the quotation marks. This is also true of some academic publications in the U.S., particularly in science and philosophy. The latter observation is not really surprising, because in a sense, having the commas and periods outside is *logical*, given that they may not be part of the quoted language. The American legal convention of putting them inside responds instead to aesthetic considerations: the typography is more attractive that way.

Alterations

Often, you will quote an authority but prefer not to quote a whole passage exactly as it appears in the original. You may wish to alter words slightly to fit them into your text, or you may wish to omit words.

To indicate modifications, use square brackets: [and].[16] So you may add a word to clarify the quotation by putting the added word in square brackets. If you change a word, use square brackets to indicate the change. Often, this means changing the case of a letter to change it from the first word of a sentence to a subsequent word, or vice versa. You can also delete part of a word, in which case you should use a pair of empty square brackets to indicate the deletion. Consider the original text in *Example 3.A*, which requires modifications so the author can fit it into the sentence where they quote it in *Example 3.B*.

16: For general guidance, see the *Alwd Guide* §§ 39.2–39.3; *Bluebook* Rule 5.2(a)–(c).

Example 3.A, Original text

The state's activities are a taking when the encroachment on private property causes damages.

Example 3.B, Original text quoted with alterations

The court must determine whether the activities "encroach[] on private property [and] cause[] damages."

Example 3.B is technically correct, but it illustrates why you should use such alterations sparingly: The result is often painful to read. In this situation, I would rephrase the rule in *Example 3.A* (as long as it was not statutory language) or quote is exactly as it is to simplify the reader's life.

To indicate the omission of one or more words, you must use an ellipsis: three periods, separated from each other and the adjacent text with spaces.[17] This is called an 'ellipsis,' deriving from the same root as 'elliptical,' which means omitting something.[18]

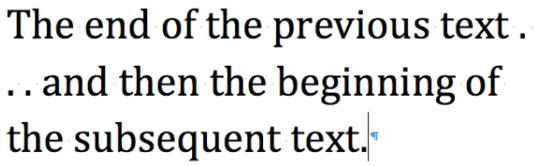
17: For general guidance, see the *Alwd Guide* § 40; *Bluebook* Rule 5.3.

18: You should not confuse it with the 'elliptical' used to refer to certain athletic equipment. That term results from the fact that the motion of the user's feet describe the geometrical shape of an ellipse—a sort of oval.

The *Bluebook*-style ellipsis is *not* the ellipsis that Microsoft Word or Google Docs automatically creates when you type three periods in a row. In those ellipses all three periods appear inside a single special character that is not *Bluebook*-style compliant. The spaces before and within an ellipsis should be *non-breaking* spaces. That is, it should not be possible for your word processor to put a line break between the previous text and the ellipsis or within the ellipsis. *Example 4* shows what happens when you use breaking spaces in an ellipsis.

Example 4

Note the line break at the end of the first line in the middle of the ellipsis.

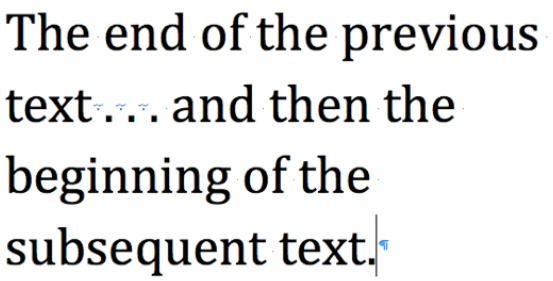


The solution is to type non-breaking spaces between the periods. You can make spaces in Microsoft Word that are non-breaking on a Mac by pressing Option-Shift-Space and in Windows with Ctrl-Shift-Space.[19] In Microsoft Word, you can see whether a space is breaking or non-breaking by turning on the display of non-printing marks and characters (clicking the ¶ mark on the tools ribbon).[20]

Example 5 shows how *Example 4* should look, after correcting the non-breaking-space problem.

Example 5

Note the little blue tilde-dots between the preceding text and periods. This is the way MS Word shows the spaces are non-breaking.[21]



But typing CTRL/SHIFT/SPACE – PERIOD – CTRL/SHIFT/SPACE – PERIOD – CTRL/SHIFT/SPACE – PERIOD every time you need an ellipsis will likely seem like a pain to you. One simple solution is to change the AutoCorrect function in MS Word on your computer so that it substitutes a *Bluebook*-compliant ellipsis instead of Word's special ellipsis character.[22]

Marking other changes

Note *ALWD Guide* § 39.6, *Bluebook* 5.2(c), and the *Redbook* § 1.42(b) offer guidance about using [sic] to mark errors in an original, and *ALWD Guide* §§ 37.2 & 39.4 and *Bluebook* 5.2(d) explain how to use parentheticals in citations to indicate other kinds of modification. This last point can be very helpful. If you are quoting an authority that is itself quoting and citing other authorities, you may wish to clean up the quotation, removing all the internal quotation marks and citations and perhaps emphasizing some words not emphasized in the original. You can do so and then add a second parenthetical at the end of your citation. The options include these:

- (emphasis added)
- (alteration in original)
- (citation omitted)
- (emphasis omitted)

19: At this writing, there is no easy way to insert non-breaking spaces in Google Docs.

20: Again, there is no way to do this in Google Docs unless you install an Add-on called *Show*.

21: This is the way it looked on my Mac in the version of Word where I took this screenshot. Windows and other versions of Word might look different.

22: There is much guidance on using Autocorrect in Word on the internet. You should be able to find a video to see how it's done. Again, Google Docs disappoints here, making it difficult to set up an automated replacement.

- (internal quotation marks omitted)
- (footnote omitted)

27.4 Capitalization

Do not capitlize the word 'court,' unless you are referring to one of the following three things:

- You are referring to the U.S. Supreme Court.
- You are referring to another jurisdiction's court of last resort.
- You are addressing or referring to the court to which you are directing your text. In other words, in a brief or letter to a court, you refer to that court as 'the Court.'

Do not capitalize job titles unless they immediately precede a person's name.

Good: Daniel Snyder is chief executive officer and president of SDS.

Not: Daniel Snyder is Chief Executive Officer and President of SDS.

27.5 Abbreviations of names

It is not necessary to announce an abbreviation, acronym, or initialism formed from a name or term in your memorandum if the abbreviation is obvious.

- **Good:** Snyder Corporation is the parent corporation of Snyder Distribution Systems ("SDS"). Chris Walker and Walker Company have sued SDS and Snyder Corp. Mr. Walker and Walker Co. allege that SDS and Snyder Corp. interfered with a contract.
- **NOT Good:** Snyder Corporation ("Snyder Corp.") is the parent corporation of Snyder Distribution Systems ("SDS"). Chris Walker ("Mr. Walker") and Walker Company ("Walker Co.") have sued SDS. Mr. Walker and Walker Co. allege that SDS interfered with a contract.

27.6 Common punctuation problems

This section is full of advice about things to get right or avoid.

Spaces between sentences and other items

Use consistent spacing between sentences. How many spaces between sentences? One or two? I prefer one with proportionally spaced fonts,[23] but two is fine, too. But whatever you choose, be consistent! See Redbook § 4.12(b).

23: *See* Bryan A. Garner, *The Redbook* § 4.12 (4th ed. 2018).

Use non-breaking spaces after list-item designators. Otherwise, the list-item designator can become separated from the first word of the item when the line breaks after the designator. This is hard on the reader. Fix

it by putting a non-breaking space between the designator and the word. Do NOT attempt to fix this by manually increasing the number of spaces before the designator, because if you later edit the sentence, it may make an even worse mess.[24] .

24: *See* Bryan A. Garner, *The Redbook* § 4.13 (4th ed. 2018) (referring to 'hard spaces').

Marking phrasal adjectives with hyphens

Mark phrasal adjectives with hyphens. Bryan Garner notes that a "phrase functioning as an adjective in front of a noun . . . should normally be hyphenated."[25] In the following example, note in the first instance that 'common' is an adjective modifying 'law' where no hyphen is required; in the second, 'common-law' is a phrasal adjective modifying 'marriage,' and a hyphen is thus required.[26]

25: Bryan A. Garner, *The Redbook* § 162(a) (4th ed. 2018).

26: See *id.* § 162 for more explanation and many examples.

> Our client is not married under the common law. A common-law marriage requires marital intent from the putative spouses and belief in the community that they are married.

Joining sentences and clauses with commas and semi-colons

You will often want to string two or more clauses together. How you do it depends on whether the clauses are independent or dependent. See Section 26.2 for an explanation of the differences. If you have two adjacent independent clauses (complete sentences) that are closely related in subject, you may string them together either with a comma and a conjunction or with a semi-colon, in the latter case, with or without a conjunction.

If you have two verb clauses with the same subject, the second is likely dependent, and you should join them with a conjunction and no comma. Of course, if you have three or more such clauses, then you have a series and should join them according to the rules in the next subsection.

Stringing two complete sentences together with no punctuation is an error, called a 'run-on sentence' by some. Stringing two complete sentences together with a comma only is an error, called a 'comma splice' by some. You *may*, however, join two closely related sentences with a semi-colon without any conjunction.

- Good
  - Defendant is a subsidiary of Snyder Corp., and Mr. Snyder owns sixty-five percent of the shares of Snyder Corp.
  - Defendant is a subsidiary of Snyder Corp.; Snyder Corp. owns seventy-five percent of the shares of defendant.
  - Mr. Snyder is president of Snyder Corp. and owns sixty-five percent of its shares.
  - Mr. Snyder is president of Snyder Corp., is a member of its board of directors, and owns 100% of its shares. (See the next section for details.)
- NOT Good

- Defendant is a subsidiary of Snyder Corp. and Mr. Snyder owns sixty-five percent of the shares of Snyder Corp. (Run-on sentence.)
- Defendant is a subsidiary of Snyder Corp., Mr. Snyder owns sixty-five percent of the shares of Snyder Corp. (Comma splice.)
- Mr. Snyder is president of Snyder Corp., and owns sixty-five percent of its shares. (No comma needed to join the second, dependent clause.)
- Mr. Snyder is president of Snyder Corp. is a member of its board of directors and owns 100% of its shares. (List of three or more things; follow advice in next section.)

Commas and semi-colons in lists and series

In a series of three or more items, you should set the last item off with a comma before the conjunction. This is sometimes erroneously called the 'Oxford comma' but is properly known as the 'serial comma.' We use it because not using it can occasionally result in ambiguity.

Following this rule can be tricky when two items together form one item in a series. Where the elements in a series are long phrases, especially ones that have commas within them, it is better to set the elements off with semi-colons.

- Good
  - I read the complaint, the answer, and the motion.
  - I brought the rope and the block and tackle. ('Block and tackle' is a single item.)
- NOT good
  - I read the complaint, the answer and the motion.
- OK
  - Defendant offered plaintiff the car, which had previously been totaled, $1000 in cash, payable in 200 payments over five months, and a release of liability, which defendant had downloaded from the Internet.
- Better
  - Defendant offered plaintiff the car, which had previously been totaled; $1000 in cash, payable in $200 payments over five months; and a release of liability, which defendant had downloaded from the Internet.

Colons

Generally, use a colon only to end a complete sentence that introduces a list or that describes the clause that follows it. Do not use it to introduce a list that is necessary for the completion of the sentence. Some folks do use it in the latter case, but only if the items in the list are enumerated. There are also mixed views about whether you must capitalize the first word after the colon, with some saying it's necessary only if what follows the colon is a complete sentence.

- Good
  - To invoke this equitable claim, the plaintiff must show two elements: (1) The sole or dominant shareholder had control of the enterprise; and (2) the dominant shareholder did not maintain corporate formalities.
  - To invoke this equitable claim, a plaintiff must show that (1) the sole or dominant shareholder had control . . . ; and (2) the dominant shareholder . . .
- NOT Good
  - To invoke this equitable claim, a plaintiff must show that: the sole or dominant shareholder had control . . . , and the dominant shareholder . . .
- OK
  - To invoke this equitable claim, a plaintiff must show that: (1) the sole or dominant shareholder had control . . . , and (2) the dominant shareholder . . .

Indicating possessives with an apostrophe

When indicating a possessive, you should add an apostrophe and a lower-case 's,' unless the possessive is pronounced without an additional syllable.

- Good
  - SDS's initial capitalization was $3,000,000.
  - The Snyders' ownership interests in Snyder Corp. exceed ninety percent. (Assuming you pronounce it 'SNEYE-derz.')
  - Mr. Jones's ownership interests in Snyder Corp. is less than five percent. (Assuming you pronounce it 'JON-ses.')
- NOT good
  - SDS' initial capitalization was $3,000,000.)
  - The Snyders's ownership interests in Snyder Corp. exceed ninety percent. (Unless you pronounce it 'SNEYE-derz-ez.')

27.7 Citation headaches

There are many common problems in the citations that lawyers use every day. You will learn about some of them during your 1L year. Many of you will serve on a journal in your 2L and 3L years, and you will learn even more about common citation problems. Focus first on this simple mantra:

Weight? Date? Can I locate?

This will keep you mostly in the good.

Appendix: Leung scenario and responses

28

Link to book TOC

This appendix provides a simple(-ish) hypothetical problem and shows examples of the ways that real law students, writing in the first three or four weeks of their law-school experience, responded to it. The students whose work appears here are among those credited on page iv. I have used their writing as they submitted it, except to change some names and correct a few minor mechanical and citation errors so they won't distract the reader here. Students granted me an express license to use their work in this fashion. These student responses represent very good work for this stage of the students' careers, but none of them is perfect. See the marginal comments with questions and suggestions for the authors about how their efforts might be improved.

28.1 The hypothetical

You are Associate Smith, an attorney in Minneapolis at Dougie & Nell. You receive the following email from the partner who supervises you, a securities lawyer named Bill Leung.

FROM:	Xiaobao "Bill" Leung <XLeung@DougieNell.com>
TO:	Associate Smith <ASmith@DougieNell.com>
SUBJECT:	Need you to look into something for me
DATE:	August 1, 2020, 10:15

Associate,

I need you to research a question for me. I was at the Art Boosters' Ball two weeks ago, and Nur Abdelahi came up to me to talk about a painting she bought almost exactly two years ago. Neither the firm nor I have ever done any legal work for Nur, but she knows that I'm a lawyer interested in art. She learned immediately after buying it from Shy Hulud that it is a forgery. She didn't make a fuss at the time, because she had other deals that Shy was involved in, and she just hasn't gotten around to suing Mr. Hulud.

We were chatting over the hors d'oeuvres and champagne toward the end of the evening, and the music in the background was pretty loud. I told her that art is not my area of specialty, and that I prefer to speak to clients in the office, rather than at parties, etc. But she was insistent, she's a big donor to the ball, and as an organizer of it, I wanted to keep her happy.

She wanted to know—with the two-year anniversary of the purchase coming up—whether she needs to be worried about the statute of limitations on her claim. I told her that sales under the UCC have a four-year statute of limitations. She was very happy with my answer and said she'd relax and take her time bringing a claim. I realize now that my advice may have been wrong.

> I need to know what the odds are that I established an attorney-client relationship with Nur. Please get back to me about this as soon as you can.
>
> -Bill

Imagine that as you read this email, you are aware that a statute of limitations is a statute that limits the time after an event in which parties can bring a claim in court, and the UCC or uniform commercial code is a Minnesota statute that governs contracts for the sale of most tangible goods, though you can't remember if it covers sales of art works. You recall that parties to a written purchase contract can shorten the statute of limitations by contract between them. You know that an attorney-client relationship is a prerequisite to an attorney malpractice claim, but you don't remember the rule for attorney malpractice in Minnesota.

Probably the first thing you would want to do is clarify the question Bill is asking and make sure that's all he wants you to do, at least for now. For detailed guidance on how to do that, you might review Chapter 3. Bill's question could be limited to the last paragraph. He may have given you more factual detail than you needed to answer that question, so there is at least a chance he wants you to research the other potential matters here. As you begin work on his request, you may want to ask Bill to confirm your understanding.

28.2 Confirmation emails

Here are two students' efforts to clarify and confirm the question. You may wish to evaluate their responses according to the standards in Chapter 3 (stating legal questions) and Chapter 18 (emails).

Student 1's confirmation

FROM:	Associate Smith <ASmith@DougieNell.com>
TO:	Xiaobao "Bill" Leung <XLeung@DougieNell.com>
SUBJECT:	Re: Need you to look into something for me
DATE:	August 1, 2020, 13:01

Mr. Leung,

I want to confirm the legal question you are asking me to research. Under Minnesota rules, can an attorney-client relationship be established through conversation that was not conducted in a professional legal setting?

Additional concerns I have regarding the circumstances are:

- Does the Uniform Commercial Code (UCC) Law in Minnesota cover sales of art work?
- Did Shy Halud and Nur Abdelahi have a written purchase contract for the sale?
- If an attorney-client relationship was established, could this result in an attorney malpractice claim?

Please let me know if I framed your legal question correctly and if you have any additional questions you want me to research.

Regards,

Associate Smith

Attorney | Duggie & Nell LLC

639 Turner Street | Minneapolis, MN 55111

(612) 468 - 2209 | asmith@dougienell.com

This e-mail may contain confidential or privileged information. If you believe you've received it in error, please notify the sender immediately and delete this message without copying or disclosing it. No waiver of privilege is intended by such an error.

Student 2's confirmation

FROM:	Associate Smith <ASmith@DougieNell.com>
TO:	Xiaobao "Bill" Leung <XLeung@DougieNell.com>
SUBJECT:	Re: Need you to look into something for me
DATE:	August 1, 2020, 13:01

Bill,

I understand you want me to determine whether you established an attorney-client relationship with Nur when you told her about the UCC four-year statute of limitations. Is that correct?

For now, I am putting aside the issue of Nur's statute of limitations question. You do not need me to look into whether sales under the UCC do in fact have a four-year statute of limitations or if the statute of limitations can be shortened by a contract between parties.

If you could confirm that I am on the right track, I would greatly appreciate it.

Thanks,

Associate Smith

Attorney | Duggie & Nell LLC

639 Turner Street | Minneapolis, MN 55111

(612) 468 - 2209 | asmith@dougienell.com

This e-mail may contain confidential or privileged information. If you believe you've received it in error, please notify the sender immediately and delete this message without copying or disclosing it. No waiver of privilege is intended by such an error.

28.3 Simple analyses

Here are two students' efforts to answer the question. You may wish to evaluate their responses according to the standards in Chapter 9 (on analysis generally), Chapter 10 (on writing simple analyses), and Chapter 18 (emails).

Student 3's analysis

FROM:	Associate Smith <ASmith@DougieNell.com>
TO:	Xiaobao "Bill" Leung <XLeung@DougieNell.com>
SUBJECT:	Re: Need you to look into something for me
DATE:	August 2, 2020, 07:12

Mr. Leung:

You previously asked me to assist you in determining whether you may have established an attorney-client relationship with Nur Abdelahi. It is my determination that you most likely did not establish an attorney-client relationship with Ms. Abdelahi.

In Minnesota, an attorney-client relationship may be established under two different theories: a contract theory and a tort theory. However, the facts, as they relate to the matter with Ms. Abdelahi, do not warrant a contract theory evaluation, so I will not be discussing that theory further. In Minnesota, under a tort theory, an attorney-client relationship is established "whenever an individual . . . receives legal advice from an attorney in circumstances in which a reasonable person would rely on such advice." *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 693 n.4 (Minn. 1980). However, there are several factors to determine the circumstances in which someone would reasonably rely on the advice, such as meeting location, prior relationship/familiarity, and the actions of the attorney. For instance, in *Togstad v. Vesely, Otto, Miller & Keefe*, the potential client set up an official meeting with the attorney to determine whether her potential suit had merit. They met in the attorney's law office, they had no prior familiarity, and the attorney asked questions and took notes. At no point in the meeting did the attorney mention he was not a specialist in the matter of the potential client's suit, and he even stated that he did not believe she had a case. The court found that there was an attorney-client relationship established in this matter, and it was reasonable for the potential client to rely on the advice of the attorney at the time.

The balance of the sentences in this paragraph probably all need citations after them.

Contrasting that case with the facts of your interaction with Ms. Abdelahi using the same factors, it would be likely that you would not be found to have established an attorney-client relationship. Your meeting took place in a social setting that was not planned with the intention of discussing legal matters, whereas the previous case did. In the previous case, the attorney and potential client had no prior familiarity and were meeting under professional pretenses, whereas you were at a social event and talked with Ms. Abdelahi over champagne. Finally, unlike the attorney in the case mentioned, you specifically told Ms. Abdelahi that you only liked to meet with clients in your office and that you were not a specialist in this area of the law. Under a tort theory, it would most likely not be reasonable for Ms. Abdelahi to rely on the advice you provided her at the event. Since it would most likely not be reasonable for her to rely on the advice you provided, it is most likely the case that you did not establish an attorney-client relationship with Ms. Abdelahi.

However, I would recommend taking a few precautionary actions to clarify any potential issues with Ms. Abdelahi that could arise from this situation. First, I would recommend researching the issue of the statute of limitations that you provided an answer for at the party to clarify whether your advice was sound or not. Considering your prior relationship with Ms. Abdelahi, it seems like the best thing to

do given that you two are friendly. I am more than happy to conduct that research for you, if you would like. Next, I would recommend you contact Ms. Abdelahi to further remind her that your specialty is not in that area of the law and go as far as to recommend an attorney that she could consult for better advice. This would further clarify that you do not consider her a client and she should not rely exclusively on your advice, especially considering that "[u]nder the Minnesota Rules of Professional Conduct, it is the responsibility of a lawyer to clearly communicate the formation of the attorney-client relationship, including identifying the scope of representation and the basis for any fees charged." *In re Paul W. Abbott, Co. Inc.*, 767 N.W.2d 14, 19 (Minn. 2009). Given your concern about this matter, I would recommend prioritizing these actions.

I hope I provided a clear enough answer to your question. Please let me know if you have any further concerns or questions.

Sincerely,

Associate Smith

Attorney | Duggie & Nell LLC

639 Turner Street | Minneapolis, MN 55111

(612) 468 - 2209 | asmith@dougienell.com

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Student 4's analysis

This student was instructed not to give full citations to cases, only a short name and a page number.

FROM:	Associate Smith <ASmith@DougieNell.com>
TO:	Xiaobao "Bill" Leung <XLeung@DougieNell.com>
SUBJECT:	Re: Need you to look into something for me
DATE:	August 2, 2020, 07:12

Mr. Leung:

In an earlier email you asked me to look into whether or not you created an attorney-client relationship with Ms. Nur Abdelahi during your conversation at the Art Booster's Ball. After researching the subject, I have found that a court will probably conclude that you did not create an attorney-client relationship with Ms. Abdelahi.

In Minnesota, an attorney-client relationship is formed in one of two ways, commonly known as the contract theory and the tort theory. In the contract theory, an attorney-client relationship is formed when an attorney "either expressly or impliedly promised or agreed to represent" the client. *Ronningen* at 422. Since you did not speak with Ms. Abdelahi about representing her in any future legal cases, there is no need to discuss the contract theory in any further detail. In the tort theory, an attorney-client relationship is formed when an individual receives legal advice from an attorney in circumstances in which a reasonable person would rely on such advice. *Togstad* at 693 n.4. When deciding whether these circumstances are ones in which

a reasonable person would rely on an attorney's advice, courts have typically looked at the setting of the meeting between the attorney and potential client and the substance of the conversation at this meeting.

Courts have typically held that the setting in which the discussion occurs between the attorney and potential client must be a formal setting in order for there to be an attorney-client relationship. In *Ronningen v. Hertogs*, the plaintiff sued the attorney for negligence in prosecuting a tort claim, stating that an attorney-client relationship was formed when the attorney met the plaintiff at the plaintiff's farm. *Ronningen* at 422. The setting of the meeting was not formal, and the court held that there was not an attorney-client relationship formed. In *Togstad v. Vesely, Otto, Miller & Keefe*, the plaintiff sued the attorneys for incorrect legal advice given during a meeting at the attorneys' law office. *Togstad* at 690. Due to the formality of the meeting's setting creating a circumstance in which a reasonable person would rely on an attorney's advice, the court found that an attorney-client relationship had been formed.

Also, courts have typically held that the substance of the conversation between the attorney and potential client plays a role in whether an attorney-client relationship is formed. In *Ronningen*, although legal advice was sought and given, the attorney had told the plaintiff that the conversation was occurring due to his representing another client and the plaintiff had told the attorney that he may be interested in retaining the attorney at a later date. *Ronningen* at 422. Since the attorney and the client were clear in expressing the reasons behind this conversation, the court held that this meeting did not create an attorney-client relationship. Similarly, in the case of *In re Paul W. Abbott Company, Inc.*, since the attorney clearly told the plaintiff that he would not be able to answer her legal questions, the court held that there was no attorney-client relationship formed in this meeting. *In re. Paul W. Abbot* at 16. Alternatively, in *Togstad*, the attorney gave advice without any caveats. The attorney did not tell the plaintiff that their firm did not have expertise in this area of law and did not advise her to meet with another attorney. *Togstad* at 690. Due to this lack of information given to the plaintiff, the court ruled that an attorney-client relationship had been formed since the client had not been informed that this advice was not advice she should rely on.

In your case, the conversation in which you gave Ms. Abdelahi advice occurred at the Art Boosters' Ball, an informal setting for a legal conversation. You, like the attorney in *Ronningen*, gave legal advice in an informal setting where it is not common for a reasonable person to rely on this advice. Also, before giving any advice to Ms. Abdelahi, you cautioned her that you prefer to give advice in your office and that art law was not within your area of expertise. These are very similar to factors discussed in *Togstad*, where it was decided that since the attorney in this case did not give such caveats to his client, an attorney-client relationship was created. Since you did warn Ms. Abdelahi, the precedent set in *Togstad* should apply and show that you did not create an attorney-client relationship.

However, it could be argued that since you have had a personal relationship during your friendship with Ms. Abdelahi and since she had prior knowledge of your legal career when she approached you for advice, she may believe that she could rely on your advice. Because she knew about your career and you went ahead and gave

her advice, regardless of your wariness to do so, it could be argued that this creates a situation where a reasonable person could rely on your advice.

But given the precedents set in the prior cases discussed above, a court will probably conclude that an attorney-client relationship was not formed from your conversation with Ms. Abdelahi.

Please let me know if you have any questions about this topic or if you have additional information about this case that you would like me to look into.

Sincerely,

Associate Smith

Attorney | Duggie & Nell LLC

639 Turner Street | Minneapolis, MN 55111

(612) 468 - 2209 | asmith@dougienell.com

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Appendix: Fair-use problem & student responses

29

Link to book TOC

This appendix provides two stages of a hypothetical problem and shows examples of the ways that real law students, writing in the first semester of their law-school experience, responded to it. This problem arose under U.S. Copyright law, and particularly the fair-use doctrine, which permits someone other than the copyright owner to use a copyright work in certain ways if the secondary user satisfies a factor-balancing test. This text introduced the statutory test for fair use in Section 4.3 and in Section 14.1, starting at page 94.

The project proceeded in two stages. In phase one, the students received a set of facts about the client, Ms. Connor. They wrote a memo making certain assumptions. Those facts and two students' responses to the assignment appear in Section 29.1. In phase two, students received feedback on their phase-one efforts and additional information, some relating to the original issue and some about another issue. It is not uncommon for the ground to move under a lawyer's feet some, forcing a reassessment of a situation in response to new facts. Two other student's responses appear in Section 29.2.[1]

1: The students whose work appears here are among those credited on iv. I have used their writing as they submitted it, except to change some names and correct a few minor mechanical and citation errors so they won't distract the reader here. Students granted me an express license to use their work in this fashion. These student responses represent very good work for this stage of the students' careers, but none of them is perfect.

29.1 Fair-use problem, phase I

In this phase of the problem, students received some facts about the client, Ms. Sarah Connor, and a recent lecture series she has been offering in a local park. In the lecture series, for which she charges a small admission fee, Ms. Connor shows clips of movie comedies and then explains the comedic techniques used in them. She has received a cease-and-desist letter from Simba & Company Production, Inc., which claims that it owns copyrights in these films and that Ms. Connor's use of them is copyright infringement. The students' supervising attorney, Mr. Swagger, asked the students to assess whether Ms. Connor's use of the film clips is a *fair use* under the copyright law.[2] At this stage, Mr. Swagger asked the students to make assumptions about three of the four fair-use factors, so the assignment referred only to the first factor.

2: You can get an introduction to the rule for fair use and how it works in Section 4.3 and in Section 14.1, starting at page 94.

Student 5's memo

Student 5's response to Phase I of the Sarah Connor problem begins on the next page. I have preserved the formatting the student's submission used, based on a memo template that the instructor provided (which is why student submissions in this chapter are formatted so similarly). In the right margin of the memo are blue circled reference numbers that other parts of this text make reference to.

Scorsese Tarantino & Associates

22 Jump Street
Suite Pennsylvania 6-5000
Bluebonnet, TX 99766

MEMORANDUM

ATTORNEY-CLIENT PRIVILEGE/ATTORNEY WORK PRODUCT

Date: October 10, 2020

To: Robert "Bob" Swagger

From: Student 5

Subject: First fair-use factor analysis — Sarah Connor

This memorandum determines whether a fair-use defense applies to our client, Sarah Connor, in her unauthorized use of copyrighted material. In doing so, we were asked to only analyze the first of four factors that determine whether a secondary use of copyrighted material qualifies as fair use and then apply that to the facts of Ms. Connor's situation. 1

QUESTION PRESENTED 2

Sarah Connor is accused of copyright infringement by Simba & Co. over the unauthorized use of clips from several movies in a monthly presentation she puts on in her local park. In her event, Ms. Connor shows clips from several comedy movies in an attempt to analyze different comedic techniques used by interjecting between clips and discussing with the event's attendees. Ms. Connor did not receive permission from Simba & Co. to show or use the clips from their movies. Under federal copyright law, which permits the unauthorized use of copyrighted material through the evaluation of four factors to determine whether the unauthorized use qualifies as fair use, will Ms. Connor's use of the clips in her event qualify as fair use?

BRIEF ANSWER 3

Yes. Ms. Connor's use of the movie clips in her event will qualify as fair use, because—assuming the third and fourth factors also weigh in her favor—the first fair-use factor will weigh in her favor. Even when the secondary use of copyrighted work is considered commercial, the first fair-use factor may still apply if the secondary use is transformative of the original and the user acts in good faith. Ms. Connor's use of the clips in her event had a very limited commercial purpose and was transformative of the original work; Ms. Connor also acted in good faith. This makes the first factor weigh in her favor and allows fair use to apply.

4

FACTUAL BACKGROUND

Sarah Connor puts on a monthly event in her local park on the use of different comedy techniques in movies by displaying a compilation of clips from different comedy movies and discussing them with the audience. Some of the movies Ms. Connor gathered clips from are copyrighted by Simba & Co. Production, Inc. (Simba), which claims Ms. Connor infringed on its copyrights because she did not receive licensed permission to use the clips from its movies.

Ms. Connor, a drama teacher at Bluebonnet High School and former aspiring actress, claims she grew restless of just teaching drama and wanted to combine her passion for comedy movies with her passion for teaching. In May 2017, Ms. Connor began hosting Comedy in the Park, an event in a local park that showed clips from several comedy movies and discussed different comedy techniques used in each clip. To put on the event, Ms. Connor filed the necessary paperwork and obtained permits and licenses from the city of Bluebonnet to hold the event in the park. She also purchased access to a premium editing software that allowed her to create a compilation of movie clips to show at her event. It is currently not known how Ms. Connor obtained access to the movies she took clips from and whether she purchased, rented, or how she otherwise accessed the movies; this fact is still undetermined and would need further clarification.

At the event, Ms. Connor charged ten dollars per ticket, which was required to attend the event. Ms. Connor claims this was done to cover the costs of putting on the event and to limit the people attending to those interested in the subject. At the start of the event, she introduced herself and explained the purpose of the event, which she claimed was to create a welcoming environment where she and the attendees could discuss different comedy techniques employed in comedy movies. Then, Ms. Connor would show a compilation of movie clips, usually pausing between each clip to discuss the techniques used with the audience.

On or about August 17, 2020, a representative from Simba attended Ms. Connor's event. The Simba representative witnessed Ms. Connor identify herself as the event's organizer and noticed Ms. Connor's compilation contained clips from several movies copyrighted by Simba. The representative notified her company of the event and—since no record existed of licensed permission from Simba for Ms. Connor to use the clips—Ms. Connor received a cease-and-desist demand from Simba, dated September 13, 2020, pertaining to the use of

its copyrighted material in her event. Ms. Connor retained our firm as counsel and no further legal action has taken place, although Simba maintains it may pursue further action if Ms. Connor does not comply with its demand.

DISCUSSION

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In this memo, I will only discuss the relevant factors, sub-factors, and facts as they pertain to the first fair-use factor, as instructed. The other three factors are not discussed due to your assumption that the second factor would not weigh in favor of Ms. Connor and that if the first factor weighs in her favor, then the third and fourth would also weigh in her favor.

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Ms. Connor's use of the copyrighted work qualifies as fair use, because the first factor, and consequently the third and fourth factors, will weigh in her favor. The first factor of fair use requires the deliberation of three main sub-factors: transformativeness of the secondary use, commercial or non-profit purpose, and the good or bad faith of the secondary user. *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 478–79 (2d Cir. 2004). These three sub-factors are required to determine the character and purpose of the secondary use and how they alter the original copyrighted work. Regarding the transformativeness of the secondary use, this weighs in favor of Ms. Connor due to her edit of different clips into one coherent project to produce a new interpretation. Next, on the commercial or non-profit nature of the secondary use, Ms. Connor's commercial nature of the event would not weigh against her because she did not solely intend for the event to be a profit-driven mechanism and merely charged to recoup costs. Finally, Ms. Connor acted in good faith through her attempts to hold the event in a legitimate fashion or, at the very least, she did not act in bad faith by unknowingly using copyrighted material in an unauthorized manner. Therefore, the three sub-factors that determine whether the first factor of fair use is met weigh in favor of Ms. Connor and will make her secondary use qualify as fair use.

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I. The secondary use of the original work requires transformativeness in the new work's purpose and character. Ms. Connor's editing and arranging of clips into a new presentation elicited new interpretations and made her new work transformative.

Ms. Connor claims her motivation behind holding the event is to share and discuss the different comedic techniques used in different comedy movies. This makes Ms. Connor's secondary use of the clips transformative of the original work due to the editing of the clips

compiled from the different comedy movies to facilitate a critical analysis and discussion of comedy techniques used. For a secondary use to have transformativeness, the Court stated that it "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message" to draw a clear distinction between the original work and the secondary use. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). The transformativeness of a secondary use should allow the users of that new work to interpret or draw a different understanding than the original intended interpretation of the original work. *Id.* For example, in *NXIVM Corp. v. Ross Institute*, the unauthorized use of the original work was still considered a transformative work because it added a critical analysis of the original work, markedly changing the original interpretation intended by the copyright owner. 364 F.3d at 479.

Therefore, the use of the clips from comedy movies in Ms. Connor's analysis of different comedic techniques is a transformative use of the original work, because it extracts a different interpretation from the original works than were originally intended by their copyright owner. The copyright owner intends for the audience to consume these comedy movies as a form of entertainment. However, Ms. Connor intends for the audience to critically analyze the compilation of these clips through interjections between clips to determine which comedic technique is used and for what purpose or effect.

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Even though she is using the same material as the comedy movies and repackaging them for an audience, the reason behind that repackaging is what separates Ms. Connor's use from the secondary use employed in a similar case, *Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.*, 342 F.3d 191, 195 (3rd Cir. 2003), where the secondary user repackaged the original work into a new form for the express purpose of substituting that original work and it's intended interpretation. In that case, the court determined the defendant's repackaging of movie clips into short previews was not transformative, since it merely attempted to substitute the original movie trailers they did not have permission to use on their website. *Id.* This is markedly similar to Ms. Connor's case, because they both focus on the use of the same content, where the comedy movie obviously already contained the used clip, and Ms. Connor's presentation uses that clip in a repackaged manner. However, the difference between them is incredibly important, because Ms. Connor never intended for her new secondary use of the original work to substitute for the original work where the clip is from. This made Ms. Connor's secondary use

transformative whereas the use in *Video Pipeline* was not. *Id.* Therefore, Ms. Connor's secondary use allows the first fair-use factor to weigh in her favor because the secondary use was transformative in eliciting a different interpretation and intending the audience to consume the material in a new manner.

II. The secondary use of an original work is either for commercial or non-profit purposes.

A. Ms. Connor's secondary use is commercial due to her charging for admission to her event and the exclusion of those who did not pay for entry, but it was not the primary motivation or purpose of the event, so it would not weigh against her.

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Ms. Connor's use of the secondary material is commercial, because she charged for entry into the event that used the original work and excluded those who did not pay the entry fee. However, in *Campbell*, the Court made it clear that the secondary use of an original work classifying as commercial does not necessitate that the first factor weighs against the secondary user, because almost all instances of secondary use would require some form of commercial use and is common in uses such as news reporting, literary criticism, and research. *Campbell*, 510 U.S. at 584. Secondary users and their ability to derive commercial benefits from the secondary use of a copyrighted work is exemplified in *Triangle Publications v. Knight-Ridder Newspapers,* 626 F.2d 1171, 1173 (5th Cir. 1980), where the producers of a rival television guide booklet used their direct competitor's product in advertising comparing the two products. Thus, even where the entire purpose of the secondary use was for a business accruing commercial benefits, the court still found the first factor could weigh in their favor, or at least not entirely cause it to weigh against the secondary user, due to the outcome of the other sub-factors. *Id.*

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However, Ms. Connor claims her hosting the event was done in attempt to foster an educational and welcoming environment where people came to learn about the different comedic techniques employed in different comedy movies. She charged ten dollars per ticket for entry into the event, only charging enough to break even and recoup the costs of putting on the event. At most, she only profited enough to buy a celebratory bottle of wine. Thus, her secondary use was not even intended to solely profit on the secondary use of the

original works, but only to cover the cost of putting on the event with the ultimate purpose of teaching comedic techniques.

Furthermore, in *Triangle Publications,* where the court determined the first factor weighed in favor of the secondary user, the secondary use itself was entirely for commercial gain in competing directly against the original work. *Id. at* 1178. Therefore, Ms. Connor's attempt to profit from the event should not disqualify her secondary use from a fair-use defense, because, as *Triangle Publications* proves, the secondary use can attempt to solely profit from the use while still qualifying as fair use of an original work. *Id.* The commercialism of a secondary use of a copyrighted work can still weigh in favor of the secondary user even if the use is solely for commercial gain. *Id.* Ms. Connor's limited commercial gain of charging an entry fee to cover the costs for her event would not on its own cause the first factor to weigh against her fair-use defense and may actually weigh in her favor due to her attempt not to generate a copious profit from the secondary use.

B. The secondary use of the clips in Ms. Connor's event was conducted in good faith and she did not deliberately attempt to violate rights of copyright owner.

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* * *

Ms. Connor's secondary use of the clips in her event is sufficient under the first fair-use factor and allows it to weigh in her favor, making her use of the copyrighted work qualify as fair use. The sub-factors of this first factor are how the transformativeness of the secondary use compares to the original work, whether the secondary use is for commercial or non-profit educational purposes, and if the secondary user acted in good or bad faith. First, Ms. Connor's secondary use is transformative of the original work by repackaging clips from comedy movies into a presentation which elicits a new interpretation from the audience coupled with critical analysis of the comedic techniques used through interjected discussions. This makes her use of the copyrighted work a completely new work and constitutes fair use. Next, her use is commercial because of the tickets she sells for entry into her event, but this is only for the purposes of covering costs of the event and not for the purpose of making a copious profit on the secondary use in her event. The commercial nature of her secondary use would not cause the first factor to weigh against her and might

cause it to weigh in her favor since the use was not solely for commercial gain and was limited in its intended profits. Finally, Ms. Connor's clear act of good faith in obtaining the necessary permits to host the event and purchase of access to an editing software for her clip compilation would lead to the first factor to weigh in her favor, or at the very least not cause it to weigh against her due to her lack of bad faith by unknowingly using the clips in an unauthorized manner. To definitively determine whether she acted in good faith, we would still need to determine how she obtained access to the movies she retrieved the clips from. However, the combination of all three of these sub-factors is enough to determine that, when applied to Ms. Connor's secondary use, the first factor of a fair-use defense would weigh in her favor. Therefore, after determining the first factor weighs in favor of Ms. Connor, we can conclude that her secondary use qualifies as fair use under § 107.

CONCLUSION

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Ms. Connor's use of the movie clips in her event will qualify as fair use, because the first fair-use factor—along with the third and fourth factors–will weigh in her favor. Before proceeding with any response to Simba & Co.'s letter, it is recommended that the manner in which Ms. Connor gained access to the movies used in her event is determined. Then, in responding to Simba & Co.'s cease-and-desist demand, Ms. Connor and her counsel should assert the use of the movie clips in question qualify as fair-use of Simba's copyrighted material, while also clearly articulating she had no intention of violating Simba's copyright. Moving forward, if Ms. Connor would like to continue hosting this event, she should prepare a statement at the start of the event which clearly states she does not own the rights to the clips shown in the presentation and only intends the fair use of the respective clips. These actions should allow Ms. Connor to declare a fair-use defense from Simba's copyright claims and protect her event from possible future conflicts regarding the use of movie clips in her event.

Student 6's memo

Student 6's response to Phase I of the Sarah Connor problem begins on the next page. If you read it in comparison to Student 5's response, you should note many similarities but also some differences. The choices reflect the students' judgment regarding effective approaches. Though they are of similar quality, each has some strengths that the other lacks.

As with the previous sample, the blue circled reference numbers in the right margin are reference points discussed in other parts of this text.

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MEMORANDUM

ATTORNEY-CLIENT PRIVILEGE/ATTORNEY WORK PRODUCT

Date: October 10, 2020

To: Bob Swagger

From: Student 6

Subject: First Statutory Factor Analysis in re. Ms. Connor

You asked me to look into the fair-use statutory factors of copyright infringement regarding Ms. Connor's case. As per your instructions, I have specifically researched the first factor and determined if this factor would weigh in favor of fair use to predict whether Ms. Connor's lecture series will be covered under the fair-use doctrine.

QUESTION PRESENTED

Ms. Connor has been using clips from popular movies during her Comedy in the Park lecture series. In this lecture series, she shows these short movie clips as examples of the comedy techniques she speaks about in the discussions that form most of the lecture series. A representative from Simba & Co. Production, Inc., has informed her that this use of its movie clips is infringing on its copyright. Under Title 17, United States Code, Section 107, which allows for an exception in copyright cases when the secondary use is considered fair use, will Ms. Connor's use of the movie clips fall under the fair-use doctrine?

BRIEF ANSWER

Yes. Ms. Connor will likely be able to prove that her use of the movie clips falls under the fair-use doctrine. In order for a secondary use to be considered fair use, the four statutory factors of fair use need to be weighed together and should weigh in favor of fair use. The first statutory factor, the central factor in this case, partially relies on the transformative nature of the secondary work, which considers whether it adds something substantially new to the original work. Ms. Connor's lecture series is transformative in nature since the discussion portions add significantly to the movie clips, satisfying the first statutory factor. Therefore, since the first, third, and fourth statutory factors will most likely weigh in favor of fair use, Ms. Connor's lecture series will most likely fall under the fair-use doctrine.

FACTUAL BACKGROUND

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In May of 2017, Sarah Connor created a Comedy in the Park lecture series that is held monthly in Durden Park. She created this lecture series to use her passion for movies to educate the public about comedy techniques used in movies. These lectures are two hours long, attended by around twenty-to-thirty people, and include an introduction, the showing of the movie clips, and discussions over the comedic techniques shown in the clips.

Each lecture series usually uses ten to twelve movie clips that are typically between four and eight minutes each. Most of these movie clips are from famous comedic movies, although a few clips are from indie or low-budget films. After playing the clips, Ms. Connor pauses the video and then leads a discussion with the audience about the comedic methods that they were just shown.

Ms. Connor charges $10 per person to attend each lecture and her friend volunteers to sell and check tickets at the entrance. The admission fee was started to help with the overhead cost of running the series, such as buying chairs, video editing software, and the snacks and drinks that she provides at each lecture. Occasionally she will make a small profit from the lecture series, but this rarely occurs.

On September 13, 2020, Michael Johnson, an attorney for Simba & Co. Production, Inc. (SCP), contacted Ms. Connor and demanded that she cease and desist from using their movies in future lectures. Mr. Johnson stated that Ms. Connor infringed upon the SCP copyright by showing clips from their movies and told her that if she did not stop using clips from their movies, they would pursue legal options.

DISCUSSION

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Ms. Connor will likely be able to prove that her Comedy in the Park lecture series is covered by the fair-use doctrine. In order for the fair-use doctrine to apply, the courts take into account four statutory factors which include: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107 (2102). The courts have held that the fair-use doctrine's purpose is to protect the copyright statute while still allowing the courts to exempt the creative actions that the law intended to protect. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994). The Supreme Court has

stated that the court must look at all four statutory factors and weigh them together equally to determine if the individual case falls under the fair-use doctrine. *Id.* at 578.

Although all four statutory factors are considered by the courts to determine if a case is covered by the fair-use doctrine, as per your instructions I will only discuss the first factor of fair use in this memo. I agree with your statement that we may assume that the second factor will not favor fair use and that if the first factor favors fair use, the third and fourth factors will also favor fair use. The first of the four statutory factors in the fair-use doctrine focuses on "the purpose and character of the use." 17 U.S.C. § 107 (2012). The courts have broken down this first factor into three subfactors: the transformative quality of the new work, the commercial aspect of the new work, and the motive behind the secondary use. *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 478–79 (2d. Cir. 2004). Ms. Connor should be able to prove that the first factor favors fair use in her case, since, although the lecture series is somewhat commercial in nature, it is transformative in nature and the use was done in good faith. Therefore, Ms. Connor will likely be able to prove that her lecture series is covered under the fair-use doctrine.

I. Ms. Connor's lecture series is transformative in nature because of the discussion portions of her lectures.

Ms. Connor will likely be able to prove that her lecture series is transformative in nature due to the lecture portions of her lecture series. To determine the transformative quality of the new work, the courts often determine whether the new work "supersede[s] the object of the original creation . . . or instead adds something new, with a further purpose or different character . . . in other words, whether and to what extent the new work is 'transformative.'" *Campbell*, 510 U.S. at 579. The transformative subfactor is not absolutely necessary for fair use, but the courts have often determined that the more transformative the work is, the more likely the fair use doctrine will be applied to the work. *Id.* In *Campbell*, the court found that the secondary use was transformative since "parody, like other comment or criticism, may claim fair use under § 107." *Id.* Similarly, in *NXIVM Corp v. Ross Institute*, the court found that the secondary use was transformative since the original work was only used to support the arguments and give examples for the analysis shown in the secondary use. 364 F.3d at 477. But in *Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.*, 42 F.3d 191, 199 (3d Cir. 2003), the court found that the secondary work was not transformative due to the secondary work only being movie clips without any added criticism.

In the case of Ms. Connor, the lecture series used the movie clips to provide evidence for her discussion. Similar to *NXIVM Corporation*, she used the original work to support her arguments and discussion and like *Campbell,* she used the original work for criticism which is commonly covered by fair use. Although Ms. Connor's case is similar to *Video Pipeline, Inc.,* since they both deal with using movie clips, they have distinct and important differences in that Ms. Connor is adding commentary and criticism to the clips while in *Video Pipeline, Inc.,* they only showed the clips with no added commentary. Therefore, it is likely that Ms. Connor's use of the movie clips will be considered transformative.

II. Ms. Connor's lecture series is commercial in nature because she sold tickets to attendees.

It is likely that Ms. Connor's lecture series will be determined to be commercial in nature due to her selling tickets to the series. The commercial aspect of the new work is not a distinction whether there is commercial gain from the use but instead whether the user is profiting from exploiting the copyrighted original work. *Compaq Comput. Corp. v. Ergonome Inc.*, 387 F.3d 403, 409 (5th Cir. 2004). The courts have often stated that the fact that a new work is used for profit does not necessarily make it any less likely to be fair use than if it were used for educational purposes. *Campbell*, 510 U.S. at 584. Some courts even go so far as to ask, "whether the alleged infringing use was primarily for public benefit or for private commercial gain." *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 922 (2d Cir. 1994). In *Campbell*, the court found that the secondary use was commercial in nature due to the fact that the secondary use could only be obtained by paying money for it. *Campbell*, 510 U.S. at 584.

Similarly, in our case, the mere fact that tickets were sold makes this use likely to be considered commercial in nature. But in many cases, including *Compaq Computer Corp.*, *NXIM Corporation*, and *Triangle*, the courts held that even though the secondary use was commercial in nature, the fair-use doctrine still applied to these cases. Therefore, in our case, although Ms. Connor's lecture series is likely to be considered commercial in nature, it does not rule out the finding of fair use.

Although it is likely that the lecture series will be determined to be commercial in nature, an argument can be made that it is not commercial, since the use is primarily for educational purposes and rarely makes a profit. Courts have often separated secondary

uses that are for educational purposes from those that are commercial. *Id.* Also, in *Super Future Equities, Inc.,* the court determined that the secondary use was not commercial, since the secondary user did not make a profit and found that the fact that the secondary user gained notoriety from the secondary use did not make it commercial in nature. *Super Future Equities, Inc. v. Wells Fargo Bank Minn.*, N.A., 553 F. Supp. 2d 680, 699 (N.D. Tex. 2008). In Ms. Connor's case, since the lecture series was primarily for educational purposes and does not usually make a profit, like in *Super Future Equities, Inc.*, an argument could be made that the work is not commercial in nature. Although this is a possible argument, courts tend to rule that any use that costs money to attend or use is commercial in nature, so the lecture series is likely to be considered commercial in nature.

III. Ms. Connor's lecture series was done in good faith because she was unaware of any possible copyright infringement.

[This section of the student's analysis is redacted for space.]

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Therefore, since Ms. Connor's lecture series is likely to be considered transformative in nature and her actions were in good faith, the first factor of fair use will most likely favor fair use. Although the lecture series is commercial in nature, which weighs against fair use, the other two subfactors weigh in favor of fair use, causing the first factor to be likely to favor fair use.

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CONCLUSION

Ms. Connor's lecture series is likely to be considered fair use. Since the lecture series is transformative in nature and was done in good faith, the first statutory factor of fair use weighs in favor of fair use. As you stated in your previous email, if the first factor weighs in favor of fair use, so will the third and fourth factors. Although the second factor of fair use will likely not weigh in favor of fair use, the other three factors will likely support fair use. Therefore Ms. Connor's lecture series will likely prevail under the fair use doctrine.

29.2 Fair-use problem, phase II

In phase II of this problem, students received some facts about a more recent instance of the lecture sercies Ms. Connor has been putting on. She has received another cease-and-desist letter. This time, Mr. Swagger asked students to reassess the first fair-use factor and also to analyze the third factor, making assumptions about the other two.

Student 7's memo

Student 7's response to Phase II of the Sarah Connor problem begins on the next page. If you read it in comparison to Student 8's response, you should note many similarities but also some differences. The choices reflect the students' judgment regarding effective approaches. Though they are of similar quality, each has some strengths that the other lacks.

As with the previous sample, the blue circled reference numbers in the right margin are reference points discussed in other parts of this text.

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MEMORANDUM

ATTORNEY-CLIENT PRIVILEGE/ATTORNEY WORK PRODUCT

Date: November 17, 2020

To: Bob Swagger

From: Student 7

Subject: Connor copyright matter: November 13 event

You asked me to assess a fair-use defense for Ms. Connor's use of SCP's movies at her November 13 event but only by analyzing the first and third fair-use factors. 1

QUESTION PRESENTED 2

Under Title 17 United States Code, Section 107, which permits the use of copyrighted work for purposes such as criticism, comment, news reporting, and teaching, can a secondary user establish a claim for fair use when they created a video compilation—without making any substantial changes—using movie scenes the copyright owner alleges are the most iconic?

BRIEF ANSWER 3

Most likely, no. A key subfactor of the first fair-use factor is the transformative aspect of the secondary use. Because Ms. Connor's use did not substantially alter or add anything to the original work, she will most likely not be able to prove her use was transformative. The third fair-use factor considers whether the secondary work took the heart of the original. Because Ms. Connor used a substantial amount of allegedly the most iconic scenes, a court would most likely conclude she took the heart of the original movies.

FACTUAL BACKGROUND 4

Our client, Ms. Connor, continued to host a community event called "Comedy in the Park." A SCP representative attended the November 13 event and was concerned with a few changes. Unlike previous events, Ms. Connor did not engage in commentary after each clip. Instead, she told the representative the event "was now mainly for fun." However, Ms. Connor reassured us that she was unable to adequately prepare her commentary for this event because she was focusing on her studies. We should ask for clarification and make sure she intends to keep up the original commentary.

Ms. Connor showed clips from four different movies, three of which were SCP property. The SCP representative alleges Ms. Connor took the most iconic scenes of the movies. Its calculations show that Ms. Connor used 10.4% of *When Harry Met Sally*, 27.8% of *Anchorman*, and 19.3% of *Airplane!* We should conduct our own research to determine whether all these scenes are in fact considered the most iconic.

Ms. Connor increased the price of admission to $15 to cover the increase in overhead costs; Ms. Connor had to purchase more DVDs and is now providing wine as a beverage option, which increased her refreshment budget.

DISCUSSION

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Ms. Connor most likely will not have a strong fair-use defense. In determining fair use, the statute outlines the following factors: (1) purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994). As you requested, we are assuming the second fair-use factor will go for SCP and the fourth fair-use factor for Ms. Connor. Therefore, this memo will address the first and third fair-use factors only, which both weigh against Ms. Connor. On balance, with three of the fair-use factors weighing against Ms. Connor, her secondary use is most likely not a fair use.

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I. Because Ms. Connor's secondary use was not transformative and it was commercial, the first factor will most likely go against fair use even though her use was in good faith.

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The first factor of fair use, purpose and character of the use, 17 U.S.C. § 107 (2012), most likely weighs against Ms. Connor. Courts consider three subfactors: (1) the extent to which the secondary use is transformative; (2) the commercial nature of the use; and (3) the good faith of the secondary user. *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 922-23 (2d Cir. 1994). Ms. Connor's secondary use is not transformative because she did not engage in commentary, it is commercial as the event required a $15 ticket, and Ms. Connor's conduct was most likely in good faith because she purchased DVDs of SCP's movies. A balance of the three subfactors most likely weighs the first factor against Ms. Connor.

A. Ms. Connor's compilation of SCP's movies is most likely not considered transformative because she no longer added commentary.

Ms. Connor's use of SCP's movies is most likely not transformative. Courts consider a use transformative if it "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." *Campbell*, 510 U.S. at 579. The preamble of the fair-use statute lists examples of uses such as comment and teaching to serve as guidelines of the copying courts most commonly found to be fair use. *Id.* at 577-78.

When a secondary user includes quotes from a manual on a website criticizing the creators of the manual, the secondary use is transformative as the user added the quotes "to support their critical analysis." *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 477 (2d Cir. 2004). In *NXIVM*, the secondary user published reports critiquing NXIVM's manual on "Executive Success." *Id.* at 475. The court explained that when the secondary use "fits the description of uses described in § 107, factor one will normally tilt in the defendants' favor." *Id.* at 478. In *NXIVM*, the secondary use was transformative and a fair use. *Id.* at 482.

Conversely, compiling movie trailers and making them available on a website is not a transformative use. *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191, 200 (3d Cir. 2003). In *Video Pipeline*, the secondary user created previews by compiling short excerpts of full-length Disney movies. *Id.* at 199. The court found this did not involve creativity or add anything substantial to Disney's original movies. *Id.* at 200. Overall, the court concluded the secondary use was not fair use. *Id.* at 203.

In Ms. Connor's case, her use of SCP's movies is most likely not transformative. Like the secondary user in *Video Pipeline*, Ms. Connor creates compilations from full-length movies. Originally, Ms. Connor's case was more like *NXIVM* because she was using her compilation to support her commentary of comedy techniques. The November 13 event suggests her purpose has changed from education to entertainment because she no longer adds her commentary after each clip. She mentioned she did not have time to adequately prepare for this event, but we should ask Ms. Connor if she intends to include more commentary at future events. This will help establish if the lack of commentary in November was a unique situation. However, she told the SCP representative that the event "was now mainly for fun." Now Ms. Connor's secondary use resembles more the secondary use in *Video Pipeline* because both secondary users used the video compilations for entertainment. Most likely, a court would conclude Ms. Connor's use did not add anything substantial to SCP's original movies and therefore is not transformative.

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B. Ms. Connor's use is commercial as she sells $15 tickets for audience members to attend her lecture.

Ms. Connor's use is commercial as she receives money from the tickets she sells. The first factor of the fair-use statute considers "whether such use is of a commercial nature or is for nonprofit educational purposes." *Campbell*, 510 U.S. at 577. In *Video Pipeline*, the district court found, and the court of appeals affirmed that because Video Pipeline charged a fee to stream the clips it compiled, the use was commercial. *Video Pipeline, Inc.*, 342 F.3d at 198.

Ms. Connor's secondary use is like *Video Pipeline* because she charged $15 for admission to her event where she showed her video compilations. Ms. Connor said she increased the price of admission because the overhead costs of the event increased. For example, she had to purchase DVDs and wine for the event. However, prior cases do not seem to consider how the secondary user spent the profit from the secondary use. Because she charged $15 for admission to her event, a court will most likely conclude Ms. Connor's use was commercial.

C. Ms. Connor will most likely prove that her use of SCP's films was in good faith because she purchased DVDs of the movies.

Ms. Connor will most likely prevail in proving her secondary use was in good faith. The secondary user's conduct is relevant "at least to the extent that [the secondary user] may knowingly have exploited a purloined work for free that could have been obtained for a fee." *NXIVM Corp.*, 364 F.3d at 475. In *NXIVM*, the manual, which the secondary user copied, contained a copyright notice therefore the court found the secondary user acted in bad faith because he knew his access was unauthorized. *Id.* at 474-75. The court also mentioned that the secondary user could have obtained the manual legally by paying the fee. *Id.* at 475.

Ms. Connor purchased DVDs of the movies to use the editing software and create her compilations. Unlike the secondary user in *NXIVM*, Ms. Connor could assume that because she is paying a fee to obtain the movies she is not exploiting copyrighted works. For this reason, Ms. Connor could most likely show her secondary use was in good faith.

D. On balance, the three subfactors of the first fair-use factor will weigh against Ms. Connor.

Even though a court would most likely find Ms. Connor's secondary use to have been in good faith, the other two subfactors are not in her favor. The more transformative the

secondary work is, the less important the other factors are in finding fair use. *Campbell*, 510 U.S. at 578.

In *Campbell*, the secondary user created a parody of a song by copying "the characteristic opening bass riff" and a line of lyrics. *Id.* at 588. The parody sold a quarter of a million copies, which made the use commercial. *Id.* at 573. The court stated "if . . . the commentary has no critical bearing on the substance or style of the original composition . . . other factors, like the extent of its commerciality, loom larger." *Id.* at 580.

In this case, the three subfactors weigh against Ms. Connor. The analysis in *Campbell* shows the transformative subfactor is the most significant and the commerciality subfactor differs in importance based on how transformative a secondary work is. The *Campbell* court does not explicitly mention good faith, suggesting it is the least important of the three subfactors. Ms. Connor's secondary use is unlike *Campbell* because it lacks any transformative quality. Therefore, the commerciality aspect of her use is more important while the finding of good faith is not enough to change the balance.

* * *

With two of the three subfactors against Ms. Connor, the first factor will most likely go against fair use. You have instructed me to assume the second fair-use factor will weigh in favor of SCP and the fourth fair-use factor will weigh in favor of Ms. Connor. We must analyze the third factor to conclude whether Ms. Connor's use of SCP's movies was fair use.

II. Ms. Connor's sizeable use of the most fundamental scenes of each movie most likely tilts the third factor against her.

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A court will most likely conclude the third factor weighs against fair use. For the third fair-use factor, courts look at the secondary work both qualitatively and quantitatively. *Fuentes v. Mega Media Holdings, Inc.*, No. 09-22979-CIV, 2011 WL 2601356, at *16 (S.D. Fla. June 9, 2011). To determine the qualitative aspect of a secondary use, courts look at whether the secondary user "took . . . the heart" of the original work. *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 564-65 (1985). To determine the quantitative aspect of a secondary use, courts examine "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." *Id.* at 564.

In *Harper & Row*, the editor of *The Nation* published a story he created after anonymously receiving a manuscript of former President Ford's memoir. *Id.* at 543. The court stated the chapters copied verbatim for the article were the "'most interesting and moving parts of the entire manuscript.'" *Id.* at 565. Additionally, the editor's testimony made it clear that "he quoted these passages precisely because they qualitatively embodied Ford's distinctive expression." *Id.* The court concluded the secondary use was not fair use. *Id.* at 569.

In *Iowa State University Research Foundation v. ABC*, 621 F.2d 57, 58 (2nd Cir. 1980), university students produced a film biography of a student who was destined to win a gold medal at the Olympics, and ABC broadcasted portions of the film. The court mentioned that on three different occasions, ABC broadcasted eight percent of the original film, suggesting ABC found this footage "essential or at least of some importance." *Id.* Overall, the court concluded ABC's use was not fair use. *Id.* at 62.

Ms. Connor's secondary use is like *Harper & Row* because she copied the heart of each movie by using the most iconic scenes. However, this conclusion rests solely on SCP's assertion that Ms. Connor used the most iconic scenes. We should do our own research to see if this allegation has merit. Even if we can show the scenes are not necessarily the most iconic, Ms. Connor, like the editor of *The Nation*, intentionally chose these specific scenes. A court will most likely conclude Ms. Connor took the heart of SCP's movies because she purposefully chose those scenes.

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Additionally, the fact that Ms. Connor copied a substantial amount of each movie: 10.4% of *When Harry Met Sally*, 27.8% of *Anchorman*, and 19.3% of *Airplane!* suggests she took the heart of the original works. These percentages are greater than the eight percent in *Iowa State*. Ms. Connor's secondary use differs slightly from *Iowa State* because the quantity is much greater, but it is similar because she specifically chose these scenes suggesting she found them important or iconic. This will be a potential issue for finding fair use; in both *Harper & Row* and *Iowa State*, the courts found there was no fair use.

* * *

Because the scenes Ms. Connor used are allegedly the most iconic scenes of each movie, a court will most likely conclude she used the heart of the movies. Furthermore, she used a substantial amount of each movie. This will most likely tilt the third fair-use factor against Ms. Connor.

III. On balance, the factors of fair use will most likely weigh against Ms. Connor.

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A court is most likely to conclude that Ms. Connor's secondary use is not fair use. In determining fair use, courts will weigh the outcome of each factor against copyright's purpose. *Campbell*, 510 U.S. at 578. The purpose of copyright law is to encourage creativity; when the secondary user does not add any of their own creativity, courts find concluding there is no fair use will not stifle the creativity that the law encourages. *Video Pipeline, Inc.*, 342 F.3d at 198.

Ms. Connor did not substantially alter the original works with her own creativity, which most likely makes the first factor go against fair use. The outcome of the third factor is most likely also against fair use. Not only was Ms. Connor's use not transformative but she also took the heart of the original works. Weighing the third factor against the first factor most likely suggests this was not fair use. Additionally, you asked me to assume the second factor will weigh in favor of SCP and the fourth fair-use factor will weigh in favor of Ms. Connor. Three of the four fair-use factors, including the purpose of the secondary use, go against fair use; a court will most likely conclude Ms. Connor's use was not fair use.

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CONCLUSION

Ms. Connor most likely cannot establish a claim, under 17 U.S.C. § 107, that her secondary use of SCP's movies was fair use. Three of the four fair-use factors most likely weigh against Ms. Connor based on the facts of the November 13 event. We should inform Ms. Connor that she potentially infringed copyright. To mitigate this risk, we could try to come to an agreement with SCP asking them to overlook the November 13 event if Ms. Connor agrees to certain guidelines for future events. In the meantime, Ms. Connor should consider reverting to the original set-up of her event.

Student 8's memo

Student 8's response to Phase II of the Sarah Connor problem begins on the next page. If you read it in comparison to Student 7's response, you should note many similarities but also some differences. The choices reflect the students' judgment regarding effective approaches. Though they are of similar quality, each has some strengths that the other lacks.

As with the previous sample, the blue circled reference numbers in the right margin are reference points discussed in other parts of this text.

Scorsese Tarantino & Associates

22 Jump Street
Suite Pennsylvania 6-5000
Bluebonnet, TX 99766

MEMORANDUM

ATTORNEY-CLIENT PRIVILEGE/ATTORNEY WORK PRODUCT

Date: November 17, 2019, 8:17 PM

To: Bob Swagger <Robert.Swagger@ScorseseTarantino.firm>

From: Student 8

Subject: Connor copyright matter: First and third fair-use factor analysis

This memo analyzes whether Ms. Connor's use on November 13 is likely to prevail as a fair use. It examines her use according to the first and third fair-use factors. I would recommend discussing potential concessions with Ms. Connor and starting settlement negotiations with Simba's counsel. 1

QUESTION PRESENTED 2

Under Federal Copyright law 17 U.S.C. § 107 (2012), which allows secondary users of a copyrighted work an exception for fair use, is the secondary use a fair use when the secondary user charges guests fifteen dollars to view approximately nineteen percent of three copyrighted movies without providing commentary?

BRIEF ANSWER 3

Most likely no. Ms. Connor's secondary use was most likely not a fair use. The first factor examines the purpose and character of the secondary use. *Id.* The third factor examines the quantitative and qualitative substantiality of the copyrighted work used. *Id.* Because Ms. Connor's use was not for educational purposes and used a substantial amount of Simba's movies, she will most likely fail on fair use.

FACTUAL BACKGROUND 4

On November 15, 2019, Ms. Connor received a second letter from Simba demanding that she cease any further screenings of excerpts from Simba's movies in her public lecture series "Comedy at the Park." Ms. Connor would like to continue using clips from Simba's movies as part of the event.

Ms. Connor has hosted "Comedy at the Park" approximately once a month since May 2017. For each event, Ms. Connor had compiled popular movie clips to analyze and

discuss the comedic techniques used to attendees. She had charged guests ten dollars to attend, but had used the money to recoup event costs. She stated she had not, "see[n] the event as a business or as a way to make some spare income." On September 13, she received a letter from Simba demanding she refrain from using its movies in her lectures. Our firm determined her use was a fair use and discussed the matter with Simba's counsel.

On November 13, Ms. Connor hosted another event. Compared to prior events, Ms. Connor charged fifteen dollars per attendee. She stated she used the extra money to purchase DVDs of the movies and refreshments for the event.

Additionally, Ms. Connor only briefly addressed the audience before playing the movie-clip compilation. The compilation used four movies, three of which were Simba's properties. Each clip was a long, unedited, continuous section of the most iconic scene from each movie. The percentages copied from each movie ranged from approximately ten percent to twenty-eight percent. Ms. Connor played on average approximately nineteen percent of each movie.

Furthermore, Ms. Connor did not stop the compilation to analyze the comedic techniques used in each clip. Instead, she only discussed the techniques in one-on-one conversations as guests exited. A majority of attendees did not hear her discussions.

Afterwards, Ms. Connor told a Simba representative that the event, "was now mainly for fun" and that her focus was to, "ensure guests enjoyed themselves."

Simba has threatened a lawsuit against Ms. Connor for violating its copyright.

DISCUSSION

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Ms. Connor will most likely fail on fair use. Under federal copyright law, a fair use of a copyrighted work is not copyright infringement. 17 U.S.C. § 107 (2012). There are four factors used to determine whether a secondary use of a copyrighted work is a fair use: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the quantitative and qualitative substantiality of the use; and (4) the effect of the secondary use on the market. *Id.* You asked me to assume that the second factor will weigh against and the fourth factor will weigh for Ms. Connor. You also asked me to analyze the first and third factors: both will most likely disfavor fair use. On balance, the four factors weigh against fair use.

6

7

I. The first fair-use factor most likely weighs against Ms. Connor.

Ms. Connor's use most likely disfavors a fair-use finding of the first factor. The first fair-use factor examines the "purpose and character of the use," weighing against commercial uses and in favor of nonprofit educational uses. *Id.* Courts have identified three sub-factors composing the first factor: (1) whether the use is "transformative"; (2) whether the use is of a commercial nature; and (3) whether the use is in "good faith." *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 921-25 (2d Cir. 1994). Ms. Connor's use was most likely not transformative, was most likely a commercial use, and was likely in good faith; weighed together the first factor most likely weighs against fair use.

A. Ms. Connor's use did not transform the works.

To begin, Ms. Connor's use most likely did not transform the copyrighted works. A derivative work is transformative if it adds something new to the work, "altering the first with new expression, meaning, or message." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). A transformative work must involve creative effort, "and not merely the facile use of the scissors; or extracts of the essential parts, constituting the chief value of the original work." *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1260 (2d Cir. 1986) (quoting *Folsom v. Marsh*, 9 F.Cas. 342, 345 (C.C.D. Mass. 1841). In *Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.*, the secondary user created "clip-previews," two-minute long sections from movies, hosted on its website. 342 F.3d 191, 195 (3d Cir. 2003). The court found that these previews "involved no new creative ingenuity," but were instead exact copies, strongly finding against a transformative use. *Id.* at 198-99. Additionally, in *Castle Rock Entertainment, Inc. v. Carol Publishing Group., Inc.* the secondary user created a quiz book based on trivia copied from *Seinfeld*. 150 F.3d 132, 141 (2d Cir. 1998). The court found against a transformative use because the book did not serve to educate readers, but instead repackaged *Seinfeld* to entertain readers. *Id.* at 142.

Here, Ms. Connor's use of long, continuous clips of Simba's movies did not change the character or purpose of the original movies. Her situation is very similar to *Video Pipeline* because she merely cut snippets away from the original movies without adding any new creative changes. Additionally, her use is similar to *Castle Rock*'s usage because she rearranged the original works for entertainment and not education. Ms. Connor's use copied Simba's movies verbatim without adding any commentary or discussions to the majority of attendees. Her use essentially fulfilled the movies' entertainment purpose. Therefore, a court would most likely find her use was not transformative.

B. Ms. Connor's use was a commercial use.

Next, Ms. Connor's use was most likely a commercial use. The secondary user's use is commercial if they receive financial gain without fairly reimbursing the copyright holder. *Compaq Comput. Corp. v. Ergonome Inc.*, 387 F.3d 403, 409 (5th Cir. 2004). Courts also recognize a dichotomy between a nonprofit educational use and a commercial use. *American Geophysical*, 60 F.3d at 922. In *Video Pipeline*, the court found that a fee charged to viewers to watch the clip previews constituted a commercial use. 342 F.3d at 198. Additionally in *Maxtone-Graham*, an author copied quotes from interviews with women for a critical essay. 803 F.2d at 1256. Despite the educational purpose for the book, the court held that "even a minimal level of commercial use weighs against a finding of fair use." *Id.* at 1262.

Here, Ms. Connor charged guests fifteen dollars to see her extended movie-clip compilation. Just as in *Video Pipeline*, she charged a fee for viewers to watch the movie clips. Additionally, as in *Maxtone-Graham*, she did not intend to profit from her use. Unlike *Maxtone-Graham,* she was not trying to educate the audience, but to entertain them. Although she used the fees to purchase DVDs and refreshments for the event, her use still had commercial elements. Therefore, a court would most likely find her use was a commercial use.

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C. Ms. Connor's use was likely in good faith.

Continuing, Ms. Connor's use was likely in good faith, although courts have differing interpretations of what constitutes good faith. Courts have interpreted good faith to mean whether the secondary use is for nonprofit educational purposes, *Campbell*, 510 U.S. at 585, whether the secondary user attempted to reimburse the copyright holder, *Super Future Equities, Inc. v. Wells Fargo Bank Minn.*, 553 F. Supp. 2d 680, 697 (N.D. Tex. 2008), or whether the user copied unauthorized works. *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 478 (2d Cir. 2004)

The first interpretation examines whether the secondary user made the use for nonprofit educational purposes or for financial gain. § 107(1); *Campbell*, 510 U.S. at 585. This interpretation closely intertwines the commerciality sub-factor, with the findings of each depending on how closely the facts of the case align with the statute's definitions. *Id.*

The second interpretation investigates the secondary user's attempts to reimburse the copyright holder. *Super Future*, 553 F. Supp. 2d at 697. In *Super Future*, the secondary user copied sections of the copyright holder's website in order to criticize them. *Id.* at 698-

99. Despite this, the court held that bad faith did not apply in that case, because the copyright holder's website was freely accessible, and did not charge a fee to access it. *Id.* at 698.

The third interpretation examines whether the secondary user copied unpublished or licensable works. *NXIVM*, 364 F.3d at 478. In *NXIVM*, the court held that the secondary user copied the work in bad faith because it did not purchase the original work, but instead obtained a copy from someone who violated a non-disclosure agreement. *Id.* at 478-79.

Here, a court would most likely find a bad-faith use with the first interpretation, but a good-faith use with the latter two. Ms. Connor's use was non-educational, but she properly purchased DVDs of the movies she copied, and the movies she copied were publicly available. The Northern District Texas's interpretation, mentioned in *Super Future*, is most valuable because that court would most likely hear this case. Based on that court's interpretation, Ms. Connor likely acted in good faith.

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D. On balance, the first factor most likely weighs against fair use.

Finally, in weighing the first fair-use factor, courts put greater emphasis on the transformative sub-factor compared to the other sub-factors. *Campbell*, 510 U.S. at 579. Balancing the sub-factors in this case, a court would most likely find a secondary use that is not transformative, is commercial, and made in good faith as weighing against fair use.

II. The third fair-use factor most likely weighs against Ms. Connor.

Ms. Connor's use most likely disfavors a fair-use finding of the third factor. The third fair-use factor considers a quantitative and qualitative assessment of the secondary use compared to the copyrighted work. *Maxtone-Graham*, 803 F.2d at 1263. Courts examine both the percentage of the original work copied, and whether the copy duplicates the "heart" of the copyrighted work. *Harper & Row v. Nation Enters.*, 471 U.S. 539, 564 (1985). Ms. Connor's use most likely copied a substantial percentage and copied the hearts of the movies; weighed together the third factor most likely weighs against fair use.

10

A. Ms. Connor copied a substantial percentage of the works.

To begin, Ms. Connor's use most likely copied a substantial percentage of the copyrighted works. There are no absolute rules about how much a copyrighted work can be copied and still allow fair use. *Maxtone-Graham*, 803 F.2d at 1263. In *Iowa State University Research Foundation, Inc. v. ABC*, ABC aired two-and-a-half minutes of a twenty-eight minute

student film on television. 621 F.2d 57, 59 (2d Cir. 1980). The court held that the amount aired, about eight percent of the film, was sufficiently substantial to weigh against fair use. *Id.* at 61.

Here, a court would most likely find Ms. Connor's copy as quantitatively substantial. Her situation is directly comparable to *Iowa State*, because she copied sections of the films verbatim. Ms. Connor used nineteen percent of the copyrighted works on average compared to ABC's eight percent. Ms. Connor's lowest percentage copied of the three films, about ten percent, was still greater than the percentage the court found as substantial in *Iowa State*. Therefore, a court would most likely find she copied a substantial percentage of the movies.

B. Ms. Connor's use took the hearts of the works.

Next, Ms. Connor's use most likely copied the hearts of the copyrighted works. The heart of a work is its most valuable or defining parts. *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119, 1122 (9th Cir. 1997). Additionally, copying a substantial portion of a copyrighted work verbatim suggests that portion is qualitatively valuable. *Harper & Row*, 471 U.S. at 565. In *L.A. News*, a news channel broadcasted thirty seconds of a four-minute tape of the beating of Reginald Denny during the 1992 Los Angeles riots. 108 F.3d at 1129. The court found against fair use stating that although the channel only copied a small amount, it was the best and most valuable part of the footage. *Id.*

Here, a court would most likely find that Ms. Connor copied the hearts of Simba's movies. Her situation is directly comparable to *L.A. News*, because she copied the most iconic portions of each video verbatim. She also copied long, continuous sections of the movies without alterations, suggesting those portions were qualitatively valuable. Therefore, a court would most likely find her use took the hearts of Simba's movies.

C. On balance, the third factor most likely weighs against fair use.

Finally, in weighing the third fair-use factor, the actual amount of the work copied is less important than if secondary user copied the heart of the work. *Harper & Row*, 471 U.S. at 565. Balancing the sub-factors in this case, a court would most likely find a use that copies a substantial percentage and takes the hearts of the copyrighted works as weighing against fair use.

III. Weighing the fair-use factors leads to a finding against fair use.

Weighed together, the fair-use factors of Ms. Connor's use most likely opposes fair use. You asked me to assume the second factor weighs in favor of Ms. Connor while the fourth factor weighs against her. In total, the first, second, and third factors weigh against fair use while the fourth factor weighs for fair use. Therefore, when the factors are weighed together, Ms. Connor will most likely fail on fair use.

CONCLUSION

Ms. Connor's use of Simba's movies on November 13 was most likely not a fair use. You asked me to assume that the second factor weighs for Ms. Connor while the fourth factor weighs for Simba. This memorandum analyzed the first and third factors but did not analyze the other two. I would recommend discussing this matter with Ms. Connor before entering settlement negotiations with Simba's counsel. If Ms. Connor is willing to adhere to permanent changes to her lectures, such as analyzing each clip for longer than that clip's duration, Simba may allow her to continue using its movies. Other negotiable options include mandating a maximum clip length, paying Simba a fine, or sending all profits from the event to Simba.

Appendix: Opinion in Filippi v. Filippi

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This case illustrates the need you may commonly have to synthesize a rule from a single case. Here, the court addresses the issue of *promissory estoppel*, a doctrine that can bind a person who makes a promise to carry it out, even if it was not part of a contract. See if you say what the rule for promissory estoppel in Rhode Island is, based only on this case.

Link to book TOC

Filippi v. Filippi

818 A.2d 608 (2003)

Peter Filippi et al.
v.
Marion Filippi et al.
v.
Peter Filippi et al.
v.
Citizens Trust Company, in its capacity as Corporate Trustee of the Paul A. Filippi Trust Agreement.

No. 2001-130-A. and 2001-169-A.

Supreme Court of Rhode Island.

February 18, 2003.

609*609 610*610 611*611 Present WILLIAMS, C.J., LEDERBERG, FLANDERS, GOLDBERG, JJ. and WEISBERGER, C.J. (Ret.)

Richard W. MacAdams, Providence/Kris Macaruso Marotti, Thomas A. Tarro, III, Warwick/Denean M. Russo, Providence, for Plaintiff.

Lori Caron Silveira, John A. McFadyen, III/Howard E. Walker, Providence, for Defendant.

Opinion

WILLIAMS, Chief Justice.

This family feud involves the sad but all too familiar story of a family united solely by its eldest member during his life and then fiercely divided after his death.[1] The plaintiffs, Peter Filippi (Peter), Carolyn Filippi Cholewinski (Carolyn) and Paula 612*612 Consagra (Paula) (collectively referred to as plaintiffs), are decedent Paul Filippi's (Paul or decedent) three adult children from his first marriage. The defendants are Marion Filippi (Marion), who is Paul's widow, and Citizens Trust Company (Citizens), the institutional trustee of Paul's trust. The plaintiffs appeal

1: As Abraham Lincoln said in his 1858 address at the Republican State Convention in Illinois, "[a] house divided against itself cannot stand * * *." Abraham Lincoln, Address at the Republican State Convention, Springfield, Ill. (June 16, 1858).

the trial justice's grant of Marion's motion for a new trial on damages conditioned upon plaintiffs' rejection of a remittitur. They also appeal the judgment that entered in favor of Citizens on the undue influence claim. That judgment entered after the trial justice decided to invoke his right to rule on undue influence in equity and deem the jury verdict on that issue purely advisory. Marion cross-appeals the trial justice's denial of her motions for judgment as a matter of law and the conditional grant of a new trial.

This complex appeal combines two separate actions consolidated before trial and consolidated again on appeal. The first action was for breach of contract against Paul and involved plaintiffs against Marion, as executrix of Paul's estate. The second case named Citizens as defendant in an undue influence action with respect to Paul's 1992 trust amendment. For the sake of clarity, we will address the issues of each individual case *seriatim* but we begin with a recitation of all the relevant facts.

I. Facts and Travel

Paul was a businessman and restaurateur. The plaintiffs were born to Paul and his first wife, Elizabeth Filippi: Peter in 1938, Carolyn in 1941 and Paula in 1946. Paul and Elizabeth divorced in 1968.

In 1973, Paul, then fifty-nine years old, married Marion, who then was twenty-four years old. Paul and Marion had three children. Marion gave birth to the couple's first child, Paul, Jr., in 1975. Steven was born in 1979 and Blake arrived one year later.

This controversy centers around Ballards Inn and Restaurant (Ballards), a family business and famous Block Island eatery that Paul acquired during his marriage to Elizabeth. Shoreham, Inc. (Shoreham), a corporation in which Paul held all the shares, owned all of Ballards's physical assets. Ballards opened each season from around Memorial Day to Labor Day. Most, if not all, of the Filippis worked in the restaurant at some point.

Of the three plaintiffs, Paula participated the most in the business. In fact, she worked there every season from age eleven until 1968, when she married Lou Consagra (Lou) and the couple moved out of state. In 1974, Paula returned to Rhode Island and worked a few weekends at Ballards, once filling in as manager. After the weekend she worked as manager, Paula testified that her father said, "I want you to come back and run Ballard's for me * * * and if you do this for me, Ballard's will be yours and you will take care of the family." She initially turned him down, but in the summer of 1976, after his repeated requests, she returned to help her father run Ballards.

Paul fell ill with cancer in 1977 and again in 1979. During his battles with cancer, Carolyn, a registered nurse, assisted in his care and treatment. His serious illness most likely caused him to contemplate his mortality and how he was going to care for his family after he died.[2] Consequently, 613*613 at the end of 1979, Paul executed a will and living trust dividing his estate into six equal shares to be held in a marital trust for Marion and family trusts for each of the then existing five children. He amended the trust in 1980 to provide for his newest child, Blake. This was the first

2: Unfortunately for plaintiffs, Paul followed the admonition of the Latin poet of more than fifteen hundred years ago, "Death plucks my ear and says Live — for I am coming." Catherine Drinker Bowen, Yankee from Olympus: Justice Holmes and His Family, 409 (Little, Brown and Company 1945) (1944).

of fifteen documents relating to his estate that Paul executed over the last twelve years of his life.

On January 5, 1981, Paul executed a new will and trust providing that each plaintiff was to receive a specific gift of $25,000. Paul divided the remainder of the estate into five parts, granting 25 percent to Marion, 9 percent to Peter for life and 22 percent for the benefit of each of Paul's three youngest children. The trust also granted control of Ballards to an institutional trustee. Later that year, Paul amended the trust to name Peter, Paul and Marion as executors and trustees.

In February 1982, once again Paul revised the trust. He divided the estate into sevenths: three sevenths for Marion, one seventh for Paul's three youngest children, two sevenths for Paula and one seventh for Carolyn and Peter.

The next year, Paul executed a new will that attempted to devise to each plaintiff cottages (Bosworth cottages) that he and Marion owned. He also left money to Marion and certain real property held in trust for her. He then created a marital trust with the residue passing to his three youngest children. Furthermore, he expressly acknowledged plaintiffs' omission from the will but indicated that he believed he adequately provided for them in life. Paula was reappointed co-trustee of the marital and family trusts.

In 1984, Peter, Carolyn and her husband, Clides Brizio (Brizio), formed a limited partnership called Block Island Associates (Associates) to buy and develop a seventeen-acre piece of property known as Ocean View upon which the Ballards property partially encroached. Associates purchased the land for $850,000 with Brizio putting up $200,000, Carolyn providing $40,000 and Peter adding $10,000 of the initial payment and closing costs. Shortly thereafter, the partners of Associates asked Paula to join the partnership in return for her knowledge and expertise. She agreed.

The plaintiffs said that Associates received an offer to purchase Ocean View for $1.85 million in 1985. Thereafter, Paul and plaintiffs discussed the fate of Ocean View. The plaintiffs assert that Paul orally agreed to the following:

(1) Associates would convey Ocean View to Block Island Realty (Realty), Paul's real estate corporation;

(2) Paul would pay the outstanding $600,000 mortgage on the property;

(3) Brizio would recover his investment in Associates;

(4) Paul would keep the portion of the land that Ballards encroached upon;

(5) Plaintiffs would reimburse Paul for the expenses associated with the sale or development; and

(6) Paul and plaintiffs would evenly divide the net proceeds between the four of them.

However, the only evidence of any transaction involving Ocean View is a purchase and sale agreement between Associates and Realty and the resulting deed, indicating that Realty is the sole owner of Ocean View.

Neither document referenced the alleged oral agreement between Paul and plaintiffs.

Unfortunately, in June 1986, a fire destroyed Ballards. Paul, Marion, plaintiffs 614*614 and other family members met to discuss what they should do because the restaurant was underinsured. They decided to sell Ocean View and another property that Paul owned with his brother to rebuild Ballards.

In September 1986, Paul sold two small parcels of Ocean View: one for $250,000, paid in full, and the other for $175,000: $50,000 paid in cash and a $125,000 promissory note. The final and largest piece of Ocean View sold in December 1986 for $3.4 million to developers Ephron Catlin (Catlin) and Kenneth Stoll (Stoll). Catlin and Stoll paid $100,000 cash and signed a promissory note for $3.3 million. Following the sale, Paul liquidated Realty and became the holder of the notes.

At the beginning of 1987, Paul revoked his 1983 will and executed a new will leaving his entire estate, including the Shoreham stock, to Marion, except for the proceeds from the sale of Ocean View. He left the Ocean View sale proceeds to his children in equal sixths. In March 1987, when Paul informed plaintiffs of the change, they agreed to decrease their one-fourth share to one-sixth so that Paul could provide for his three youngest children as well.

In need of cash to rebuild Ballards, Paul agreed to subordinate his priority position on the Ocean View mortgage so that Catlin and Stoll could sell the property to a third party. In return, he received a portion of the mortgage in cash along with other payoffs and an easement on the property on which Ballards encroaches.

Upon learning of the subordination, Carolyn expressed to Paul her concerns that the second mortgage would not be honored. She testified that he promised that he would assume the risk of not collecting on the loan and personally guaranteed that she would receive interest on her one-sixth share. Paula asked Paul to memorialize the one-sixth interest in the Ocean View proceeds in writing. He agreed and his attorney drafted the agreement in June. The agreement characterized the one-sixth share in the net proceeds as a gift.

That same month, Peter demanded his one-sixth interest up front, which Paul's accountant, Ronald Nani (Nani) calculated as $260,706. However, Peter accepted a check for $200,000 as partial payment.

Ballards reopened in June but not without fireworks. Paula and Marion had a falling out in July resulting in Paula's departure from Block Island.[3] According to Paula, Marion insisted that she not return or else Marion would take the couple's three young boys to Italy for the summers. By the close of the turbulent season, Stoll had not paid the outstanding amount on the subordinated mortgage on Ocean View or the subordination agreement, both due on October 1. Consequently, Carolyn testified, Paul paid her $13,000 in interest pursuant to his promise until Marion would not allow him to make any more payments.

Because of the tax consequences of the 1987 will, Paul revised this instrument with the help of attorney Paul Silver (Silver). Silver suggested that Paul leave plaintiffs the equivalent of the exemption from the unified

3: The argument was about the Bosworth cottages that Paul attempted to leave to plaintiffs in his 1983 will. Paula requested that in addition to the Ocean View promise, Paul give her the Bosworth cottage he left to her in his 1983 will. When Marion found out about Paula's request, she determined that Paul and Marion owned the cottages jointly, and that, therefore Paul could not leave them to anyone without Marion's consent. Marion refused to consent and advised Paula of her decision in a "stormy confrontation."

gift and estate tax, which totaled approximately $600,000, or $200,000 each. On November 13, 1989, Paul and Marion executed the new estate 615*615 plan. It included Paul's will, inter vivos trust, and agreement not to revise the estate plan without Marion's consent. This pour-over will devised the real estate to Marion with the residue of the estate funding two trusts: a marital trust for Marion and the couple's three children, and a family trust for the benefit of plaintiffs. Everything else was left to Marion, including the Shoreham stock.

On May 7, 1992, Paul amended his trust agreement to decrease the amount to plaintiffs from the exemption equivalent amount initially suggested by Silver to $50,000 each. Death "plucked" Paul a few months later.

The plaintiffs alleged that Marion began to exert undue influence over Paul sometime after the execution of the 1989 documents and concurrent with his allegedly deteriorating physical health. They also alleged that Paul's and Marion's agreement not to revise their estate plans without the other's consent was the product of undue influence. The plaintiffs alleged the same for the 1992 trust agreement.

In January 1993, the executors of Paul's estate denied plaintiffs' claims against the estate. As a result, in April of the same year, plaintiffs filed breach of contract claims against Paul's estate in Superior Court. That summer, plaintiffs also filed an undue influence claim against Citizens to contest the 1992 amendment. The cases were consolidated in 1999, subject to the trial justice's discretion to sever.[4]

4: Only Citizens filed a motion in opposition to plaintiffs' motion to consolidate.

The trial justice heard Marion's pretrial motions *in limine* seeking to exclude evidence of any oral agreement relating to count 1 (Ocean View), the alleged agreement to share in the Ocean View sale proceeds, and count 3 (Ballards), the alleged agreement between Paul and Paula that he would give her Ballards upon his death if she worked for him. The trial justice denied both motions.

A jury trial commenced in June 2000. Just before trial, the trial justice, with consent of the parties, reserved his decision until the close of evidence on whether to rule on the undue influence claim in equity and consider the jury's verdict merely advisory, or to allow the jury to decide the claim. The defendants moved for judgment as a matter of law at the close of plaintiffs' case, at the close of all the evidence and after the verdict. The jury returned a verdict in favor of plaintiffs on counts 1 and 3. The jury also returned a verdict in favor of plaintiffs on the undue influence claim. After the verdict, however, the trial justice determined the undue influence claim to be equitable in nature and the jury verdict to be purely advisory. The jury made the following award of damages:

- Peter: $ 400,000 plus statutory interest on count 1 (Ocean View).
- Carolyn: $ 600,000 plus statutory interest on count 1 (Ocean View).
- Paula: $ 260,706 plus statutory interest on count 1 (Ocean View). $2,500,000 plus statutory interest on count 3 (Ballards).

In December, the trial justice denied defendants' renewed motion for judgment as a matter of law and motion for a new trial concerning liability, but granted it on the issue of damages unless plaintiffs accepted a remittitur. The remittitur called for a reduction of the jury award as follows:

- Peter: Reduced to $ 60,706, plus statutory interest on count 1 (Ocean View).

616*616

- Carolyn: Reduced to $260,706, plus statutory interest on count 1 (Ocean View).
- Paula: Reduced to $ 8,700, plus statutory interest on count 1 (Ocean View). Reduced to $322,500, plus statutory interest on count 3 (Ballards).

The plaintiffs accepted the remittitur and judgments entered on December 15 and 21. The plaintiffs and Marion appealed on January 4, 2001.

In February 2001, the trial justice issued his written decision on the undue influence claim. Contrary to the advisory jury verdict, he found in favor of defendants. The trial justice found plaintiffs to be biased and noted that they failed to present any unbiased corroborating witnesses. He found that "[t]here [was] utterly no evidence that Marion was able to over-ride his wishes unless he wanted to let her." Moreover, he explained that although he did not lightly disregard the jury verdict, he was not bound by it. In fact, he found that the verdict did not deserve deference because it probably was a product of the jury's frustration with Paul's conduct involving the contracts as well as Marion's failure to testify truthfully in a few instances. The verdict, he explained, would not have withstood a motion for a new trial. Furthermore, the trial justice concluded that the jury disregarded the instruction that "[i]t is not undue influence * * * if [Paul] was influenced only by his affection and love for Marion and his three younger children."

We begin our discussion with Marion's claim of error in the trial justice's rulings on the motions for judgment as a matter of law and new trial on the count 1 and count 3 breach of contract claims. We then explore the issues relating to damages. Finally, we address the arguments involving the undue influence action.

II. Count 1 (Ocean View Claim)

During the trial, plaintiffs testified about their alleged oral agreement with Paul concerning the Ocean View transaction. All three plaintiffs explained their father's agreement to share the proceeds of Ocean View's sale with each of them equally. The only written evidence of the transaction or agreement, however, is in the form of a purchase and sales agreement and a deed, both of which only indicate that Realty, Paul's company, bought the property from Associates, thereby making Realty the sole owner of the seventeen-acre tract of land. Marion filed a motion *in limine* to preclude any evidence of the oral agreement under the statute of frauds and the parole evidence rule. The trial justice denied the motion.

[The court's analysis continues here for several paragraphs.]

Although the jury found that there was a contract between Paul and plaintiffs, the 622*622 jury was allowed to consider the oral partnership agreement. Without this evidence, no reasonable juror could find that there was a contract because the purchase and sales agreement constituted

the entire agreement with respect to Associates's sale of Ocean View to Realty. * * *

Our rules of contract exist for a reason. The power of the written word must remain paramount. The trial justice's ruling provides undue weight to the alleged spoken word. We must give effect to the written word when the law so requires or open the litigation flood gates to the he said, she said "War of the Roses."[6]

6: War of the Roses (Twentieth Century Fox 1989).

B. Motion for a New Trial

Marion argues also that the trial justice erred in denying her Rule 59 motion for a new trial based on the trial justice's finding that passion and prejudice influenced the jury's verdict. The trial justice denied the motion on liability and granted a new trial on damages unless plaintiffs accepted a remittitur. The issue concerning count 1 is moot because the trial justice should have found for Marion as a matter of law.

III. Count 3 (Ballards Claim)

This claim focuses on the alleged 1974 oral promise that Paul made to Paula that Ballards would be hers if she came to manage the business during the season each year. In 1976, Paula began managing Ballards and continued to do so each season until 1987. The jury found that Paul's oral promise constituted a legally enforceable contract to convey his interest in Ballards to Paula at his death. Marion filed motions for judgment as a matter of law and for a new trial, contending that plaintiffs failed to prove the "irrevocable will contract" by clear and convincing evidence and that both G.L. 1956 § 6A-1-206, applicable through Article 2 of the Uniform Commercial Code (UCC), and § 9-1-4 prohibited such an oral contract. The trial justice rejected both arguments, finding that plaintiffs proved their case by clear and convincing evidence and that the statute of frauds from the UCC did not apply.[7]

7: Marion failed to raise G.L. 1956 § 9-1-4 at trial; therefore the trial justice did not rule on it.

At the close of plaintiffs' case, at the close of all the evidence and following the verdict, Marion moved for judgment as a matter of law on this count. She also filed a motion for a new trial after the verdict. 623*623 The standard of review for a decision on a motion for judgment as a matter of law applies here as well. The new trial standard is articulated below.

It is well settled that "the trial justice acts as a 'superjuror' in considering a motion for a new trial." *Rezendes v. Beaudette*, 797 A.2d 474, 477 (R.I.2002) (quoting *English v. Green*, 787 A.2d 1146, 1149 (R.I.2001)). If the trial justice:

> "reviews the evidence, comments on the weight of the evidence and the credibility of the witnesses, and exercises his * * * independent judgment, his * * * determination either granting or denying a motion for new trial will not be disturbed unless he * * * has overlooked or misconceived material and relevant evidence or was otherwise clearly wrong." *Id.* at 478 (quoting *English*, 787 A.2d at 1149).

"If the trial justice determines that the evidence is evenly balanced or that reasonable minds could differ on the verdict, he should not disturb the jury's decision." *Id.* (citing *Perkins v. City of Providence*, 782 A.2d 655, 656 (R.I.2001)). If, however, the verdict fails to do justice because it is against the weight of the evidence, the trial justice should grant the motion. *See id.*

A. Contract for a Testamentary Disposition

Marion asserts that the evidence at trial could not reasonably support a juror's conclusion that Paul entered into the legally enforceable contract that Paula alleges. Marion contends that even if there was a contract between Paula and Paul, it fails to defeat a written will, and therefore the trial justice's finding that a contract existed clearly was wrong. Finally, if the oral promise is binding, the estate would be bankrupt, thereby frustrating Paul's overall testamentary purpose of caring for his family.

The alleged contract at issue is not an irrevocable will contract, which is an oral agreement to create mutual wills. *See Lerner v. Ursillo*, 765 A.2d 1212, 1217 (R.I. 2001); *Lorette v. Gorodetsky*, 621 A.2d 186, 187 (R.I.1993) (mem.). The contract at issue is an oral contract that contradicts the terms of Paul's will. Although this may be a distinction without a difference, both are held to the same standard.

1. Clear and Convincing Evidence

"Contracts for testamentary disposition are allowed to stand only when established by clear proof." *Messier v. Rainville*, 30 R.I. 161, 170, 73 A. 378, 381 (1909). More recently articulated is the principle that the existence of such a contract must be proven by clear and convincing evidence. *See Colangelo v. Estate of Colangelo*, 569 A.2d 3, 4 (R.I.1990) (per curiam) (holding that a mother's promise to leave her entire estate in equal shares to her children if they would relinquish any claim to their father's estate must be proven by clear and convincing evidence). We interpret this to mean that to prove the existence of a contract, Paula must prove each element of a valid contract by clear and convincing evidence.

[In the next two subsections, (a) and (b), the court analyzes the contract issue, and also promissory estoppel, an alternative theory of liability to contract where one of a contract's elements is missing.]

a. Contract [The court analyzes Paula's contract claim.]

Paula's testimony alone does not establish the existence of a contract by clear and convincing evidence. Absent clear and convincing evidence of a bargained-for exchange, we conclude that no contract existed as a matter of law, and the trial justice did not err in so finding.

b. Promissory Estoppel The plaintiffs assert that Paul's alleged promise to Paula is enforceable under the doctrine of promissory estoppel. This Court has defined promissory estoppel as: "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance, [and therefore] is binding if injustice can be avoided only by enforcement of the promise." *Alix v. Alix*, 497 A.2d 18, 21 (R.I.1985) (quoting Restatement (Second) *Contracts* § 90 at 242 (1981)). This Court extended the application of promissory estoppel to situations in which the promisee's reliance on the promise was induced, and injustice may be avoided only by enforcement of the promise. *See id.* (citing *East Providence Credit Union v. Geremia*, 103 R.I. 597, 601-02, 239 A.2d 725, 727-28 (1968)).

A successful promissory estoppel action must include a clear and unambiguous promise. *See B.M.L. Corp. v. Greater Providence Deposit Corp.*, 495 A.2d 675, 677 (R.I. 1985). This Court adopted the following conditions precedent for promissory estoppel:

> " '(1) Was there a promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee?
>
> " '(2) Did the promise induce such action or forbearance?
>
> " '(3) Can injustice be avoided only by enforcement of the promise?' " *East Providence Credit Union*, 103 R.I. at 603, 239 A.2d at 728.

However, we think it more straightforward to set forth a three-element approach to promissory estoppel as used in other jurisdictions. 626*626 To establish promissory estoppel, there must be:

> 1. A clear and unambiguous promise;
>
> 2. Reasonable and justifiable reliance upon the promise; and
>
> 3. Detriment to the promisee, caused by his or her reliance on the promise. *See Nilavar v. Osborn*, 127 Ohio App.3d 1, 711 N.E.2d 726, 736 (1998).

We also stated in *Alix* that if "the doctrine is applicable in a situation in which consideration is lacking in a contract, then it logically follows that promissory estoppel should be applied to a case in which one of the parties has deliberately failed to perform an act necessary to the formal validity of the contract." *Alix*, 497 A.2d at 21. "More specifically, we assert that when a necessary element of a contract is lacking as a result of one contracting party's failure to act," the benefiting party cannot then assert that the contract is invalid to avoid fulfilling his or her obligation under the contract. *Id.*

Paula's testimony indicates that she abandoned the career for which she was trained so that she could work at Ballards. She had a degree in elementary education from the University of Miami and she never pursued a career related to her degree. On appeal, Paula describes her living conditions during the four months of the Ballards' season as less than desirable and her income of $300-$400[8] per week as insufficient compensation for her services. Furthermore, she explained that work caused her to be separated from her husband during those months. She

8: During her final year at Ballards, her income was increased to $500 per week.

asserts that she made these sacrifices in reliance on Paul's promise that he would give her the restaurant.

There is other evidence, however, that speaks to the unreasonableness of Paula's reliance on the alleged promise. Paula admitted at trial that she was not only aware of Paul's 1979 testamentary documents that entrusted control of Ballards to an institutional trustee and provided that Paula would run the business in return for compensation, but also that she and the family approved these documents. In other words, three years after she says that she accepted Paul's offer, she had written confirmation that if he died, he was not going to leave Ballards to her. Yet, she continued to work.

Paula's promissory estoppel claim fails on every element. First, the promise is unclear and ambiguous. Paul's promise, "I want you to come back and run Ballard's [*sic*] for me * * * and if you do this for me, Ballard's [*sic*] will be yours and you will take care of the family," failed to indicate whether he meant Ballards as the business including the good will or simply the stock of Shoreham, which owned the physical assets of Ballards. The hand-written letter from Paul indicating that the stock will "take effect" upon his death confirms this ambiguity, since Paula asserts he intended to leave her the whole business and not just the physical assets. Furthermore, Paul never clarified what he meant by "you will take care of the family." This is especially confusing since the family included, in addition to Carolyn and Peter, Paul's three youngest children, with whom Paula had no real relationship, and Marion, with whom Paula had a rocky relationship.

Even the trial justice admitted that "the parameters of Paula's interest in Ballards after Paul's death were never clearly defined * * *." In fact, he went so far as to state that "there is no clear and convincing evidence that Paul ever promised to bequeath the total corporate ownership of Ballards to Paula Consagra" and that the 627*627 only clear and convincing evidence was that Paul promised to leave her "some interest in the profitability of Ballards. * * * He clearly *did not* promise her that he would leave her unbridled ownership of the business." All that appears to be clearly and unambiguously established then is what Paul *did not* promise to leave to Paula. Thus, we cannot conclude that the promise was clear and unambiguous.

Moreover, in assessing the reasonableness of Paula's reliance, we find that Paula unreasonably relied on the promise after learning and approving of the 1979 will. Her admitted knowledge, understanding and acquiescence that an institutional trustee would control Ballards and that she would manage it for compensation to be determined by her and the trustee destroyed any argument she previously had for reasonably relying on the promise. This Court has held that when there is written, actual notice contradicting the oral promise, such notice deems any reliance on that oral promise unreasonable. *See Galloway v. Roger Williams University, 777 A.2d 148, 150 (R.I.2001) (per curiam)*. Consequently, after Paula obtained knowledge of Paul's 1979 will, she no longer could reasonably rely on his promise.

Finally, even if Paula satisfied the first two elements, she suffered no detriment. While Paula argues that she went back to work at Ballards based on Paul's oral promise that Ballards someday would be hers, Paul

compensated her for her services. At trial, Paula never took issue with the adequacy of that compensation nor did she present evidence about her compensation, contrary to her allegation on appeal. She undisputedly received between $300 and $400 per week as well as a room to stay in for her services. Her decision to work was voluntary, and Paul paid her for that work. Under these circumstances we refuse to find such detriment that justice requires enforcement of the alleged contract.

In addition, and regardless of the failure to satisfy the promissory estoppel requirements, the trial justice should have granted Marion's motion for judgment as a matter of law. Viewing the evidence in a light most favorable to Paula, no reasonable juror could find that there was clear and convincing evidence of the promise she alleges. To reiterate, "[w]here an oral agreement of this nature [to make a will] rests on parol evidence, it must be established by clear, satisfactory and convincing evidence. Such a contract is to be looked upon with suspicion and can only be sustained when established by the clearest and strongest evidence, and such evidence must be so clear and forcible as to leave no reasonable doubt of its terms or character." *Johnson v. Flatness*, 70 Idaho 37, 211 P.2d 769, 774 (1949).

As discussed in the contract section *supra*, the only evidence Paula presented of the promise was her recollection of it. All other testimony and evidence offered failed to establish not only the terms of the contract but also its mere existence.

The trial justice instructed the jury on the high degree of proof required under this standard: "the evidence in favor of [Paula's] claim must be so clear, direct, and weighty, and convincing as to enable you to come to a clear conviction without hesitancy of the truth of the precise facts in issue." After reviewing plaintiffs' evidence on count 3 (Ballards), the trial justice should have realized either at the close of plaintiffs' case, at the close of all the evidence or after the jury verdict, that no reasonable jury could have found that Paula's evidence was clear and convincing. As a result, he erred in denying the Rule 50 motion.

628*628 2. Statute of Frauds

Marion argues that Paula's testimony about the alleged oral agreement with Paul falls within the statue of frauds, and therefore, is not enforceable unless it is in writing. She cites both § 9-1-4(5)[9] and the UCC to support her position. We need not reach this issue because plaintiffs failed to prove their claim by clear and convincing evidence.

9: The relevant part of §9-1-4 provides: "No action shall be brought: (5) Whereby to charge any person upon any agreement which is not to be performed within the space of one year from the making thereof; * * * unless the promise or agreement upon which the action shall be brought, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person by him or her thereunto lawfully authorized."

B. New Trial Based on Passion and Prejudice

Marion again argues that the trial justice erred in denying her Super.R.Civ.P. 59 motion for a new trial, which alleged that passion and prejudice influenced the jury's verdict. The trial justice denied the motion on liability but granted a new trial on damages unless plaintiffs accepted a remittitur. This issue is moot because the trial justice should have granted the motions for judgment as a matter of law.

Conclusion

With respect to counts 1 (Ocean View) and 3 (Ballards), the defendant Marion Filippi's appeal is sustained and the judgment of the Superior Court is vacated. Concerning the undue influence claim, the appeal of the plaintiffs Peter Filippi, Paula Consagra and Carolyn Cholewinski is denied and dismissed and judgment for the defendant Citizens is affirmed. The papers of the case are remanded with instructions to enter judgment on counts 1 and 3 for the defendant Marion Filippi.

Justice Lederberg participated in all proceedings but deceased prior to the filing of this opinion.

Appendix: Opinion in Lake v. Wal-Mart Stores

31

This case illustrates the development of the tort law of privacy. Before this case, there was no common law tort for invasion of privacy in Minnesota. This copy of the opinions in *Lake v. Wal-Mart Stores, Inc.*, includes annotations to help the first-time reader of a court opinion understand what's going on in it.

Link to book TOC

Lake v. Wal-Mart Stores

Elli Lake, et al., pet., Appellants,
v.
Wal-Mart Stores, Inc., et al., Respondents.

The 'petitioners' or 'appellants' are the parties who appealed from the lower court decision(s). The 'respondents' are sometimes also called 'appellees.' The 'et al.' is short for Latin 'et alia,' which means 'and others.' This means there is at least one other party on each side of the case. It's traditional in opinions to refer to only the first party on each side and then only by last name. Thus: Lake v. Wal-Mart Stores, Inc.

582 N.W.2d 231 (1998)

Understanding this citation: This court opinion appears in vol. 582 of the second series of the Northwest Reporter, a printed collection of opinions. The opinions begin on page 231 of that volume. Note that you can find opinions like this in places other than the print reporters. The version in this file came from Google Scholar. The court decided the case in 1998.

Supreme Court of Minnesota

July 30, 1998.

These two lines identify the court responsible for these opinions and the date the court published its opinions. Taken together, everything so far is often referred to as the "caption" for the case.

232*232 Keith L. Miller, Miller, Norman & Associates, Ltd., Moorhead, for appellants.

Richard L. Pemberton, Pemberton, Sorlie, Sefkow, Rufer & Kershner, Fergus Falls, for respondents.

Douglas A. Hedin, Minneapolis, amicus curiae National Employment Lawyer Ass'n.

Michael J. Ford, Corrine L. Everson, St. Cloud, amicus curiae Minnesota Defense Lawyers Ass'n.

Steve G. Heikens, Minneapolis, amicus curiae Minnesota Trial Lawyers Ass'n.

John P. Borger, Faegre & Benson, Mark Anfinson, Minneapolis, amicus curiae Minnesota Broadcasters Ass'n and Minnesota Newspaper Ass'n.

Here, before the court's opinion, is a list of the attorneys who appeared before the court in this appeal. Note that most of them do not represent the appellants and respondents. Rather, they represent amici curiae, or "friends of the court." These are organizations that want to influence the court's decision because of its potential effect on public policy and their businesses.

Heard, considered, and decided by the court en banc.

BLATZ, Chief Justice. (majority opinion)

Usually, though not always, a court's opinion has an author, one of the judges or justices who decided the case. Unless otherwise indicated, the first opinion will be the majority opinion, expressing the views of a majority of the judges on the appeals panel. A majority of the court's members have to agree on the outcome to change the lower court's decision. Though Justice Blatz was the chief justice when she wrote this opinion, the chief justice does not always write the majority opinion

Elli Lake and Melissa Weber appeal from a dismissal of their complaint for failure to state a claim upon which relief may be granted. The district court and court of appeals held that Lake and Weber's complaint alleging intrusion upon seclusion, appropriation, publication of private facts, and false light publicity could not proceed because Minnesota does not recognize a common law tort action for invasion of privacy. We reverse as to the claims of intrusion upon seclusion, appropriation, and publication of private facts, but affirm as to false light publicity.

This paragraph tells us a lot about this case: (1) Lake and Weber, the appellants here, were the plaintiffs below, because they brought the complaint. (2) The causes of action in their complaint were (a) intrusion on seclusion, (b) appropriation, (c) publication of private facts, and (d) false light, each of which is a kind of invasion of privacy. (3) Their complaint was dismissed below in the pleading stage because they failed "to state a claim upon which relief may be granted." (4) The source of law in this case is Minnesota's common law. (5) The lower courts held there is no common-law tort in Minnesota for invasion of privacy. (6) This opinion by the supreme court is going to change parts of the lower court opinions—reversing them—and support part of them—affirming them.

Nineteen-year-old Elli Lake and 20-year-old Melissa Weber vacationed in Mexico in March 1995 with Weber's sister. During the vacation, Weber's sister took a photograph of Lake and Weber naked in the shower together. After their vacation, Lake and Weber *233*233* brought five rolls of film to the Dilworth, Minnesota Wal-Mart store and photo lab. When they received their developed photographs along with the negatives, an enclosed written notice stated that one or more of the photographs had not been printed because of their "nature."

> The "233*233" in this paragraph refers to the page number in the print reporter which begins at the point in the text where the number appears. Thus, the text "brought five rolls..." appears at the top of page 233.

In July 1995, an acquaintance of Lake and Weber alluded to the photograph and questioned their sexual orientation. Again, in December 1995, another friend told Lake and Weber that a Wal-Mart employee had shown her a copy of the photograph. By February 1996, Lake was informed that one or more copies of the photograph were circulating in the community.

> Notice that the supreme court refers to the facts in this case as if they are established. But the case was dismissed below at the pleading stage, so the plaintiffs had not proved any of these facts yet. In a motion to dismiss, the court must accept all the facts alleged by the plaintiff as true; the supreme court continues that practice here. Even though the plaintiffs won on this appeal, they would have to go back to the trial court and actually prove all these facts to win their claim(s).

Lake and Weber filed a complaint against Wal-Mart Stores, Inc. and one or more as-yet unidentified Wal-Mart employees on February 23, 1996, alleging the four traditional invasion of privacy torts—intrusion upon seclusion, appropriation, publication of private facts, and false light publicity. Wal-Mart denied the allegations and made a motion to dismiss the complaint under Minn. R. Civ. P. 12.02, for failure to state a claim upon which relief may be granted. The district court granted Wal-Mart's motion to dismiss, explaining that Minnesota has not recognized any of the four invasion of privacy torts. The court of appeals affirmed.

> This paragraph tells us the defendants are Wal-Mart and unidentified persons (sometimes called "Does" or "Roes" after the fictitious "John Doe" and "Jane Roe"). We already knew most of the rest of this information from the introduction, but the court repeats it here in its chronological context as the court tells the "story" of the case.

Whether Minnesota should recognize any or all of the invasion of privacy causes of action is a question of first impression in Minnesota.[1] The Restatement (Second) of Torts outlines the four causes of action that comprise the tort generally referred to as invasion of privacy. Intrusion upon seclusion occurs when one "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns * * * if the intrusion would be highly offensive to a reasonable person."[2] Appropriation protects an individual's identity

1: Previous cases have addressed the right to privacy torts only tangentially, in dicta. *See Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 28 (1996); *Hendry v. Connor*, 303 Minn. 317, 319, 226 N.W.2d 921, 923 (1975).

2: Restatement (Second) of Torts, § 652B (1977).

and is committed when one "appropriates to his own use or benefit the name or likeness of another."[3] Publication of private facts is an invasion of privacy when one "gives publicity to a matter concerning the private life of another * * * if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.[4] False light publicity occurs when one "gives publicity to a matter concerning another that places the other before the public in a false light * * * if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed."[5]

3: *Id.* at § 652C.

4: *Id.* at § 652D.

5: *Id.* at § 652E.

Note that the court here says that Minnesota has not yet recognized these torts. Nevertheless, it spells out the elements—the things a plaintiff has to prove to win—for each of the four torts, based on their description in a law treatise called the *Restatement (Second) of Torts*.

I.

This court has the power to recognize and abolish common law doctrines.[6] The common law is not composed of firmly fixed rules. Rather, as we have long recognized, the common law:

> is the embodiment of broad and comprehensive unwritten principles, inspired by natural reason, an innate sense of justice, adopted by common consent for the regulation and government of the affairs of men. It is the growth of ages, and an examination of many of its principles, as enunciated and discussed in the books, discloses a constant improvement and development in keeping with advancing civilization and new conditions of society. Its guiding star has always been the rule of right and wrong, and in this country its principles demonstrate that there is in fact, as well as in theory, a remedy for all wrongs.[7]

6: *See Anderson v. Stream*, 295 N.W.2d 595 (Minn.1980) (abolishing parental immunity); *Nieting v. Blondell*, 306 Minn.122, 235 N.W.2d 597 (1975) (abolishing state tort immunity).

7: *State ex rel. City of Minneapolis v. St. Paul, M. & M. Ry. Co.*, 98 Minn. 380, 400-01, 108 N.W. 261, 268 (1906) (citations omitted).

*234*234* As society changes over time, the common law must also evolve:

> It must be remembered that the common law is the result of growth, and that its development has been determined by the social needs of the community which it governs. It is the resultant of conflicting social forces, and those forces which are for the time dominant leave their impress upon the law. It is of judicial origin, and seeks to establish doctrines and rules for the determination, protection, and enforcement of legal rights. Manifestly it must change as society changes and new rights are recognized. To be an efficient instrument, and not a mere abstraction, it must gradually adapt itself to changed conditions.[8]

8: *Tuttle v. Buck*, 107 Minn. 145, 148-49, 119 N.W. 946, 947 (1909).

In these long quotations, the court is asserting it has authority to determine what the common law, the source of law in this case, is.

To determine the common law, we look to other states as well as to England.[9]

The tort of invasion of privacy is rooted in a common law right to privacy first described in an 1890 law review article by Samuel Warren and Louis Brandeis.[10] The article posited that the common law has always protected an individual's person and property, with the extent and nature of that protection changing over time. The fundamental right to privacy is both reflected in those protections and grows out of them:

> Thus, in the very early times, the law gave a remedy only for physical interference with life and property, for trespass *vi et armis.* Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of a man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life,—the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession—intangible, as well as tangible.[11]

Although no English cases explicitly articulated a "right to privacy," several cases decided under theories of property, contract, or breach of confidence also included invasion of privacy as a basis for protecting personal violations.[12] The article encouraged recognition of the common law right to privacy, as the strength of our legal system lies in its elasticity, adaptability, capacity for growth, and ability "to meet the wants of an ever changing society and to apply immediate relief for every recognized wrong."[13]

The first jurisdiction to recognize the common law right to privacy was Georgia.[14] In *Pavesich v. New England Life Ins. Co.*, the Georgia Supreme Court determined that the "right of privacy has its foundation in the instincts of nature," and is therefore an "immutable" and "absolute" right "derived from natural law."[15] The court emphasized that the right of privacy was not new to Georgia law, as it was encompassed by the well-established right to personal liberty.[16]

Many other jurisdictions followed Georgia in recognizing the tort of invasion of privacy, citing Warren and Brandeis' article and *Pavesich.* Today, the vast majority of jurisdictions now recognize some form of the right to privacy. Only Minnesota, North Dakota, and Wyoming have not yet recognized any of the four privacy torts. Although New York and Nebraska courts have declined to recognize a common law basis for the right to privacy and instead provide statutory protection,[17] *235*235* we reject the proposition that only the legislature may establish new causes of action. The right to privacy is inherent in the English protections of individual property and contract rights and the "right to be let alone" is recognized as part of the common law across this country. Thus, it is within the province of the judiciary to establish privacy torts in this jurisdiction.

9: *See Shaughnessy v. Eidsmo*, 222 Minn. 141, 23 N.W.2d 362 (1946); *Jacobs v. Jacobs*, 136 Minn. 190, 161 N.W. 525 (1917); *Seymour v. McAvoy*, 121 Cal. 438, 53 P. 946, 947 (1898).

10: Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L.Rev. 193 (1890).

11: *Id.* at 193.

12: *Id.* at 203-10.

13: *Id.* at 213, n.1.

14: 122 Ga. 190, 50 S.E. 68 (1905).

15: *Id.* 50 S.E. at 69-70.

16: *Id.* at 70.

17: *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442, 447 (1902); *Brunson v. Ranks Army Store*, 161 Neb. 519, 73 N.W.2d 803, 806 (1955).

Today we join the majority of jurisdictions and recognize the tort of invasion of privacy. The right to privacy is an integral part of our humanity; one has a public persona, exposed and active, and a private persona, guarded and preserved. The heart of our liberty is choosing which parts of our lives shall become public and which parts we shall hold close.

Here Lake and Weber allege in their complaint that a photograph of their nude bodies has been publicized. One's naked body is a very private part of one's person and generally known to others only by choice. This is a type of privacy interest worthy of protection. Therefore, without consideration of the merits of Lake and Weber's claims, we recognize the torts of intrusion upon seclusion, appropriation, and publication of private facts. Accordingly, we reverse the court of appeals and the district court and hold that Lake and Weber have stated a claim upon which relief may be granted and their lawsuit may proceed.

The last two paragraphs may be a bit confusing. The court "recognize[s] the tort of invasion of privacy." But then it says it recognizes three of the four privacy torts. Is invasion of privacy one tort or four? Don't worry, 2Ls and 3Ls struggle with this question, too.

II.

We decline to recognize the tort of false light publicity at this time. We are concerned that claims under false light are similar to claims of defamation, and to the extent that false light is more expansive than defamation, tension between this tort and the First Amendment is increased.

Reading question: In Section II of the opinion, the court talks about defamation, which is another common law tort. To prove defamation, a plaintiff must show the defendant is responsible for "a false statement purporting to be fact . . . , publication or communication of that statement to a third person," and damages or harm to the defendant. See http://www.law.cornell.edu/wex/defamation. Generally, the First Amendment to the U.S. Constitution protects the ability of anyone to make true statements. What's the difference between the invasion of privacy torts and defamation? Why does the Minnesota Court care about the U.S. Constitution when discussing Minnesota law?

False light is the most widely criticized of the four privacy torts and has been rejected by several jurisdictions.[18] Most recently, the Texas Supreme Court refused to recognize the tort of false light invasion of privacy because defamation encompasses most false light claims and false light "lacks many of the procedural limitations that accompany actions for defamation, thus unacceptably increasing the tension that already exists between free speech constitutional guarantees and tort law."[19] Citing "numerous procedural and substantive hurdles" under Texas statutory and common law that limit defamation actions, such as privileges for public meetings, good faith, and important public interest and mitigation factors, the court concluded that these restrictions "serve to safeguard the freedom of speech."[20] Thus to allow recovery under false light invasion of privacy, without such safeguards, would "unacceptably

18: *See, e.g., Sullivan v. Pulitzer Broadcasting Co.*, 709 S.W.2d 475 (Mo.1986); *Renwick v. News and Observer Pub. Co.*, 310 N.C. 312, 312 S.E.2d 405 (1984); *Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex.1994).

19: *Cain*, 878 S.W.2d at 579-80.

20: emphId. at 581-82.

derogate constitutional free speech."[21] The court rejected the solution of some jurisdictions—application of the defamation restrictions to false light—finding instead that any benefit to protecting nondefamatory false speech was outweighed by the chilling effect on free speech.[22]

We agree with the reasoning of the Texas Supreme Court. Defamation requires a false statement communicated to a third party that tends to harm a plaintiff's reputation.[23] False light requires publicity, to a large number of people, of a falsity that places the plaintiff in a light that a reasonable person would find highly offensive.[24] The primary difference between defamation and false light is that defamation addresses harm to reputation in the external world, while false light protects harm to one's inner self.[25] Most *236*236* false light claims are actionable as defamation claims; because of the overlap with defamation and the other privacy torts, a case has rarely succeeded squarely on a false light claim.[26]

Additionally, unlike the tort of defamation, which over the years has become subject to numerous restrictions to protect the interest in a free press and discourage trivial litigation,[27] the tort of false light is not so restricted. Although many jurisdictions have imposed restrictions on false light actions identical to those for defamation, we are not persuaded that a new cause of action should be recognized if little additional protection is afforded plaintiffs.

We are also concerned that false light inhibits free speech guarantees provided by the First Amendment. As the Supreme Court remarked in *New York Times Co. v. Sullivan:* "Whatever is added to the field of libel is taken from the field of free debate."[28] Accordingly, we do not want to:

> create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, particularly as related to nondefamatory matter.[29]

Although there may be some untrue and hurtful publicity that should be actionable under false light, the risk of chilling speech is too great to justify protection for this small category of false publication not protected under defamation.

Thus we recognize a right to privacy present in the common law of Minnesota, including causes of action in tort for intrusion upon seclusion, appropriation, and publication of private facts, but we decline to recognize the tort of false light publicity. This case is remanded to the district court for further proceedings consistent with this opinion.

Affirmed in part, reversed in part.

In these last two short paragraphs, the court summarizes its holding and disposition of the case.

21: *Id.* at 581.

22: *Id.* at 584.

23: *Stuempges v. Parke, Davis & Co.,* 297 N.W.2d 252, 255 (Minn.1980).

24: Restatement (Second) of Torts, § 652E.

25: *See Sullivan,* 709 S.W.2d at 479.

26: J. Clark Kelso, *False Light Privacy: A Requiem,* 32 Santa Clara L.Rev. 783, 785-86 (1992).

27: For privileges against defamation claims, *see, e.g.,* Minn.Stat. § 548.06 (1996) (providing that published retraction may mitigate damages); *Johnson v. Dirkswager,* 315 N.W.2d 215 (Minn.1982) (absolute privilege in defamation for public service or administration of justice); *Mahnke v. Northwest Publications Inc.,* 280 Minn. 328, 160 N.W.2d 1 (1968) (conditional privilege regarding public officials and candidates for office—official must prove actual malice); *Friedell v. Blakely Printing Co.,* 163 Minn. 226, 203 N.W. 974 (1925) (privilege for communication made in good faith when publisher has an interest or duty).

28: 376 U.S. 254, 272, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

29: *Time, Inc. v. Hill,* 385 U.S. 374, 389, 87 S.Ct. 534, 17 L.Ed.2d 456 (1966).

TOMLJANOVICH, Justice (dissenting).

This heading signals a change. The majority of the supreme court justices agreed with Chief Justice Blatz. (Otherwise, her opinion would not be the *majority* opinion.) But not all the justices agreed. Here, Justice Tomljanovich explains her reasons for disagreeing, in a type of opinion called a dissent. Not present in this case but common in others is a concurring opinion, where judges agree with the majority outcome but want to express additional reasoning or concerns. In theory, each judge can write his or her own opinion, though this is unusual in the modern era.

I respectfully dissent. If the allegations against Wal-Mart are proven to be true, the conduct of the Wal-Mart employees is indeed offensive and reprehensible. As much as we deplore such conduct, not every contemptible act in our society is actionable.

I would not recognize a cause of action for intrusion upon seclusion, appropriation or publication of private facts. "Minnesota has never recognized, either by legislative or court action, a cause of action for invasion of privacy." *Hendry v. Conner*, 303 Minn. 317, 319, 226 N.W.2d 921, 923 (1975). As recently as 1996, we reiterated that position. *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 28 (Minn.1996).

An action for an invasion of the right to privacy is not rooted in the Constitution. "[T]he Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' " *Katz v. United States*, 389 U.S. 347, 350, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Those privacy rights that have their origin in the Constitution are much more fundamental rights of privacy—marriage and reproduction. *Griswold v. Connecticut*, 381 U.S. 479, 485, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (penumbral rights of privacy and repose protect notions of privacy surrounding the marriage relationship and reproduction).

We have become a much more litigious society since 1975 when we acknowledged that we have never recognized a cause of action for invasion of privacy. We should be even more reluctant now to recognize a new tort.

In the absence of a constitutional basis, I would leave to the legislature the decision to create a new tort for invasion of privacy.

STRINGER, Justice.

I join in the dissent of Justice TOMLJANOVICH.

In the absence of a constitutional basis, I would leave to the legislature the decision to create a new tort for invasion of privacy.

Here, Justice Stringer expresses support for Justice Tomljanovich's opinion.

Appendix: Opinion in Ronnigen v. Hertogs

32

This is the first of three cases that students might use to answer the legal question presented in the Bill Leung hypothetical in Appendix Chapter 28. The other two are *Togstad v. Vesely, Otto, Miller & Keefe*, which appears as Appendix Chapter **??**, and *In re Paul W. Abbott Co., Inc.*, 767 N.W.2d 14 (Minn. 2009), which is available on Google Scholar, Westlaw, etc. .

Link to book TOC

Ronnigen v. Hergotgs

Marshall B. Ronnigen, Appellant,

v.

Samuel H. Hertogs, Respondent.

199 N.W.2d 420 (1972)

Supreme Court of Minnesota.

June 30, 1972.

This court opinion is copied from Google Scholar. I make no claim to copyrights in court opinions. Footnotes from the original case, if any, appear as marginnotes here, though they appeared at the end of the opinion on Google. My comments appear in boxes in the text or in the margins without reference numbers. Note that citations here may not conform to current *Bluebook* style because the rules may have been different when this opinion came out, the court may have had its own rules, and Google may make alterations from the original text.

Understanding this citation: This court opinion appears in vol. 199 of the second series of the *North Western Reporter*, a printed collection of opinions of from state courts in IA, MI, MN, NE, ND, SD, and WI. The opinions begin on page 420 of that volume. Note that you can find opinions like this in places other than the print reporters. The version in this file came from Google Scholar. The court decided the case in 1972. We know from the caption of the case that Mr. Ronnigen is appealing a decision of a court below—he is thus the appellant. But the caption does not tell us whether Ronnigen or Hertogs was the plaintiff below.

Merlin, Starr & Kiefer, William Starr, Bruce W. Okney, Minneapolis, for appellant.

Altman, Geraghty, Mulally & Weiss, K. M. Schadeck, and Judd S. Mulally, St. Paul, for respondent.

*421 Heard before KNUTSON, C. J., and ROGOSHESKE, KELLY, and MASON, JJ.

Here begins page 421 in the print reporter.

ROGOSHESKE, Justice.

Here, we learn who the parties' attorneys were and which justices heard this case. The Minnesota Supreme Court had seven justices at this time, and we have to wait until the end of this opinion to find out what happened to the other three. By the way, "C.J." is an abbreviation for "chief justice," "J." for "justice," and "JJ." for "justices." The practice of doubling an initial abbreviation to make

it plural dates from Roman times and is common in the law. Thus, "JJ." is the plural of "J" for "justices"; "pp." is the plural of "p." for "pages"; "§§" is the plural of "§," the symbol for "section"; and "¶¶" is the plural of "¶," the symbol for "paragraph."

Plaintiff appeals from an order denying his motion for a new trial of his action for damages for alleged malpractice against defendant, an attorney at law of the State of Minnesota.

Now we know that the appellant, Ronnigen, was the plaintiff below. We also know that the action below went through trial, and that the claim below was for attorney malpractice.

Plaintiff claims he retained defendant as his attorney, who then negligently failed to prosecute a tort claim for property damage resulting from the alleged negligence of two municipal corporations. The dispositive issue is whether the trial court erred in directing a verdict for defendant. Applying the test for granting a motion for a directed verdict, Rule 50.01, Rules of Civil Procedure, we hold the trial court properly determined the evidence was insufficient to present a fact question to the jury of whether an attorney-client relationship existed between defendant and plaintiff and accordingly affirm the trial court's order.

We now know that the court granted a directed verdict below. See Figure 13.4 on page 85 to understand where that happens in a civil case. This paragraph has the holding, or outcome, in this case: "the trial [judge] properly determined the evidence was insufficient to present a fact question to the jury of whether an attorney-client relationship existed between defendant and plaintiff." The existence of an attorney-client relationship is only one element in the test for legal malpractice, but absent the A/C relationship, there can be no malpractice.

The court next introduces the facts relating to the underlying claim; that is, the facts not about the plaintiff and defendant in this case, but about the lawsuit that the defendant in this case was involved with.

The detailed facts giving rise to plaintiff's property-damage claim against the municipalities can be found in *Larson v. Township of New Haven*, 282 Minn. 447, 165 N.W.2d 543 (1969). Briefly, for purposes of this case, plaintiff's semitractor and trailer loaded with livestock was destroyed on May 22, 1964, when Merlyn W. Larson, his driver-employee, was unable to negotiate a turn where the township roads of Pine Island and New Haven townships form a T-intersection. The vehicle left the roadway, broke off a utility pole, and overturned, causing not only plaintiff's loss but also Mr. Larson's death. Mrs. Larson, as trustee represented by defendant at trial, recovered damages for her husband's death against Pine Island township upon findings, which we affirmed, that the township was negligent in failing to post proper highway warning signs and that decedent, her husband, was free of contributory negligence. *Larson v. Township of New Haven*, *supra*.

Getting on the same page: You are reading this case in a textbook, and you are currently on page 227 of the textbook. If you need to quote or cite the text in the next paragraph in a brief, however, you need to refer to the case's pagination in the *North Western Reporter*, not in this case pack. The same issue arises if you get a copy of a court opinion from Google or from Westlaw or Lexis. All these sources provide the answer by inserting an asterisk and page number in the text at the point where a new page begins. So, for example, you can find "*421" a couple paragraphs above, and if you scroll down a couple paragraphs, you'll find "*422". Consequently, you know that all the text between those two markers is on page 421 of the *North Western Reporter*. Almost every time you cite a text in legal writing, you'll need to provide what's called variously a "pinpoint cite," "pincite," or "jump cite" to the specific page to which you are citing. We'll learn some related quirks and complexities later.

Plaintiff commenced this action in 1970 seeking recovery of his loss against defendant upon claims that (1) on May 28, 1964, 6 days after the accident, he also retained defendant, who was representing Mrs. Larson, to prosecute his claim for damages to his tractor and trailer against the townships; (2) defendant negligently failed to preserve his right to seek recovery from the townships by neglecting to serve a notice of his claim upon the municipalities within 30 days of the accident;[1] and (3) but for defendant's negligence, plaintiff would have been successful in recovering damages from Pine Island township, whose liability for the accident had been established by *Larson v. Township of New Haven*, *supra*. After plaintiff presented his case to the jury, the court granted defendant's motion for a directed verdict. In denying plaintiff's post-trial motion for a new trial, the court explained:

> After review of the record the Court remains of the opinion that Plaintiff failed to establish fact issues with respect to an attorney-client relationship, and also failed to establish that he would have been successful in prosecuting his cause of action.

1: A statutory prerequisite to a tort suit against a municipality. Minn. St. 466.05.

The Supreme Court's language is a little sloppy here. The plaintiff's claim—his cause of action—was for legal malpractice. The "claims" to which the court refers here are really allegations. They are structured to fit the rule for legal malpractice, which the court does not actually state but does imply here. We'll discuss this rule later.

The more complicated question of whether plaintiff's proof failed to establish the township's liability for his loss need not be reached, for the evidence fell short of establishing an attorney-client contractual relationship creating a duty of due care upon an attorney, the primary essential to a recovery for legal malpractice.[2]

2: *Christy v. Saliterman*, 288 Minn. 144, 179 N.W.2d 288 (1970). *See, also, White v. Esch*, 78 Minn. 264, 80 N.W. 976 (1899); 10 Williston, *Contracts* (3 ed.) § 1285; 4 Elliot, *Contracts*, § 2857; 7 C.J.S. Attorney and Client § 65; 7 Am. Jur. 2d, Attorneys at Law, §§ 91, 167, 188; Wood, *Fee Contracts of Lawyers*, c. III, § 8; Cheatham, *Cases on the Legal Profession* (2 ed.) c. X, § 1, part A.

The court here identifies a standard for determining whether an attorney-client relationship exists, that of a "contractual relationship," but it does not say how to assess that standard.

Now, the court talks about facts in *this* case for malpractice. Notice

that it begins talking about reading "the transcript of the testimony in the light most favorable to support plaintiff's claim." That's because the trial court did not allow the jury to decide the factual issues—it granted the defendant's motion for a directed verdict. Thus, the trial judge concluded at the end of the trial that the jury did not need to decide, because the evidence was not sufficient for the jury to come out on plaintiff's side. Contrast this with *Togstad* in Appendix Chapter **??**, where the Supreme Court viewed the trial court's decision in the light most favorable to the party who *won* below.

*422 One cannot read the transcript of the testimony in the light most favorable to support plaintiff's claim without being compelled to conclude that no disputed fact issues were raised for a jury to resolve, and that plaintiff did not in fact retain defendant, who was then a complete stranger, as his attorney. The record is clear that on May 28 defendant came to plaintiff's farm to ascertain facts supporting possible claims of his client, Mrs. Larson, not only against the townships but also for workmen's compensation benefits from plaintiff, her husband's employer. The discussion upon which plaintiff relies concerning whether defendant could also represent plaintiff's property-damage claim was only incidental. At best, plaintiff proved no more than an expectation to employ defendant as his attorney. His testimony demonstrates that, subsequent to the accident, he suggested to Mrs. Larson that they employ another attorney known to him to pursue both their claims against the townships; that he believed she had agreed to this course; and that since she apparently preferred defendant, he expected to retain defendant if he personally found it necessary to later employ an attorney. Plaintiff believed, and so told defendant, that he expected to recover, apparently without assistance of counsel, because he was assured by a Pine Island township supervisor that the township had recently "taken out an insurance policy for this type of thing" and "when a bridge is down, or a sign is down * * * they should become liable."

About June 23, plaintiff received a letter from defendant acknowledging that Mrs. Larson had filed a claim for workmen's compensation benefits against him. Since the claim had been filed on June 11, defendant assumed plaintiff might know of it, and the letter at most solicited plaintiff's cooperation with Mrs. Larson in her tort action despite the filing of this claim, which, as defendant wrote, created "a diversity of interest as between yourself and us." Following this letter, plaintiff consulted the attorney he had earlier suggested to Mrs. Larson to handle both their claims. Plaintiff was then advised that his claim was now barred by the 30-day-notice requirement. His testimonial conclusion that he believed he had in fact retained defendant at their May 28 meeting appears most likely and understandably to have been reached only after he was advised his claim against the townships was barred.

The court here engages in a little carefully worded snark toward the plaintiff.

Under the fundamental rules applicable to contracts of employment or the doctrine of promissory estoppel, Restatement, Contracts, § 90, urged as a theory of recovery by plaintiff for the first time on appeal, the evidence

would not sustain a finding that defendant either expressly or impliedly promised or agreed to represent plaintiff in his property-damage claim against the townships.

> Again, the court emphasizes that the key issue is whether a "contract of employment" was formed without really saying what it takes to form one. (Ignore the references to "promissory estoppel" here, as the court notes that the plaintiff raised this issue only on appeal—which is generally not permitted.)

Affirmed.

OTIS and TODD, JJ., took no part in the consideration or decision of this case.

MacLAUGHLIN, J., not having been a member of this court at the time of the argument and submission, took no part in the consideration or decision of this case.

> And finally we find out what happened to the other three justices of Minnesota's Supreme Court here. If any of them had written a dissenting opinion, it would have appeared here after the majority opinion of Justice Rogosheske.

Appendix: Opinion in Togstad v. Vesely, Otto, Miller & Keefe

33

This is the second of three cases that students might use to answer the legal question presented in the Bill Leung hypothetical in Appendix Chapter 28. The first was *Ronnigen v. Hertogs*, which appears as Appendix Chapter 33 in this text, and the third is *In re Paul W. Abbott Co., Inc.*, 767 N.W.2d 14 (Minn. 2009), which is available on Google Scholar, Westlaw, etc.

Link to book TOC

Togstad v. Vesely, Otto, Miller & Keefe

John R. Togstad, et al., Respondents,

v.

Vesely, Otto, Miller & Keefe and Jerre Miller, Appellants.

291 N.W.2d 686 (1980)

Supreme Court of Minnesota.

April 11, 1980.

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*689 Meagher, Geer, Markham, Anderson, Adamson, Flaskamp & Brennan and O. C. Adamson II, Minneapolis, Collins & Buckley and Theodore J. Collins, St. Paul, for appellants.

DeParcq, Anderson, Perl, Hunegs & Rudquist and Donald L. Rudquist, Minneapolis, for respondents.

Heard, considered and decided by the court en banc.

PER CURIAM.

> You should look up "en banc" and "per curiam," if you have not already.

This is an appeal by the defendants from a judgment of the Hennepin County District Court involving an action for legal malpractice. The jury found that the defendant attorney Jerre Miller was negligent and that, as a direct result of such negligence, plaintiff John Togstad sustained damages in the amount of $610,500 and his wife, plaintiff Joan Togstad, in the amount of $39,000. Defendants (Miller and his law firm) appeal to this court from the denial of their motion for judgment notwithstanding the verdict or, alternatively, for a new trial. We affirm.

In August 1971, John Togstad began to experience severe headaches and on August 16, 1971, was admitted to Methodist Hospital where tests disclosed that the headaches were caused by a large aneurism[1] on the left internal carotid artery.[2] The attending physician, Dr. Paul Blake, a neurological surgeon, treated the problem by applying a Selverstone

1: An aneurism is a weakness or softening in an artery wall which expands and bulges out over a period of years.

2: The left internal carotid artery is one of the major vessels which supplies blood to the brain.

clamp to the left common carotid artery. The clamp was surgically implanted on August 27, 1971, in Togstad's neck to allow the gradual closure of the artery over a period of days.

The treatment was designed to eventually cut off the blood supply through the artery and thus relieve the pressure on the aneurism, allowing the aneurism to heal. It was anticipated that other arteries, as well as the brain's collateral or cross-arterial system would supply the required blood to the portion of the brain which would ordinarily have been provided by the left carotid artery. The greatest risk associated with this procedure is that the patient may become paralyzed if the brain does not receive an adequate flow of blood. In the event the supply of blood becomes so low as to endanger the health of the patient, the adjustable clamp can be opened to establish the proper blood circulation.

In the early morning hours of August 29, 1971, a nurse observed that Togstad was unable to speak or move. At the time, the clamp was one-half (50%) closed. Upon discovering Togstad's condition, the nurse called a resident physician, who did not adjust the clamp. Dr. Blake was also immediately informed of Togstad's condition and arrived about an hour later, at which time he opened the clamp. Togstad is now severely paralyzed in his right arm and leg, and is unable to speak.

Plaintiffs' expert, Dr. Ward Woods, testified that Togstad's paralysis and loss of speech was due to a lack of blood supply to his brain. Dr. Woods stated that the inadequate blood flow resulted from the clamp being 50% closed and that the negligence of Dr. Blake and the hospital precluded the clamp's being opened in time to avoid permanent brain damage. Specifically, Dr. Woods claimed that Dr. Blake and the hospital were negligent for (1) failing to place the patient in the intensive care unit or to have a special nurse conduct certain neurological tests every half-hour; (2) failing to write adequate orders; (3) failing to open the clamp immediately upon discovering that the patient was unable to speak; and **690* (4) the absence of personnel capable of opening the clamp.

Dr. Blake and defendants' expert witness, Dr. Shelly Chou, testified that Togstad's condition was caused by blood clots going up the carotid artery to the brain. They both alleged that the blood clots were not a result of the Selverstone clamp procedure. In addition, they stated that the clamp must be about 90% closed before there will be a slowing of the blood supply through the carotid artery to the brain. Thus, according to Drs. Blake and Chou, when the clamp is 50% closed there is no effect on the blood flow to the brain.

About 14 months after her husband's hospitalization began, plaintiff Joan Togstad met with attorney Jerre Miller regarding her husband's condition. Neither she nor her husband was personally acquainted with Miller or his law firm prior to that time. John Togstad's former work supervisor, Ted Bucholz, made the appointment and accompanied Mrs. Togstad to Miller's office. Bucholz was present when Mrs. Togstad and Miller discussed the case.[3]

Mrs. Togstad had become suspicious of the circumstances surrounding her husband's tragic condition due to the conduct and statements of the hospital nurses shortly after the paralysis occurred. One nurse told Mrs. Togstad that she had checked Mr. Togstad at 2 a. m. and he was

3: Bucholz, who knew Miller through a local luncheon club, died prior to the trial of the instant action.

fine; that when she returned at 3 a. m., by mistake, to give him someone else's medication, he was unable to move or speak; and that if she hadn't accidentally entered the room no one would have discovered his condition until morning. Mrs. Togstad also noticed that the other nurses were upset and crying, and that Mr. Togstad's condition was a topic of conversation.

Mrs. Togstad testified that she told Miller "everything that happened at the hospital," including the nurses' statements and conduct which had raised a question in her mind. She stated that she "believed" she had told Miller "about the procedure and what was undertaken, what was done, and what happened." She brought no records with her. Miller took notes and asked questions during the meeting, which lasted 45 minutes to an hour. At its conclusion, according to Mrs. Togstad, Miller said that "he did not think we had a legal case, however, he was going to discuss this with his partner." She understood that if Miller changed his mind after talking to his partner, he would call her. Mrs. Togstad "gave it" a few days and, since she did not hear from Miller, decided "that they had come to the conclusion that there wasn't a case." No fee arrangements were discussed, no medical authorizations were requested, nor was Mrs. Togstad billed for the interview.

Mrs. Togstad denied that Miller had told her his firm did not have expertise in the medical malpractice field, urged her to see another attorney, or related to her that the statute of limitations for medical malpractice actions was two years. She did not consult another attorney until one year after she talked to Miller. Mrs. Togstad indicated that she did not confer with another attorney earlier because of her reliance on Miller's "legal advice" that they "did not have a case."

On cross-examination, Mrs. Togstad was asked whether she went to Miller's office "to see if he would take the case of [her] husband * * *." She replied, "Well, I guess it was to go for legal advice, what to do, where shall we go from here? That is what we went for." Again in response to defense counsel's questions, Mrs. Togstad testified as follows:

> Q And it was clear to you, was it not, that what was taking place was a preliminary discussion between a prospective client and lawyer as to whether or not they wanted to enter into an attorney-client relationship?
>
> A I am not sure how to answer that. It was for legal advice as to what to do.
>
> *691 Q And Mr. Miller was discussing with you your problem and indicating whether he, as a lawyer, wished to take the case, isn't that true?
>
> A Yes.

On re-direct examination, Mrs. Togstad acknowledged that when she left Miller's office she understood that she had been given a "qualified, quality legal opinion that [she and her husband] did not have a malpractice case."

Miller's testimony was different in some respects from that of Mrs. Togstad. Like Mrs. Togstad, Miller testified that Mr. Bucholz arranged and was present at the meeting, which lasted about 45 minutes. According

to Miller, Mrs. Togstad described the hospital incident, including the conduct of the nurses. He asked her questions, to which she responded. Miller testified that "[t]he only thing I told her [Mrs. Togstad] after we had pretty much finished the conversation was that there was nothing related in her factual circumstances that told me that she had a case that our firm would be interested in undertaking."

Miller also claimed he related to Mrs. Togstad "that because of the grievous nature of the injuries sustained by her husband, that this was only my opinion and she was encouraged to ask another attorney if she wished for another opinion" and "she ought to do so promptly." He testified that he informed Mrs. Togstad that his firm "was not engaged as experts" in the area of medical malpractice, and that they associated with the Charles Hvass firm in cases of that nature. Miller stated that at the end of the conference he told Mrs. Togstad that he would consult with Charles Hvass and if Hvass's opinion differed from his, Miller would so inform her. Miller recollected that he called Hvass a "couple days" later and discussed the case with him. It was Miller's impression that Hvass thought there was no liability for malpractice in the case. Consequently, Miller did not communicate with Mrs. Togstad further.

On cross-examination, Miller testified as follows:

> Q Now, so there is no misunderstanding, and I am reading from your deposition, you understood that she was consulting with you as a lawyer, isn't that correct?
>
> A That's correct.
>
> Q That she was seeking legal advice from a professional attorney licensed to practice in this state and in this community?
>
> A I think you and I did have another interpretation or use of the term "Advice". She was there to see whether or not she had a case and whether the firm would accept it.
>
> Q We have two aspects; number one, your legal opinion concerning liability of a case for malpractice; number two, whether there was or wasn't liability, whether you would accept it, your firm, two separate elements, right?
>
> A I would say so.
>
> Q Were you asked on page 6 in the deposition, folio 14, "And you understood that she was seeking legal advice at the time that she was in your office, that is correct also, isn't it?" And did you give this answer, "I don't want to engage in semantics with you, but my impression was that she and Mr. Bucholz were asking my opinion after having related the incident that I referred to." The next question, "Your legal opinion?" Your answer, "Yes." Were those questions asked and were they given?
>
> MR. COLLINS: Objection to this, Your Honor. It is not impeachment.
>
> THE COURT: Overruled.

> THE WITNESS: Yes, I gave those answers. Certainly, she was seeking my opinion as an attorney in the sense of whether or not there was a case that the firm would be interested in undertaking.

Kenneth Green, a Minneapolis attorney, was called as an expert by plaintiffs. He stated that in rendering legal advice regarding a claim of medical malpractice, the "minimum" an attorney should do would be **692* to request medical authorizations from the client, review the hospital records, and consult with an expert in the field. John McNulty, a Minneapolis attorney, and Charles Hvass testified as experts on behalf of the defendants. McNulty stated that when an attorney is consulted as to whether he will take a case, the lawyer's only responsibility in refusing it is to so inform the party. He testified, however, that when a lawyer is asked his legal opinion on the merits of a medical malpractice claim, community standards require that the attorney check hospital records and consult with an expert before rendering his opinion.

Hvass stated that he had no recollection of Miller's calling him in October 1972 relative to the Togstad matter. He testified that:

> A * * * when a person comes in to me about a medical malpractice action, based upon what the individual has told me, I have to make a decision as to whether or not there probably is or probably is not, based upon that information, medical malpractice. And if, in my judgment, based upon what the client has told me, there is not medical malpractice, I will so inform the client.

Hvass stated, however, that he would never render a "categorical" opinion. In addition, Hvass acknowledged that if he were consulted for a "legal opinion" regarding medical malpractice and 14 months had expired since the incident in question, "ordinary care and diligence" would require him to inform the party of the two-year statute of limitations applicable to that type of action.

This case was submitted to the jury by way of a special verdict form. The jury found that Dr. Blake and the hospital were negligent and that Dr. Blake's negligence (but not the hospital's) was a direct cause of the injuries sustained by John Togstad; that there was an attorney-client contractual relationship between Mrs. Togstad and Miller; that Miller was negligent in rendering advice regarding the possible claims of Mr. and Mrs. Togstad; that, but for Miller's negligence, plaintiffs would have been successful in the prosecution of a legal action against Dr. Blake; and that neither Mr. nor Mrs. Togstad was negligent in pursuing their claims against Dr. Blake. The jury awarded damages to Mr. Togstad of $610,500 and to Mrs. Togstad of $39,000.

On appeal, defendants raise the following issues:

(1) Did the trial court err in denying defendants' motion for judgment notwithstanding the jury verdict?

(2) Does the evidence reasonably support the jury's award of damages to Mrs. Togstad in the amount of $39,000?

(3) Should plaintiffs' damages be reduced by the amount of attorney fees they would have paid had Miller successfully prosecuted the action against Dr. Blake?

(4) Were certain comments of plaintiffs' counsel to the jury improper and, if so, were defendants entitled to a new trial?

1. In a legal malpractice action of the type involved here, four elements must be shown: (1) that an attorney-client relationship existed; (2) that defendant acted negligently or in breach of contract; (3) that such acts were the proximate cause of the plaintiffs' damages; (4) that but for defendant's conduct the plaintiffs would have been successful in the prosecution of their medical malpractice claim. *See, Christy v. Saliterman*, 288 Minn. 144, 179 N.W.2d 288 (1970).

This court first dealt with the element of lawyer-client relationship in the decision of *Ryan v. Long*, 35 Minn. 394, 29 N.W. 51 (1886). The *Ryan* case involved a claim of legal malpractice and on appeal it was argued that no attorney-client relation existed. This court, without stating whether its conclusion was based on contract principles or a tort theory, disagreed:

> [I]t sufficiently appears that plaintiff, for himself, called upon defendant, as an attorney at law, for "legal advice," and that defendant assumed to give him a professional opinion in reference to the matter as to which plaintiff consulted him. Upon this state of facts the defendant must be taken to have acted as plaintiff's **693* legal adviser, at plaintiff's request, and so as to establish between them the relation of attorney and client.

Id. (citation omitted). More recent opinions of this court, although not involving a detailed discussion, have analyzed the attorney-client consideration in contractual terms. *See, Ronnigen v. Hertogs*, 294 Minn. 7, 199 N.W.2d 420 (1972); *Christy v. Saliterman, supra.* For example, the *Ronnigen* court, in affirming a directed verdict for the defendant attorney, reasoned that "[u]nder the fundamental rules applicable to contracts of employment * * * the evidence would not sustain a finding that defendant either expressly or impliedly promised or agreed to represent plaintiff * * *." 294 Minn. 11, 199 N.W.2d 422. The trial court here, in apparent reliance upon the contract approach utilized in *Ronnigen* and *Christy, supra*, applied a contract analysis in ruling on the attorney-client relationship question. This has prompted a discussion by the *Minnesota Law Review,* wherein it is suggested that the more appropriate mode of analysis, at least in this case, would be to apply principles of negligence, i. e., whether defendant owed plaintiffs a duty to act with due care. 63 Minn. L. Rev. 751 (1979).

We believe it is unnecessary to decide whether a tort or contract theory is preferable for resolving the attorney-client relationship question raised by this appeal. The tort and contract analyses are very similar in a case such as the instant one.[4] Or, stated another way, under a tort theory, "[a]n attorney-client relationship is created whenever an individual seeks and receives legal advice from an attorney in circumstances in which a reasonable person would rely on such advice." 63 Minn. L. Rev. 751, 759 (1979). A contract analysis requires the rendering of legal advice pursuant to another's request and the reliance factor, in this case, where the advice was not paid for, need be shown in the form of promissory

4: Under a negligence approach it must essentially be shown that defendant rendered legal advice (not necessarily at someone's request) under circumstances which made it reasonably foreseeable to the attorney that if such advice was rendered negligently, the individual receiving the advice might be injured thereby. *See, e. g., Palsgraf v. Long Island R. Co.,* 248 N.Y. 339, 162 N.E. 99, 59 A.L.R. 1253 (1928).

estoppel. *See,* 7 C.J.S., *Attorney and Client*, §65; *Restatement (Second) of Contracts*, §90. and we conclude that under either theory the evidence shows that a lawyer-client relationship is present here. The thrust of Mrs. Togstad's testimony is that she went to Miller for legal advice, was told there wasn't a case, and relied upon this advice in failing to pursue the claim for medical malpractice. In addition, according to Mrs. Togstad, Miller did not qualify his legal opinion by urging her to seek advice from another attorney, nor did Miller inform her that he lacked expertise in the medical malpractice area. Assuming this testimony is true, as this court must do, *see, Cofran v. Swanman*, 225 Minn. 40, 29 N.W.2d 448 (1947),[5] we believe a jury could properly find that Mrs. Togstad sought and received legal advice from Miller under circumstances which made it reasonably foreseeable to Miller that Mrs. Togstad would be injured if the advice were negligently given. Thus, under either a tort or contract analysis, there is sufficient evidence in the record to support the existence of an attorney-client relationship.

5: As the *Cofran* court stated, in determining whether the jury's verdict is reasonably supported by the record a court must view the credibility of evidence and every inference which may fairly be drawn therefrom in a light most favorable to the prevailing party. 225 Minn. 42, 29 N.W.2d 450.

See that footnote! Note that the court here accepts the decision of the jury on this factual matter as conclusively established. Because the trial concluded and the jury reached a verdict, on appeal the court will not disturb the factual determination. So here, the Supreme Court views the conclusions of the jury below in the light most favorable to the party who *won* below, the plaintiff/appellee. Contrast *Ronnigen* in Appendix Chapter 33, where the Supreme Court viewed the evidence below in the light most favorable to the plaintiff/appellant who *lost* below, because the trial court did not allow the jury to decide.

Defendants argue that even if an attorney-client relationship was established the evidence fails to show that Miller acted negligently in assessing the merits of the Togstads' case. They appear to contend that, at most, Miller was guilty of an error in judgment which does not give rise to legal malpractice. *Meagher v. Kavli*, 256 Minn. 54, 97 N.W.2d 370 (1959). However, this case does not involve a mere error of judgment. The gist of plaintiffs' claim is that Miller failed to perform the minimal research that an ordinarily prudent attorney would do before rendering legal advice in a case of this nature. The record, through the testimony of Kenneth Green **694* and John McNulty, contains sufficient evidence to support plaintiffs' position.

In a related contention, defendants assert that a new trial should be awarded on the ground that the trial court erred by refusing to instruct the jury that Miller's failure to inform Mrs. Togstad of the two-year statute of limitations for medical malpractice could not constitute negligence. The argument continues that since it is unclear from the record on what theory or theories of negligence the jury based its decision, a new trial must be granted. *Namchek v. Tulley*, 259 Minn. 469, 107 N.W.2d 856 (1961).

The defect in defendants' reasoning is that there is adequate evidence supporting the claim that Miller was also negligent in failing to advise Mrs. Togstad of the two-year medical malpractice limitations period and thus the trial court acted properly in refusing to instruct the jury in the manner urged by defendants. One of defendants' expert witnesses,

Charles Hvass, testified:

> Q Now, Mr. Hvass, where you are consulted for a legal opinion and advice concerning malpractice and 14 months have elapsed [since the incident in question], wouldn't — and you hold yourself out as competent to give a legal opinion and advice to these people concerning their rights, wouldn't ordinary care and diligence require that you inform them that there is a two-year statute of limitations within which they have to act or lose their rights?
>
> A Yes. I believe I would have advised someone of the two-year period of limitation, yes.

Consequently, based on the testimony of Mrs. Togstad, *i. e.,* that she requested and received legal advice from Miller concerning the malpractice claim, and the above testimony of Hvass, we must reject the defendants' contention, as it was reasonable for a jury to determine that Miller acted negligently in failing to inform Mrs. Togstad of the applicable limitations period.

Defendants also indicate that at the time Mrs. Togstad went to another attorney (after Miller) the statute of limitations may not have run and thus Miller's conduct was not a "direct cause" of plaintiffs' damages. As they point out, the limitations period ordinarily begins to run upon termination of the treatment for which the physician was retained. *E. g., Swang v. Hauser,* 288 Minn. 306, 180 N.W.2d 187 (1970); *Schmidt v. Esser*, 183 Minn. 354, 236 N.W. 622 (1931). There is other authority, however, which holds that where the injury complained of consists of a "single act," the limitations period commences from the time of that act, even though the doctor-patient relationship may continue thereafter. *See, e. g., Swang, supra.* Consequently, the limitations period began to run on either August 29, 1971, the date of the incident in question, or October 6, 1971, the last time Dr. Blake treated Mr. Togstad. Mrs. Togstad testified that she consulted another attorney "a year after [she] saw Mr. Miller." Thus, since she visited with Miller on October 2, or 3, 1972, if Mr. Togstad's injuries resulted from a "single act" within the meaning of *Swang, supra,* the limitations period had clearly run by the time Mrs. Togstad consulted another attorney. If, as defendants argue, the statutory period commenced on the date of last treatment, October 6, and Mrs. Togstad's testimony is taken literally, she would have met with a different attorney at a time when perhaps three days of the limitations period remained.

Defendants' contention must be rejected for two reasons. First, at trial defendants apparently assumed that the limitations period commenced on August 29, 1971, and thus did not litigate the instant issue below. Accordingly, they cannot raise the question for the first time on appeal. *E. g., Turner v. Alpha Phi Sorority House,* 276 N.W.2d 63 (Minn.1979); *Greer v. Kooiker,* 312 Minn. 499, 253 N.W.2d 133 (1977). Further, even assuming the limitations period began on October 6, 1971, it is reasonably inferable from the record that Mrs. Togstad did not see another attorney until after the statute had run. As discussed above, Mrs. Togstad testified that she consulted a lawyer a year after she met with **695* Miller. This statement, coupled with the fact that an action was not brought against Dr. Blake or the hospital but instead plaintiffs sued defendants for legal malpractice which allegedly caused Mrs. Togstad to let the limitations period run,

allows a jury to draw a reasonable inference that the statutory period had, in fact, expired at the time Mrs. Togstad consulted another lawyer. Although this evidence is weak, it constitutes a prima facie showing, and it was defendants' responsibility to rebut the inference.

There is also sufficient evidence in the record establishing that, but for Miller's negligence, plaintiffs would have been successful in prosecuting their medical malpractice claim. Dr. Woods, in no uncertain terms, concluded that Mr. Togstad's injuries were caused by the medical malpractice of Dr. Blake. Defendants' expert testimony to the contrary was obviously not believed by the jury. Thus, the jury reasonably found that had plaintiff's medical malpractice action been properly brought, plaintiffs would have recovered.

Based on the foregoing, we hold that the jury's findings are adequately supported by the record. Accordingly we uphold the trial court's denial of defendants' motion for judgment notwithstanding the jury verdict.

2. Defendants next argue that they are entitled to a new trial under Minn.R.Civ.P. 59.01(5) because the $39,000 in damages awarded to Mrs. Togstad for loss of consortium is excessive. In support of this claim defendants refer to the fact that Mr. and Mrs. Togstad were divorced in July 1974 (the dissolution proceeding was commenced in February 1974), and assert that there is "virtually no evidence of the extent of Mrs. Togstad's loss of consortium."

The reasonableness of a jury's damage award is largely left to the discretion of the judge who presided at trial and, accordingly, the district court's ruling on this question will not be disturbed unless a clear abuse of discretion is shown. *E. g., Bigham v. J. C. Penney Co.*, 268 N.W.2d 892 (Minn.1978). Or, as stated by the court in *Dawydowycz v. Quady*, 300 Minn. 436, 440, 220 N.W.2d 478, 481 (1974), a trial judge's decision regarding the excessiveness of damages will not be interfered with on appeal "unless the failure to do so would be 'shocking' and result in a 'plain injustice.'" In this case, we believe the trial court acted within its discretionary authority in ruling that Mrs. Togstad's damage award was not excessive.

"Consortium" includes rights inherent in the marital relationship, such as comfort, companionship, and most importantly, sexual relationship. *Thill v. Modern Erecting Co.*, 284 Minn. 508, 170 N.W.2d 865 (1969). Here, the evidence shows that Mr. Togstad became impotent due to the tragic incident which occurred in August 1971. Consequently, Mrs. Togstad was unable to have sexual intercourse with her husband subsequent to that time. The evidence further indicates that the injuries sustained by Mr. Togstad precipitated a dissolution of the marriage.[6] We therefore conclude that the jury's damage award to Mrs. Togstad finds sufficient support in the record.

6: In Dawydowycz v. Quady, 300 Minn. 436, 220 N.W.2d 478 (1974), this court acknowledged that evidence of difficulty in enduring a marriage constitutes proof of loss of consortium.

3. Defendants also contend that the trial court erred by refusing to instruct the jury that plaintiffs' damages should be reduced by the amount of attorney fees plaintiffs would have paid defendants had Miller prosecuted the medical malpractice action. In Christy, supra, the court was presented with this precise question, but declined to rule on it because the issue had not been properly raised before the trial court. The *Christy* court noted, however:

> [T]he record would indicate that, in the trial of this case, the parties probably proceeded upon the assumption that the element of attorneys' fees, which plaintiff might have had to pay defendant had he successfully prosecuted the suit, was canceled out by the attorneys' fees plaintiff incurred in retaining counsel to establish **696* that defendant failed to prosecute a recoverable action.

288 Minn. 174, 179 N.W.2d 307.

Decisions from other states have divided in their resolution of the instant question. The cases allowing the deduction of the hypothetical fees do so without any detailed discussion or reasoning in support thereof. *McGlone v. Lacey*, 288 F. Supp. 662 (D.S.D. 1968); *Sitton v. Clements*, 257 F. Supp. 63 (E.D. Tenn.1966), *aff'd* 385 F.2d 869 (6th Cir. 1967); *Childs v. Comstock*, 69 App. Div. 160, 74 N.Y.S. 643 (1902). The courts disapproving of an allowance for attorney fees reason, consistent with the *dicta* in *Christy, supra,* that a reduction for lawyer fees is unwarranted because of the expense incurred by the plaintiff in bringing an action against the attorney. *Duncan v. Lord*, 409 F. Supp. 687 (E.D. Pa.1976) (citing *Christy*); *Winter v. Brown*, 365 A.2d 381 (D.C. App. 1976) (citing *Christy*); *Benard v. Walkup*, 272 Cal. App. 2d 595, 77 Cal. Rptr. 544 (1969).

We are persuaded by the reasoning of the cases which do not allow a reduction for a hypothetical contingency fee, and accordingly reject defendants' contention.

4. Finally, defendants assert that during closing argument plaintiffs' counsel violated Minn. R. Civ. P. 49 by commenting upon the effect of the jury's answers to the special verdict questions. Rule 49.01(1) reads, in pertinent part, that "[e]xcept as provided in Rule 49.01(2), neither the court nor counsel shall inform the jury of the effect of its answers on the outcome of the case." Rule 49.01(2) states: "In actions involving Minn. Stat.1971, Sec. 604.01 [the comparative negligence statute] the court shall inform the jury of *the effect of its answers to the percentage of negligence question and shall permit counsel to comment thereon* * * *." (Emphasis added.) Thus, Rule 49 allows counsel to comment only upon the effect of the jury's answers to the percentage of negligence inquiries.

The statements of plaintiffs' counsel which are being challenged by defendants read as follows:

> Now, this Special Verdict is not complicated, but it is a long one. The defense, of course, would like you to find 50 percent or more negligence on the part of my client. Again, whatever you put down in the damage verdict, doesn't mean anything, because he gets nothing. The Judge arrives at the conclusions of law when you answer these questions. *If you answer it, there is no causation. He gets nothing.*

(Emphasis added.) The first portion of the above comments is proper because it refers to the impact the jury's apportionment of negligence would have on the case. It is unclear, however, whether counsel's reference to causation is consistent with Rule 49. If counsel intended to disclose to the jury the effect the answers to the "direct cause" inquiries would have on whether plaintiffs recovered, then the statement violates Rule 49.

In any event, the question of whether the alleged Rule 49 violation entitles defendants to a new trial is a matter within the sound discretion of the trial court. *See, Patterson v. Donahue,* 291 Minn. 285, 190 N.W.2d 864 (1971). Here, the district court concluded that the purported improper comments of counsel did not require a new trial. In light of the ambiguous nature of counsel's statement, we hold that the trial court did not abuse its discretion in so ruling.

Affirmed.

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