Legal Argumentation

Reasoning & Writing About the Law

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CALI®
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CALI® eLangdell® Press

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

About CALI® eLangdell® Press

The Center for Computer-Assisted Legal Instruction (CALI®) is a nonprofit organization with over 200 member US law schools, and an innovative force pushing legal education toward change for the better. There are benefits to CALI® membership for your school, firm, or organization. Visit https://www.cali.org/. eLangdell® is our electronic press with a mission to publish more open books for legal education.

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Acknowledgments

This book has been the effort of a community of scholars and teachers. Though the "Editors & contributors" page identifies them and indicates their contributions as editors, contributors, or both, it cannot communicate their depth of commitment or effort. My thanks to them all!

Every true teacher learns from their students, and we owe so much of our understanding of legal communication and argumentation to our students. In the early days of this project, my students at Texas A&M University School of Law contributed one or more samples of their writing that we 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, we have their permission to distribute their work as part of this text without individual attribution. They are identified on the "Student contributors" page. Our warmest thanks to them all.

I thank the authors of the excellent textbooks that have come before—I admire aspects of many of them, even if we have chosen to go our 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.

From the outset, my goal was to make this an open educational resource, one that others could revise, remix, and distribute on a not-for-profit basis. eLangdell® Press at the Center for Computer-Assisted Legal Instruction (CALI®) was a perfect match for this project. Its team members have many years of experience with OERs; they were open to our proposal to 'do' this book in quite a different way from the OER textbooks eLangdell® has previously published; and they provided valuable financial and technical support. As a result, students can use the PDF version of this book and never buy a print copy; other teachers can revise and remix this text and distribute the resulting PDF without charge (but note the requirements of the Creative Commons attribution, non-commercial, share-alike license); and CALI® plans to make a version of the text available for use with screen readers and assistive technology. We owe special thanks to CALI®'s Sara Smith and Elmer Masters for their management and technical assistance.

CALI® also arranged for anonymous peer reviewers for the contributions in this book. We are grateful for the reviewers' comments, corrections, and suggestions. The editors take responsibility for any remaining faults.

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A note to teachers | 0

Brian N. Larson

Welcome to this volume and to this note for teachers! We believe it will be valuable for anyone adopting, or considering adopting, this text to read this note first. It first addresses our rationale for this volume, including its scope and coverage; second, its current state and the status of our Teaching Manual; third, an example of how the volume can work in a first-semester 1L class; and finally, some choices we have made that may annoy some teachers and even students but that we think are justifiable.

0.1 Rationale for this volume

We believed the prices of textbooks are high, the electronic versions of textbooks are disappointing, and editions change often and sometimes on short notice. This book was meant to be our response. We didn't want to make money from being textbook authors. We just wanted a book that works the way we want it to. Starting around 2018, I created a draft and began using it in my classes. In spring 2023, I reached out to others in the community of scholars and teachers of legal analysis, reasoning, research, and communication to find collaborators to help me finish the project. Our collective efforts are evident in this draft.

Some points worth observing about this rationale are our commitment to open access and remixability; our rhetorical focus on teaching legal skills; the scope and coverage of this volume; and our sense that there are many ways to work through this volume, many ways of 'telling the story of legal writing,' in 1L and perhaps 2L writing classes.

Open access & remixability

We have worked with CALI® and eLangdell® Press to make this book an open educational resource (OER). Within the generous confines of the Creative Commons license (see the copyright page for details), teachers are free to copy, remix, and remodel this text for their own purposes.

We typeset the book using LaTeX, an open-source typesetting application, and soon after the final PDF and print versions of the text are available, the LaTeX source code will also be available online. So it would possible, for example, for a legal writing program at a law school to adopt a customized version of this textbook with the school's branding and resources particular to that institution. You could change things you don't like, delete things you don't need, and add things you think are missing.[1]

1: Fair warning: LaTeX can be something of a beast to learn, and just getting the whole volume to recompile after minor changes can take several minutes, so you might want to think carefully about whether to take on editing the LaTeX source code.

But because the book in PDF form is free of charge, there's no reason you can't just use portions of this text as part of a class built around another textbook or no textbook at all. If you require students to buy the print version of this book, of course, they may expect you to make pretty extensive use of it.

The PDF version is also richly interlinked, with a main table of contents that links to all chapters and sections in them; a mini-TOC at the beginning of each chapter with links internal to the chapter and a link back to the main TOC; and many cross-references in the text, each of which should directly link to the applicable location. (My students have found the ability to navigate the PDF extremely valuable. Not lugging another textbook around is also attractive to many.)

We also show our commitment to OERs by making all our references to citation guides link to the *Indigo Book*,[2] itself an OER presentation of the standard legal style of citation.[3]

Finally, we have CALI's assurance that it will generate a version of the text suitable for screen readers or other assistive technology. This PDF, unfortunately, does not measure up on that basis.

2: Christopher Sprigman, Jennifer Romig, et al., *The Indigo Book: An Open and Compatible Implementation of A Uniform System of Citation* (2d ed. 2022, 2023 revs.), https://indigobook.github.io/versions/indigobook-2.0-rev2023-2.html.

3: Our references to it also include cross references to the *ALWD Guide* and *Bluebook*.

Rhetorical stance & focus

In this volume, we have taken what we think of as a *rhetorical stance* to the teaching of legal skills. In the West, the study of rhetoric and the philosophy of law were born together 2500 years ago in a few Mediterranean city states, and the disciplines have been intertwined ever since, though some modern legal theorists say legal analysis is all about logic and has nothing to do with rhetoric. In our view, law and rhetoric belong together. Adopting a rhetorical stance to legal writing means teaching students to be attentive to the differences that they see in language use and writing, to understand why those differences might be present, to be aware of the audiences and the constraints of the situations in which they are communicating, and to make their own rhetorical choices based on this information.

Our goal with this volume is to teach students how to think about the core concepts of the law, but to recognize at every step of the way that what counts in legal writing is the audience. The audience for a trial brief is different than the audience for a predictive analysis in an email. A judge may be a very different audience for writing than opposing counsel. One judge may view the audience for which they are writing very differently than another judge would, which matters very much for a clerk trying to draft an opinion for the judge. Even two different senior lawyers in the same firm may have different views about what their audiences expect from writing, meaning that a new associate has to be prepared to speak in different voices to different audiences depending on which senior attorney they are writing for.

These differences can exist at the highest levels. For example, what passes for a client-advice email depends on the law firm, the client, the type of matter, and even the lawyer whose signature will be at the bottom of it. It

might have a different level of organization at the highest level. It might have a different style of presentation (perhaps bending or twisting the CREAC paradigm taught in this text). It might adopt different usage, spelling, and punctuation standards. This book can't teach all those alternatives, but we overtly try to make students think about these details in their contexts so they have the necessary adaptability to deal with new contexts.

Scope & coverage

Any experienced teacher of legal skills glancing even briefly through the table of contents of this text will immediately recognize that it is (a) overinclusive and (b) underinclusive. It is overinclusive in the sense that we are presenting different avenues into the topics relevant to legal communication, offering more chapters than any professor will likely wish to assign in two 1L semesters, and describing too many genres of legal communication to fit into a 1L syllabus. It is underinclusive in that our chapters on genres (see Chapter 27 through Chapter 40) tend to provide pretty high-level coverage of the topics. For example, Chapter 28, on professional email, does not cover all the variations you might encounter when writing emails in the great variety of sub-genres in which email manifests in any given lawyer's practice.

This approach is by design! We expect that experienced teachers introducing any of the genres in this book to students as part of a major graded assignment will have their own handouts, copies of articles, and other resources to teach the genre well. But even novice teachers should be able to use the applicable genre chapters in this book to present a basic assignment attentive to the characteristics of any of these genres.

0.2 Current state of the volume

Though this volume is complete and ready to use, we are still completing the Teaching Manual as of May 2025; we anticipate it being complete sometime in June 2025. The TM will be a Word/PDF document made available on CALI®'s site only to teachers. The TM will include:

1. Sample syllabi for use in a 1L legal-writing program, one set of fall/spring syllabi that emphasizes one approach and one set that emphasizes another. Each syllabus should show how a teacher can capitalize both on the textbook's breadth and its non-sequential structure.
2. Lists of additional readings that may prove useful either for teachers or students for particular chapters or sections of the text.
3. For each chapter, identities of any chapters or sections elsewhere in the book that we think students need to read or might benefit from reading before the current chapter.
4. For each chapter and some sections, identifying any applicable handouts or other teaching aids in an 'exhibits folder' available to teachers; noting any concepts that seem tricky to us to introduce to

students and how we handle them; offering alternative vocabulary for some terms we use; and providing questions for comprehension or proficiency quizzes if you want to give them to students to see whether they are doing the reading.

5. Sample exercises and assignments keyed to the textbook's presentation.

0.3 How to teach with this book

If you are a student in this class, STOP for a moment and read this note! This section of the note to teachers outlines only one way of using this textbook. Your professor may use a radically different approach, and it will probably be a good one. You should never approach your professor with the contents of this section and ask 'Why aren't we doing things *this way* in our class?'

We do not intend for you to assign the chapters of this book to students in order from beginning to end. Rather, we recommend that you choose a story of your own about effective legal communication. Here is how I've been using this text during the 1L first semester in a three-credit legal writing class at a school with a twelve-week semester. I use an approach that *chunks* and *scaffolds* learning, as described in Section 25.4.

Scaffolding with low-stakes exercises

I show students the graphic in Figure 1 and explain that we follow a basic procedure all year:[4]

- **Acquiring knowledge.** This they do through reading something, usually in this textbook. Students may have to take a comprehension quiz.
- **Practicing skill.** This is learning by doing. Students put their knowledge to work, practicing the skill(s) they read about for completion points. We do this usually without prior discussion in class. Sometimes this means writing a short text; sometimes it means evaluating one of the examples in this textbook.
- **Formative assessment 1.** This is learning by assessing others' work. Students review each other's work and comment on it, using evaluative criteria from this text, for completion points. Having to articulate the concepts in the text as part of their evaluations of each other strengthens their understanding of material.

4: Where an exercise indicates 'completion points,' that means that if the student submits on time and the teaching assistant believes the student made a good-faith effort, the student gets full points. On quizzes, I usually set them to allow multiple attempts and students get full points if they get a majority of answers correct on at least one attempt.

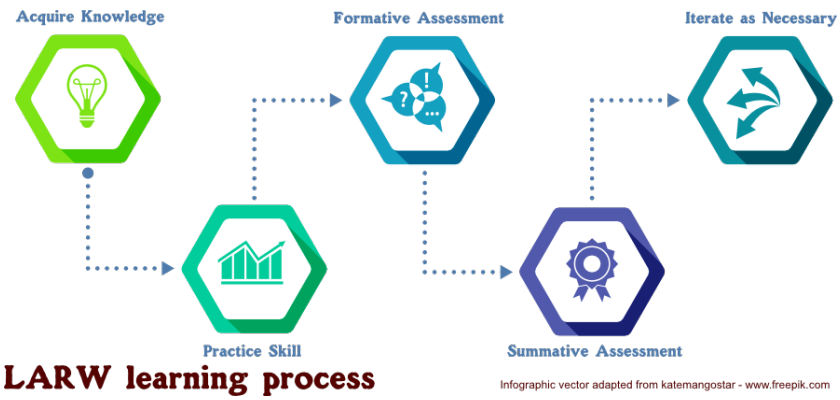


Figure 1: This is the learning-process graphic Larson shows students at the beginning of their 1l legal writing class.

- **Formative assessment 2.** We nearly always workshop the resulting peer reviews in class time, discussing students' work and talking through choices students made. Seeing other students' efforts gives them more ability to imagine different ways of taking on the same task. And hearing my reaction to selected examples prompts questions from them about their own work. Note that this workshop, where students see each other's writing, also makes students more accountable for these exercises that otherwise have low stakes.[5]
- **Missing link.** Figure 1 doesn't show a missing link. Before proceeding to summative assessment, I ask students to practice the same skill again, either by writing something new or by revising what they already did. This is part of the *Iterate as necessary* icon.
- **Summative assessment.** These assignments are the few in the fall that I actually grade for their quality, rather than just the student's completion. My fall semester usually includes three, culminating in a full predictive/objective memo project, including research.
- **Iterate as necessary.** Every completion-point exercise and graded assignment is a chance to have students practice what they learned in previous iterations. By practicing skills more than once and iterating them in slightly varying circumstances, we can teach students to be skilled and adaptable.

5: For details on this pedagogy, see Brian N. Larson, *Centering Students' Rhetorical Knowledge: The Community of Inquiry as Formative Assessment*, 27 Legal Writing 223 (2023).

Chunking the building blocks

I chunk the material with the following goals. First, I want to be sure students have some basic background. We then proceed to two short chunks, one on elementary legal reasoning and communication and one on more advanced legal analogy and the memo genre. The final chunk (which is really probably two or three concurrent intertwined chunks) is the students' first full research and writing project in memo form.

The basics. There is some basic information that I feel students must have about this class and about the law when we get started. Each year, depending on the school's orientation plans and who my students' other teachers are, I may expect they will get some of this elsewhere. But I usually assign much of the material under this heading to students for them to read *before* they get to their first class with me.

- Chapter 1 (Introduction for students) (five pages). This chapter introduces the legal writing class and textbook.
- Chapter 2 (What is law?) (eight pages). This seems a necessary introduction from my prospective. Some professors would find it unnecessary, figuring students will get some kind of gestalt sense of the answer in their first few weeks of law school. I make this chapter optional if I'm sure that the school's orientation discusses this topic.
- Chapter 16 (Humans in the legal context) (eight pages). Because my students do *a lot* of peer review and because lawyers often interact with a wide variety of people in law school and afterwards, I place a special focus on treating other people (even those whom we think we dislike and those with whom we disagree profoundly) with respect.

I ask students to place a special focus on Section 16.5 (Guiding one another with peer review).

- Chapter 17 (Sources of American law & precedent) (ten pages). I refer to this chapter and the essential framework and vocabulary it gives students frequently throughout the 1L year.
- Chapter 41 (Appendix: Plagiarism) (six pages). Students 'sign' a pledge to conform to my policy by taking a quiz in our LMS.
- I have students read Section 39.1 (Elevator pitches) (one page) and have each post an *elevator pitch* on our peer-review platform. They give feedback to two or three other students before our first class, where we discuss the norms for peer review in the class.

Elementary legal reasoning & presentation skills. The goal of this chunk is to get students to the point where they can perform a very basic legal analysis and communicate it to a law-trained audience after the first three weeks of class or so. At that point, I want them to show rule-based arguments and case-based arguments intended to explain rules. (The next chunk includes more advanced case-based, or 'analogical,' reasoning.) This chunk and the following ones intertwine material from the three major parts of the text, LEGAL REASONING, LEGAL CONTEXTS, and LEGAL COMMUNICATION.

- From the LEGAL REASONING part of the text, students read:
  - Chapter 3 (Overview of legal reasoning) (six pages).
  - Chapter 4 (Stating the question(s)) (four pages).
  - Chapter 5 (Rule-based reasoning) (seven pages).
  - Chapter 6 (Case-based reasoning) (five pages).
  - Chapter 14 (Writing a simple analysis) (22 pages). This chapter is the beating heart of the semester. We refer back to it multiple times. At this stage, however, we focus only on the CREAC components.
- From the LEGAL CONTEXTS part of the text, students read:
  - Chapter 18 (The civil case) (eight pages). The first half of the semester, I would only teach with civil problems. The second half might be civil or criminal. I might make this chapter optional if I'm sure my students' CivPro prof gives a broad overview like this early in the semester. If I were to use criminal problems in the first half of the semester, I would have students read Chapter 19 (The criminal case) instead.
  - Chapter 20 (Outlining rules in legal texts) (nine pages).
  - Chapter 23 (Reading opinions of courts) (four pages). From the APPENDIX CHAPTERS, students also read the annotated court opinion either in Chapter 51 (Appendix: Opinion in *Lake v. Wal-Mart Stores*) (ten pages) or Chapter 52 (Appendix: Opinion in *Ronnigen v. Hertogs*) (six pages).
- From the LEGAL COMMUNICATION part of the text, students read:
  - Chapter 27 (Overview of correspondence) (five pages).
  - Chapter 28 (Professional email) (ten pages).
- Exercises and assignments.

- Students write weekly for completion points, peer review, and workshopping in class. They learn how to state the question they are going to answer, write a simple application of a simple rule, and write a simple analysis where a case provides explanation for a statutory rule. They do at least one of these exercises in the form of an email.
- *Graded assignment.* Students write an analysis of a legal question in the form of an email, applying rule-based reasoning. I mark, but do not grade, mechanical errors and include references to applicable sections of Chapter 42 (Appendix: Words, sentences & paragraphs), Chapter 43 (Appendix: Using verbs), and Chapter 44 (Appendix: Writing mechanics).

Legal analogies and the memo genre. In the second three weeks of class, students learn to use cases as examples in the compare-and-contrast form that is at the heart of legal reasoning. They also become acquainted with the memo genre.

- From the LEGAL REASONING part of the text, students reread:
  - Chapter 6 (Case-based reasoning) (five pages).
  - Chapter 14 (Writing a simple analysis) (22 pages). We return to this chapter continually during the first semester.
- From the LEGAL CONTEXTS part of the text, students read:
  - Chapter 21 (Understanding legal citations) (eight pages).
  - Chapter 22 (Reading enacted law) (eight pages) (along with the example in Appendix Chapter 45). I sometimes postpone this chapter until later in the semester, particularly if the problem in this chunk does not include statutory interpretation.
- From the LEGAL COMMUNICATION part of the text, students read:
  - Chapter 29 (Memoranda) (nine pages). I encourage students to skim the chapter at this stage. We review it for the next chunk.
- From the APPENDIX CHAPTERS, students read:
  - Chapter 46 (Appendix: Leung scenario & responses) (eight pages) and Section 47.1 (Fair-use problem, phase I) (fourteen pages). We use these examples of student writing in exercises.
  - Chapter 52 (Appendix: Opinion in *Ronnigen v. Hertogs*) (six pages) and Chapter 53 (Appendix: Opinion in *Togstad v. Vesely, Otto, Miller & Keefe*) (eleven pages), cases that figure in Chapter 46.
  - Chapter 45 (Appendix: Example of a statute in context) (to accompany Chapter 22).
- Exercises and assignments.
  - Students write weekly for completion points, peer review, and workshopping in class. They get more practice writing emails and analyses.
  - *Graded assignment.* Students write an analysis of a legal question in the form of a memo (without question presented, brief answer, factual background, or conclusion sections), applying rule-based reasoning and case-based reasoning using a closed universe of

between four and six cases. I supply them a memo template that simplifies formatting issues. I mark and grade mechanical errors, but they have small weight in the assignment grading.

Planning and executing a research project. After fall break, in the final six weeks of the semester, students learn how to take a legal project from start to finish, including researching and writing a full-memo. The goal is for students to have a high-quality writing sample at the end of the first semester.

- From the LEGAL REASONING part of the text, students read:
  - Chapter 11 (The analysis & writing process) (nine pages).
  - Chapter 12 (Legal research) (eight pages).
  - Chapter 13 (Facts in the law) (six pages).
  - Chapter 15 (Writing a complex analysis) (eleven pages).
- From the LEGAL CONTEXTS part of the text, students read:
  - Chapter 19 (The criminal case) (twelve pages) or Chapter 18 (The civil case), whichever was not assigned in the first chunk.
  - Chapter 26 (Material contexts) (eight pages).
- From the LEGAL COMMUNICATION part of the text, students reread:
  - Chapter 29 (Memoranda) (nine pages). In this rereading, we focus on the parts of the memo other than the discussion.
- From the APPENDIX CHAPTERS, students read:
  - Appendix Chapter 50 (Appendix: Opinion in *Filippi v. Filippi*) (twelve pages). We read this case to learn about rule synthesis.
- Exercises and assignments.
  - Students write weekly for completion points, peer review, and workshopping in class. Students start by writing question presented, brief answer, factual background, and conclusion sections for the memo they wrote in the previous chunk. There are other writing exercises associated with research for this project.
  - *Graded assignment.* Students write an analysis of a legal question in the form of a memo, including question presented, brief answer, factual background, and conclusion sections, having performed the necessary research. I mark and grade mechanical errors, and they have relatively large weight in the assignment grading.

0.4 Different voices/different choices

Voices. Readers will note differences in presentation from chapter to chapter because we were not strict about contributors conforming to one style of writing or one 'voice.'

Choice. We also consciously made certain choices about usage and style. Some of these choices were controversial with peer reviewers.

- We use contractions in the text.

- We use third-person, plural pronouns to refer to individuals of unknown gender.
- We write in the first person.

We nevertheless made these choices because we want to cultivate in students a rhetorical awareness of the texts they read. Relatively early in the text, we explain these choices to students. In other parts of the text, we explain that many legal readers don't like these choices. We teach our students to be sensitive to audience and context and choose the right approach for the circumstances.

Our approach to citations. This is a textbook for 1Ls, and we believe it's helpful for them to see citations that look like those they will encounter in practice documents. Unfortunately, some of the in-line citations used in practice documents according to the *Indigo Book*, *ALWD Guide* and *Bluebook* are unwieldy. This text takes a hybrid approach: Citations to authorities appear in samples and examples of legal writing in-line as if the text were a practice document except where we think they make the text difficult to follow, in which case they 'fly out' into numbered sidenotes.

Quotations. We use what likely seems (and may well be) an idiosyncratic approach to quotation marks. When referring to words and phrases, we put them in single quotation marks. We use the same approach for 'scare quotes,' the quotation marks that go around expressions that the author wishes to put into question or doubt. We use double quotation marks only for quotations of the words of others. For emphasis, we use italics. See these examples.

> We use 'they' to refer to individuals of unknown gender.
>
> If I were to write 'The plaintiff is represented by our firm,' you would note that the sentence includes an instance of passive voice.
>
> These instances of 'legal analogy' are really examples of case-based reasoning and not analogies at all.
>
> Garner describes these as "zombie nouns," which seems a little harsh to me.[6]
>
> This chunk of the semester emphasizes *case-based* reasoning.

6: Bryan A. Garner, *The Redbook* § 14.3(c) (5th ed. 2023). We use double quotes here, because these are Garner's words, which also explains the citation.

1 Introduction for students

Brian N. Larson

1.1 Legal argumentation

We designed this book 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'[1] 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. Furthermore, you cannot effectively help a client out of a bad situation if you do not properly assess how bad the situation really is.[2]
- **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 possible on their client's behalf.[3]

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 choose 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 analysis and 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.[4] They concern themselves with fine details of grammar,

1: In this book, you will note that we use single quotation marks to refer to a word or phrase in its *citation* form; that is, when we are talking about the word or phrase itself. When we quote from some text or authority, we use double quotation marks. This practice is a little unusual, but we want you to think about the difference between quoting someone else who is using certain words and our talk about the words themselves. You will find a guide to a typical approach for using quotation marks in legal writing in Section 44.4.

2: You will find examples of objective or predictive communications to clients in Section 14.2, Section 37.2, Section 46.3, and Chapter 47.

3: You will find examples of such persuasive communications in Section 31.4, Section 31.5, Chapter 33, Chapter 35, and Chapter 48.

4: See Section 42.5 for common pet peeves of your likely readers. Ask your teacher about theirs. Later, when in practice or clerkship, ask your supervising attorney or judge about theirs!

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're working for a judge who insists that there must be two spaces between sentences instead of one, you had better adhere to that preference.

Wait, aren't contractions a little informal?

In the previous sentence and in the caption of this box, we have used contractions ('you're' and 'aren't'). The subsection on using contractions at page 364 notes that many legal writers strongly dislike contractions in formal legal writing. So you might ask why we should tell you there to be cautious about using contractions in your legal writing while simultaneously using contractions freely in this textbook. The answer is that this textbook is our communication to you, the student, and we'd like to sound a little more informal and friendly. As the discussion of contractions at page 364 notes, to be an effective legal writer, you should be rhetorically sensitive to contexts and adapt your practices to them. Of course, you should avoid contractions entirely in your class if your teacher says so. But out in the world of practice, you will have other possible choices.

1.2 The design of this book

The book is divided into three major parts, with appendices that provide additional tools in a fourth part:

- **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 part explains the major argumentative moves that are permitted and widely used in the law. It cannot only address *rational* tactics, however, as nonrational tactics play a significant role, even in predictive analyses.
- **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, and even private contracts between parties. Legal argumentation also always happens in some kind of real-world context:[5] within a law office or firm, within a business relationship between parties, in a courtroom, a before an arbitrator, etc. This part explains those contexts.
- **Legal Communication**. This part describes various ways of presenting your legal analysis. These 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

5: Except for most of the writing you will do in law school.

argument before the same court, and many other *genres* or kinds of legal communication.

Following these three parts is a fourth that consists of several appendices, the first of which tackle some key grammatical and mechanical issues, and the rest of which function as teaching aids.

To make the best use of this book, you will not read it cover to cover. Instead, you should read the parts your instructor assigns in the order they[6] assign them. You are thus not likely to read the chapters in numerical order. Instead, your teacher will have you read chapters in the order most applicable to their syllabus. There may be chapters your teacher does not assign, and your teacher may substitute other resources that they prefer for some chapters of this book.

You may find some of the chapters, especially in the first part on legal reasoning, a little esoteric, as they focus on the rational processes in legal reasoning. Don't let that discourage you from exploring the many examples and guides to various techniques and genres later in the book.[7]

6: In this text, the authors are using 'they' to refer to a single person whose gender is unknown. We may occasionally use feminine pronouns ('she,' 'her,' etc.) as generic pronouns. We 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 pronouns in Section 16.3 and Section 42.4.

7: Several of my students have contacted me after their 1L–2L summer to tell me that they used the examples in this book as templates or starting points for genres they had to write during a summer job or internship.

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 argue the law. Sometimes there is not a simple answer, even if there is often a safe answer. In some contexts, for example, there will be a presumption that you should avoid risks; there, the lack of a simple answer might lead the client to prefer a cautious course of action. Other times, there is 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* part of this volume introduces you to genres with which your teacher may wish you to be familiar during your first year in law school. Your teacher may not plan to introduce all these genres to you; do not be surprised if that is the case. Your teacher may also introduce you to one or more of the many other genres of legal communication, such as policy guides, investigative reports, specialized letters, and so on, that simply cannot fit in this volume.
- **Focus on communicating with laypeople**. As a specific example of the last bullet, 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. Chapter 37 touches on client communication, but you will learn much more about it later

in law school, especially in clinical courses, internships, externships, and clerkships.

1.4 How to succeed

Dedicate time to revision! Every year, first-year law students 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.'

> **Even highly skilled and experienced lawyers 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."[8]

Some folks estimate that the author of a good memo or brief spends 50–80% of their time revising with only the balance available for the first draft.[9] 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 in a way that leaves that much time, you can observe the adage: 'Get it down . . . then get it right!' You may need to turn what you initially put on paper or your computer completely upside down, 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 never likely 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.'

8: For more on the planning process for writing and the required time, see Section 11.2.

9: For more on giving writing enough time, see Section 11.2 and Anne Lamott, *Shitty First Drafts*, in *Writing About Writing* 527, 528 (Elizabeth Wardle & Doug Downs eds., 2d ed. 2014).

Figure 1.1: How do you succeed in legal communication? Planning, especially planning to spend a lot of time in the revision and proofreading phases. Image: Oleksii Bychkov https://www.oleksiibychkov.com.

1.5 Ethics: Your success matters

At various points in this book, we'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 ethical duty for lawyers to be competent, and this seems like a good time to bring that up.

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 Rules of Pro. Conduct R. 1.1 (Am. Bar Ass'n 2018).

Legal argumentation encompasses all the key requirements—knowledge, skill, thoroughness and preparation—that this rule requires.

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 really know the law only if you can express it in argumentative form, applying it to your client's facts.

Your work will never be perfect. Nobody's is. 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 legal argumentation.

What is law? 2

Brian N. Larson

This chapter very briefly introduces an important question often neglected in the first-year legal curriculum: 'What is law?' The question is important because one's answer to it affects what one would expect the answer to a second question should be: 'What is legal argumentation?'

Of course, this little chapter can hardly be said to give a full account of the nature of law. Whole courses are dedicated to the question. But it can get you thinking first about what it means for a system to be a *legal system* and then what we might consider to be appropriate argumentation for deliberating in such a system. We start by thinking about rules and what it means for them to be part of a legal system. We then consider theoretical views of the content of the law that have predominated in Anglo-American circles for the last 200 years or so, natural law and positivism. Folks who embrace positivism, procedural natural law, or both are drawn to the idea of textualism, which we will touch on briefly.[1] The theories that Section 2.2 through Section 2.4 summarize are vulnerable to the criticisms in Section 2.5.

1: Please note that the teacher's manual for the course includes some citations to further readings on these theoretical questions. Ask your teacher, if you are one of those students who really wants to dig deeper.

Section 2.6 then emphasizes that lawyers cannot afford to rely on a single theoretical perspective on the law when attempting to persuade a judge or opposing party to accept a legal argument. You have no way of knowing which philosophy the judge actually practices (whatever their public statements about it may be), and you have no way of knowing whether the judge might be persuaded by considerations outside that philosophy if only you bring them to the judge's attention. This leads us to practical reason in law, the brand of argumentation in which lawyers must be prepared to engage, regardless of their theoretical or philosophical stripes. Practical reason is the method that this text embraces, and indeed, that most practicing lawyers live by. The section concludes with a summary of some of the types of practical reason Chief Justice John Marshall (perhaps the most famous U.S. Supreme Court Chief Justice) used in an early case.

2.1 Rules & laws

> **(Human) Law**: The body of rules, whether proceeding from formal enactment or from custom, which a particular state or community recognizes as binding on its members or subjects.
>
> —*Law*, n. I.i.1.a., *Oxford English Dictionary.*

This simple definition seems quite broad, in part because of the terms that it comprises. The definition relies first on the term "rule." A rule is probably

best understood as a statement of how certain consequences attach to an action or state of affairs. The scope of "state or community" is unclear. It could mean just governmental actors, as in "state or municipality," or it could mean any social actors, as in "state or social group." Finally, it is not certain what "binding" means here, though presumably, it means that there are consequences for not obeying the rule.

Consider some examples:

- A cooking recipe might warn you not to have any oil in a bowl that you will use to whip egg whites, as egg whites will not whip and stiffen in the presence of oil. The community of experienced cooks recognizes this as a sort of rule. But the recipe's rule arises not from enactment or custom but from the laws of chemistry and would seem not to be a part of any human legal system.
- The convention that one should not wear white clothes between Labor Day and Memorial Day now seems quite dated. In its heyday, folks might have looked down on you for failing to practice the convention, but the only sanctions were likely to be informal social ones that members of the community imposed, such as sneering comments behind your back.[2] It would seem this is not a law in part because there were no binding consequences.
- Rules of conduct for customers in a shopping mall might be seen as binding, in the sense that they have consequences: Violate them, and you will be ejected from the mall. Here, though, it's hard to argue that a state or community recognized the rules. Only the mall's owner or operator does so. It would seem this is not a law as a result.[3]

2: Fictional contexts may sometimes present fatal consequences for failing to follow this 'law,' as fans of the classic John Waters film *Serial Mom* (1994) will tell you.

3: The mall's right to eject violators of its rules does, however, have roots in property law.

Rules that might be laws vary not only in whether they are formally or informally enacted, recognized by states or communities, and binding. They vary based on their complexity and on who enforces them. Consider the rules of a sport like baseball.

Most of us would not think of the rules of baseball as a legal system, but they certainly meet the OED's definition: Baseball players and umpires (and to a certain extent, the fans) are members of a community that has formally enacted a set of rules that is binding on the players and umpires.[4]

4: *See, e.g.*, Office of the Commissioner of Baseball, *Official Baseball Rules* (2023 ed.).

The rules of a game like baseball can be quite complicated, and those of Major League Baseball run to some 190 pages. Nevertheless, they deal with a very narrow range of human activity: the playing of a single sport. They also tend to be pretty straightforward to apply. For example, those things that count as a *strike* in baseball are narrowly defined by the rules. So a pitch is a strike as thrown if "any part of the ball passes through any part of the strike zone." *Id.* at 155. The *strike zone* in turn is defined as "that area over home plate the upper limit of which is a horizontal line at the midpoint between the top of the shoulders and the top of the uniform pants, and the lower level is a line at the hollow beneath the kneecap." *Id.* The rule language is so carefully drafted that one could imagine a computer algorithm being able to decide whether a pitch was a strike or a ball. Making such a decision is hardly something that most folks would be willing to pay a lawyer for, and we certainly don't expect that our judges are determining something so rudimentary.[5] Not only do baseball's rules

5: Contrast the claims of Chief Justice John Roberts, who imagines instead judges calling "balls and strikes." John Roberts, *Chief Justice Roberts Statement—Nomination Process*, United States Courts (2005), https://perma.cc/74UT-ZEWQ.

seem extraordinarily simple in comparison to our legal system, but we also instinctively doubt that a system of rules not enforced by the government is a set of laws.

Compare the rules of baseball to the rules of law of a state such as Iowa, for example. Iowa's legal rules are vastly more complicated than those of baseball and call for more subtle judgments. Iowa's rules of law are also different from baseball in that they have the coercive power of the state behind them. If you break the law of baseball, you lose the game. The authority imposing the rule of conduct is a baseball league. If you break the laws of Iowa, the authority imposing consequences is the state, which can put you in jail, take away your property, and otherwise coerce you.

The thing you have come to law school to study is the *legal system, the system that makes and enforces that body of rules, whether proceeding from formal enactment or from custom, which a particular community recognizes as binding on its members or subjects and which the government of that community enforces by coercion*. We are left with a problem, though: What is the *content* of those rules proceeding from formal enactment or custom?

There are varying opinions on what we should regard as the content of the laws that bind us. Some thinkers look to natural law grounded in religious texts or an imagined natural state of humanity. Others look to the expectations of any community of people about what the law *should* be. Still other thinkers desire to adhere strictly to the words of laws that legislators and legislatures (and similar bodies) enact, giving rise to the notion of *textualism*. But ultimately, lawyers make use of all these approaches—and others—when engaging in practical reason about what the law is.

2.2 Natural law

Rooted deeply in most cultural understandings is the idea that the law is or should be connected somehow to a natural order of things. In the West, such views are at least as old is the Roman statesman Cicero (1st c. BCE). Many theories of natural law in the modern West have roots in the notion of *natural law* that Thomas Aquinas (13th c. CE) set out. There are at least two principal threads of natural-law theory. One thread is that natural law is known from religious traditions: in Aquinas's case, the Bible of the Christian faith (in the version accepted by the Roman Catholic Church). The other thread, common to Western thinkers in the 17th century and onward, is that we can look at the world around us and reason about what the law should be from the way the world is.

The first of these threads is challenged in a pluralistic society such as the U.S., where even people in the same denomination of Christianity cannot agree on what their god's law is. The latter thread is challenged in two ways: First, it's not clear that looking at the world around us and *seeing how it is* can reasonably serve as justification for rules about what the law *should be*. An effort to make such a justification is what philosophers sometimes call the *is-ought problem* or the *naturalistic fallacy*.[6] Some thinkers in the West's so-called 'Enlightenment' reasoned from how they thought humans

6: For discussion of the is-ought problem, see David Hume, *A Treatise on Human Nature* (1739); find treatment of the naturalistic fallacy in G.E. Moore, *Principia Ethica* (1903).

would have behaved in a *state of nature*, that is, before the creation of human societies and their laws, to claims about what human society and laws should look like. Without any direct evidence about that state of nature, however, they had to resort to imagining it based upon how humans behave in our societies—something that should be obvious to you as a form of circular reasoning.

What's worse, those philosophers at least sometimes engaged in motivated reasoning to pick and choose from the world around us those facts that best supported their arguments.[7] For example, John Locke's (17th–18th century CE) theories about property took an angle that is by no means logically necessary but that conveniently justified the taking of property from indigenous peoples of the Americas during his lifetime and afterwards. Immanuel Kant (18th–19th century CE) similarly made 'logical' arguments for classifying peoples of the world in such a way as to justify European colonialism.

7: Motivated reasoning is "when biased reasoning leads to a particular conclusion or decision, a process that often occurs outside of conscious awareness." *Motivated Reasoning*, Psychology Today, https://www.psychologytoday.com/us/basics/motivated-reasoning, last visited Nov. 17, 2024.

Nevertheless, many of us have a general sense that the content of the law should be morally grounded—that the law should not be immoral. Many leading figures in the framing of the American constitution and laying the foundations for interpreting it in the early nineteenth century expressly cited natural-law principles. Supreme Court Justice Joseph Story published treatises on the law of his time in which he asserted that we could deduce the law from the principles of natural law. But how many of the principles of Story's natural law would contemporary Americans be willing to embrace? If you got to vote on the U.S. Constitution today, how many of its authors' moral predilections would you share? How many would you share even with your fellow contemporary Americans?

The challenge of natural law, therefore, is getting a grasp on what exactly it should be in a nation with widely divergent moral and ethical ideas and ideals.

Given this seemingly overwhelming challenge about what the law is or ought to be, perhaps there may be natural laws about how we make and enforce the laws.

2.3 Procedural natural law

Human societies make laws, and one philosopher, Lon Fuller, argued that there were natural laws governing the *process* of law-making and enforcement. He argued that for a system to be a legal system, it should have an inner morality, exhibiting the following characteristics:[8]

8: The names of these principles and statements of them are adapted from the study of Ivar R. Hannikainen, Kevin P. Tobia, et al., *Are There Cross-Cultural Legal Principles? Modal Reasoning Uncovers Procedural Constraints on Law*, 45 Cognitive Sci. e13024 (2021).

- **Generality**. Laws should be general rules and not apply only to specific people. For example, a law should not say, 'Everyone except white men must pay sales tax.' There are, of course, laws that seem valid that apply only to some people. But those distinctions usually need to be grounded in some articulated public interest. For example, children might not be permitted to drive cars on grounds that they do not have the physical or mental capacities necessary to do so.

- **Publicity**. Persons subject to laws should be able to find out what the laws are. There should not be secret laws.
- **Comprehensibility**. Those subject to laws should be able to understand them.
- **Possibility**. The law should not require people to do things that are impossible.
- **Non-retroactivity**. Laws should not punish people for acts that were legal when committed in the past.
- **Consistency**. Laws should not contradict one another, at least within a given jurisdiction.
- **Stability**. Laws should not change very frequently. 'Frequently' is relative, of course, but certainly laws should not change daily or weekly.
- **Enforcement**. The law should be enforced as it is enacted. In other words, there should not be laws on the books that the authorities do not enforce or, worse, that the authorities enforce against only some citizens.

You may have doubts about whether the American legal system exhibits these characteristics, but research suggests that not only Americans, but people around the world *expect* their legal systems to conform to these norms.[9] Folks in different cultures might not agree about the rights of women, religious minorities, or sexual minorities, but they largely agree about these principles. In other words, Fuller's procedural norms are practically universal.

9: *Id.* (surveying more than three thousand people across eleven countries, including the U.S. and others in Europe, South America, and Asia).

Our discussion still has not told us what the *content* of the law is, but it hints at the process for determining it.

2.4 Legal positivism

The OED definition allows for the rules to "proceed[] from formal enactment or from custom." The paradigmatic instance of "formal enactment" is when a legislature passes a law that the executive signs (or at least does not veto). Such law is also called 'posited' law, the law 'put forth' by a person or body of people legitimately empowered to do so. From that term, we get the name of a group of philosophies called *legal positivism*, which generally and to one degree or another hold that the content of the law is what authorized officials enact as the law.

This sort of procedure for making laws, assuming it goes on in public, seems at least to satisfy the publicity and stability requirements that Fuller identified. Given that legislators are folks just like us and assuming that they read what they are voting on, we'd also expect such laws to be comprehensible. Fuller's other goals have to do more with the content of those laws.

A strong Anglo-American tradition since the early 1900s, positivism holds that what the content of the law is bears no necessary relation to what the law should be; that is, morality plays no role in what the law *is*. Morality may play a motivating effect on making law (including on the procedures

discussed above), and it may have an effect on applying the law if the law's text appeals to moral principles. But the law itself may be moral or not.

There is a trivial way in which this is instinctively true. For example, according to their laws, Americans drive on the right-hand side of the road and folks in the UK on the left-hand side. It's hard to argue that one or the other of these laws is morally superior.

Given some of the commitments of positivism and the nearly universal natural-law procedural principles that should guide the development and enforcement of laws according to Fuller, it is not surprising that legal theorists are very much attached to the text of enacted laws as the principal source of their true meaning. This is hardly new: Cicero himself acknowledged that the first place to look for the meaning of a law is its text.

2.5 Problems with positivism & textualism

But positivism and textualism suffer from limitations that make them seem an insufficient model for determining the content of the law.

Starting first with textualism, we shall see in Chapter 8 that the text is always a good starting place when working with the law. But textualism—focusing (almost) entirely on the text of the law—faces a number of challenges. Some of them are discussed elsewhere in this text. A key challenge is that there are rules of thumb for interpreting texts, sometimes called 'canons of interpretation' or 'canons of construction,' that can point in different directions. When they do, the text by itself simply cannot answer the question about which way the case should go, and the judge has to make a practical decision on other bases.

Strict positivism also faces criticism when it is used to defend immoral laws. The classic example is Nazi Germany. Most policies of the Nazi government were enacted into written law according to procedures the German country then recognized as legitimate, making them seem to be legitimate laws. But the laws included things like unjustified and uncompensated taking of the property of Jewish citizens and forced sterilization of 'undesirables,' making the laws seem immoral and therefore illegitimate.

We have an important response to the problem of *immoral positivism* from Gustav Radbruch, a German jurist who was seen as an old-style positivist before World War II. In 1945 he published a short essay called "Five Minutes of Legal Philosophy."[10] He still seems positivistic, but he now raises a threshold, a point beyond which a law that is lawfully posited is so wrong morally that it must be disobeyed. Radbruch ultimately says that law must exhibit three characteristics (in a kind of balance) for it to have moral force as law: public benefit, legal certainty, and justice.

10: Gustav Radbruch, *Five Minutes of Legal Philosophy*, 26 Oxford J. Legal Studs. 13 (2006) (originally published 1945).

Two of Radbruch's criteria, public benefit and justice, require us to think morally or ethically about what the law should be and should do. Balancing competing canons of textual interpretation and more ethical questions of public benefit and justice requires a kind of reasoning that is practical

and flexible, a kind of reasoning that has a long history in American jurisprudence.

2.6 Practical reason in law

As the previous sections have shown, lawyers cannot afford to rely on a single theoretical perspective on the law when attempting to persuade a judge or opposing party to accept a legal argument. Lower-court judges cannot rely on such perspectives when attempting to persuade higher-court judges to uphold their decisions, either. (After all, a lower court's opinion is not just meant to justify the judge's opinion to the parties, but it is meant to fortify the judge's decision against appellate review.) In fact, even the U.S. Supreme Court cannot rely on a single philosophy if it wishes to maintain institutional credibility.

What lawyers and judges commonly do is engage in a more flexible form of *practical reasoning*. Yes, an enacted statute is an important source for interpreting and applying a law, and the text of that statute is a critical guide to its meaning, but courts in the United States have historically evaluated many other issues.

Consider the opinion of Chief Justice John Marshall in the case of *McCulloch v. Maryland*, 17 U.S. 159 (1819). Certainly, Marshall was well aware of the constitutional text about which he wrote. Justice Antonin Scalia has claimed that Marshall "is usually accounted the greatest of our Justices."[11] And Scalia asserted that "the Supreme Court of the United States was firmly committed to judicial textualism as early as the chief justiceship of John Marshall."[12]

11: Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* xxi (2012).

12: *Id.* at 23.

In *McCulloch*, the Chief Justice had to decide whether the federal government had power under the U.S. Constitution to create a national bank. The First Congress of the United States had created a national bank by statute but allowed the statute to lapse and the bank to be dissolved. After the War of 1812, Congress created a new national bank, but the state of Maryland challenged the federal government's authority to do so. Maryland argued that the federal government's powers are limited to those expressed in the federal Constitution, and that text nowhere expressly authorized Congress to create a bank. Supporters of the bank pointed to section 10 of Article I of the Constitution, which provided Congress the power "to make all laws which shall be necessary and proper for carrying into execution" the powers of the federal government.

In reaching the conclusion that the federal government had the power to create a bank, Marshall did not just consider the text of the Constitution, which lacked any reference to such a power, nor did he confine his analysis to what exactly "necessary and proper" might mean in Article I, section 10. Instead, he provided an exhaustive analysis that considered all the following factors:

- He noted that the power of Congress to create a bank had been widely accepted until the *McCulloch* case. This argument is grounded in tradition.
- He concluded that we should not expect the text to list all the powers by name, as enumerating every instrumentality the federal government might need would have been impractically long. This argument is a pragmatic one about the limitations of texts and the convenience of legislators.
- He concluded that creating corporations, such as banks, is an "ancillary power," not a "great power." This argument is an argument by classification, which has no textual basis in the Constitution itself.
- He considered generally what would be the effects of construing "necessary and proper" narrowly. These consequentialist arguments consider not the just meaning of the text, but the impacts that various meanings might have. Further, he raised the consequences of not allowing this particular power as necessary and proper, given the federal government's recent experiences with financing the 1812 war.
- Marshall also drew analogies to the governments of the states and territories of the United States.

Marshall's opinion is not without its detractors, but it clearly illustrates the rich variety of arguments that lawyers need to be able to make in support of their positions, and it emphasizes the *practical* in practical reason.

In this text, we hope to offer you guidance for how to make and evaluate such arguments.

Legal Reasoning

3 Overview of legal reasoning

Brian N. Larson

In this chapter, you will learn that there is a rational perspective about what legal argumentation should be: that it should give good reasons for believing the conclusions for which it argues. You will also learn that there is a rhetorical perspective about what legal argumentation should be: that it should be persuasive so your client wins. After this chapter introduces these concepts, the following chapters will look at them in more detail.

3.1 Legal argumentation's motivations

A proposition is just a statement that something either is or should be true. 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.' A cliché example is this:

> *Premise:* Diotima is a human.
>
> *Premise:* All humans are mortal.
>
> *Conclusion:* Therefore, Diotima is mortal.

Here, the two premises are propositions about the world and a particular person in it, and together, they permit one to infer the conclusion, which is itself another proposition.

Different kinds of arguments, including different kinds of evidence and different adherence to the requirements of deductive logic, are applicable in different domains of argumentation. Think about mathematical proofs or scientific studies that rely on statistical induction—neither of which is a good analog for what lawyers and judges do. Legal argumentation consists of the forms of argumentation that are recognized as conventional in the legal arena.

Two key points are worth noting: First, the law is almost always subject to some debate. Even with a 'settled rule'—like the permissibility of *de jure* racial segregation in public services established in the infamous case of *Plessy v. Ferguson*, 163 U.S. 537 (1896)—social context, judges, and legal arguments come along—as they did to overturn segregation in *Brown v. Board of Education*, 347 U.S. 483 (1954).

Second, as a lawyer, you will likely have clients, and your job will be to advance your clients' goals, provided doing so is within the ethical constraints that the law imposes on you.[1] To the extent that a settled rule works against your client, it will be your job to try to subject the rule to debate.[2]

1: For discussions on ethical concerns, see Section 10.1, Section 13.9, Section 26.5, Section 26.6, Section 27.3, and Section 37.8. Section 3.5, Section 6.4, Section 9.1, Section 12.5, Section 13.5, Section 26.4, Section 36.2, Section 36.5, Section 37.6, and Section 41.5 also discuss ethical concerns.

2: *See, e.g.*, Section 7.3. Your clients will not always be able to afford your efforts to overtun settled law. *See* Chapter 26.

In the practical context of the lawyer advising clients or advocating for them before judges and tribunals, you must know that the law is malleable, both in its rules and in their application.[3] Even if every fiber of your being tells you that there is or should be a clear answer to every legal question, you cannot rely on that instinct when crafting arguments.

3: *See generally* Melissa H. Weresh, *Stargate: Malleability as a Threshold Concept in Legal Education*, 63 J. Legal Educ. 689 (2014).

But legal argumentation is not a complete free-for-all: There are conventional rational approaches to argumentation in the law that can provide good reasons for believing their conclusions, even if they are not as iron-clad as the deductive reasoning implied by the rules of baseball or as confident as some positivists that the answer is always in the text.[4] This text calls such arguments *rational tactics*, because they are designed to appeal to the audience's reason. Usually, however, there will be opposing lawyers offering what they urge are *better* reasons to believe *their* conclusions. This conversation is what ancient Western philosophers would have called *dialectic*, the exchange of rational arguments in a deliberation.[5]

4: For the discussion of baseball and positivism, see Chapter 2.

5: Robin Smith, *Aristotle's Logic* § 8.3, Stanford Encyclopedia of Philosophy, `https://perma.cc/6Z3K-YEYG` (explaining the uses of dialectic in Aristotle's era).

The dialectical motivation in law is thus, in part, 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. An appeals court that does not accept the argument 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.

Because lawyers have clients who want to win, they also engage in argumentative techniques that appeal to their audiences' emotions, unconscious assumptions, and sometimes biases. This text calls these *nonrational tactics*.

In summary, this section has identified the two motivations that 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—to win.

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.[6] To succeed, your presentation needs to use both *rational* and *nonrational* argumentative tactics.[7] It may also use *narrative* tactics to appeal to the audience with storytelling techniques.[8]

6: For a discussion of understanding your audience, see Section 11.1.

7: Regarding the latter, see Chapter 9.

8: *See* Chapter 10.

3.2 Rational tactics

The dialectical motivation—and our sense of how law should work—tells us that legal arguments should be rational or *cogent*.[9] The arguments that an advocate makes before a judge are also dialectical in that they anticipate

9: In other words a legal argument 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." Trudy Govier, *The Philosophy of Argument* 119 (1999). Notice that this chapter (and much of this book) avoids the use of the word 'logical' in this context. To say that legal reasoning is or can be 'logical' may, according to some interpretations of that term, suggest that it can be certain. There is not room here for me to fully refute that view. Lawyers and judges usually describe their arguments as logically certain only when they know that they are not but want to dress them up in the *clothing* of certainty. Don't be fooled by this nonrational tactic.

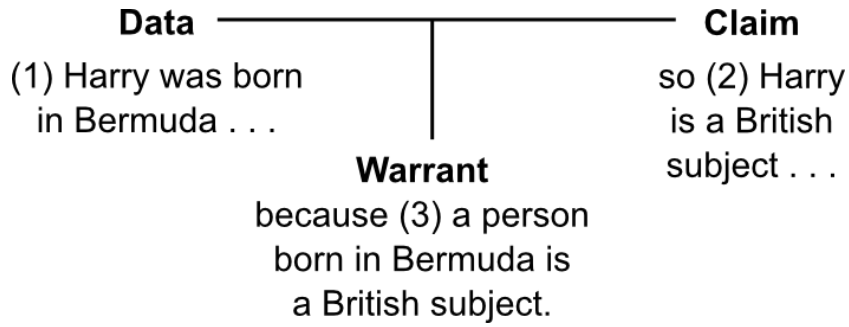


Figure 3.1: In Toulmin's model, a warrant licenses the move from data to some claim.

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."[10] A rational tactic is one that makes it more sensible or reasonable to believe the conclusion that the argument supports. Lawyers very commonly combine three rational tactics—rule-based arguments, case-based arguments, and policy arguments—to make their arguments cogent.

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

Each of these tactics has at its heart three things: First, there is some evaluative criterion or *warrant* that permits us to draw a conclusion in the presence of some facts; second, some facts or *data* about the present situation that could fit with the warrant; and finally, the conclusion or *claim* that the warrant and data taken together support.

Philosopher Stephen Toulmin developed this data–warrant–claim model in the 1950s, and his first example of it is depicted in Figure 3.1 according to his model: "Harry was born in Bermuda, so Harry is a British subject, because a person born in Bermuda is a British subject." If we reorder this sentence a litle, it looks something like a logical deduction:

> *Warrant or major premise:* If a person was born in Bermuda, they are a British subject.
>
> *Data or minor premise:* Harry was born in Bermuda.
>
> *Claim or conclusion:* Therefore, Harry is a British subject.

The warrant allows the reasoner to move from the data to the "claim," the conclusion that Harry is a British subject.

But in the law, the warrant is not always a rule like the one in this example. In other words, not all legal reasoning is 'rule-based' reasoning, the subject of Chapter 5. For Toulmin, and for us, there will be other possible kinds of warrants.

For example, case-based arguments or 'legal analogies' take an example of a previously adjudicated case and argue that the current case should come out the same way.

> *Warrant or precedent:* In a previous case, the petitioner was found to be a British subject because he was born in Bermuda.
>
> *Data:* Harry was born in Bermuda.
>
> *Claim or conclusion:* Therefore, Harry is a British subject.

You may instinctively feel that this argument is not quite as strong as the rule-based one that preceded it, and you wouldn't be wrong. Nevertheless, such arguments are conventionally accepted in the law. Learn more about them in Chapter 6.

Policy-based arguments identify a policy and claim that having a case with certain data should result in a particular outcome. Sometimes they rely on additional data and sub-arguments.

> *Warrant:* Persons born in the overseas territories of the United Kingdom should be deemed British citizens because:
>
> - the foreign affairs and defense of overseas territories are committed to the UK; and
> - assignment of citizenship is critically connected to duties of persons to defend their homeland and to their ability to travel abroad.
>
> *Data 1:* Harry was born in Bermuda.
>
> *Data 2:* Bermuda is an oversees territory of the United Kingdom.
>
> *Claim:* Therefore, Harry is a British subject.

If you look closely here, you will see that the policy argument is really two intertwined arguments. One is the argument that those born in overseas territories should be treated a certain way to achieve a certain outcome. The opponent of this argument might marshal a number of counter-arguments. You might also note that the arguer here is using a policy justification for a new rule. In short, the warrant in this argument is basically the same as the first example, the rule-based argument. But assuming that first rule is not set out anywhere in enacted law, this argument makes an argument for that rule. Learn more about policy arguments in Chapter 7.

Of these three rational tactics, rule-based reasoning is probably the most popular among advocates and judges, though the two other rational tactics, legal analogies and policy arguments, are also common.[11]

11: *See* Brian N. Larson, *Precedent as Rational Persuasion*, 25 Legal Writing 135 (2021), https://ssrn.com/abstract=3540538 (showing that in one set of court briefs and opinions, case-based arguments—or legal analogies—were about half as common as rule-based arguments, and policy arguments were about half as common as legal analogies).

3.3 Interpreting legal language

As you may already have figured out, the sources for many rules for rule-based reasoning, cases for case-based reasoning, and policies for policy-based reasoning are other legal texts, including statutes, court opinions, and a wide variety of others. One set of rational skills you will usually need in the law is how to interpret the language you find in legal texts. Chapter 8 takes up that issue briefly, but you should focus attention also on Chapter 20, Chapter 22, Chapter 23, and Chapter 24, depending on what types of textual authorities you are using for your analysis and arguments. Legal interpretation is an art, however, so don't expect to become expert at it your first year in law school or even before you graduate. For many lawyers, it takes years of experience to master.

3.4 Nonrational tactics

Legal communication includes many characteristics that are important for gaining the trust of the reader or listener but that do not directly support the cogency of an argument. In other words, these *nonrational tactics* function to make the argument more acceptable to the audience without (necessarily) making it more rational. Nonrational tactics include rhetorical moves, but they also include a broader array of techniques.[12]

12: To understand how to make nonrational tactics work, you need to know something about how the human mind works. You can find some information about the cognitive context of human beings in Chapter 25.

First and foremost, professional communication inspires confidence. It results in a kind of prejudgment by the reader or listener that what you've presented is more likely to be true because you've presented it well. So, for example, satisfying the reader's expectations for good grammar and punctuation—though it does nothing to make your argument more rational—can go a long way toward building your credibility. Similarly, the task of 'roadmapping' for your reader, discussed in Section 14.11, makes it easier to follow the development of your argument.

You can facilitate a positive audience response by analyzing the audience's situation and suiting your communication to it. This might affect your word choice, sentence length, etc. But even when you are using rule-based reasoning, you should recognize that you can state a rule in a way that is rationally correct but also persuasive to your particular audience.

Finally, rhetorical tactics like alliteration, cadence, varying sentence length, parallelism, simile, metaphor, and personification can make your communication 'land' better with the audience and perhaps make it more memorable.

See Chapter 9 for a broader discussion of nonrational tactics.

3.5 Narrative tactics

One kind of tactic does not fall plainly into the rational or nonrational camp: the narrative tactic. This approach is also sometimes called 'storytelling' or 'applied legal storytelling.' Narrative reasoning is important in the law, as in all types of practical reasoning, because it helps the audience understand the context into which the legal facts fit. When using it, the argument's proponent often calls upon the imagination of the audience to understand the facts in a certain light.

In that sense, the use of narrative tactics can be rational. Understanding the context surrounding certain facts can be critical for assessing them rationally. Narrative reasoning comes with many ethical risks, however. One is that an argument's proponent might use narrative to create a story that relies on deep-seated—but unstated—stereotypes about participants in the story. In such a situation, the argument's proponent is appealing to emotions and prejudice.

Chapter 10 discusses narrative reasoning in more detail.

3.6 Complexity & the pivot to persuasion

The next seven chapters address the principal tactics you may use in your legal argumentation. It may be helpful for you to think of those chapters progressing in two ways:

- First, the chapters go from being easier for the novice practitioner (that's you!) to apply to being more complex. Rule-based reasoning (Chapter 5) is most like the logic problems you may have been told are useful for preparing you for law school. Rules-based arguments and case-based arguments (Chapter 6) also come with fairly clearly cut methods for assessing and attacking them. Policy-based arguments (Chapter 7) and narrative reasoning (Chapter 10) may seem a little harder to grasp, especially when you are trying to apply them to legal problems. And you will spend much of the rest of law school learning how to evaluate and attack arguments based on them.
- Second, the chapters go from focusing on more rational tactics to focusing more on nonrational tactics. These changes represent a continuum: Even in rule-based reasoning (Chapter 5), the rational tactic that looks most like logical deduction, the pivot to persuasion arises where you must look at ways to *frame* a rule so that it is persuasive for your client's position. In many problems, there will be a huge range of policy arguments (Chapter 7) and narrative arguments (Chapter 10), and lawyers often chose among them with very clear persuasive goals in mind. And arguments about the meaning of texts (Chapter 8) often bring all these complexities together.

But before you can even *begin* analyzing a problem so that you can use argumentation to find an answer, you need to be able to state what question you are trying to answer. Chapter 4 provides some guidance there.

4 Stating the question(s)

Brian N. Larson

Before you being researching and analyzing a legal question, you must at least tentatively decide which question you are trying to answer. This is often not as simple as you might think. This chapter provides you some guidance on how to formulate the question you are trying to answer when you do your research and analysis. Note that you may state the question you form at this stage differently than the question you present in your communications of your legal analyses.[1]

1: *See* Section 29.4; Section 35.3.

4.1 Ill-defined problems

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."[2] 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.

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

Ill-defined problems are those where the "problem is largely being made up as it is being worked on."[3] 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.[4] 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.

3: *Id.* at 268.

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

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 a law firm or 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 upon 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 14, and CREAC, which Section 14.3 introduces and which you will use throughout your first year.[5]

5: CREAC stands for 'Conclusion, Rule, Explanation, Application, Conclusion,' an organizational paradigm for writing legal analysis.

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 writing.

So we need to think about how to refine legal problems into legal questions. Consider the hypothetical situation in the next section.

4.2 Maria's brother the lawyer

Imagine this scenario:

> After you are licensed to practice law and go to work in a law office in your state, 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 lawsuit 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 the elder 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 the rules of lawyer ethics, is it permitted to be both lawyer and witness in the same legal proceeding?

4.3 How to frame questions

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

Figure 4.1: Framing legal questions. Image: Oleksii Bychkov https://www.oleksiibychkov.com.

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 you to 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:[6]

> **Attorney-client privileged communication**
>
> 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 our state's 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]

6: You may want to look at the examples of confirmation emails in Section 46.2, which arise under the hypothetical situation in Section 46.1. Regarding the privilege legend at the top of this email, you may wish to review Section 28.5.

Finally, and perhaps most importantly, recognize that your question may need to evolve. On a matter as simple as Maria's, the confirmation email above may be the last iteration of the question. You might offer her an answer to her question the next day. On a bigger project, however, you may review the law and discover that certain facts—facts your client has not yet provided you—are critically important for your issue. After gathering those facts, you may need to revise the question you are trying to answer. Even in Maria's case, as she reads your confirmation email, she may decide that she *does* want you to explore some of the issues you carved away.

5 Rule-based reasoning

Brian N. Larson

Chapter 3 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 the cliché example from Section 3.1:

> *Premise:* Diotima is a human.
>
> *Premise:* All humans are mortal.
>
> *Conclusion:* Therefore, Diotima is mortal.

Jurist and philosopher Neil MacCormick sets this up in the form of a classical deduction and generalizes it to legal rules:[1]

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

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 forms of these ways of reasoning. Chapter 20, Chapter 22, and Chapter 23 provide guidance on how to read and brief them in statutes and court opinions.

1: Neil MacCormick, *Rhetoric and the Rule of Law* 43 (2005); *see also* Torben Spaak, *(Review of) Neil Maccormick, Rhetoric and the Rule of Law: A Theory of Legal Reasoning*, 23 Const. Comment. 101, 104-07 (2006).

5.1 Deductive rules & their elements

The simplest type of rule is the deductive rule, the one in which 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.' 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.[2] But you should recognize that rules can just as easily be embodied in statutes (and other enacted law) as in court opinions.

2: You can read an example of a common-law legal claim springing into existence in the *Lake v. Wal-Mart* case in Chapter 51.

The *operative facts* in the civil battery rule 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.

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 one of the five items in the list must be true for the normative consequence to attach. The fourth item, however, is itself *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 a 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?[3] Consider this statement of the rule from *Pechan v. DynaPro, Inc.*, 622 N.E.2d 108, 117 (Ill. App. Ct. 1993).[4] Imagine your assignment in the instant case is to 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).[5] 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,

3: In addition to this example, you might find it instructive to read the *Filippi* opinion in Chapter 50.

4: Stop a moment: What is the source of this opinion? Consult *Indigo Book* Table T3, 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?

5: 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 5.1: 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://perma.cc/R68J-2BNH.

> 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.

Taking into account your assignment, you might state the operative facts 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 Consequence] is liable to the plaintiff for battery.

You can omit 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. You need not include the 'intent to harm' issue, because that arises only if the touching was otherwise a lawful act. Finally, you need 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.[6]

6: 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.

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 20.1, you completely outline the rule to fully understand it. In the second, described in Section 14.4, 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.

5.2 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. To do so, they will ask themselves certain questions that we call 'critical questions.' Critical questions are questions, the answers to which may undermine the argument at which they are directed.

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.[7] 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).

7: Stop a moment: What kinds of authorities could have changed the law from *Pechan*? *See* Chapter 17.

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.

5.3 Factor-based rules

A factor-based or balancing test requires a court to consider two or more factors and balance their effect.[8] 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*, so that copying "for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright." 17 U.S.C. § 107. Section 107 continues:

> 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.

To apply this rule, you must read cases to see how courts balance these factors. In fair use, 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 6. Generally, you would assess each factor separately and then follow with a balancing of them, something discussed further in Chapter 15.

8: Section 20.5 provides practical guidance for reading and briefing rules of this kind.

5.4 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.[9] Consider the opinion in *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.[10] 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:

9: Section 20.6 provides practical guidance for reading and briefing rules of this kind.

10: Why is the U.S. Supreme Court reviewing the decision of the Illinois Supreme Court here? Be sure you understand these structural characteristics. For fuller discussion, see Section 17.2.

> 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 6. Generally, you might assess each *issue* separately and then follow with an assessment of the totality, constructing a complex analysis of the kind discussed further in Chapter 15.

5.5 Rules & the pivot to persuasion

When you are writing persuasive arguments, as opposed to analytical or objective analyses, you will probably be selective in how you frame the rules for your legal problem so that your writing is the most persuasive it can be to your reader.[11]

11: Section 9.2 provides guidance on writing persuasive rule statements for those situations.

You will also work hard to characterize the operative facts in your problem in such a way that the rule does or does not apply (depending on what best suits your client). Within ethical constraints, you are not just allowed but expected to do so.[12]

12: See Chapter 13 for a discussion of writing facts.

Case-based reasoning 6

Brian N. Larson

In Section 3.2, we reviewed the deductive argument structure, one where the premises, if they are true, *compel* the conclusion. We noted, however, in Chapter 5, and particularly Section 5.2, that deductive arguments in the law are subject to several critical questions. Consider the Bill Leung hypothetical problem in Appendix Chapter 46, 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 52) and *Togstad* (Appendix Chapter 53), you will see that there is not one 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 case examples, what lawyers typically call 'analogizing.' Like rule-based reasoning, case-based reasoning 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 5.[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 https://perma.cc/7ZGK-KPJ5.

6.1 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 in Section 14.2 attempts to determine whether her client 'operated' his vehicle under the Texas drunk-driving statute. Her client, the would-be 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 notes 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 *Barton*: 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 into 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 will 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 respective analyses. The assertion of the relevance of f_1 and f_2 is implied or *enthymematic*.

For our purposes, an enthymeme is just an argument in a form where a premise or conclusion is left unstated.[3] 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.

3: The concept has more complicated dimensions, some of which are discussed here: Christof Rapp, *Aristotle's Rhetoric*, The Stanford Encyclopedia of Philosophy (Edward N. Zalta ed. Spring 2022 ed.), https://perma.cc/6BW4-ZKYN.

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, 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 is not there, though, as we shall now see.

6.2 Critical questions

There are critical questions for legal analogies just as there are for legal deductions:[4]

4: *See* Section 5.2.

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 $f_1 \ldots f_n$, is the feature present both in the Cited Case and the Instant Case?
CQ 3 *Relevance Question.* On what basis are features $f_1 \ldots f_n$ relevant to legal category A?
CQ 4 *Precedent Outcome Question.* Did the Cited Case really assign legal category A?
CQ 5 *Relevant Dissimilarity Question.* Are there some dissimilarities $g_1 \ldots g_n$ between the Cited Case and the 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 $f_1 \ldots f_n$, except that legal category A is not applied in that other 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 5.2, CQ1 asks the threshold question for every argumentation scheme: Is it appropriate here? In theory, there may be some circumstances where using 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.[5] CQ4 merely tests whether the proponent of the argument has correctly stated the outcome of the Cited Case.

5: *See* Chapter 7.

CQ5 and CQ6 invite new information that might undermine or defeat the argument. CQ5 looks at dissimilarities between the Cited Case and the 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.

6.3 *A fortiori* arguments

An *a fortiori* argument, as *Black's Law Dictionary* (11th ed. 2019) notes, is one that should prevail by "even greater force of logic; even more so it follows."[6] Thus, "if a 14-year-old child cannot sign a binding contract, then, *a fortiori*, a 13-year-old cannot." *Id.*

6: *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.

Think back to the discussion of copyright fair use in Chapter 5. 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 contained 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.

The example from *Black's Law Dictionary* 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 Oxford, and the fourteen-year-old there was just of average intelligence?

Some legal writers actually use the term '*a fortiori*' in their arguments. That's fine.[7] But it can also sound a bit pompous, and as my fair-use example showed, it's not necessary to make the point.[8]

7: Do remember to italicize the term.

8: For more, see Section 42.4 at page 366.

6.4 Cases & the pivot to persuasion

Case-based reasoning can sometimes be very amenable to persuasive legal writing. When your job is to persuade a reader rather than to objectively assess a problem, you will choose among cases carefully to find the ones that function best to support your client's position.

An ethical caveat is in order here, though: If you are presenting arguments and analysis to a court you must disclose adverse law that is controlling on your case. So if a precedent case seems to go against you, it's your job to bring it up.[9] Lawyers address this problem in a variety of ways. But a common one is to work hard to distinguish such negative precedents from the instant case. Writers can do this as part of the counter-arguments in their analyses.[10]

9: See Section 11.4 for a fuller discussion of this ethical rule.

10: See the discussion of counter-arguments in Section 14.9.

Sometimes advocates will even relegate their efforts to distinguish the bad cases to footnotes, perhaps in hopes that the reader won't bother to review them. Though that approach technically satisfies the ethical rules, it can become rather obvious and a little tedious if the advocate uses it continually.

7 Policy-based reasoning

Beverly Caro Duréus

In Section 3.2 you were briefly introduced to policy-based reasoning as one of the rational tactics common in legal argument. In this chapter, we will take a more in-depth look at policy-based reasoning and learn that you should not think of adding it merely as an afterthought to a legal argument. Rather it can be, in and of itself, as a situation warrants, the 'main course,' or the central theme undergirding an argument. It may be presented separately or interwoven in other portions of a legal argument. And because policy is everywhere in the law, you should be sensitive to it even if you have no intention of making a policy argument.

An argument based upon policy-based reasoning, sometimes simply referred to as a policy argument, is founded upon considerations within a society or other social construct that are deemed essential to support or to avoid, especially because of the impact that a court's ruling may have on a group or the public at large. Policy-based arguments identify a policy and claim that having a case with certain facts should result in a particular outcome.

This chapter provides several examples with specific types of fact patterns that are readily amenable to policy arguments, including filling a gap in the law, finding an exception to a rule, and overturning a long-standing precedent. It also identifies general categories of policy arguments that may be applicable to your client's problems. It concludes by arguing that you should *always* be looking for the policies that underlie the legal rules and cases that you are applying in your reasoning.

7.1 Policy fills a gap

Policy arguments are often needed to fill a void in authorities. This is especially true because the structures of the federal government and most state governmental systems are trifurcated: The legislative branch writes our laws; the executive branch carries them out; and the judicial branch interprets and applies them. This type of separation of powers is designed to ensure a good check and balance on each governmental branch and to discourage any branch from growing too powerful. Of course, as up-and-coming lawyers, you know that it is the judicial branch that hears and resolves legal cases, and there is some portion of the public, at least, that thinks the judiciary should just apply the law without interpreting it.

Occasionally, however, no settled law clearly applies to a legal question. For our first example—a policy argument to fill a gap in the law—we

will return to one given in Section 3.2, which used the warrant-data-claim model discussed in Chapter 3.

> *Warrant:* Persons born in the overseas territories of the United Kingdom should be deemed British citizens because:
>
> - the foreign affairs and defense of overseas territories are committed to the UK; and
> - assignment of citizenship is critically connected to duties of persons to defend their homeland and to their ability to travel abroad.
>
> *Data 1:* Harry was born in Bermuda.
>
> *Data 2:* Bermuda is an oversees territory of the United Kingdom.
>
> *Claim:* Therefore, Harry is a British subject.

As Section 3.2 noted, the policy argument is really two intertwined arguments. One argument supports the adoption of a new rule, that 'Persons born in the overseas territories of the United Kingdom should be deemed British citizens.'[1] The second argument applies that rule to Harry's case. The proponent in this example offers two reasons for the new rule: First, that the UK controls the foreign affairs of oversees territories, and second, that the foreign-affairs power is integrally tied to citizenship of subjects in those territories.

1: We assume this is a *new* rule, because if there already existed a statutory or common-law rule in support of this warrant, it would generally not be necessary to make the policy argument for it. The exception is when an advocate is making a policy argument to *overturn* an existing, settled rule. Consider how you might incorporate this type of policy discussion into the structure for arguments about what a rule should be, discussed in Section 15.5.

The opponent of this argument might marshal a number of counter-arguments, each grounded in its own policy considerations. But the opponent might also marshal arguments from other rules of law or previous cases. As I will note again below, the advocate will usually make the argument for the policy as one that should apply to all parties who meet its specifications—here, all persons born in oversees territories of the UK—before attempting to apply the resulting policy (or its rule) to the party in the instance case—here, Harry. Note that when policy arguments are made regarding specific litigants in an action, they are often called 'equity' or 'equitable' arguments, and focus on what is fair or equitable to that specific litigant. Courts, however, are more inclined to rule based upon policy arguments that impact more people.

In any event, the policy in this argument is grounded in questions about the very strucure and purpose of government. But gap filling is commonly necessary in other contexts. 'Issues of first impression' are those that a court is considering for the first time and concerning which the laws are silent or have not even been fully fashioned. Accordingly, litigants may have no choice but to rely on policy-based reasoning to prevail. Some of those hot topics and categories of cases of first impression might include fact patterns involving cutting-edge technologies such as generative AI tools ChatGPT, Harvey.AI, or Google Bard. A court may be asked to consider how the use of these tools might infringe on intellectual property rights or incorporate materials in violation of copyrights. When faced with that type of argument, there may be equally compelling policies on the other side of the aisle, arising from policy-based arguments that favor innovation.

7.2 Policy finds an exception

Sometimes, a well-settled rule or a well-established law may be vulnerable to rational arguments that it should be changed. In those scenarios, the court may need assistance from the advocates in fashioning a judicial exception to the existing case law or to help clarify a gray or nuanced area of the law. Enter the need for policy-based reasoning. An advocate may attempt to articulate reasons why it is not a good idea or good policy for the court to follow the law as it exists now.

Another illustration helps to make this point. Assume that you are the judge hearing the appeal of a drunk-driving case in Texas.[2] The evidence shows the following:

- According to the police report that Officer Rita Mariano filed on August 5, 2023, and her later testimony in court:
  - At 12:20 a.m. on August 5, she detained the defendant Chad Smith after finding him asleep in his car on Oak Lawn Avenue in Dallas.
  - The vehicle, a blue Chevy Corvette, was running, Smith was in the driver's seat, and he was the only person in the vehicle.
  - The vehicle was in a legal parking spot on the side of the street.
  - The vehicle's transmission was in *Drive*, but Smith's foot was resting on the brake, and at no time did the officer see the vehicle move.
  - After Officer Mariano roused Smith, he put the vehicle in *Park* and agreed to her testing him with her breathalyzer.
  - He blew 0.3% and concedes now that he was intoxicated.
- A friend of Smith's, Ada Boldy, also testified at trial:
  - She was with Smith for about four hours that evening at the Stonevine Bar, which is immediately adjacent to the spot in which Officer Mariano found Mr. Smith's car.
  - Smith had a lot to drink during that time, at least eight beers and several shots of whisky.
  - As they were getting ready to leave the bar, Smith said he couldn't drive home and that he was going to sit in his car with the AC turned on until he slept off his 'buzz.'
  - They parted outside the bar on the morning of August 5. Smith had gotten into his car and started it, firing up the AC. Boldy had given him a goodnight kiss and gotten into her Uber at 12:10 (according to her Uber app).

At issue in the drunk-driving case against Mr. Smith was whether he was "operating" his vehicle at the time Officer Mariano detained him. Under the Texas law one may be deemed to be "operating" a vehicle if the defendant can "affect the functioning" of the vehicle in a manner that would enable the "vehicle's use."[3] Relying on analogous cases, the trial court convicted Mr. Smith on the grounds that having the vehicle running and—particularly—having it in the *Drive* gear was clear evidence that he could affect the functioning of the vehicle in a manner that would enable the vehicle's use.[4]

2: This hypothetical is based on the example analysis of the the drunk-driver scenario in Section 14.2, but it adds the evidence from Ms. Boldy.

3: *See* Section 14.2 (citing *Barton v. State*, 882 S.W.2d 456, 459 (Tex. App.—Dallas 1994, no pet.)).

4: See Section 14.2 for that analysis.

Assume that during the appeal before you, the defense raises an issue it had also raised at the trial. Mr. Smith's counsel urges you to see a policy argument here based on the desire not to impose a 'chilling effect' on alleged drunk drivers who are in their cars and capable of driving but stay off the roadway for safety reasons. The defendant wants you to conclude more specifically that the state of Texas should not penalize drunk drivers who do not enter a roadway, even if they could affect the functioning of the vehicle in a manner that would enable the vehicle's use. The defense stresses that there is a greater likelihood that someone could be severely injured or killed should drunk drivers operate their vehicles on the roadway, rather than remaining on the roadside upon realizing that they are likely too intoxicated to drive.

In brief, the defense here is arguing for an exception to the courts' previous rule or definition of what counts as operating a vehicle.

How can the defendant support this policy argument? If possible, the proponent of a policy argument will offer legal authorities and often empirical data to fashion a public policy without reference to the particular case before the court. The proponent will then argue that the newly fashioned policy should apply in the present case.

"A public policy argument is stronger when the explanation of the policy cites a case or other authority that recognizes that public good" that undergirds the policy-based reasoning advanced by the advocate.[5] Some in the legal writing academy even opine that policy arguments *should always* be supported by authorities.[6] So, certainly, other court opinions identifying and describing the public policy for which the defense argues are fair game, even if they are not binding on the court hearing this appeal.

5: *An Advocate Persuades* 65 (Joan Rocklin, Robert B. Rocklin, Christine Coughlin & Sandy Patrick, eds., 2d ed., 2022).

6: Mary Beth Beasley, *A Practical Guide to Appellate Advocacy* 81 (2019).

Another way to support the policy argument is with data. Imagine that in support of this policy argument, a brief by an *amicus curiae* provides statistics from the National Highway Safety Administration supporting the defense's theory. Though there are some limits to *evidence* that can be admitted on appeal, policy arguments may be supported by any type of legal authority or secondary data. Because your decision as the judge here will impact many people, it is very valuable for you to have empirical data to support your decision-making process.

A critical step in making the policy argument is tying the the policy *to the type of issue* in the case before considering the facts of the instant case. By doing so, counsel holds off arguing for application of the policy to the defendant, instead asserting that it should apply to all people in a particular type of situation. The goal of making a policy argument is to show that a large group will benefit from the application of your desired point.

Thus, for example, if Mr. Smith's counsel argues for a decision that incorporates a policy that favors the safety of others rather than just penalizing drunk drivers, on appeal you might conclude:

> Where, as here, the Court is passing judgment on an alleged drunk driver, the Court should first consider that there is value in not throwing the DWI book at drivers who conscientiously take steps *not to injure* others by *driving* while intoxicated.

> When those drivers take steps to remain off the road to sleep off their intoxication, that is a mitigating factor that should be considered as the Court is trying to determine if the driver was really "in control" of the vehicle. *See, e.g., State ex rel. Dept. of Pub. Safety v. Kelley*, 172 P.3d 231, 236 (Okla. Civ. App. 2007). *Kelley* held that there was no "actual physical control of a vehicle" because in the interest of safety, the driver pulled over to avoid driving while intoxicated." *Id.* That court considered pulling off the road to sleep off a buzz to be the next best thing to having a designated driver or using a shared ride to get to one's desired destination. *See generally id.* We don't reach that issue here, as Mr. Smith never left his parking spot while intoxicated.
>
> Nevertheless, the Court must agree that individuals who take steps like those employed by Mr. Smith to avoid driving while intoxicated are not typical reckless drunk drivers and should not be treated as such. Rather, their efforts in promoting safety need to be acknowledged, as maintaining safe roads has always been a paramount concern in the state of Texas. *Cf. id.* (referencing valid concern in the sister state of Oklahoma). We hold that where the evidence shows that the defendant chose in the interest of safety not to drive the vehicle on a roadway, and the defendant did not in fact drive the vehicle on a roadway, the jury may conclude that he did not *operate* the vehicle within the of the statute.

Here, the combination of non-binding court authority from a nearby state and empirical data supported the court's decision to introduce an exception into an existing definition of what it means to operate a vehicle while intoxicated.[7] Thus, while the existing Texas case law as applied to Mr. Smith might have yielded an unfavorable result, applying the policy-based reasoning, not only to Mr. Smith but to all drunk drivers in Texas, makes the roads a safer place to travel, or so you claim as the presiding judge.

7: Note also that it is an example of an *a fortiori* argument, discussed more fully in Section 6.3.

7.3 Policy overturns settled law

The most potent, and often controversial, use of policy is to overturn settled law. Consider this example. In 2022, the United States Supreme Court in the case of *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), reviewed the constitutionality of Mississippi's Gestational Age Act—a law banning most abortions after fifteen weeks of pregnancy, with exceptions for medical emergencies and fetal abnormalities. In a divided opinion, the Court upheld the Mississippi law and overturned two long-standing U.S. Supreme Court decisions, *Roe v. Wade*, 410 U.S. 959 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and concluded that the Constitution does not provide a right to have an abortion.

Throughout the litigation, on appeal, and beyond, advocates on both sides of the issue made policy arguments in favor of and against the ban on abortions. Anti-abortion advocates sought to protect unborn fetuses and advanced

arguments based on acknowledging the sanctity of life, compliance with the Bible's prohibition of murder, and favoring alternatives to abortion, such as adoption.[8] On the other hand, reproductive-rights advocates urged policy arguments based on a woman's right to control her body, the necessity of autonomy for women's reproductive rights, and avoiding the overreach of the government into private matters.[9]

In addition to using or refusing to follow existing precedents in arriving at its decision, the Court in *Dobbs* heard all of these policy arguments.

8: *See, e.g.*, The National Right to Life Organization, https://perma.cc/5VXG-GU4Z.

9: *See, e.g.*, Reproductive Freedom for All, https://perma.cc/YR45-LZ37. You may also find the table of contents of one of the *Dobbs* briefs in Figure 35.2 interesting.

7.4 Some grounds for policy

In the case of Harry in Section 7.1, we saw policy grounded in the very structural purposes of government. For Mr. Smith in Section 7.2, the policy category was public safety. And for the parties in *Dobbs*, discussed in Section 7.3, the policies were grounded in religious authorities, principles regarding the value of life, and questions of individual autonomy and decisional privacy. All these categories of policy are in common use. Here are a few other areas of the law that traditionally lend themselves to the inclusion of policy arguments.

- **Constitutions.** One of the benefits of making a policy argument based upon a constitutional provision is that the underlying constitutional provision can be cited, in addition to authorities that support the policy-based reasoning. Constitutional provisions rank higher in authority than statutes and case law. Thus raising a constitutionally based argument may garner a court's attention.
- **Police-citizen interactions.** There also appears to be a lot of litigation swarming around alleged police brutality and the violation of civil rights. These kinds of cases readily lend themselves to the use of policy arguments. Citizens have civil rights, but those in law enforcement must have the power to serve and protect and to keep the peace.
- **Discrimination.** Dichotomies are also often drawn between people who seek equal protection of the laws but who are discriminated against at the hands of others based on their race, gender, religion, sexual orientation, or other markers of diversity.
- **The environment.** Issues sensitizing the courts to the realities of climate change and the need for societies not to contribute to pollution and global warming are often raised as policies. But they are often pitted against economic policies that favor the use of natural resources to create jobs and keep product costs low.
- **Economics.** Many litigants use economics and cost-benefit analyses to support their policy arguments.
- **Morality, broadly.** In addition, many policy-based arguments are based upon religious, philosophical, and moral tenets.

Other bases for policy arguments are grounded in the functions of the courts themselves. Among these are arguments based on *judicial administration*, predicated on "the practical administration of the rule by the courts."[10] The goal at the heart of these arguments is a "fair and efficient judicial

10: *Legal Writing* 346 (Richard K. Neumann, Jr., J. Lyn Entrikin & Sheila Simon, eds., 3rd ed., 2015).

system."[11] An example that fits into this category is an argument that if the court follows its trajectory and rules in favor of or against a point, it will encourage a lot of undesired litigation as a result, which will congest courts' dockets. This is often referred to as impermissibly "opening up the floodgates of litigation."[12] Courts do not want to be overworked, and this type of argument often piques a court's attention. However, it has been observed that sometimes this very argument is overused.[13]

11: *Id.*

12: *Id.*

13: *Id.*

A similar type of policy argument points out the court's *institutional competence*.[14] This type of policy-based argument stresses that 'making laws is the job of the legislature, not the judiciary,' or that 'the court is impermissibly ruling by judicial fiat.' By raising this type of policy argument, an advocate urges the court to wait and let the issue be decided by the proper branch of the government—the legislative branch—urging for respect to be given to the separation of powers and their established boundaries. Of course, the wise advocate will use finesse, and not insults, in communicating such an argument! Rather than saying the court is 'incompetent' to decide an issue, the advocate can remind the court that the legislative body is better suited to doing so because its decision will take into consideration the voice and choice of the people.[15] Legislative decisions are also often arrived at with the aid of expert testimony on both sides of an issue, and such robust debate helps legislative hearings to be thorough in a way that court cases are not.[16] The point being made is that in such a situation the court is not the best entity to decide an issue.

14: *Id.* at 347.

15: *Id.* at 347-48.

16: *See id.*

7.5 Policy everywhere

Policy arguments can be crafted rationally, so that they provide additional reasons for a court to accept the arguments before it. They can also make use of the nonrational tactics described in Chapter 9.

Regardless of whether and how you will make policy arguments, you already know that you will have to make rule-based and case-based arguments commonly in your work as a lawyer. Even while using those more narrowly defined argumentative techniques, *you should always be considering the policies that underlie the rules and court cases that you read*. In fact, a considerable portion of your law school education is not so much learning about rules and cases but rather learning the policy rationales that underlie many parts of the law. At any time in your practice, whether as a transactional lawyer or counselor or as a litigator, you should be prepared to bring policy arguments to bear in support of your client's preferred interpretations of the law. Remember to support them with citations, even if they are only to secondary sources.

Interpreting legal language 8

Beverly Caro Duréus

Practicing law is all about using and interpreting language. A common task you will face is reasoning about legal texts and then making arguments about those meanings. This is not mere *semantics*. The essence of the law is in grasping the language in which it is conveyed.

Interpreting legal language depends to a certain extent on what kind of language you are interpreting. There are chapters in this book dedicated to the sources of law and the types of text they produce (Chapter 17) and on how to read enacted law, such as statutes and regulations (Chapter 22), court opinions (Chapter 23), contracts (Chapter 24), and the rules that you find in all these legal texts (Chapter 20).

The first task in interpreting legal language is to read the language itself. The text you are trying to interpret may be as little as a single word, clause, or sentence, and each of those things exists within a larger statutory context. You may have to make arguments about these issues using the vocabulary of the English teacher or linguist, and you may find the appendices in Chapter 42, Chapter 43, and Chapter 44 useful for teaching you this vocabulary.

This chapter describes general tactics for interpreting language in these texts, but with a focus on enacted law or statutory texts.[1] It makes note of places where contract interpretation might be similar or different.[2] When you are interpreting the language in court opinions, you will generally conform to the principles here, but there are other considerations to apply there.[3]

Before we get started, note that this chapter makes reference to certain 'canons of construction,' which are really just court-endorsed rules of thumb for interpreting language. Oftentimes, a canon will have a Latin name.[4]

1: See Section 17.2 for a discussion of these types of text as authorities, Chapter 22 and Chapter 45 for how to read them, and Section 8.6 for guidance on applying them.

2: See Section 17.4 for a discussion of contracts as authorities, Chapter 24 about how to read them, and Section 8.7 for guidance on applying them.

3: *See* Section 14.4; Section 14.7; Section 17.2; Section 17.5; Chapter 20; Chapter 23.

4: For a discussion of law French and Latin, see page 366.

8.1 Grammar & punctuation

Something as little as punctuation and the words 'in a' can cause confusion. Consider language from the Texas Medical Liability Act, which provided a higher standard of proof for medical negligence

> [i]n a suit . . . arising out of the provision of emergency medical care in a hospital emergency department or obstetrical unit or in a surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department.

The question is how much of the whole clause the final phrase applies to. Should we read it this way?

> [1] **in a** hospital

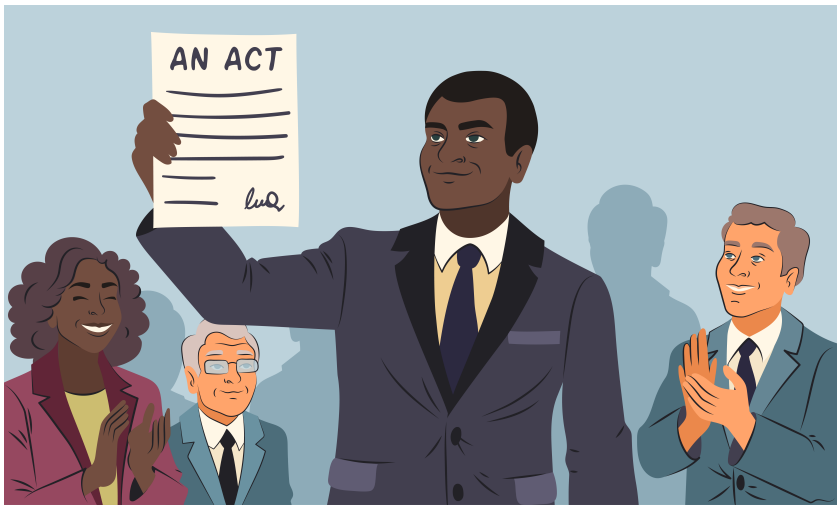


Figure 8.1: Interpreting statutes requires a toolset of canons and an in-depth understanding of language, grammar, and punctuation. Image: Oleksii Bychkov https://www.oleksiibychkov.com.

> [a] emergency department or
>
> [b] obstetrical unit or
>
> [2] **in a** surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department.

Or should we read it this way?

> [1] **in a**
>
> > [a] hospital emergency department or
> >
> > [b] obstetrical unit or
> >
> > [c] **in a** surgical suite
>
> [2] immediately following the evaluation or treatment of a patient in a hospital emergency department.

These two parses of the language should make it clear to you where the problem is: We cannot be sure whether the "evaluation or treatment" clause applies only to the third of the locations (a surgical suite) or to all three locations (emergency department, obstetrical unit, and surgical suite).

The Texas Court of Appeals struggled to decide this question in *D.A. v. Texas Health Presbyterian Hospital of Denton*, 514 S.W.3d 431 (Tex. App.—Fort Worth 2017, pet. granted), and the Texas Supreme Court came down the opposite way in *Texas Health Presbyterian Hospital of Denton v. D.A.*, 569 S.W.3d 126 (Tex. 2018).[5]

You can probably imagine one or two ways that the legislators could have resolved this problem from the start. For example, if the legislature meant the first parse above, it could have adopted the statute with the alpha-numeric markers like the parse I did above.

There are many other ways to prevent this type of uncertainty.

Of course, this is statutory language, but the same problems can arise in contract language. What if a contract provides:

5: Find a fuller discussion of this case in Brian N. Larson, *Practical Reason in Peril: From Cicero to Texas Health Presbyterian*, in *Rhetorical Traditions & Contemporary Law* 70 (Brian N. Larson & Elizabeth C. Britt eds., 2025) (available open access at https://perma.cc/9W9U-B8AE).

> Buyer shall pay seller a bonus of $1,000 for each delivery of bricks, lumber, and gravel that meets ISO standards.

Must the *delivery* itself meet ISO standards? Must all bricks, lumber, and gravel meet those standards? Or is it only the gravel that must meet the standards?

This section shows that the structure of the grammar and punctuation of a sentence can change the meaning of the phrase. Sometimes though, you can't pin down the meanings of specific words.

8.2 Word meanings

The previous section provides examples where the meanings of particular words were not at issue but rather how they connected to each other in the grammar of a sentence. Consider this hypothetical statute from the State of Confusion:

> **§ 1783. Taxes on imported fruits.**
>
> (a) The import of lemons, limes, oranges, and similar fruits, shall be taxed at the rate of $200 per load.
>
> (b) Exotic fruits shall be taxed at the rate of $500 per load.

To make any sense of this provision, you need to know the meaning of several words, including "load" and "exotic fruits." So, for example, how much is a load? As Section 22.3 notes, with a statute, you would want to start by checking the sections in the statute near this one to see if they define these terms. If not, you might look for a definition elsewhere in the statutes. But let's assume that nowhere in Confusion's statutes are there definitions of these two terms.

An interpreter might then look to a dictionary for a definition, but it seems unlikely that a dictionary will provide a definite weight or volume for what counts as a *load*. Perhaps you could look to a guide or standards document from the fruit shipping industry or look at the International Standards Organization (ISO) standards for containers for shipping fruit, if there are any, to see if they have a standard weight or volume for a load of fruit. Finally, you might have to consult with the traders who actually handle fruits on the import docks of Confusion to find what counts as a load there.

The statute's language may leave you not only with uncertainty at the *word* level, but also uncertainty about word meaning at the *clause* level. What does "or similar fruits" mean in the context of "lemons, limes, oranges"? It might mean other *citrus* fruits, a category in which the listed fruits belong. But why would the legislature not just say citrus fruits if that's what it meant? Could it not also mean other fruits from trees, such as apples, or pears? If it includes them, would it include stone fruits, such as peaches and nectarines?

You might begin your analysis with one of the most common canons of statutory construction, *ejusdem generis*. Literally meaning 'of the same kind,' this interpretive canon means that where, as here, there is a term or catch all phrase that follows a list, the catch all phrase includes items that are similar in nature. Accordingly, the focus is on what the phrase "and similar fruits" really means. But you might also find yourself wondering how this helps: After all, you already knew that your problem was deciding which fruits were similar to lemons, limes, and oranges. Without a clear answer, you will make an argument for a broader or narrower scope depending on what your client needs.

In addition to the uncertainty that arises within clauses of the statute, you might also find uncertainty in their interactions with each other.

8.3 Dueling clauses

Thinking back to the example in the previous section, how do subsections (a) and (b) of section 1783 interact? Assume for the moment that you have determined that an "exotic fruit" is one where the price per pound of the fruit in its raw, uncut state is $60 or more. If an importer handles especially fancy limes that sell at $65 per pound, would those limes be taxed at $200 per load because they are limes or at $500 per load because they are exotic fruits?

One principle in the law is that the more specific provision generally supersedes a more general provision. So, if the statute said 'fruits are taxed $200 per load' and later said 'exotic fruits are taxed at $500 per load,' a court would understand that the higher rate applies only to the narrower subset of the broader class. But in our example, which is the more general rule, the one that applies to citrus "and similar" fruits or the one that applies to exotic fruits? According to the hypothetical facts that started this section, these classes are at best overlapping subsets of fruits.

The legislators in the state of Confusion could solve both of these problems by creating a list that is mutually exclusive and collectively exhaustive (sometimes called 'MECE'):

> **§ 1783. Taxes on imported fruits.**
>
> (a) Except as provided in subsections (b) and (c), the import of all fruits shall be taxed at the rate of $150 per load.
>
> (b) Lemons, limes, oranges, and other citrus fruits shall be taxed at the rate of $200 per load.
>
> (c) Exotic fruits, other than those identified in subsection (b), shall be taxed at the rate of $500 per load.

Of course, even this MECE approach depends on a common understanding of "fruit," "citrus," etc.

8.4 Intrinsic context

We have looked at grammar, punctuation, the meanings of individual words, and the meanings of words within clauses and across adjacent clauses. But legal texts often provide broader contexts. As Section 22.3 notes, for example, you may find definitions relating to a chapter in the statutes within the section where they are used, within a given chapter or title, or even at the beginning of the whole code.

You can also look to other sections of the same body of statutes or of the same contract to find what some expression means. We can call this 'intrinsic context,' the context outside the language or clause you are interpreting but within the same code of statutes or contract. For example, if pumpkins in Confusion are commonly classed with citrus fruits elsewhere in its statutes, you might draw the conclusion that section 1783(a) was meant to cover pumpkins, too.

Similarly, you might find that other parts of the Texas Medical Liability Act routinely apply a higher standard to prove malpractice liability where the doctor treating the patient in an emergency has no familiarity with the patient and a lower standard where the doctor is familiar with the patient. How might that affect your interpretation of provision from that act in the section above?

Use of this approach is consistent with the canon of interpretation *in pari materia*, which means that statutes with the same subject or purpose should be read together so that all of the provisions have consistent effects.

8.5 Extrinsic context

Often, you will find that you have to look outside the text of a statute, at what is sometimes called 'extrinsic' evidence or what we might call 'extrinsic context.' This would include the texts of debates and other materials leading to the adoption of a statute, usually called 'legislative history,' or to documents from the executive branch describing how it interprets and applies that statute.

Other kinds of extrinsic context include arguments about what the consequences of adopting a certain interpretation would be. If the consequences to a particular party in this case would be unfair or unreasonably burdensome, then you can make an *equitable argument* in your client's favor. If adopting a certain interpretation would be harmful to large groups of people, you can make a policy-based argument.[6]

6: *See* Chapter 7

8.6 Statutory interpretation

There are whole books written on statutory interpretation. Some have a more descriptive bent, telling readers what kinds of interpretive tools

courts actually use. Others have an explicitly normative bent, saying what they think courts *should* do.

If you want to see a fairly neutral overview of statutory interpretation at the U.S. federal level, you may find the Congressional Research Service's *Statutory Interpretation: Theories, Tools, and Trends* very useful. It is a brief treatment of the history, major theories, and typical tools of statutory construction in the United States.[7]

7: I refer to the March 10, 2023, version. It's available free of charge from the CRS at https://crsreports.congress.gov/product/pdf/R/R45153/6. It is 'brief' in the sense that it is only sixty-five pages long. Many texts on the subject are hundreds of pages long.

8.7 Contract interpretation

In deciding the meaning of contractual language, the general rule is that a written contract's terms should speak for themselves, without resort to oral testimony, unless the terms are ambiguous. This is known as the *parol evidence rule*. However, where terms are ambiguous, parties and courts need assistance in trying to determine a plausible meaning. Extrinsic evidence (information outside of the contract) may be consulted, and it may include the course of conduct or performance between the parties, as well as circumstantial evidence surrounding the transactions that led to the development of the contract.

Thus, much like the rules of statutory construction, there are contractual canons that can be consulted and applied. In addition to the rules already mentioned, the following eight rules are useful and are presented here in no particular order of importance.[8]

8: *See generally* John E. Murray & Timothy Murray, *Corbin on Contracts*, chapter 24 (2023); John Mark Goodman, *The Basics of Contract Interpretation: A Primer for Non-Lawyers in the Construction Industry*, Bradley (August 4, 2023), https://perma.cc/286F-QSDA.

1. Ascertaining and giving effect to the parties' intent should be gleaned from the words used.
2. Provisions' plain meanings should control, with an emphasis being given to the ordinary, usual, and popular meaning of words.
3. If a court can determine the intent of the parties from the words, testimony concerning the beliefs and subjective intent of the parties is not relevant.
4. A goal is to preserve as much of a contract as possible.

Figure 8.2: Interpreting contracts requires a skillset similar to that for interpreting enacted law, but with some slight variations. Image: Oleksii Bychkov https://www.oleksiibychkov.com.

5. A court will construe terms in a manner that will give meaning to all of the clauses and provisions in a contract, and not render some parts of the contract or its terms superfluous or meaningless.
6. Specific provisions prevail over general ones when they are inconsistent.
7. When a contract includes lists of items, things not listed are typically excluded.
8. Reformation rather than nullification of a contract should be the goal, thus a contract should be interpreted in such a way as to preserve and give meaning to as many of the provisions as possible.

9 Nonrational tactics

Susan Tanner

Legal analysis typically relies on rational arguments—systematic application of rules to facts and careful reasoning from precedent. However, effective legal writing also requires mastery of nonrational tactics—persuasive techniques that appeal to emotion, style, and human psychology. This chapter explores three key categories of nonrational tactics: rhetorical approaches for connecting with your audience, stylistic devices that enhance persuasive impact, and structural techniques like roadmapping that guide readers through complex arguments.

9.1 Communicating professionally to establish ethos

For attorneys, effective communication goes beyond presenting a well-structured case—it involves engaging in professional communication that inspires confidence and establishes credibility. As a law student, you should understand that your ability to communicate professionally can significantly impact the reception of your arguments. When arguments are presented well, they are more likely to be perceived as true by the audience and you are more likely to establish credibility as the speaker.

Professional communication serves as a powerful tool in legal argumentation. It not only conveys information effectively but also inspires confidence in the reader. When you present your case in a clear, organized, and professional manner, you create a positive bias in the mind of the audience. They are more inclined to believe that what you have presented is true simply because you have presented it well. As law students, recognizing and harnessing the power of professional communication is crucial to establishing a strong foundation for your legal advocacy.

One of the key elements of professional communication is the establishment of ethos—an appeal to credibility and trustworthiness. Ethos is essential in legal argumentation as it helps to gain the trust and confidence of your audience. We think of ethos as being constructed either through extrinsic means (things that the speaker brings with them—things like their standing in the community and their education) and through methods intrinsic to the communication itself. You can build your ethos through your language choices, demeanor, and adherence to ethical standards.

For example, using clear and concise language demonstrates your expertise and knowledge of the subject matter. Acknowledging and accounting for all the case law that is pertinent to your case will help establish you not

only as an expert in this legal area, but also as someone who acts ethically and respects the rule of law. Intrinsically constructed ethos can interact with the logos and pathos of your argument. One who writes a logically sound argument is more likely to be considered credible. And we tend to trust people more when they can empathize with the emotions we feel and can bring to mind appropriate emotional reactions.

There are some specific ways you can ensure that you are communicating professionally. Many of these suggestions are also explained in other chapters, but here is a quick explanation of how these tactics can influence whether your communication is seen as professional.

1. **Language and diction.**[1] As a legal professional, it is important to use clear and precise language in your legal writing and oral advocacy. Consider the audience you are addressing and strive to communicate your ideas in a manner that is accessible to them. By avoiding unnecessary legal jargon, convoluted sentences, and excessive legalese, you enhance the professional tone of your arguments and make them more persuasive. For instance, instead of using complex legal terms, opt for plain-language explanations that can be understood by a wider audience, including non-legal professionals.
2. **Tone and demeanor.** Maintaining an appropriate tone and demeanor is essential for projecting professionalism and establishing ethos. Your tone should strike a balance between assertiveness and respectfulness. Avoid using overly emotional language or personal attacks, as they can undermine your credibility. Instead, adopt a calm and composed demeanor that demonstrates your ability to engage in reasoned and professional discourse. Whether in written submissions, oral presentations, or negotiations, maintaining a professional tone contributes to the overall persuasiveness of your arguments.
3. **Ethical considerations.** Upholding ethical standards is not only a requirement for legal practitioners but is also crucial for establishing and maintaining ethos. Honesty, integrity, and fairness should guide your communication in legal argumentation. Adhering to these principles enhances your credibility and trustworthiness, reinforcing the persuasiveness of your arguments. Remember: The way you communicate reflects not only on your own professional reputation but also on the integrity of the legal profession as a whole.
4. **Non-verbal communication.** Beyond verbal communication, non-verbal cues also contribute to professional communication and ethos in legal settings. Body language, eye contact, and facial expressions can convey confidence, credibility, and professionalism. For example, maintaining good posture and appropriate eye contact during courtroom appearances or client interactions demonstrates confidence and respect. Being mindful of your non-verbal communication enhances your overall professional image and reinforces the ethos you project as a legal advocate.

1: *See generally* Chapter 42.

9.2 Persuasive rule statements

While it is essential to state rules accurately and rationally, crafting rule statements that are both logically sound and persuasive can significantly enhance the effectiveness of your arguments. This section provides a brief overview of how to construct rule statements that are not only rationally correct but also compelling in their persuasive impact.

Precision and clarity. When formulating a rule statement, precision and clarity are paramount. A persuasive rule statement should accurately and concisely articulate the legal principle or standard at issue. Avoid ambiguity or vagueness by using precise language and terms of art that are commonly understood within the legal context. By clearly defining the scope and parameters of the rule, you enhance its rational correctness and make it more persuasive to your audience. Here is an example of a rule statement where the key value is precision:

> Under the doctrine of vicarious liability, an employer can be held responsible for the negligent acts of its employees committed within the scope of their employment.

A less precise rule statement might be:

> When it comes to the idea of one person being accountable for someone else's mistakes at work, a boss might sometimes have to answer for the actions of their workers.

This reformulated rule statement lacks specificity regarding the legal doctrine invoked (vicarious liability) and the types of actions for which an employer can be held responsible (negligent acts within the scope of employment). It thus serves as a less effective guide for legal analysis. Notice, though, that the second rule statement might be easier for a lay audience to read. So what is clear to one audience might not be clear to another one.

Emphasizing legal authority. To bolster the persuasive impact of your rule statement, support it with relevant legal authority. Citing statutes, precedents, or established legal principles lends credibility to your rule statement and demonstrates its foundation in established legal doctrine. Be sure to accurately reference and contextualize the legal authority to strengthen the rational correctness and persuasive weight of your argument. For example:

> Pursuant to Section 2 of the Contract Act, an offer is defined as a proposal made by one party to another with the intention of creating a legally binding agreement.

Balancing simplicity and complexity. While rule statements should be clear and accessible, they may sometimes involve intricate legal concepts. Striking a balance between simplicity and complexity is essential to maintain rational correctness and persuasive impact. Consider your audience's level of legal knowledge and adjust the complexity of your rule statement accordingly. Present complex legal principles in a manner that is easily

understandable, using plain language explanations or illustrative examples. Observe this approach:

> The reasonable person standard, employed in negligence cases, requires an individual to exercise the level of care that an ordinary person would exercise under similar circumstances.

Tailoring to audience perspectives. To maximize the persuasive power of your rule statement, consider the perspectives and values of your audience. Frame the rule statement in a way that aligns with their beliefs or interests, making it more relatable and compelling. Connect the rule to broader societal or policy considerations, highlighting its practical implications. By tailoring the rule statement to resonate with your audience, you increase its persuasive impact while maintaining its rational correctness. For example:

> To protect consumers from unfair trade practices, the Consumer Protection Act prohibits deceptive advertising that misleads or deceives consumers.

Anticipating counter-arguments. An effective rule statement should anticipate potential counter-arguments and address them proactively. By acknowledging alternative interpretations or conflicting legal authorities, you strengthen your position and demonstrate a nuanced understanding of the issue. Incorporate rebuttals or qualifications into your rule statement to address potential challenges, enhancing its rational correctness and persuasive force. Consider this example:

> While freedom of speech is a fundamental right, the Supreme Court has recognized that certain forms of speech, such as obscenity or incitement to violence, are not protected under the First Amendment.

9.3 Recognizing readers' situations

In legal argumentation, recognizing and understanding the readers' situations is crucial for effective communication. By rhetorically analyzing the audience's context, needs, and expectations, legal writers can tailor their arguments to resonate with their readers. This section explores the concept of recognizing readers' situations, drawing on Bitzer's theory of the rhetorical situation, and highlights the importance of understanding the audience in various legal writing contexts, including clients, the public, judges, or other attorneys.

Bitzer & the rhetorical situation

Bitzer's theory identifies three essential elements of any rhetorical situation that legal writers must consider: First, the exigence—the legal problem requiring resolution, such as a contract dispute needing interpretation or a motion requiring a ruling. Second, the audience—whether judge, client, or opposing counsel—whose beliefs and perspectives shape how

the argument should be framed. Third, the constraints—genre conventions, procedural rules, precedent, and practical limitations that restrict what arguments can be made and how they can be presented.[2] Consider a motion for preliminary injunction: The exigence is the urgent need for court intervention, the audience is a judge who must be convinced that immediate action is warranted, and the constraints include the strict legal standard for injunctive relief, as well as page limits and filing deadlines. By analyzing these elements, legal writers can effectively tailor their arguments to address the readers' needs and interests.

2: Lloyd F. Bitzer, *The Rhetorical Situation*, 1 Phil. & Rhetoric 1 (1968).

Bitzer argues that a rhetorical situation arises when there is an "imperfection marked by urgency," which requires a speaker or writer to respond and attempt to change the current state of affairs.[3] Recognizing the exigence helps legal writers determine the most persuasive strategies and arguments to employ in their communication.

3: *Id.*

Importance of understanding audience in legal writing

When analyzing your audience for legal writing, you should consider all the following groups:

Clients. Understanding clients' situations is essential for effectively communicating legal advice or strategies. As a legal professional, it is crucial for you to consider your clients' legal knowledge, concerns, and goals when presenting arguments. By acknowledging their perspectives and tailoring the arguments to their specific needs, legal writers can build trust and confidence in their clients. This involves explaining legal concepts in accessible language, providing practical advice, and addressing the emotional and financial impact of the legal issue on clients.

Public. When communicating with the public, legal writers must consider the audience's level of legal understanding and their perspectives on the issue at hand. It is important to present arguments in a manner that is accessible and relatable, avoiding excessive jargon or technicalities. Additionally, highlighting the broader societal implications of the legal issue and appealing to shared values or public interest concerns can help engage and persuade the public.

Judges. Understanding the judicial context and the specific judge's preferences and legal philosophy is crucial in presenting arguments effectively. By analyzing prior decisions and rulings by the judge, legal writers can anticipate the judge's inclinations and tailor their arguments accordingly. It is important to present legal reasoning that aligns with the judge's jurisprudential approach and to use persuasive authority that resonates with their judicial philosophy. This understanding allows legal writers to effectively advocate their position within the framework set by the judge.

Other attorneys. In legal writing aimed at other attorneys, understanding the professional context and expectations is vital. Legal writers must tailor their arguments to align with the specific legal standards and norms of the relevant practice area. Engaging in nuanced legal analysis, citing relevant precedent, and referencing authoritative sources that are valued within

the legal community are effective strategies to persuade other attorneys. By demonstrating a thorough understanding of the subject matter and the professional standards, legal writers can enhance their credibility and persuasiveness.

Tailoring arguments to readers' situations

By recognizing readers' situations, legal writers can adapt their arguments to address the readers' specific concerns and expectations. This involves utilizing persuasive strategies and rhetorical techniques that resonate with the audience, such as employing logical reasoning, emotional appeals, or ethical considerations. Legal writers can structure their arguments in a manner that is coherent and easily navigable, considering the readers' level of legal knowledge and attention span. By tailoring the arguments to the readers' situations, legal writers can effectively engage their audience and increase the persuasiveness and impact of their arguments.

Recognizing and understanding readers' situations is integral to effective legal writing and argumentation. By rhetorically analyzing the audience's context, needs, and expectations, legal writers can tailor their arguments to resonate with the readers, whether they are clients, the public, judges, or other attorneys. Drawing on Bitzer's theory of the rhetorical situation, legal professionals can adapt their communication strategies to address the exigences, engage the audience, and navigate the constraints that shape the legal discourse. By understanding the readers' situations, legal writers enhance the persuasiveness and impact of their arguments, fostering effective communication and achieving their advocacy goals.

9.4 Stylistic tactics

Stylistic appeals play a crucial role in legal argumentation, enhancing the persuasiveness and impact of written and oral advocacy. By employing various rhetorical devices, legal writers can engage the audience and make their arguments more compelling. This section explores the use of specific stylistic appeals, including alliteration, cadence, varying sentence length, parallelism, simile, metaphor, and personification.[4]

Alliteration. Alliteration involves the repetition of consonant sounds at the beginning of words in close proximity. It can create a memorable and rhythmic effect, capturing the reader's attention and emphasizing key points. For example, consider the following sentence:

> The relentless pursuit of justice resonates with the righteous and reverberates through the rule of law.

The repetition of the 'r' sound in 'relentless pursuit,' 'resonates,' 'righteous,' and 'reverberates' not only adds musicality to the sentence but also emphasizes the idea of steadfast commitment to justice.

4: This section draws on Prof. Oates and Prof. Enquist's work in several editions of their legal writing texts, found in their most recent work: Laurel Currie Oates, Anne Enquist, Jeremy Francis, & Amanda Maus *Stephen, Legal Writing Handbook: Analysis, Research, and Writing* chs. 17, 19 (9th ed. 2024).

Cadence. Cadence refers to the rhythm or flow of language in writing or speech. It involves the deliberate use of stressed and unstressed syllables, punctuation, and sentence structure to create a pleasing and persuasive effect. By paying attention to the cadence of your sentences, you can add emphasis, create a sense of urgency, or evoke a particular tone. Varying the length and structure of sentences can contribute to the cadence and overall effectiveness of your writing. For example, consider the following sentence:

> In the pursuit of justice, we must persist, prevail, and protect the rights of all.

The repetition of the 'p' sound and the parallel structure of the verbs create a rhythmic cadence that emphasizes the actions and the importance of upholding justice.

Varying sentence length. Varying sentence length adds a dynamic quality to your writing and helps maintain reader engagement. Short, concise sentences can convey important points or emphasize key ideas, while longer sentences can provide detailed explanations or present complex arguments. By using a combination of short and long sentences, you can create a natural flow and prevent monotony in your writing. For example, consider the following passage:

> The defendant's actions were willful, intentional, and calculated. They knew the consequences, yet proceeded with complete disregard for the law, causing irreparable harm to innocent individuals. Such callous behavior cannot go unpunished.

The varying sentence lengths in this passage create a sense of momentum, with shorter sentences conveying the key points and longer sentences providing further elaboration and emphasis.

Parallelism. Parallelism involves using parallel grammatical structures or patterns to create balance and rhythm in writing. By repeating similar sentence structures, phrases, or clauses, you can emphasize key points and create a sense of coherence. For example:

> The defendant not only violated the law but also betrayed the trust of their colleagues and undermined the integrity of the system.

In this sentence, the parallel structure 'not only . . . but also' highlights the defendant's multiple transgressions and emphasizes their egregious conduct.

Simile. A simile is a figure of speech that compares two different things using 'like' or 'as.' It helps to create vivid imagery and make complex concepts more relatable to the audience. For instance:

> The plaintiff's argument is as flimsy as a house of cards, relying on unsubstantiated claims and weak evidence.

This simile vividly illustrates the fragility and lack of substance in the plaintiff's argument, making it more understandable and memorable to the reader.

Metaphor. Metaphor is a rhetorical device that establishes a comparison between two seemingly unrelated things. It enhances understanding by drawing connections and evoking emotions. In legal writing, metaphors can be employed to simplify complex legal concepts or illustrate abstract ideas.

> The new legislation is a shield, protecting the rights of vulnerable individuals in our society.

This metaphor portrays the legislation as a protective barrier, invoking a sense of security and emphasizing its importance in safeguarding the rights of those in need.

Personification. Personification attributes human characteristics or qualities to non-human entities, such as objects or concepts. By anthropomorphizing these entities, personification makes arguments more relatable and memorable.

> Justice, blindfolded but with a steady hand, guides the scales towards a fair and equitable outcome.

This personification of justice imbues it with human-like qualities, portraying it as impartial and steadfast, creating a vivid image in the reader's mind and reinforcing the pursuit of a just outcome.

Metonymy. Metonymy is a rhetorical device that involves using a word or phrase to represent something closely associated with it, such as using 'the crown' to refer to a monarchy or the state or 'the bench' to refer to a judge. In legal writing, metonymy can be employed to create concise and evocative descriptions, enhancing the clarity and impact of arguments. By substituting a related term or symbol, legal writers can convey complex ideas with brevity and capture the attention of the audience.

> The pen is mightier than the sword.

In this well-known metonymy, 'pen' represents the power of writing and persuasion, while 'sword' symbolizes physical force. By using this metonymy, legal writers can emphasize the effectiveness of persuasive arguments over coercive measures.

Hypotheticals. Hypotheticals involve presenting hypothetical scenarios or examples to illustrate a legal principle or argument. By creating fictional situations that mirror real-life circumstances, legal writers can make their arguments more relatable and tangible to the audience. Hypotheticals can help clarify complex concepts, highlight potential consequences, and demonstrate the application of legal principles in practical contexts. Consider this example:

> Imagine a scenario where a company knowingly conceals safety hazards from consumers, putting countless lives at risk. It is the duty of the court to hold such companies accountable and ensure the safety of the public.

Repetition. Repetition involves the deliberate use of words, phrases, or ideas for emphasis and reinforcement. By repeating key points or themes, legal writers can enhance their arguments' memorability and persuasive impact. Repetition can create a rhythmic effect, draw attention to essential concepts, and reinforce the central message. For example:

> We must not rest, we must not falter, and we must not waver in our pursuit of justice. We must stand united and resolute in upholding the principles of fairness and equality.

Euphemism. Euphemism involves substituting a mild or indirect expression for a harsh or unpleasant one. In legal writing, euphemism can be used to soften sensitive or contentious language and maintain a professional tone. By choosing words carefully, legal writers can navigate delicate topics and maintain the audience's receptiveness to the arguments presented.

> The individual in question has passed away.
>
> vs.
>
> The individual has died.

For some, the euphemism helps convey the information respectfully and mitigates the directness of the statement.

Presence. 'Presence' refers to the ability of language to create a sense of immediacy, engagement, and impact in communication.[5] In legal writing, establishing presence involves using vivid and descriptive language that captures the reader's attention, makes arguments more compelling, and enhances the persuasive power of the discourse. By employing rhetorical devices and evoking sensory details, legal writers can create a strong presence that draws the audience into the narrative and enhances their understanding and empathy.

5: Chaim Perelman & Lucie Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation* 116–17 (John Wilkinson & Purcell Weaver trans., 1969).

Presence may be achieved through the skillful use of language that creates a vivid and tangible experience for the audience. In legal writing, this can be accomplished through carefully chosen words, powerful imagery, and sensory descriptions. By appealing to the reader's senses and emotions, legal writers can make their arguments more engaging and memorable.

> In the sweltering heat of the courtroom, the plaintiff's testimony pierced the air like a thunderbolt, leaving no room for doubt. The raw emotion in their voice echoed through the hushed silence, painting a vivid picture of the pain and suffering they endured.

In this example, the use of sensory details and vivid language creates a strong presence that immerses the reader in the courtroom scene. The description of the heat, the use of metaphor ('thunderbolt'), and the emphasis on raw emotion all contribute to a persuasive presence that

captures the reader's attention and enhances the impact of the plaintiff's testimony.

Identification. Identification is the process of establishing a connection between the speaker or writer and the audience by appealing to shared values, beliefs, or experiences. In legal writing, identification plays a crucial role in building rapport, trust, and persuasiveness. By finding common ground and emphasizing shared interests, legal writers can create a persuasive bond with the audience, increasing the likelihood of acceptance and alignment with the arguments presented.

Rhetorician Kenneth Burke suggests that identification occurs through the use of language that reflects the audience's values and experiences, allowing them to see themselves in the arguments presented.[6] In legal writing, this can be achieved by highlighting shared principles, emphasizing common goals, and using inclusive language. See this example:

> As members of a society built on the foundations of justice and fairness, we all have a stake in ensuring that the rights of the accused are protected. By upholding the defendant's right to a fair trial, we safeguard the very principles that define us as a just and democratic society.

6: On Burke's theory of identification, see Kenneth Burke, *Rhetoric of Motives* (1969).

This text illustrates how identification can be established in legal writing by appealing to shared values and principles. The use of inclusive language ('we all,' 'members of a society') and emphasizing the collective interest in upholding fundamental rights helps create a persuasive bond between the writer and the audience. By framing the argument in terms of shared goals and ideals, the writer establishes a sense of identification that encourages the audience to align with the presented position.

Hypotaxis and parataxis. Hypotaxis and parataxis are rhetorical devices that govern the arrangement of clauses and sentences in legal writing. Hypotaxis refers to the use of subordination and complex sentence structures, where one clause depends on another for its full meaning. Parataxis, on the other hand, involves the use of coordination and simple sentence structures, where clauses are placed alongside one another without hierarchical relationships. Both devices have their place in legal writing, and their careful application can enhance the clarity and impact of arguments. Consider first the use of hypotaxis:

> Although the defendant claims innocence, it is incumbent upon the prosecution to demonstrate beyond a reasonable doubt that the defendant committed the alleged offense.

This example, with the dependent clause ('Although the defendant claims innocence') followed by the independent clause, creates a nuanced and complex sentence structure that allows for a comprehensive examination of the defendant's claim and the prosecution's burden of proof. Consider this example:

> The evidence is clear: the defendant was present at the scene, the weapon was found in their possession, and eyewitnesses positively identified them.

Here the use of parataxis, with the coordination of three independent clauses, creates a succinct and impactful sentence structure that presents multiple pieces of evidence in a straightforward manner.

Intensifiers and qualifiers. Intensifiers and qualifiers are rhetorical devices used to strengthen or soften the impact of language in legal writing. Intensifiers amplify the force or significance of a statement, while qualifiers moderate or limit the strength of a statement. The strategic use of these devices can help legal writers express conviction or caution, depending on the context and purpose of the argument. Consider this example:

> The evidence overwhelmingly demonstrates the defendant's guilt, leaving no room for doubt.

Here the intensifier 'overwhelmingly' emphasizes the strength and conclusiveness of the evidence, making a bold and forceful assertion.

Consider this example of a qualifier:

> The defendant's actions may potentially be seen as a breach of contract, depending on the interpretation of the contractual provisions.

Here, the qualifier 'may potentially' softens the statement, acknowledging the possibility of differing interpretations and presenting a more cautious assessment.

Antithesis. Antithesis involves the juxtaposition of contrasting ideas or words to create a vivid and memorable contrast. By presenting opposing concepts in close proximity, legal writers can highlight the differences between arguments and emphasize their own position. Antithesis helps to create a sense of tension and draws attention to key distinctions. For example:

> The defense argues for individual liberty, but we must not forget that with freedom comes responsibility.

Here, the antithesis between 'individual liberty' and 'responsibility' underscores the inherent balance and interconnectedness between these two concepts, adding depth and persuasive impact to the argument.

Effective use and limitations of stylistic devices. While stylistic tactics can enhance persuasion, they must be deployed judiciously. Overuse of devices like alliteration can appear forced or artificial. Consider this ineffective example:

> Plaintiff's persistent, pernicious, purposeful, and preventable practices produced permanent problems.

Such excessive alliteration distracts from, rather than enhances, the argument. Similarly, strained metaphors or elaborate similes may cause readers to question the writer's judgment and undermine credibility.

9.5 Roadmapping

Roadmapping involves providing a clear and structured overview of the argument to guide the reader throughout the document.[7] It serves as a navigational tool, allowing the audience to anticipate the organization of ideas and understand the logical progression of the argument. By effectively employing roadmapping techniques, legal writers can enhance the reader's comprehension, facilitate easy navigation, and reinforce the persuasive impact of their arguments.

7: For more on roadmapping in particular contexts, see Section 14.11 and Section 15.2.

Legal readers might be short on time due to the demanding nature of their work. Judges, for instance, are responsible for reviewing multiple cases, conducting hearings, and rendering decisions within strict timelines. Attorneys, too, face the pressure of managing multiple cases, conducting legal research, and preparing persuasive arguments, all while adhering to court-imposed deadlines. These time constraints make it necessary for legal writers to provide clear roadmaps that allow readers to quickly locate and comprehend the main arguments, supporting evidence, and conclusions.

Moreover, roadmapping is important for accommodating non-linear reading. Legal readers often engage in non-linear reading practices, where they may skim or selectively focus on specific sections of a document based on their immediate information needs or the time available, rather than reading the entire document from start to finish. Non-linear reading allows them to extract relevant information efficiently and make informed decisions even when time is limited. By employing effective roadmapping techniques, legal writers can assist readers in navigating the document non-linearly, finding relevant sections, and comprehending the overall argument, even if they do not read every word sequentially.

By providing a clear roadmap, legal writers cater to the needs of time-constrained and non-linear readers. They ensure that essential information is easily accessible, key points are emphasized, and the overall argument is coherent. Effective roadmapping enhances the efficiency and effectiveness of legal communication, allowing busy legal professionals to quickly grasp the essence of the argument and make informed decisions within their constrained timeframes.

Umbrella or roadmap paragraphs. At the beginning of a legal document or section (e.g., the beginning of the discussion section in a memorandum), provide a concise introduction that outlines the purpose and main objectives of the argument. This sets the stage for the reader and establishes the context for the subsequent discussion. Clearly articulate the issue at hand, state your position, and highlight the main points that will be addressed.[8]

8: Section 14.11 discusses these concepts further.

Section headings and subheadings.[9] Section headings and subheadings are essential signposts that divide the document into coherent parts. They serve as roadmaps within the larger argument, indicating the specific topics or subtopics that will be covered. Clear and descriptive headings help the reader navigate through the document and grasp the structure of the argument at a glance.

9: For more on headings in particular contexts, see Section 11.3, Section 15.6, Section 35.4, Section 34.4, and Section 34.5. For the distinction between section headings and *fixed headings*, see Section 29.3.

Well-crafted headings and subheadings serve as essential navigational aids, dividing your document into coherent sections and guiding readers through your argument's logical progression. Legal writers generally employ two types of headings: descriptive topic headings and argumentative point headings. Topic headings simply identify the subject matter of each section using a few key words. For example:

- Mens Rea
- Standard of Review
- Legislative History

Point headings, in contrast, make substantive claims about the legal issues addressed in each section. They function as mini-conclusions. For example:

- The plain language of section 230 bars plaintiff's claims.
- Because defendant had no duty of care, the negligence claim must fail.
- The Court should grant summary judgment because no material facts are in dispute.[10]

10: Note that this style of headings is described in Section 11.3. Your supervisor may wish you to write differently, and you may write documents with different styles of heading. The most important goal is for each of your own documents to be internally consistent in its use of headings.

Transitional phrases and signaling. Within the body of the document, transitional phrases and signaling words or phrases help connect ideas and indicate the logical flow of the argument. They provide smooth transitions between different sections or subtopics, ensuring that the reader can follow the development of the argument without confusion.

Within legal documents, transitional phrases and signaling words serve as verbal traffic signals, guiding readers through your analysis and indicating logical relationships between ideas. These linguistic tools help readers understand how each new point relates to what came before and what follows. There are several types of transitions:

- To show addition or similarity:
  - 'Furthermore, the defendant's conduct . . . .'
  - 'Similarly, in *Smith v. Jones* . . . .'
  - 'Additionally, the statute requires . . . .'
  - 'Moreover, subsequent cases have held . . . .'
- To indicate contrast or counter-argument:
  - 'However, this argument overlooks . . . .'
  - 'In contrast, the plaintiff's position . . . .'
  - 'Despite this precedent . . . .'
  - 'Nevertheless, the court should consider . . . .'
- To demonstrate cause and effect:
  - 'As a result of this ruling . . . .'
  - 'Consequently, the statute's application . . . .'
  - 'Therefore, summary judgment is appropriate . . . .'
  - 'Because of these factors . . . .'
- To sequence or organize ideas:
  - 'First, the court must consider . . . .'
  - 'Second, even if jurisdiction exists . . . .'

- 'Finally, public policy supports . . . .'
- 'Turning to the merits . . . .'

Consider this example showing transitions in action:

> The Supreme Court has consistently held that personal jurisdiction requires minimum contacts with the forum state. For example, in *International Shoe*, the Court emphasized the need for systematic and continuous contacts. Moreover, subsequent cases have refined this standard, requiring purposeful availment of the forum's benefits. However, in the present case, defendant's single online transaction does not rise to this level. Furthermore, modern courts have been reluctant to find jurisdiction based on isolated internet sales. Therefore, this Court should dismiss for lack of personal jurisdiction.

Effective transitions not only connect ideas but also signal their logical relationships, helping readers anticipate and understand each new point in your argument. When drafting, consider whether each paragraph's connection to surrounding text would be clearer with an explicit transitional phrase.

Summary and recapitulation. In longer legal documents or complex arguments, it can be helpful to include periodic summaries or recapitulations to reinforce key points and remind the reader of the main argument. These summaries serve as checkpoints, allowing the audience to assess their understanding and reinforcing the persuasive impact of the argument.

9.6 Integrating rational & nonrational approaches

While this chapter has presented various nonrational tactics separately, effective legal writing requires thoughtfully combining rational analysis with rhetorical and stylistic techniques. A well-crafted argument might use clear roadmapping to present its logical structure, careful attention to audience to frame its key points persuasively, and selective stylistic devices to emphasize crucial arguments—all while maintaining professional credibility through sound legal reasoning.

10 Narrative reasoning

Krista Bordatto

Narrative reasoning, also referred to as 'applied legal storytelling,' is a fundamental aspect of the art of lawyering. Narrative reasoning uses storytelling techniques to weave facts and law into a coherent and persuasive narrative, guiding the audience to understand and interpret the circumstances of a case in a specific manner. This technique helps to humanize the case, making it more relatable and engaging for the reader.

This chapter delves into the ethical considerations of narrative reasoning and provides guidance on developing narratives using storytelling, cognitive scripts, counter-stories, and emotional appeal techniques to craft more persuasive and impactful arguments.

10.1 Myths & ethical considerations

Legal writers must always uphold professional integrity, especially when employing narrative reasoning. Before delving into how to craft an ethical narrative, it's crucial to dispel common myths about narrative reasoning:

- **Narrative reasoning is not just telling a story.** Rather, storytelling techniques, explained in Section 10.2, are used to weave facts and law into a narrative that supports legal arguments and persuades the reader.
- **Narrative reasoning is not just for trial lawyers.** Legal writers use narrative reasoning in various contexts, including motions, briefs, and negotiations, to make arguments more compelling and relatable.
- **Narrative reasoning does not mean sacrificing objectivity.** A well-crafted narrative can present facts objectively while still being persuasive by balancing storytelling techniques with factual accuracy and legal analysis.
- **Narrative reasoning is not necessarily manipulative.** Ethical narrative reasoning, expanded on below, is not a manipulation tool used to distort facts or present information in a misleading way to influence the audience's perception.

Ethical narrative reasoning must prioritize accuracy, truthfulness, and respect for all parties involved, while maintaining objectivity and avoiding bias. To maintain integrity and professionalism, legal writers must adhere to the following ethical considerations:

- **Accuracy and truthfulness.** Legal writers must ensure that their narratives are based on accurate and truthful facts, maintaining objectivity and avoiding bias. Misrepresenting or exaggerating facts can undermine credibility and violate ethical standards.[1]

1: Model Rules of Pro. Conduct r. 4.1 (Am. Bar Ass'n 2023).

- **Confidentiality.** Respect the confidentiality of sensitive information. Avoid disclosing confidential details that could harm the parties involved or violate legal obligations.[2]
- **Respect for opposing parties.** Legal writers must respect opposing parties and their perspectives by avoiding inflammatory or derogatory language. This respect is crucial for maintaining professionalism and ethical standards in legal writing. By presenting arguments in a respectful and objective manner, legal writers can ensure that their narratives are persuasive without resorting to personal attacks or biased language. This approach not only upholds the integrity of the legal profession but also fosters a more constructive and fair legal process.

2: Model Rules of Pro. Conduct r. 1.6.

By understanding and dispelling the myths and adhering to ethical considerations, legal writers can effectively use narrative reasoning to craft persuasive and impactful arguments while maintaining professional integrity.

10.2 Developing the story

Storytelling is a tool used in narrative reasoning that helps legal writers present their arguments in a compelling, relatable, and persuasive manner. Storytelling emphasizes creating an engaging and relatable narrative, and narrative reasoning uses that narrative to support a legal argument. Storytelling is the method the legal writer uses to craft a compelling narrative in a way that resonates with the reader. The primary goal of storytelling is to make the case more relatable and memorable to the reader by humanizing the parties involved and creating an emotional connection. The writer uses character development, plot structure, conflict, and resolution to create a vivid and engaging story. The writer then integrates legal principles with the story to form a narrative that supports the client's position.

The way the legal writer develops the narrative using storytelling techniques is highly dependent upon the type of case and the facts of the case. To use storytelling to draft a narrative that is compelling, coherent and persuasive, the legal writer should follow these steps:

1. *Identify key facts and legal issues.* Begin by thoroughly considering all the facts of the case (see Chapter 13 for an in-depth discussion of facts). Then determine which facts are most crucial to the argument. Once these outcome-determinative facts are identified, the next step is to pinpoint the legal issues that are central to the argument. This process ensures that the narrative is built on a solid foundation of relevant facts and legal principles.
2. *Create a timeline.* The order in which the narrative unfolds can be chronological, perspectival, topical, or any combination of these approaches. Chronological means presenting the facts in the order they occurred, which helps the reader understand the progression of

events. Perspectival is the presentation of facts from different viewpoints, which provides a more comprehensive understanding of the case by highlighting different perspectives. Topical is the organization of the narrative around specific topics or themes, which emphasizes specific aspects of the case and makes complex information more digestible. Finally, combination is the mix of chronological, perspectival, and topical to create a more engaging narrative that conveys the key points of the case to the reader.

3. *Develop the characters.* Introduce the parties involved in the case and provide background information to humanize them and make the story more relatable to the reader. Give a brief overview of each party, including their roles, backgrounds, and motivations. Finally, highlight relevant personal details or experiences that can help the reader connect with their character on a deeper level. This context creates a more engaging and empathetic narrative.
4. *Highlight the conflict and use descriptive language.* Emphasize the central conflict or issue in the case by using vivid and descriptive language. Clearly articulate the main point of contention, painting a detailed picture of the events and circumstances that led to the conflict. Describe the emotions, motivations, and actions of the parties involved, bringing the narrative to life.
5. *Incorporate legal principles*. Integrate relevant legal principles and precedents into the narrative to demonstrate how the facts align with established legal standards. This involves identifying key legal doctrines and case law that support the argument and seamlessly incorporating them into the story.
6. *Address counter-arguments*.[3] Anticipate and address potential counter-arguments to enhance your narrative. This involves identifying possible objections to the narrative and providing well-reasoned responses. Addressing counter-arguments not only strengthens the writer's position but also shows that the writer has thoroughly considered all aspects of the case.
7. *Conclude with resolution*. Provide the reader with a clear resolution to the conflict by summarizing how the central issue of the case is resolved. Explain how the resolution addresses key points of contention and the implications for the parties involved. The resolution demonstrates to the reader that the narrative is complete and persuasive.
8. *Review and revise.* Review the narrative to ensure it is coherent, persuasive, and free of ethical issues. Revise to improve clarity and impact.
9. *Evaluate for effectiveness.* There are three key concepts that should be used to evaluate the overall effectiveness of a narrative—narrative fidelity, narrative coherence, and narrative correspondence. A well-written narrative should have a high narrative fidelity, which means that the narrative feels authentic and credible to the reader. Narrative coherence refers to the logical structure of a narrative, with a clear beginning, middle, and end. The facts and legal arguments should be presented in a way that makes sense and is easy for the reader to understand. Finally, narrative correspondence refers to the alignment of

3: For more on addressing adverse facts in argument, see Section 13.5. For more in-depth discussion of counter-arguments see Section 14.9.

the narrative with external reality. Successful narratives demonstrate a high correspondence, which is an accurate representation of the facts and evidence of the case.

10.3 Example of narrative reasoning using storytelling

Now that you understand the steps, consider how this fact pattern is transformed into a narrative.

Facts
Sarah, a single mother of two, had been working at XYZ Corporation for five years. She was known for her dedication and hard work, often staying late to ensure her projects were completed on time. Despite her efforts, Sarah was passed over for a promotion in favor of a less experienced male colleague. Feeling that she had been discriminated against, Sarah filed a complaint with the company's HR department. However, her complaint was dismissed without a thorough investigation. Sarah then decided to take legal action against XYZ Corporation for gender discrimination.

Narrative
Sarah's case is a classic example of gender discrimination in the workplace. Despite her exemplary performance and dedication, she was unfairly overlooked for a promotion. This decision not only affected her career growth but also had a significant impact on her personal life. As a single mother, Sarah relied on her job to provide for her children. The promotion would have meant a better salary and more stability for her family. Instead, she was left feeling undervalued and demoralized.

The company's failure to investigate her complaint further exacerbated the situation. By dismissing her concerns without a proper review, XYZ Corporation demonstrated a lack of commitment to addressing gender discrimination. This negligence not only violated Sarah's rights but also set a dangerous precedent for other employees who might face similar issues.

In conclusion, Sarah's experience highlights the importance of fair treatment and equal opportunities in the workplace. Her case serves as a reminder that companies must take discrimination complaints seriously and ensure that all employees are treated with respect and dignity.

10.4 Cognitive scripts & counter-story

Incorporating cognitive scripts and counter-stories into narrative reasoning can enhance the clarity, coherence, and persuasiveness of your legal arguments.

Cognitive scripts

Cognitive scripts are mental frameworks or blueprints that people use to understand and interpret events and behaviors. These scripts are based on past experiences and cultural norms, and they help individuals predict and make sense of new situations. Cognitive scripts are used to organize information, guide behavior, and make sense of new situations by providing a structured way to process and interpret information.

Cognitive scripts can also be deep-seated or deeply ingrained in an individual's mind. Deep-seated cognitive scripts are often formed through repeated experiences, cultural norms, or societal influences. These scripts operate automatically, often without conscious awareness, guiding thoughts and actions based on past experiences. Because these scripts are so deeply embedded, they can be difficult to change or challenge. In the context of Sarah's case, a deep-seated cognitive script might be the societal belief that men are more suited for leadership roles than women. This script can influence how individuals perceive Sarah's situation and the promotion decision, potentially leading to biased interpretations and actions.

In the context of narrative reasoning, cognitive scripts can be used to create a coherent and logical narrative by outlining the key elements of the story, such as the parties involved, the conflict, the actions taken, and the resolution. This structured approach helps ensure that the narrative is clear, engaging, and persuasive. Legal writers can use cognitive scripts to frame their client's story in a way that aligns with the intended audience's, such as a judge's or jury's, existing beliefs and expectations. By doing so, the writer can make their arguments more relatable and persuasive.

Here's an example of a cognitive script in narrative reasoning, using the fact pattern involving Sarah:

> *Introduction.* Sarah, a single mother of two, has been working at XYZ Corporation for five years. She is known for her dedication and hard work, often staying late to ensure her projects are completed on time.
>
> *Conflict.* Despite her efforts, Sarah is passed over for a promotion in favor of a less experienced male colleague. Sarah feels that she has been discriminated against based on her gender.
>
> *Initial action.* Sarah files a complaint with the company's HR department, alleging gender discrimination. Her complaint is dismissed without a thorough investigation.

Escalation. Frustrated by the lack of response from HR, Sarah decides to take legal action against XYZ Corporation for gender discrimination.

Resolution. The narrative will continue with the legal proceedings and the outcome of Sarah's case, highlighting the key arguments and evidence presented by both sides.

By following this cognitive script, the writer creates a structured and coherent narrative that effectively presents Sarah's case and the issues she faced.

Counter-story

A counter-story is an alternative narrative that presents a different perspective or viewpoint on a particular issue or event. It is used to challenge the dominant or prevailing narrative by offering a contrasting account that highlights different facts, interpretations, or experiences.

In legal writing, writers use counter-stories to challenge the opposing party's narrative and present their client's version of events. By crafting a compelling counter-story, writers can undermine the credibility of the dominant narrative and persuade the reader, usually the judge or jury, to see the case from their client's perspective.

Here's a comparison between the dominant narrative and a counter-story using the fact pattern involving Sarah:

Dominant narrative
Introduction. Sarah, a single mother of two, has been working at XYZ Corporation for five years. She is known for her dedication and hard work.

Conflict. Sarah is passed over for a promotion in favor of a less experienced male colleague, leading her to feel discriminated against.

Figure 10.1: "The terrifying tale of Goldilocks the Trespasser!" Counter-story seeks to overcome the dominant or prevailing narratives and schemas. Image: Oleksii Bychkov https://www.oleksiibychkov.com.

Initial action. Sarah files a complaint with HR, which is dismissed without a thorough investigation.

Escalation. Sarah decides to take legal action against XYZ Corporation for gender discrimination.

Resolution. The narrative will continue with the legal proceedings and the outcome of Sarah's case.

Counter-story
Introduction. XYZ Corporation, a reputable company, has a fair and transparent promotion process. John Smith, the male colleague, has demonstrated exceptional performance and leadership skills.

Conflict. Sarah feels she was discriminated against, while XYZ Corporation asserts the promotion was based on merit.

Initial action. Sarah's complaint is reviewed by HR and dismissed due to lack of evidence.

Escalation. Sarah takes legal action, and XYZ Corporation prepares to defend its decision.

Resolution. The legal proceedings will determine whether the promotion process was influenced by gender bias.

Here counter-story was used to create a structured and coherent narrative that presents XYZ Corporation's perspective and the issues the company faced. Therefore, by incorporating counter-stories into narrative reasoning, writers can create more comprehensive and persuasive arguments that address multiple perspectives and challenge cognitive scripts, including any deep-seated scripts.

10.5 Emotional appeals

An emotional appeal is a persuasive technique that seeks to evoke an emotional response from the reader to influence their attitudes, beliefs, or actions. Emotional appeals use emotions such as anger, fear, empathy, or joy to connect with the reader on a deeper level and make the message more convincing and memorable. There are several benefits of incorporating emotional appeals into narrative reasoning such as engagement, memorability, persuasion, and connection.

Legal writers use emotional appeals by using language and storytelling techniques to evoke emotions in the reader to make the argument more persuasive. Some key strategies for incorporating emotional appeals include:

- **Craft a convincing story.** Use the elements of storytelling, such as character development, conflict, and resolution to draw the reader in.
- **Humanize the parties.** Help the reader connect with the parties on a personal level by highlighting their backgrounds, motivations, and struggles.

- **Use descriptive language.** Create a strong emotional impact by using descriptive language to paint a vivid picture of the events and circumstances of the case.
- **Highlight the dangers.** Show what is at risk in the case and why it matters by emphasizing the consequences of the case for the parties involved.
- **Appeal to values.** Resonate with the reader's sense of morality by connecting the case to broader values and principles, such as fairness, equity, and justice.

In Sarah's case, using emotional appeals to highlight her struggles as a single mother and her dedication to her job can evoke empathy and support. Emphasizing the risks faced by Sarah and other female employees at XYZ Corporation due to potential gender discrimination can appeal to the reader's sense of fairness and justice. However, it is important to balance this with factual evidence and logical reasoning to ensure that the argument remains ethical and persuasive.

In conclusion, emotional appeals can be a powerful tool for legal writers. However, they must be used with caution. Emotional appeals can cloud judgment and hinder the audience's ability to make informed decisions. It is crucial to balance emotional appeals with logical reasoning and evidence. As discussed in Section 10.1, legal writers must always uphold professional integrity. Therefore, emotion should never be used to manipulate or disrespect the audience, and writers should never misrepresent facts to unfairly evoke an emotional response.

11 The analysis & writing process

Link to book table of contents (PDF only)

Brian N. Larson

Remember those term papers you wrote in college courses where you could wait to get started until the last week—maybe even the last day—before they were due? That doesn't work in law school or as a lawyer. Performing a legal analysis assignment requires that you know your audience and what they expect from your work, plan a process most likely to satisfy their expectations, perform necessary research, and outline your analysis. After these steps, you draft the components of your analysis, choosing appropriate authorities to cite and organizing your reasoning with the CREAC model, explained more fully in Chapter 14 and Chapter 15.

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 in the second iteration, 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 have other adjustments to make to the components you have written. Once you have a complete draft, you are ready to begin with revision, a third iteration. Here, you may find yourself revisiting the steps in the previous iterations. **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 or evolving circumstances.

1: See Chapter 20 for advice on outlining or 'briefing' legal rules.

Figure 11.1: Plan intermediate deliverables. Don't imagine that your final deadline is your only deadline. Instead, set internal deadlines for first draft, first fully revised draft, and final proofreading of your communication. Image: Oleksii Bychkov https://www.oleksiibychkov.com.

After you are more experienced, and especially when dealing with legal problems that are run of the mill, you may find that you can abbreviate this process. You should not expect the first year of law school to be conducive to such an approach.[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 and not just rely on a first draft.[3] 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.

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

3: For more about the process of scaffolding and chunking in learning, see Section 25.4.

11.1 Knowing your audience

Whenever you engage in communication, you are attempting to change the beliefs, emotions, or goals of your audience, even if that is just to reinforce their existing state of mind. This is true even in objective or predictive analysis, where you want your reader to feel confidence (emotion) that your analysis reaches the correct conclusion (beliefs). To do that perfectly, you would need to know all your audience's beliefs, emotions, and goals. Obviously, that's not possible, although there are ways to develop useful hypotheses about them. If your audience is a regular consumer of legal analyses, you must also address their expectations for your communication. You must also think about how your audience's legal problem fits into the broader social and economic context—in short, you must be cognizant of the stakes the legal problem poses.

Beliefs, 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; their emotional state regarding the issue; and how your communication of your analysis will affect their goals. This is the audience's "cognitive environment."[4] Anticipating someone's cognitive environment is easiest with someone who is like you. Shared experience makes it easier for you to estimate what is in another person's cognitive environment. As a lawyer, though, you must be prepared to interact with people very much *unlike* you.

4: 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 us. 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 behavior is known as 'confirmation bias.' If people are focused on observing one thing, they will be more likely to notice instances of that thing, and they may fail entirely to notice other things; this behavior is known as 'attention bias.' There are many other cognitive biases, including tendencies to allow one's emotions, goals, or objectives to interfere with rational consideration of one's beliefs.

On the positive side, emotions and goals do not just *interfere* with good reasoning. They also *motivate* it. The law is a social means of implementing moral and ethical systems. Such systems must always have goals, even if they are sometimes hard to articulate. Psychological 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 rational arguments because of their own cognitive biases. Doing so means listening carefully to, not making unwarranted assumptions about, and asking thoughtful questions of your audience and everyone else who is involved in the problem. If you do so, you can construct a picture of the audience's cognitive environment—not complete or perfect, but hopefully accurate enough—to determine how to reason with that audience.

Audience expectations & genres

If you know that 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. *Genre* is "a recurring document type that has certain predictable conventions."[5] Such documents have predictable conventions because both writers and readers have seen them before. These document types exhibit patterns that have become the subject of "genre knowledge"—the writer's beliefs about how particular approaches to writing can have particular effects on readers. The writer's beliefs are based on knowledge about a typical situation that arises between the writer and the audience, and audience's typical responses to the writing.[6] Genres in the law can be written, like the office memo (Chapter 29) or trial motion (Chapter 34), or they can be oral, like the client interview (Section 39.2), or oral argument (Chapter 38). They can have sub-genres, such as oral argument before a trial judge and oral argument before an appellate panel.

You will learn certain genres in this book starting with Chapter 27. But these are just models of the genres you will encounter in practice. When you are asked to work with 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. The examples will teach you what conventions lawyers in your office observe, and they may or may not be like the examples in this text. When you are writing in a class, you should assume that the examples and instructions in this text represent the genre conventions you are supposed to use unless your professor tells you otherwise. If someone asks you to write in a genre you have never heard of or seen before, you should review the advice in Chapter 40.

5: Alexa Z. Chew & Katie Rose Guest Pryal, *The Complete Legal Writer* (2d ed. 2020).

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

Variations exist not just at the enterprise level, i.e., within one firm or office; 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. We 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 the variations in practice.

Context & stakes

Clients usually do not ask lawyers to answer legal questions out of curiosity. Lawyers are too expensive for that. When you are answering a legal question, the client has in mind some social or economic stake that the answer will affect. 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 $5,000 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.

Social stakes also influence the effort you expend to answer the client's legal questions, 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.

Moreover, clients' needs may not at times be readily apparent. Consider a client who appears irrationally concerned about a tax filing for a small amount of money. They may actually have a significant stake in the issue if, for example, they have to disclose any missed tax filings as part of a background check for a new position that could cost them their livelihood if they fail it.

11.2 Writing process

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

- Know your audience and what they expect from your 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 and simplify it. You may instead conclude you must add a segment or segments. Finally, you must 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 at least two or three times. The greatest lawyers with whom I have worked revise their work extensively, even after decades in 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 questions they face 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 Section 4.1. 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 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 something bad. Well, if you *know* the first draft is likely 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 produced 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 practices are all guidelines. Sometimes, you will be asked a legal question, and your audience will expect or need 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 time on an extended process. Until you have the practice experience that allows you

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

8: On one 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. While the brief was great, 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).

to make these judgments, you should assume that you must always do the iterative process.

11.3 Outlines & headings

Before you get down to writing your first draft of a 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 14. Your initial outline consists of the elements of the rule as you have briefed them.[12]

12: See Chapter 20 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, as described in Chapter 15.

In either case, you may often write headings for sections of your analysis. Consider Student 7's sample memo in Appendix Section 47.2. There, the author analyzes whether the client's use of movie clips is a fair use under U.S. copyright law.[13] Unlike the fixed headings in a memo, discussed in Section 29.3, 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.

13: Section 5.3 introduced the concept of fair use and described its nature as a balancing/factor-based rule.

Student 7's sample memo in Appendix Section 47.2 uses a full style of heading, where each is a sentence that states a legal consequence and some factual cause for it.[14]

14: This hearkens back to the concept that *operative facts lead to normative consequences*, which we have spoken of before. See Section 3.2 and the beginning of Chapter 5.

When you think of the relationship of outlines and headings, it's helpful to see just the headings for an sample memo. Here are the headings for Student 7's whole analysis, with operative facts in bold face and normative consequences in italics:[15]

15: This sample represents a competent student performance, but it isn't perfect. There are opportunities to remove some passive voice and to make verb tenses more consistent. *See* Section 43.3; Section 43.5. If you notice those opportunities, great! It means you are developing a good eye for copy-editing. But that's not the focus of this section.

- 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**,[16] *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.*

16: The phrase "on balance" may not seem to you like the statement of an operative fact. In fact, it's not. But it represents the balancing that you, the analyst, have done with the outcomes of the previous three subsections, (A) through (C). It is an operative fact that you *construct*.

Notice that the normative consequences subheadings A, B, and C, become the operative facts in heading I. The writer builds the top-line conclusion from the bottom up. Notice, too, that because these headings are complete sentences, each ends with a period, and the words are capitalized as they would be in a normal sentence.

If you imagine Student 7 reading the statutory rule for fair use, you can see that headings I. and II. address two of the four fair-use factors.[17] Headings I.A. through I.C. address subfactors of the first factor. Finally, headings I.D. and III. represent points where Student 7 paused to balance subfactors or factors and come out with answers.

17: See Section 5.3 for the statutory rule for fair use. The assignment for Student 7's problem directed the student to consider only these two of the four fair-use factors.

I can easily imagine Student 7 sitting down and saying, 'What questions will I have to answer in my analysis?' Where the rule is a four-factor test, Student 7 realized just by reading the statute that they would have to assess each of four factors (though their professor told them to assume how two of the factors would come out, which is why the student analyzed only two of the four). Because the test is a factors/balancing test, they also knew they would need to have a point where they balance the factors to come out on the whole analysis. After reading some of the cases applying the statute, Student 7 likely concluded that the first factor has three subfactors,[18] the result being that they developed an answer for each subfactor and then paused to balance the subfactors to come out with an answer for the first factor.

18: This determination is not as firm as the number of statutory factors, because courts are not always clear what they consider to be necessary components of their analyses. Good faith, for example, may not be listed as a subfactor in first-factor analyses by some courts.

As the writer develops their arguments and applies their understanding of the law to the facts in their case, writing headings the way that Student 7 has done prompts the writer to answer the right questions by identifying the normative consequences shown in italics above; and to briefly explain the basis for the decision by summarizing the operative facts shown in bold above.

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.

In my view, 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 for the general topic, but also for the outcome and key fact(s) on which it turns. Second, such headings can function as the initial CREAC conclusion for the section, eliminating the need for a conclusion in the first sentence of the section.[19]

19: See Section 14.3 for a discussion of CREAC. Student 7 used this technique in at least one instance in Appendix Section 47.2, but not in other sections. Can you see where they did so? For more on structuring complex analysis, see Section 15.1.

There is a middle ground where the author gives the normative consequence 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 structure headings.[20] Conform to them when you present your analysis. Your supervisor 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 your supervisor's preferences, create an outline of headings during your analysis and writing process that you find useful. You can always change the headings later to conform to your supervising attorney's expectations.

20: In fact, not even all the contributors to this volume see eye to eye on how headings should work. Compare the memos of Student 7 and Student 8 in Section 47.2.

Also 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 29.3.
- Be wary of writing too many point headings. Use point headings to identify issues and sub-issues or to break up an analysis that is very long but don't use so many point headings that your analysis becomes choppy.
- 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.' And you do not need a '1.' unless you have at least a '2.'

11.4 Dealing with adverse law

While researching and analyzing your problem, you may encounter law that is adverse to your client, potentially including statutes, regulations, and case law. How you present adverse law in argumentation or analysis will depend upon the procedural stance in which your legal problem arises. Regardless, you always want to be aware of any adverse law. See Chapter 12 for guidance on finding it.

If your client is asking for your analysis of a legal problem to guide the client's decision-making, you should obviously inform the client of adverse law and explain how it factors into your advice.[21] If you are representing your client in early-stage negotiations with an opposing party, you should be prepared to address adverse law, but you will probably keep quiet about it until and unless opposing counsel brings it up.

21: See Section 14.9 for guidance on constructing counter-arguments.

If you are presenting arguments and analysis to a court or other tribunal (such as an arbitrator), you have a specific responsibility under the Model Rules of Professional Conduct to disclose adverse law:

> A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel . . . .[22]

22: Model Rules of Pro. Conduct r. 3.3(a)(2) (Am. Bar Ass'n 2023).

The rule may seem counterintuitive: If opposing counsel—whose client would benefit from disclosing authority adverse to your client's position—fails to disclose that authority, why should you have to do so? The key issue is an institutional one: Our adversarial system counts on the parties putting the best arguments before a judge or tribunal as the means of getting the best decision. If the parties fail to cite binding law relevant to the case before the tribunal, there is a risk that the decision may not accurately represent the state of the law. Such a bad decision could be the result of poor representation by the parties' attorneys.[23]

23: It is also possible the parties could collude to avoid raising a precedent that might have negative consequences for both, which would definitely be unethical.

The key practical issue is reputational: Courts do their own research, and if they find that both parties have failed to cite a binding legal authority, the failure brings into doubt the attorneys' competence and candor.

Regardless of the reason, you *must* disclose the authority to the judge or tribunal.

Of course, *how* you address a binding authority apparently adverse to your client's position in a filing before a tribunal is a matter of argumentative tactics. The most common approach is to give it as little space as possible, perhaps raising it in a footnote or only in oral argument. If the binding authority is a case, you will likely attempt to distinguish or *disanalogize* it,[24] arguing that your case should come out differently.

24: See Chapter 6 for more on this technique.

Legal research 12

Krista Bordatto & Brian N. Larson

Legal research is unlike academic research in some ways, while in others it may seem somewhat familiar. Familiar or not, your research will be used in key decisions from advising clients to persuading judges, and it's crucial to be proficient. There are many approaches to legal research, and you should strongly consider taking an advanced legal research course during your time in law school to learn about them. This chapter provides a beginner's guide to legal research and is adapted from Mark K. Osbeck's model.[1]

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, and crucially, it can cost a lot of time and money.
- In legal research, it's critical 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 included with your tuition in law school (e.g., Westlaw, Lexis, Bloomberg Law) are very expensive out in the practice world. This is also true of the enterprise generative AI tools that use only actual cases and authorities (unlike the free ChatGPT, for example) and that lawyers might comfortably use in practice. For a small firm, they can cost thousands of dollars per attorney per year. If you are planning to open your own firm, these tools may not be within your budget. We tend to lean on these tools during law school training, in part because they are free now. But your access to them after law school may be non-existent or incomplete. Another reason to take an advanced research course is to learn about some of the free and low-cost alternatives and how to use them.[2]

1: Mark K. Osbeck, *Impeccable Research: A Concise Guide to Mastering Legal Research Skills* (2d ed. 2016). There is also much good advice at https://perma.cc/P28D-E549.

2: Software provider MyCase has created a guide to using Google Scholar and other free tools for legal research, available at https://perma.cc/VWP6-T8T4.

12.1 Steps for researching a legal question

Every time you research a legal problem,[3] you should follow these steps, each of which is discussed further below.

1. Create a research log for the question.
2. Plan your research.
3. Review secondary authorities.
4. Search for primary authorities.

3: 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.

5. Analyze your results and retrace if necessary.
6. Update your research to ensure the law remains valid.

12.2 Receiving your assignment & creating a research plan

Whenever you go to your boss's office or to a meeting, you should have something that allows you to take notes. Osbeck recommends you always carry a legal pad with you. Several years ago, yellow legal pads were the staple for lawyers; lawyers today most use either word-processing or note-taking software.[4]

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

In practice, we always carried a paper notepad, though it's not the old yellow legal pad and we don't use it for research logs. Having a notepad serves a dual purpose. First, you can write things down. As much as most of us pride ourselves on our ability to remember things, we may forget tasks or issues. 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, that worry will probably be justified.) Typing notes on a laptop or tablet is fine, but avoid using your phone; note taking on your phone may give the impression that you are texting friends or using social media.

Before you start researching, it's important to create a plan. This is particularly important if you are working with other students or colleagues. 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 and intimidating aspect of the project. 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 or validate whether you are on the right track; and (2) you should regard your legal question as tentatively established because you may need to refine it as you learn more. It may be intimidating to ask for help, but going down the rabbit hole researching the wrong legal issue is a worse alternative.

12.3 Creating & keeping a research log

We 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. Research logs provide at least three benefits. First, you will often read dozens or even hundreds of authorities, and a research log is the only way to keep track of them all. The last thing you want to do is to reread a case 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. If 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.[5] Third, keeping a research log allows you to see how the authorities you've found can support or hurt your case, helping you advise your client.

5: 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. Pro. Conduct r. 1.1 (Am. Bar Ass'n 2018).

What should a research log look like? Your legal research and writing class may provide you a template to start, but the answer depends on what works best for you. Providing the following information at the top of your research log can help:

- *An assignment title*. It's handy to have a short-hand title 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. You might also use this title on your timesheets if you are billing a client for this work.
- *Due date*. This should appear prominently at the top of your log. Whenever you open or view it, you want to be reminded when you must finish. If your supervisor did not give you a due date, make sure to ask.
- *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 who assigned this work. 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 entities—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.'[6] 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 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 the 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 has already identified particular claims or remedies, note them here. Your research may take you elsewhere, but you need to address these issues to satisfy your audience.

6: This reference is to the sample problem and example student analyses in Appendix Chapter 46.

- *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.[7] Use *Indigo Book* Tables T1 or T3, *ALWD Guide* Appendix 1, or *Bluebook* Table T1 to identify courts whose decisions will be mandatory authority. These will be your 'bullseye' authorities, as we describe below.
- *Question(s) 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. The question it should be fairly specific, e.g., 'Under Minnesota law, is an attorney client relationship formed when an attorney answers a legal question at a party, after expressing reluctance to discuss legal matters outside of the office and lack of expertise in the applicable area of law?'[8] There may be more than one question presented and there may be sub questions that must be answered before you can answer the main question. It's helpful to note all of them here as an authority may address only part of your question.
- *Citations*. While you may be able to go back into your search history later, noting the proper citation for each authority you read from the outset can save you time and stress down the road.
- *Procedural history or posture*. If you are taking over a case from another attorney or a client who has been acting as a self-represented litigant (also known as *pro se*), you must know where the case is currently and whether you are running against any deadlines or statutes of limitations.

7: See Chapter 17 for a discussion of possible authorities and their sources.

8: This reference is to the simple problem and example student analyses in Appendix Chapter 46.

Chapter 22 offers guidance for reading statutes and other enacted laws, and Chapter 23 does the same for court opinions. Chapter 20 provides detailed advice about understanding the rules in primary authorities. In your research log, you should record every search you run and what you read, browse, or scan. If it was not useful, note that in your log and note why. In a few weeks you may need to revisit the same problem; if you have not noted useless authorities in your research log, you may find yourself re-reading them. 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*. Additionally, you may be billing clients for your time researching, and it's always a good idea to have a tangible document showing how you are spending their money. Finally, if you take a wrong turn in your research at some point, a log will help you see where you went wrong more quickly, saving you from starting your research again from the beginning.

12.4 The research bullseye

When you research the law in a topic area new to you, you should rarely go immediately to the decisional law (case law) or statutes—primary authorities—relating to that law. Instead, you should start your research by looking at secondary authorities.[9] Secondary authorities can be a gold mine, especially if you do not fully understand the legal problem. These

9: If you do not know the distinction between *primary* and *secondary* authorities, see Section 17.1.

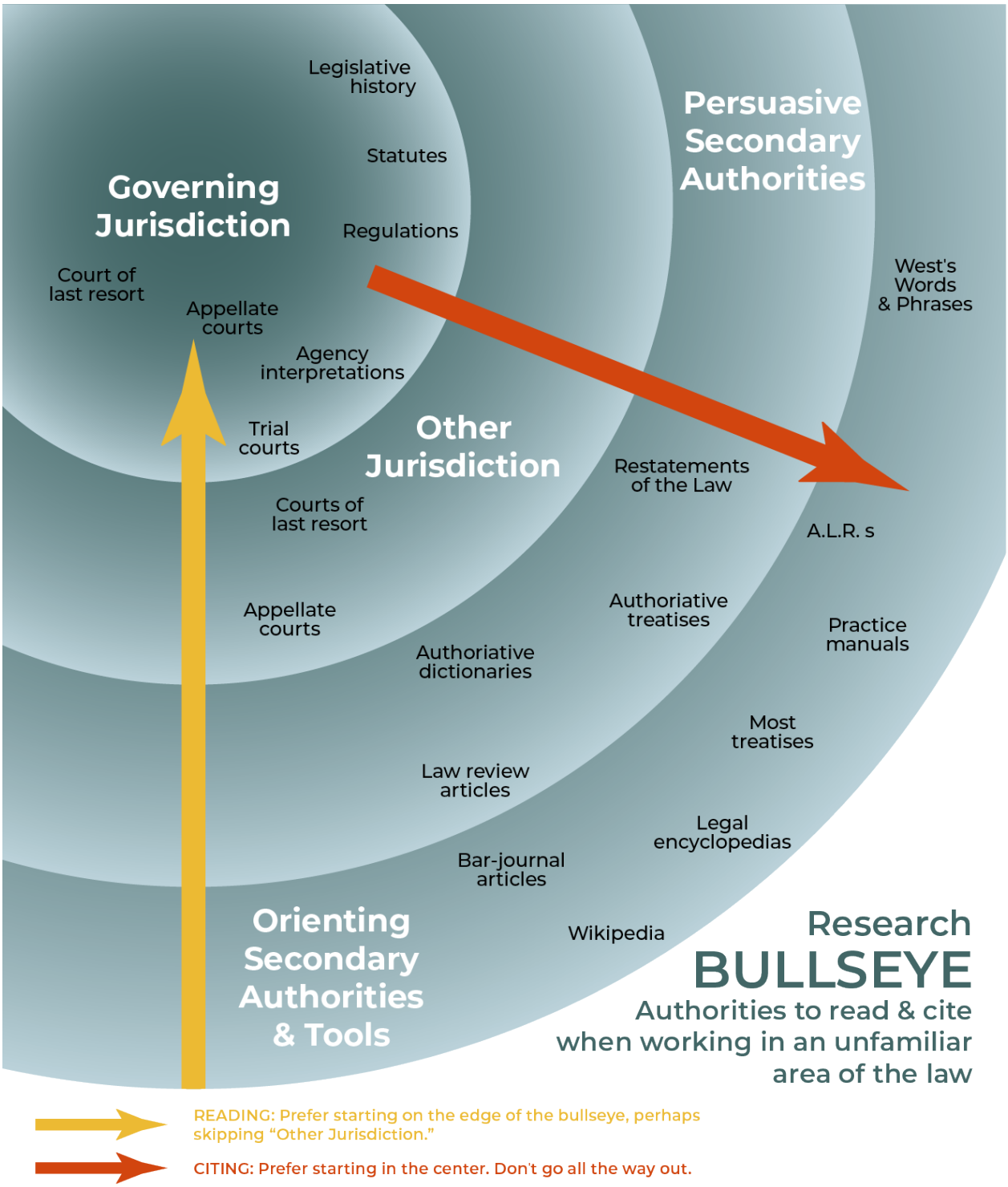


Figure 12.1: Research bullseye. Read from the outside in; cite from the inside out. Adapted from Christina L. Kunz, et al., *The Process of Legal Research* (6th ed. 2004). Image: Oleksii Bychkov https://www.oleksiibychkov.com.

authorities, such as legal encyclopedias, treatises, law review articles, and practice guides, provide comprehensive overviews and in-depth analyses of legal topics. They can help clarify complex legal principles, offer interpretations of statutes and case law, and provide practical insights and examples. Once you locate one or more secondary authorities and have a good understanding of the area of law, you will then look for the primary authorities. Going straight to primary authority can actually hinder your research if you do not understand what you are looking for.

Interestingly, you will choose to cite authorities in your writing in exactly the opposite order: Cite binding primary authorities and avoid citing secondary authorities, except where necessary. You can think of this using the bullseye pictured in Figure 12.1: the binding/mandatory authorities are in the center of the bullseye, persuasive primary authorities on the next ring out, and secondary authorities on furthest rings.

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 an area of law if you want to have any hope of doing an effective search in the primary authorities. Sometimes your search engine will not yield the results you are looking for, which can be both frustrating and time consuming. To prevent unsuccessful, frustrating, and time-consuming searches, consider building a robust vocabulary list: Reflect on your legal issue, think about the various ways to articulate the legal concepts involved, and add them to your vocabulary list. Consider this example:

> We are representing a client who believes she has been underpaid by her employer. Our client Maria lives in Miami, Florida, and was recently employed by Rosa's Cuban Cuisine. Maria earned $500 a week and was paid every Friday in cash. Maria worked ten-hour days, five days a week from February 1, 2019, until December 15, 2022. Maria is from Cuba and does not have legal status in the United States. Before she was hired, she told Miguel, the owner of Rosa's, that she was not legally authorized to work. Does Maria have a case?

When reading this fact pattern, terms such as minimum wage, overtime pay and undocumented immigrant may come to mind immediately. But how else could you phrase Maria's problem? Thinking of synonyms and the relationships between the parties can be very helpful when creating your list of search terms.

Sometimes, though, you will get lucky and 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, you will find you have less need to orient yourself in the secondary authorities. You will already have the appropriate vocabulary and understanding. During your time

in law school, secondary sources will be essential. For you, everything is new, and we cannot stress enough the value of these orienting steps to your training.

When you move to primary authority, keep in mind the hierarchy of authorities: constitutions, statutes, regulatory agency rules, and executive orders. Higher authorities, such as constitutions and statutes, have binding power over lower authorities. Recognizing this hierarchy helps ensure that your legal arguments are grounded in binding authorities, which courts are obligated to follow.[10] 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.[11] Even if you find a statute that is directly on point to your legal issue, courts may have further defined its terms or created a test to determine its application. It's crucial to understand how to use each source within the hierarchy of authorities.

10: For a discussion of these concepts, see Section 17.2.

11: See Chapter 20, Chapter 22, and Chapter 23 for more detail on reading and analyzing primary authorities.

12.5 Updating research

It would be wonderful to research a legal problem once and check it off of your to-do list. Unfortunately, the law can change at a moment's notice with a new court decision. It's not to say this will always happen, but part of your ethical duty of due diligence as a lawyer requires that you ensure you are relying on good law. For example, if you conduct your research, but the trial doesn't start until a year later, it's highly likely something may have changed in the law. If you were to use bad law, or a case that has been reversed, you could be serving a win for the opposing side on a silver platter. In addition to the potential consequences of losing a case, you could also damage your reputation.

So how do you update your research? The first step is to double check that the primary authority you are relying on remains good law. At a minimum, you need to ensure that the primary authority has not been reversed, overruled, or superseded. Additionally, it's important to understand whether the primary authority has been criticized or distinguished by other cases. Finally, you need to check to see whether there are any new cases regarding your legal question that could impact your case.

12.6 Recap of research

This chapter provides a preliminary overview of legal research. Here are a few final thoughts on conducting legal research:

- *Research does not always wrap up tidily*. In one problem, you may find the entire universe of cases that have something to say about your problem and read them all in a couple hours. Another problem may have hundreds or thousands of potentially relevant cases. 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. One tip is to stop when most of what you are reading mentions authority you've already read.

- *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. Keep in mind 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* 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 employ these strategies as you do your own research this year.

Facts in the law 13

Krista Bordatto

The foundation of all legal reasoning is the full consideration of the facts. Thus, when writing the factual background to support a legal analysis, you must decide which facts to include, how to characterize them, and where to put them. Readers begin to form an opinion about the case in the facts section, so getting it right is crucial. This section considers the general principles for writing the facts section in an objective and persuasive analysis. These recommendations can be applied in a simple or complex analysis, but recommendations for other genres are different, and for those recommendations you should review the applicable genre chapters later in this volume.

13.1 When to write the facts

When should you write the facts? An early draft of the facts as you know them can help you organize what you know and what you do not know when performing research. This early draft is generally what the client has told you and any evidence the client has provided, or you have discovered. Once you have completed an initial draft of the facts, the next step is to research relevant laws and cases. You can then use your research and initial facts draft to write the objective or persuasive analysis section. In the analysis section, you will use facts that are directly relevant to your arguments. Once your analysis section is complete, finalize the facts section. Writing the analysis section before finalizing the facts section is important because all facts used in the analysis need to be in the factual background, which Section 13.4 explores in more detail. As a rule, new facts should not be introduced in the *application* or *analysis* section of your CREAC in objective writing, or the *argument* section in persuasive writing. [1]

1: For a discussion of facts in particular genres, see Chapter 29 (memoranda) Chapter 34 (trial briefs), and Chapter 35 (appellate briefs).

13.2 Types of facts

A fact is a fact is a fact, right? Unfortunately, it's not so simple. When dealing with facts, there are generally two types. First, there are the facts that lawyers get from their clients when the client is seeking advice. Second, there are the facts that derive from an investigation.

1. **Facts from clients.** Facts from clients are the version of events from the client's perspective. These 'facts' are generally charged with positive or negative emotion regarding their legal problem. Client facts may or may not be supported by evidence. Further, the court may or may not agree with the client's version of events.

Figure 13.1: Facts come from witnesses. In general, you will need a witness who can testify from personal knowledge about any given fact. For more on the limits of what you can get into evidence, see Section 33.3. Image: Oleksii Bychkov https://www.oleksiibychkov.com.

2. **Facts from an investigation.** Investigations are fact-finding expeditions. Investigations attempt to determine, fully and convincingly, what happened and who was responsible with respect to a particular event or incident. Investigations piece together traces of events, transactions,relationships, or the lack thereof. Facts that come from an investigation should be as close to the truth as possible because all information should be reviewed and analyzed according to set standards. Investigation facts are important because they help prove or disprove the client's version of the facts.

13.3 Which facts to include

In a legal analysis or argument, the factual background generally appears before the discussion of the law.[2] Without the facts that give rise to the legal problem, the reader will not understand the relevance of legal analysis.

2: For a discussion of facts in particular genres, see Chapter 29 (memoranda) Chapter 34 (trial briefs), and Chapter 35. For examples of student efforts to draft facts, see Chapter 47.

But which facts should you include? Whether you are writing a predictive/objective or persuasive factual analysis, your factual background must include every fact that is relevant to your analysis. These are the 'operative facts' or 'legally relevant facts.' The fact section must also include any facts necessary to provide context for the operative facts. Context allows the reader to see the story and connections between the operative facts. Context may also be used in a persuasive analysis to minimize the impact of any single fact, including negative facts.

But how much context should you provide? There is no hardline answer; you must provide as much as necessary, but not too much to confuse or distract the reader with irrelevant details. The goal is for the reader to have enough background information to understand, but not lose sight of, the operative facts. In a predictive or objective analysis, you should also include any negative facts that may impact your legal problem. In a persuasive analysis, you should also include negative facts, but you will likely attempt to minimize their impact on the reader. Additionally, the fact

section is a good place to identify any unknown facts that might materially affect the analysis.

Finally, you should include procedural facts, which typically identify for the reader the the problem at issue, or in other words why you have written this analysis. 'Our client has asked us to determine . . .' or 'We are determining whether the client should move for summary judgment on damages' are ways to provide the why to the reader. Finally, if a lawsuit has already been filed, you can end the facts with the procedural history.

However, there are a few things that should not be included in the facts section. You should avoid making inferences, drawing conclusions, or using legally conclusory language in the fact section. If you conclude in the facts, there is no point for the reader to read your analysis.

13.4 How to depict & organize the facts

How you organize the facts is a key consideration for both objective and persuasive writing. For organization, consider the following advice.

Start with some context. Tell us how everyone got where they are. For example, 'Our client, Mr. Smith, was arrested for drunk driving after he was found intoxicated with his vehicle running.'[3]

3: This example derives from the more in-depth fact pattern in Section 14.2.

Attribute facts to their sources. Tell the reader where the facts came from such as a police report, accident report, or the client.

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. When dealing with multiple claims surrounding the same topic, you may choose to organize them by importance or based on the order in which you will analyze them.
- Perspectival refers to the perspectives of the actors on the scene, considering and presenting different viewpoints and perspectives to strengthen your argument. For example, writing from the client's perspective, if Mr. Smith had been conscious and not blacked out, the lawyer may point out how Mr. Smith's account of operative facts differs from those in the police report. You may also write from the opposing side's viewpoint, acknowledging and countering anticipated arguments. In persuasive writing, you may also consider the policy implications of the case.

Consider *nesting* the organization. You may use a chronological organization at the high level, stopping along the way to describe the perspectives of each party in turn. Or you may use a perspectival approach at the high level, instead, giving the whole chronology from one person's perspective and followed by the other's account.

Use concrete details. You may include certain details and exclude others. In Mr. Smith's case, would you include the make of the car? Or the time of day? Why or why not? The facts you include will depend on which facts have an impact on the outcome of the case or provide necessary background. Facts that do neither should likely be excluded as irrelevant.

Make the facts flow. You want the reader to want to keep reading. Unless the facts are very simple, you will likely need to organize them into paragraphs. Once you introduce the reader to the problem, it can be helpful to orient the reader by providing a roadmap at the end of the first paragraph so they understand how the facts will unfold. For instance, before describing in detail the facts of Mr. Smith's case, you may want to tell the reader that Mr. Smith was evicted from his house prior to being arrested for drunk driving and then provide details on the eviction followed by details of the drunk driving arrest. Using topic sentences for each paragraph and incorporating transitions between paragraphs and sentences will enhance the cohesiveness of the story.

Identify the status and categories of people. Where possible, identify the status and categories of individuals beyond their procedural roles in the case. For example '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 define these parties and refer them as 'the tradespeople' or 'the partners.' It's crucial to establish these terms, as they will help you connect your facts to the law. Once you define a term, consistently use it throughout to avoid confusing the reader. This is particularly important because every case involves a plaintiff and a defendant—or an appellant and appellee—making it challenging for the reader to distinguish between the parties in your case and those in other cases. If there is not a good method to describe the parties, using names is better than 'Plaintiff,' 'Defendant,' 'Appellant,' or 'Appellee.'

When you write the facts, you must ensure you are telling the reader when the facts happened or will happen. You should use past tense for things that already happened, present tense for things currently happening, and future tense for things that will happen.

13.5 Addressing adverse facts

In every case there will be facts that help the client's case, but there will also be facts that are adverse to the client's position, sometimes called bad facts. Lawyers cannot simply omit these adverse facts, for a few reasons.

First, as lawyers, we must consider all the facts to understand the problem, our client's position, and the potential opposing arguments. This is particularly important when writing objectively. There is no way to be objective when only looking at one side. Through this process, we can make predictions and advise our client about the likelihood of success. In persuasive writing, we must include bad facts so that we may provide context for them.

Second, any attempt to hide bad facts will generally be futile. The bad facts will eventually come out, whether it is through discovery or from opposing counsel. Either way, the lawyer may suffer reputational damage and the client may lose. This is especially true if the adverse fact directly impacts the satisfaction of a rule.

Third, lawyers have ethical duties which include a duty to act in good faith and to not engage in conduct that is intended to disrupt a court of law.[4] Instead, by proactively addressing bad facts, you can present the bad facts on your terms rather than your opponents'.

4: On reputation for questionable conduct, including misstating or skipping key facts and being generally unprofessional, see Judge Kenneth K. So, *A Lawyer's Reputation Can Be Hard to Untarnish*, L.A. Daily J. (Aug. 30, 2023).

13.6 Writing neutral facts

When writing an objective analysis, it is important to take a neutral position when writing facts, avoiding the positive or negative language the client uses to describe events. Additionally, it's important not to convey unsupported conclusions. Consider the following facts as told by Mr. Smith:

> The officer must have beaten me when she arrested me. When I woke up in jail, I had bruises and a black eye. The arrest report doesn't mention that I had these injuries *before* I was arrested.

Our client, Mr. Smith, was arrested for drunk driving. Do these facts have anything to do with the drunk driving charge? No, not really. Therefore, Mr. Smith's attorney may simply omit these facts. If the attorney were to include these facts, she should not simply regurgitate Mr. Smith's unsupported inferences. Instead, the attorney can neutralize the facts without contradicting Mr. Smith by writing, 'Mr. Smith sustained injuries on X date and has no recollection of the events leading to these injuries. Because the police report does not mention those injuries, he concludes that the officer beat him.' Here, the lawyer is conveying Mr. Smith's facts objectively, without any inference or legal conclusion.

13.7 Writing persuasive facts

Writing the factual background for an advocacy, or persuasive, document—such as a demand letter, trial brief, or letter to opposing counsel—requires a different strategy.[5] However, writing persuasive facts is generally easier after first writing the facts objectively. Writing the facts objectively first allows the reader to look for themes, facts to emphasize, and facts to de-emphasize. Moreover, it helps the reader understand how the facts satisfy, or do not satisfy, the rule. By considering both positions, it is generally easier to identify the strengths and weaknesses of your opponent's position.

The factual background is the first chance you have to persuade the reader that your client should win and must be consistent with the overall theme of the analysis. The key is to be persuasive without being too extreme. It is always a possibility that the judge may adopt your factual background in

5: See Chapter 31 for insights on demand letters and Section 34.4 on facts in trial briefs.

her opinion. Additionally, there are ethical constraints to consider, which are discussed in the next section.

How do you turn an objective factual background into a persuasive one? Consider the following suggestions.

Weave the theory of the case into the facts. The theory of the case is the unifying theme of your case and can help the reader empathize with your client. Once you've determined what your theory of the case is, you can use facts to support that theory. If your client was in a car accident the legal theory might be negligence, but the theory of your case might be that the other driver was in a rush and distracted. You would draw attention to facts such as the other driver left home at 8:05 for an appointment at 8:15 that was located a twenty-minute drive away.

Use your legal theory to emphasize the strengths of your case. If the case is based on negligence, you would want to point out facts that support that the other party had a legal duty, they breached that duty, your client's injuries were reasonably foreseeable, and as a result your client suffered an injury.

Be subtle, not dramatic. The undertones of your factual background should persuade the reader your version is right but should not appear biased. If you want the reader to think of your client as the good guy, you might describe your client as a 'family man' or a 'dog lover.' Just remember that you cannot intentionally deceive.

Neutralize the impact of bad facts. When deciding how to organize your facts, it is important to consider where your bad facts should go. One way to de-emphasize bad facts is by placing the bad facts in between two good facts, which I generally refer to as the sandwich method. Another way is to neutralize the language used to describe a fact. For example, in a personal injury case:

> Bad Fact: Mr. Jones rear-ended Mrs. Sweet.
>
> Rewritten: Mr. Jones' car bumped into Mrs. Sweet's car.

However, you must also make sure that you are not changing the facts or being misleading. If Mr. Jones had hit Mrs. Sweet at seventy miles per hour, the word 'bumped' would likely not be accurate. Another way is to use organization to your advantage. Similar to the sandwich method, you can de-emphasize bad facts by placing them at the end of the facts after all of the positive facts. Bottomline, you should include all relevant facts, even when they can hurt your case.

13.8 Applied storytelling

Applied storytelling is one technique that can be helpful in persuasively portraying your client's side of the story. Applied storytelling is not the crafting of a fictional story, but rather the staging of facts in narrative form ripe with a plot, cast of characters, and the sequence of events that form the storyline. A well-drafted story will engage the reader and end with your

client as the legal victor. Chapter 10 provides a more in-depth discussion of applied storytelling.

13.9 Ethical constraints

Ethics should always play a key role in how you draft facts. As discussed in Section 13.6, you must include all legally relevant facts. Leaving out bad facts can negatively impact your credibility and may be a violation of the Rules of Professional Conduct. Additionally, you should not write facts with the intent to create any type of bias or prejudice prohibited by the ethics rules.[6] Simply put, if you think your characterization of facts could manifest bias, prejudice, or harassment, err on the side of caution and redraft.

6: Model Rules of Pro. Conduct r. 3.5(a) (Am. Bar Ass'n 2023).

14 Writing a simple analysis

Link to book table of contents (PDF only)

Brian N. Larson

This chapter focuses on how to write a simple legal analysis. As you shall see, the task is anything but simple. In fact, you'll find Chapter 15, 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.

Section 14.1 first describes the basic components of almost any legal analysis, and Section 14.2 offers a hypothetical email that an attorney might write to a client, which will will serve as an example for much of the rest of the chapter. Much of the balance of the chapter explains CREAC, pronounced 'CREE-ack,' an organizational paradigm that you will use throughout your legal career: Section 14.3 offers a basic explanation of CREAC, with Section 14.4 through Section 14.10 explaining its components in detail. Finally, Section 14.11 explains how to use roadmapping to structure an analysis so that it meets expectations of your legally trained readers.

14.1 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 you are asking, states it, and provides a high-level answer. It may also alert the reader to what you think the next steps are. The introduction may come in the form of a single paragraph at the beginning of an email or a trial brief, or it may come in the form of a 'question presented' and 'brief answer' in an office memorandum. See Chapter 4 for a discussion of how to develop and confirm the legal question, Chapter 28 for email conventions, Chapter 29 for conventions for writing legal memoranda, and Section 34.3 for introductions in trial briefs. For examples of this part of an analysis in practice, see the first paragraph of each simple analysis in Appendix Section 46.3.[1]
- *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. Several parts of this text address the proper treatment of facts in your communication, which is highly context-dependent. For starters, see the treatment of facts in Chapter 13.[2]

1: You'll also find examples in the segments of the four sample memos in Chapter 47 with these markers:

1 2 3

2: In the four sample memos in Appendix Chapter 47 the segments with this marker provide the factual background:

4

- *The reasoning*. 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, the complexity of the problem, and the stakes—how they reached the conclusion in the introduction. See Chapter 3 for an overview of legal reasoning and Chapter 5 through Chapter 10 for details of various types of arguments.[3]
- *A conclusion*. 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. The last paragraph of each simple analysis in Section 46.3 constitutes its conclusion.[4] In analyses going to a judge or opposing counsel, the conclusion usually just bluntly states what the author or their client wants.

3: If you want to see some examples, reasoning makes up the bulk of the simple analyses in Section 46.3 and of the sample memos in Appendix Chapter 46.

4: You'll also find examples in the four sample memos in Appendix Chapter 47 where you see this :

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. But depending on the circumstances, an author might include assumptions in the introduction, factual background, and conclusion.

Making assumptions

Your professors 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 teaching you about assumptions is very important! **And either way, you must always inform your reader about the assumptions you are making.**

Repetition of conclusions, assumptions, and other items is valuable because some readers turn immediately to the conclusion and expect it to include 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. Note that putting this information in multiple places generally does not mean you just copy and paste it from one place to the other. The role that the information plays in different positions is different. In an introduction, you might alert your reader up-front about a recommendation that you will repeat at the conclusion of the analysis. At the beginning, you present the alert as a heads-up to your reader. In the conclusion, you present the recommendation as the culmination of your reasoning process.

Finally, there is a special kind of reader that you want to satisfy: the skimmer. If your reader trusts you and your analysis—or if they are simply

overwhelmed and don't have time to read the whole thing—they may read only the introduction, the conclusion, or both, and then leave satisfied with your answer. Those readers must 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 or further details on some point or points. Consequently, it's important for you to put everything that your reader absolutely must know both in the introduction and the conclusion, 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 them.

Where do I put missing facts? . . .

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 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.

14.2 Example analysis

Imagine a lawyer sending the email below, reflecting the lawyer's effort to objectively analyze the client's legal issue. This email maps almost perfectly to the email conventions described in Chapter 28 and the outline for legal analysis provided in this chapter, as the marginal comments show. The bracketed words in bold red text indicate parts or sections of the email; they would not have appeared in the actual email.

FROM:	Anne Associate <Anne.Associate@SuperDuper.firm>
TO:	Chad Smith <chadrocksinhis84vette@gmail.com>
SUBJECT:	Police stop on August 5, 2023
DATE:	August 7, 2023, 10:15 AM

Dear Chad,[5]

[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. I conclude that you do not, absent some compelling fact or facts that you have not

5: 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 16.2.

shared with me, though we may be able to assist you with this case.[6]

[FACTUAL BACKGROUND] You explained to me that on the evening of August 4, you had had a lot to drink. In the early morning on August 5, Officer Rita Mariano detained you after finding you asleep in your car on Oak Lawn Avenue in Dallas.[7] As you have no recollection of the events, the facts we have come from Officer Mariano's arrest report. According to her report, the vehicle, your 1984 custom blue Chevy Corvette, was running, you were in the driver's seat, and you were the only person in the vehicle. The vehicle was in a legal parking spot on the side of the street. 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.[8] **[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.[9] **[EXPLANATION, PART 1]** "While driving involves operation, 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).[10] 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.), 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.

[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*: In either case, the lifting of the driver's foot or feet—whether intentional or not—would have resulted in the vehicle moving.[11] **[CREAC CONCLUSION]** Unless you have any facts to suggest any irregularity in the stop,

6: In this introduction, Ms. Associate provides context, as suggested in Section 28.1, states the legal question, provides the answer, and then hints at recommended next steps.

7: This paragraph provides the factual background. Note the cautious, clinical tone. See Chapter 13 for more on that.

8: 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.'

9: This sentence and the previous one function as a roadmap, letting the reader know what issues Ms. Associate is going to handle. Some authors put this sort of roadmapping in an opening paragraph, before the CREAC.

10: 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* (15th ed. 2022).

11: Here, the author compares her client's problem and the cited case, identifying the legally relevant similarities.

the breathalyzer test, or the arrest, you would very likely be convicted on this charge.

[COUNTER-ARGUMENT AS 'MINI-CREAC'] Furthermore, 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.[12] *Id.* Consequently, this difference will likely have no effect, you will very likely be found to have operated the vehicle, and will thus be found guilty of drunk driving.

[OVERALL CONCLUSION] If you would like to talk to me about ways to mitigate the consequences,[13] judges frequently respond positively during sentencing if the defendant has been proactive in certain ways. We can definitely help you out there!

Let me know if you have questions!

Sincerely,[14]

Anne Associate [Etc.]

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

12: Why the difference between "Barton" and *"Barton"* in this sentence? With *"Barton"* Ms. Associate is referring to the court that wrote the *Barton v. State* opinion and is using a short form for the case name, which we always italicize in practice documents. When she refers to "Barton," she is referring to the defendant in the *Barton* case, and we generally don't italicize the names of people when we write about them.

13: In this concluding paragraph, Ms. Associate does not repeat the conclusion. She could make that judgment call because the conclusion was the last sentence of the previous paragraph, and she immediately makes a recommendation that Mr. Smith retain her firm for help in this matter.

14: Simplified here for the sake of space, this closing is quite typical for an email. See Section 28.4 and Section 28.5 for more discussion of email contents and closings.

14.3 CREAC

The CREAC model represents what Romantz and Vinson call an "organizational paradigm."[15] They say that legal writers use such paradigms as a "guide or template when drafting legal analyses."[16] Of course, they warn 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. 'C R E A C' stands for:

- Conclusion
- Rule
- Explanation or Example (and sometimes both)
- Application (though some will say 'Analysis,' and in persuasive documents, they might call it 'Argument')
- 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 suggest one reason: It's helpful for the writer trying to organize their thoughts. That's true. In fact, after twenty-five years of practicing law, I still

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

16: *Id.*

find that if I'm writing an analysis and am stumped about how to proceed, backtracking and reorganizing it as a CREAC helps me move ahead.[17]

17: Some folks also 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 3.2 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 or simply does not have much time, 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. For example, if you fail to demonstrate the expected level and type of organization, opposing counsel may find subtle ways to highlight what the judge is likely to perceive as your disorganization.

But 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 discuss some of those situations in this book.[18] There are some times when it makes sense to abandon CREAC completely. Nevertheless, those times are more like the seasoning on a meal—and CREAC is more like the protein and vegetables that generally sustain you.

18: *See, e.g.*, Section 15.5.

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

14.4 Writing the rule(s)

Section 20.1 discusses how to *read* legal rules, but that task is 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 analysis, 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 Chapter 5 for an introduction and Chapter 22 and Chapter 23 for detailed guidance.

Consider the disjunctive rule for employment discrimination described in Section 20.1.

> 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).

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 will include all facets that are relevant to analyzing your case, and you must be careful not to strip away parts of the rule your reader would care about or would likely ask you about. 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.[20] 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 Penal Code.[21] But notice that she used opinions from the Texas Court of Criminal Appeals (Texas' court of last resort for criminal matters) when 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. Consider the following alternatives, with and without attributive cues and decide which you think make for a more concise presentation of information:

- **Without attributive cues.** "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).

20: Your strategy may look a little different if you have to synthesize a rule from different cases. See Section 14.7 for further discussion of synthesis.

21: Another example of this approach appears in Student 6's memo in Section 47.1, starting at page 431. 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

- **With attributive cues.** "Under the Texas Penal Code, 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)."
- **Without attributive cues.** "While driving involves operation, 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).
- **With attributive cues.** The Texas Court of Appeals concluded in 2017 that "[w]hile driving involves operation, 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).
- **Without attributive cues.** 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).
- **With attributive cues.** According to a decision of the Texas Court of Criminal Appeals that is binding on this case, 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).

It would have been a waste of words for Ms. Associate to write the versions with attributive cues. Her approach was more concise.[22]

22: There are at least three places where you will likely use attributive cues. First, when you are writing a case example, as explained in Section 14.6, these cues will be useful. Second, there are situations where you need to discuss which court adopted an opinion. For example, if one federal circuit court of appeals holds one way on an issue, and another court of appeals holds the opposite way—something we call a 'circuit split'—your discussion of the issue will require you to refer to the deciding courts. Finally, in communications with a layperson, making the informational content of the citations more explicit in the text may be desirable. See Chapter 37 for more information.

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, applying to everyone and not just to her client.

Fourth, though it is not required, lawyers typically state rules by first identifying the normative consequence 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 formulation 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, which 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 actions that lead 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.

> BAD EXAMPLE ***(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.[23] If, however, you are writing about a common-law rule, you may find it helpful to organize it with enumerated subparts.

23: Some writers might, however, present this paragraph as I have here but put the enumerators in brackets like so: [a], [b], and [c]. Such brackets are a common signal in legal writing that their contents were not in the quoted text.

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

> BAD 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 suggested in Chapter 20, but legal readers in most contexts expect prose, not bullet points. I say 'most' contexts, because there are environments where it would be just fine or even preferable to present the rule in this form—your first year in law school does not represent such an environment unless your professors tell you otherwise.

14.5 Explanation generally

The 'E' in CREAC represents an explanation of the law, often accompanied by examples of its application or exposition of the policy that underlies it. Explanation is important for all the types of reasoning discussed in Chapter 3 through Chapter 10. The explanation part of CREAC is evident in Ms. Associate's email in Section 14.2. The explanation will generally go from the general to the specific. Thus, in the first part of the explanation, Ms. Associate establishes that a vehicle does not need to be in motion for the defendant to be operating it—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.

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

- Write about the rules as they are today. You do not need to explain their historical development, unless the rule you are using is subject to debate or its history is otherwise particularly relevant.
- Use present-tense verbs to describe what the law *is*.[24]
- 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.[25] Her approach is consistent with the 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.[26]

The two parts of Ms. Associate's explanation above represent two approaches commonly used in rule explanations: introducing definitions that explain the rule and offering examples of the application of the rule in court opinions.[27] A third role for explanation, not evident in Section 14.1, is the need to support a synthesized rule.[28]

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 hers, 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 Texas 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 court opinions.

24: If you are uncertain what present tense is and how it differs from other tenses, review Section 43.3.

25: Each sample analysis in Section 46.3 does the same by first stating overall rules, then explaining applicable factors, and then giving examples of the application of those factors.

26: See the discussion of attributive cues at page 112 for more information.

27: Note that definitions can also function as rules in their own right, something we'll consider more deeply in Chapter 15.

28: *See* Section 14.7.

14.6 Explanation: Case examples

When you offer a case as an example, you will often attempt to set the stage for reasoning by legal analogy.[29] You may use examples to clarify rules, to prove that the rules you assert really are the applicable rules, and to foreshadow your application of the rules. In this part of your explanation, you will describe one or more cited cases with sufficient detail to compare the case(s) to your problem.

29: See Chapter 6 for a fuller discussion of this topic.

Ms. Associate provides a simple model example in Section 14.1:

> 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 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 her client's problem. Here is where you should describe all applicable details of the cited cases. You should not introduce any new details in the Application portion of your CREAC. That section is for ***A***pplying what you have already ***E***xplained.
- 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 from the example align with those of 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?[30]
- She quoted any key phrases from the case that she wished to use in the application portion of her CREAC.
- She said nothing about *her* legal problem here. She saved that for the Application portion of the CREAC.
- When possible, she began her example with a *hook*, explained further below.

30: See Chapter 6 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, however, to compare the facts from *Barton* to those in her problem.[31]

31: For other examples of this technique, see Student 3's explanation of *Togstad* in Section 46.3 and Student 7's case example for *Video Pipeline* in Section 47.2.

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 46.3 starting at page 418. 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 following 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.*[32] In *Ronnigen 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. *Ronnigen* at 422.[33] 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 *Ronnigen*, 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. *Ronnigen* 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.

32: The italics in the first sentence of this paragraph and the next are added to higlight the student's hook.

33: Note that the citations in this example are not complete. That's because the students who wrote these examples were in their fourth week of law school, and I introduce the details of citations more gradually.

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 consequence. This rule is not necessarily stated in any case, but it is one

that the author of the analysis has drawn and synthesized from multiple cases. The author then uses the case examples in the paragraph to back up that rule. The author of the analysis draws the rule in such a way that it helps to resolve the instant legal problem. The italicized sentence starting the second paragraph seems like a hook, but it is a less specific and effective one because it describes only 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 can make the conversation more likely to result in an attorney-client relationship.

The alternative to the conceptual organization in the previous example 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 *Ronnigen 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. *Ronnigen* 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. *Ronnigen* 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 attorneys 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 because 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 during their meeting. *In re Paul W. Abbott* at 16.

This example 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 46.3 starting at page 418, 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 their analysis.

Sometimes, you may be unable to avoid the case walk, and it may be the most effective approach when 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 5.4 and Section 20.1 starting at page 181.

You can compare the ways students used examples in Appendix Chapter 46 and Appendix Chapter 47 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, you should not choose 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 additional 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 were thus authoritative for establishing what the rule was. They were not, however, factually similar to Ms. Associate's problem. For that, she found an opinion from the intermediate Texas Court of Appeals.

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

14.7 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 or of a component of the rule. In fact, the problem of differently formulated rules sometimes appears in a single case. Consider the opinion in *Filippi v. Filippi* in Appendix Chapter 50.[34] There, in a single opinion, the court offers at least three formulations for the rule for promissory estoppel—whose differences are potentially material to the rule—as well as some reasoning that might suggest another element, and the differences are potentially material to the rule.[35]

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.

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

35: For more on complex synthesis, see Section 15.4.

Synthesis just means putting something together, as opposed to *analysis*, which means taking it apart. You must start with analysis though, taking apart each rule formulation as recommended in Chapter 20, briefing it, outlining it, and then comparing it with the possible formulations.

Synthesizing a rule raises ethical questions. Of course, when you are writing predictive analysis for a client, you might synthesize a rule in the form you think that a court would mostly likely adopt, but you might also need to consider alternative syntheses—ones your client's opponent in a dispute might construct—to evaluate all the likely outcomes. When serving your client, this is appropriate. When you are writing to persuade a judge, you must be careful not to misrepresent the cases from which you are synthesizing the rules, violating your duty of candor to the court. But within ethical constraints, you should work to present the most favorable rule for your client.

It's nearly impossible to *describe* how to do rule synthesis. 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 20 and Chapter 23 for reading and briefing the variations of the rules. *Read court opinions very carefully!*
2. Policies motivate most rules. A court's discussion of the policies underlying its rule formulation, how it construes a statute-based rule, or how it states a precedent-based rule provides critical guidance for how it may construe that rule in the future.[36]
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. Furthermore, you have an ethical duty not to misrepresent precedent cases for your client's benefit.
4. A common problem is deciding how broadly or narrowly to construe a rule. Perhaps a court, in a case with quite peculiar facts, announces a very broad rule in its opinion when resolving the case. Perhaps the court announces no rule at all in resolving the case. In either of those circumstances, does the case stand for a broad rule or any rule? Would a case with slight factual differences have offered a different outcome, and would it support a different rule?

36: Chapter 7 discussed how to make policy *arguments* generally, but it closed in Section 7.5 by noting that you should *always be thinking about the policies that underlie rules and case examples* because the policies' goals are what the rules and cases are trying to achieve.

Carefully consider whether you need to spend time in the *Explanation* part of your CREAC explaining 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

likely choose a different approach. Section 9.2 discusses persuasive rule statements generally, and Chapter 34, Chapter 35, and Chapter 38 provide advice on creating persuasive rule statements in advocacy contexts.

You will have many chances to practice synthesis in law school, and you will also receive feedback on your efforts.

14.8 Pure application

For now, you should attempt to do as the examples in this chapter and Appendix Chapter 46 do: When the authors reach the *Application* portions of their CREAC analyses, they do not introduce any new law or citations into them. All the legal authority that the applications require 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; even then, you should probably have quoted it in the *Rule* or *Explanation* portion.

Even those citations in the *Application* section are unnecessary, however, if you introduce the quotation in the *Rule* or *Explanation* section of your CREAC, and the quoted language is a short phrase or rule that you are going to apply. Consider Ms. Associate's analysis on page 109. There, she quoted in *Explanation, part 1* the rule from *Denton* that at issue is whether the defendant acts "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, however, she uses identical language without quoting or citing *Denton*. That is acceptable because she has already introduced the exact language with the quotation marks and citation in the *Explanation*. 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 or to use quotation marks around certain phrases repetitively as a nonrational tactic.[37]

37: *See* Chapter 9.

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*. On the contrary, 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. Failure to use the law from *Rule* and *Explanation* portions risks making the *Application* section just your opinion. You did all the hard work creating the *Rule* and *Explanation* portions, meaning to use them in the *Application*, so capitalize on that work.

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 case is similar to *Barton*." She drew the very explicit comparison between the position of the drivers' feet on the pedals and the consequences of their feet 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.

14.9 Counter-argument

The counter-argument or counter-analysis is where the author raises a potential weakness in their argument, usually the strongest argument that the opposing side could make. In the counter-argument, the author raises that weakness, explains it in fair terms, and then disposes of it—on the author's terms instead of their opponents'—with further argument. Note that the counter-argument in Ms. Associate's email in Section 14.1 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. Ms. Associate does not start by saying 'This is my counter-argument . . . .' Instead, she asserts that the conclusion she previously reached is correct, despite the 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. *Id.* Consequently, this difference will have no effect, and you will very likely be found to have operated the vehicle.

She explains what the counter-argument is—our case is distinguishable from *Barton*—and then disposes of it by showing the distinction is not relevant.[38]

38: Of course, Ms. Associate set aside the issue of the public place early in her analysis. If that element were at issue, the difference between her client's situation and Mr. Barton's described in this paragraph could be very important.

The second approach is to closely interweave the counter-argument into 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 and circumstances, 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 47 to get a better sense of your options when performing analysis.[39]

39: In the sample memos in Appendix Chapter 47, 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 during your second semester or second year in law school), you may want to 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 expect you to present at least some plausible counter-arguments in your predictive analysis. At this stage, your professor needs you to *show your work*.

14.10 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.[40] Confusion about standards of proof and confusion between them and more routine communications of probability compound the problem.

40: In advocacy writing, the author will almost always insist that their client's position on ultimate issues is 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.[41]
- *Clear and convincing evidence*. "Evidence indicating that the thing to be proved is highly probable or reasonably certain."[42]
- *Beyond a reasonable doubt*. This standard requires proof that forecloses any "belief that there is a real possibility that a defendant is not guilty."[43]

41: "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).

42: *Evidence, id.* ("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.").

43: *Reasonable doubt, id.*

These definitions set the standards for proof, which are probabilities that the evidence before courts facing the respective standards supports the conclusions the courts reach; but they are not the terms in which you make your predictions for a client. First, your statements of probability when predicting an outcome are statements about the likelihood of meeting those standards of proof. Thus, these standards of proof are themselves things about which you may be required to make assessments of probability. For example, in some case, you may have to predict whether a court will apply preponderance of the evidence or clear and convincing evidence as the standard of proof. In another 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: The evidence is consistent with an interpretation that represents a real possibility that the defendant is not guilty.' 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 communicate much meaning to your audience. Preponderance of the evidence suggests just a feather more than 50%. Telling your client that 'a preponderance of the evidence supports the conclusion that the venture you plan to invest in is lawful' is not useful if your client wants to know whether to make a multi-million-dollar business investment. You would not say to any client 'It is beyond a reasonable doubt that you would prevail in this case before a jury.' And I've seen no clear and convincing evidence for what 'clear and convincing evidence' 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:[44]

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 improbable	10-20%
Almost no chance	0-10%

Professor Fore first notes that most lawyers are not comfortable with numerical statements of probability, as they sound too exact.[45] But he also urges that lawyers should disclose to clients what probability they assign to a term the first time that they use a term. So, in Ms. Associate's memo on page 109, 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.[46]

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 on page 109, because she used the "very likely" language. She might not communicate the percentages to Mr. Smith, but they would still guide her vocabulary.

44: Joe Fore, *"A Court Would Likely (60-75%) Find . . ." Defining Verbal Probability Expressions in Predictive Legal Analysis*, 16 Legal Commc'n & Rhetoric 49, 81 (2019), https://perma.cc/8AXJ-REMD. I recommend that students read this article.

45: In fact, that's why I support his decision to include the ends of his ranges in two ranges. Thus a theoretical probability of exactly 50% would be both 'unlikely' and 'more likely than not.' In short, the answer should really be 'We don't know,' although many a client will find such uncertainty unsatisfactory.

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

Professor Fore's lexicon is not symmetrical in that there are more options above 50% than there are below 50%. 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 confident conclusion there. Note, too, that it will be fairly rare for you ever to say 'almost certain' or 'almost no chance.' Furthermore, Professor Fore includes 100% and 0% in the table, but with the "*almost* certain" and "*almost* no chance" levels, because you can't predict any legal outcome with absolute certainty.

Two more strong recommendations about how you express your conclusions: First, use the same language everywhere. If you say 'very likely' in the introduction to your analysis, then 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 taking a clear position about what they are writing. Second, don't mix 'likely' and 'probably.' If you describe your conclusion as '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 include them at the beginning of the overall analysis and at its end. Readers who trust your analysis—and ones who simply don't have time to read it all—may not read anything more than the introduction, the conclusion, or both. You should also provide a conclusion about the issue in every CREAC at the beginning and end of the CREAC. (That's why the 'C's are in CREAC, after all.) 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.[47]

You might also provide a conclusion at the beginning of the *Application* part of a CREAC, especially if you offered a comparatively lengthy *Explanation* section. Consider Ms. Associate's choice in Section 14.1: 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 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 instance. At the beginning of the CREAC, she connected the overall conclusion with the elements of the offense. At the beginning of her *Application*, she connected that conclusion to the element that she was about to apply. In the *Conclusion* part of her CREAC, she wove the overall conclusion into 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

47: If the analysis or discussion section of your memo or brief comes before a section titled *Conclusion*, there may be some question as to whether you should end the discussion section with your overall conclusion and then immediately follow it with the same overall conclusion at the beginning of the conclusion section. See examples of how other students handled this in Section 46.3 and Chapter 47. Whether to do so is a judgment call that should be sensitive to the conventions in the applicable work environment, the nature of the communication, and the problem to which it relates. When in doubt, ask your supervisor or professor.

the counter-argument would not prevail. In each of these situations, the statement of the conclusion reiterates the outcome but also serves some roadmapping function.

14.11 Roadmapping

An important tool in legal communication is what some folks call 'roadmapping' and others refer to as 'signposting.'[48] 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 often functions as an alternative to using section headings. In theory, the email Ms. Associate wrote in Section 14.1 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. A simple analysis with more paragraphs might, however, warrant such headings.

48: See Section 9.2 and Section 15.2 on roadmaps.

There are at least three ways 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 your 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, but before explaining it, you may need to indicate to your reader 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 was no meaningful basis to dispute the other three. Sometimes (especially in law school) you will be told to make certain assumptions about elements and factors. Roadmapping allows you to identify those assumptions.

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 a statute or court opinion, you should usually leave the elements or factors in roughly the same order as they appear in the primary authority.[49] 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 issue, and the others are of secondary importance, you might want to prioritize it. If you do so, you need to tell reader that you are reordering elements or factors in your analysis, and probably why. You need a roadmap because you run the risk of confusing the reader without it.

49: You should expect that other law-trained readers 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 46, where Student 4 did so in the second paragraph of their email to Mr. Leung, beginning on page 420. At the end of that

paragraph, the student identified two factors to examine, "the setting of the meeting" and "the substance of the conversation." This cue 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 15.

There are more and less effective ways of roadmapping. The examples from Ms. Associate and the second paragraph of Student 4's analysis on page 420 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 14.1 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 sentences now knows full well that the analysis will take up the *operating* issue and say little or no 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 technique is a form of what we refer to as a 'nonrational tactic' in Section 3.4 and Chapter 9. Roadmapping uses human cognitive biases—particularly confirmation bias—to intensify the reader's likely agreement to what you are saying.[50]

50: For more on confirmation bias, see Section 11.1 at page 83.

15 Writing a complex analysis

Stephanie Rae Williams & Jessica Mahon Scoles

This chapter is about writing a complex analysis. When this text refers to a complex analysis, it refers to an analysis that discusses multiple issues, or multiple sub-issues, or even multiple issues that themselves have multiple sub-issues. Thus, what distinguishes the complex analyses discussed in this chapter from the simple analyses discussed in Chapter 14 is not the difficulty of the issues analyzed, but rather the number of legal issues analyzed. A legal question that presents just one issue for which there is little authority on point might be conceptually very difficult to understand, but this text would refer to your analysis of that difficult issue as a 'simple' analysis. Conversely, it might be easy to answer a legal question addressing a rule with multiple elements. But this text would call the analysis of that question 'complex' because the analysis requires discussion of multiple sub-issues, namely the rule's elements.

Because you have already read Chapter 14,[1] you know that the basic components of a legal analysis are the introduction, the facts, the reasoning, and the conclusion. The considerations for drafting the introduction, facts, and conclusion are largely the same whether your analysis is simple or complex. For that reason, the focus of this chapter is on how to structure the reasoning component of a complex analysis.

The best structure for the reasoning component of a complex analysis is a structure that allows the reader to understand your analysis of each issue and sub-issue, as well as the relationship between the various issues and sub-issues. What does that structure look like? It depends. Unfortunately, we cannot provide you with a single structure that will work for every complex analysis. What we can provide is a process for thinking through how to structure your analysis. You will then need to use your judgment[2] to select a structure that makes sense given the question you are analyzing.

1: If you haven't already read Chapter 14, go ahead and do that now. Chapter 15 will be waiting when you are done.

2: Professor Williams tells her students that law school is thinking school. Structuring a complex analysis is a perfect example of a task that calls for thinking. But be careful not to turn law school into over-thinking school. If your professor (or supervisor) gives you a structure that they would like you to follow for a particular assignment, use the provided structure.

15.1 Deciding how to structure a complex analysis

There are four steps for structuring a complex analysis: Identifying the issues, identifying sub-issues, deciding how much analysis each will get, and organizing your analysis.

Identify issues. Each question that your supervisor, client, or law professor wants you to answer is an issue. So, if you can figure out what questions you are being asked,[3] then you will know what the issues in your analysis are.

3: Sometimes your supervisor, client, or professor will ask you a question that is already well-defined. Often, you will have to do the work of defining the question yourself. See Chapter 4 for help stating the question.

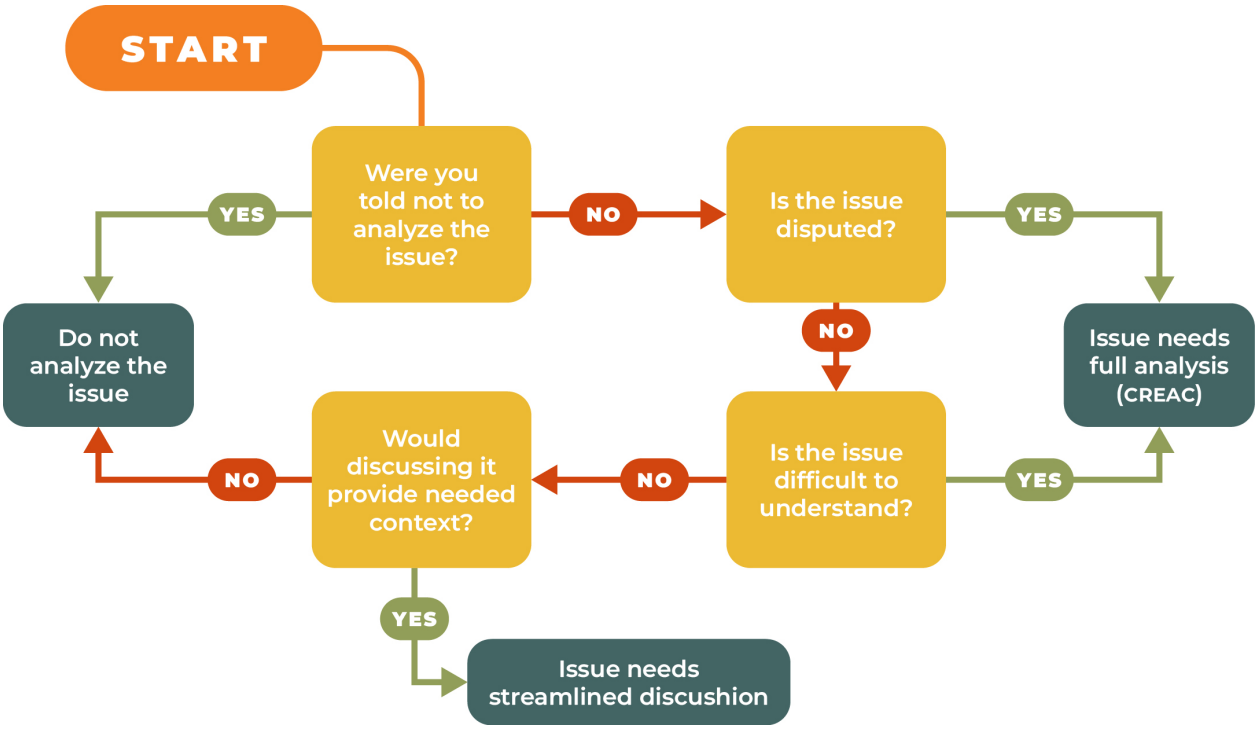


Figure 15.1: Deciding how much analysis an issue or sub-issue requires. This flowchart requires you to consider four questions: Whether your assignment excluded the issue, whether the issue is (or is likely to be) disputed, whether it is complicated, and whether it provides needed context for other parts of the analysis. Image: Oleksii Bychkov `https://www.oleksiibychkov.com`.

Identify sub-issues. To determine whether an issue has sub-issues, you will need to do some legal research. Does the rule that governs your legal issue have multiple elements or factors? Do courts that have resolved your issue go through a multi-step analysis? If you have answered yes to either of these questions, then you are dealing with an issue that has sub-issues that potentially require discussion.[4]

Decide how much analysis each issue or sub-issue requires.[5] Once you have identified the issues and sub-issues in your analysis, you must determine which issues or sub-issues need to be analyzed and how much analysis they need. As you gain legal experience, this process will become more intuitive. Figure 15.1 walks you through some of the considerations attorneys weigh to decide how much to analyze an issue or sub-issue.

- **Full analysis (CREAC).** Issues that are necessary to your analysis 1) disputed or 2) difficult to understand without a detailed explanation generally require a full analysis. Draft a CREAC analysis for these issues. If an issue requires a CREAC analysis, it should have its own heading or subheading.
- **Streamlined discussion.** Issues that are necessary to your analysis but are either undisputed or very straightforward should be discussed. However, they likely do not need a full CREAC analysis. If the reader does not need case illustrations to understand how the rule works, you can omit them.[6] For very simple issues, a sentence or two explaining how the law applies to the facts is often enough.[7]
- **No discussion.** Some issues require no discussion. The issue may be

4: See Chapter 5 to learn more about different types of rules and Chapter 20 for guidance on how to brief them for analysis.

5: *See* Mary Beth Beazley, *A Practical Guide to Appellate Advocacy* (6th ed. 2023)

6: Some law professors use the acronym 'CRAC' to refer to the resulting structure.

7: Law professors do not use the acronym 'AC' for the resulting structure, but they could.

entirely irrelevant to your assignment. Your supervisor or professor may have told you not to discuss the issue. Or the issue may be so clear or so indisputable that there is no reason to discuss it.[8]

8: See Section 4.3 and Section 14.11 about where you can note that you have not discussed an issue.

Organize your analysis. Although there usually is not just one correct way to organize an analysis, there are a few rules of thumb that you can use to organize almost every analysis.

1. Discuss each issue separately, under its own heading.
2. If an issue has sub-issues, consider using sub-headings for each sub-issue. Nest the sub-headings below the main issue heading.
3. Roadmap at the beginning of your analysis and wherever an issue has sub-issues. See Section 15.2 for tips on effective roadmapping.

Let's apply those rules of thumb to a question that has two issues that require CREACs. One of the issues has two sub-issues that require CREACs. The resulting structure looks like the one in the shaded box below.

Organization of a complex analysis

Overall conclusion and roadmap of the entire analysis

A. Heading for first issue

CREAC for first issue

B. Heading for second issue

Conclusion and roadmap for second issue

1. Heading for first sub-issue

CREAC for first sub-issue

2. Heading for second sub-issue

CREAC for second sub-issue

Conclusion for second issue

Overall conclusion for the entire analysis

15.2 Critical roadmapping

Section 14.11 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 analyses. In fact, complex analyses work best when you lead your reader through each point with detailed roadmapping. You can use both major roadmaps for each large section and mini-roadmaps for the subsections or subsubsections.

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. We call these 'major roadmaps,' and we recommend you outline them as you outline your reasoning sections, but then finalize the roadmaps (and all roadmaps) after you've drafted the analysis sections.
- 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. Sometimes, one sentence is enough for this mini-roadmap; sometimes, you will need a few sentences.

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 and shows how this subsection fits into the overall analysis. 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 where 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 46.3 starting at page 420. 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, Student 4 cues the reader that the two paragraphs that follow will include case examples that address these two factors. 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.

9: Check out Section 5.4 for an explanation of this type of rule and Section 20.1, starting at 181 for advice on reading and briefing them.

15.3 Multiple CREACs

After your roadmaps, you'll use a multiple CREACs approach. The simplest way to think about multiple CREACs is to use an example of a tort with multiple elements, like negligence. The roadmap must list each element and might note where one is not at issue. For example, your supervisor might ask you to address duty, breach, and causation, but tell you there is no question about the damages defendant will owe if it did indeed owe plaintiff a duty, and so forth. In this example, your roadmap will list the four elements, explain that the memo will not address damages, and set up

three CREACs, one on each remaining element. Then, your subsections could be: A. CREAC on duty; B. CREAC on breach; and C. CREAC on causation.

The best way to understand the concept of multiple CREACs is to observe them in action. Consider the example from Student 7 in Section 47.2, starting at page 437. You can think of the discussion section of the memo as one giant CREAC.[10] Here, in outline form, is what Student 7 does in the discussion section of their memo.[11]

Student 7 presents their legal analysis in the discussion section of their memo.[12] 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.[13]
- 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 analysis will go.
- The *application* is everything in the subsections with the Roman numerals, except the very last sentence.[14]
- The conclusion re-appears in the last sentence of the discussion.

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:

- 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.[15]
- 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, and shows a nice synthesis of the authorities into a concrete rule for the reader. We discuss synthesis more in Section 15.4.
- The *conclusion* appears at the end of section I.[16]

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

10: If you have trouble seeing the discussion section as a giant CREAC, that's okay. Professor Mahon Scoles has trouble with that idea too. You may find it helpful to think instead of the discussion section of Student 7's memo as being comprised of (1) a roadmap with a conclusion, roadmap rule that explains the fair use factors, and quick explanation of the issues the writer is not discussing; and (2) two subsections that discuss the first and fourth fair use factors in CREAC form.

11: For more on the formal characteristics of a memo, see Chapter 29.

12: Though some call the discussion an 'Analysis' instead.

13: Indicated in the example with this marker:

14: Indicated in the example with markers:

15: Indicated in the example with the marker:

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

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.[17]
- In the first part of the fourth paragraph, Student 7 *applies* this law to the facts of Ms. Connor's case.
- Student 7 wraps up the fourth paragraph by reiterating the *conclusion*.

17: See Section 14.5 starting on page 116, for advice on using examples in the explanation portion of a CREAC.

Connecting CREACs into a structure resolves each element, factor, or issue and allows the author to build up to the overall conclusion. For this connecting 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.

15.4 Synthesis

Your job as the writer of a complex analysis is to use the organized structure we discussed above as you analyze how the facts of your problem or question fit into multiple factors or issues. You will often have a body of decisional law where each decision discusses only some of the relevant factors or issues in your matter, or where decisions seem to disagree. It is your job to explain how the authorities fit together. Thus, one of the most important things your complex analysis reader needs is a full *synthesis* of what might seem to be unconnected, or even inconsistent, decisions or authorities. By 'synthesis,' we mean weaving the points from multiple authorities into one specific overall approach for your matter.[18]

18: See Section 14.7 for in introduction to synthesis.

To include synthesis in complex analysis, you should still begin and end your CREACs with your conclusion. The difference is in your *Rule, Explanation,* and *Analysis* portions. For synthesis:

- The first sentence provides the *conclusion*.
- The rest of the first paragraph provides the over-arching *rule*, but now you'll draw the rule from several authoritative cases. This rule statement will usually include multiple commas, and can be in the form of: 'Courts find X when A, B, and C, but not when D,' for example.
- The next paragraphs provide *explanation* in the form of case examples, in a synthesized way. Thus, you might present the facts of several key cases together, to show the reader what was similar and different among the cases. Then, you can explain the reasoning of the cases together. This will help you save words when you have a tight word limit, and more importantly will show the reader how the law all fits together. Be sure to mention when one court quoted or discussed

another decision you're using. As in all complex analyses, there is no set structure here; let your authorities dictate the way you explain the law.

- Next, *apply* this law to your facts, again with synthesis. Compare the facts of your matter and the cases together, and then show how your reader should use the synthesized reasoning from multiple decisions to reach a result in your case.
- Finally, as in any CREAC, conclude by reiterating the *conclusion*.

15.5 Alternative structures

The reasoning section of most legal analyses can be structured using some variation on the multiple CREAC structure discussed in Section 15.3. But there are some situations where multiple CREACs just don't make sense. In this section, we cover a few common scenarios that call for alternative structures.

A purely legal issue

You will know that you are faced with a purely legal issue if an assignment requires you to argue about what the law should be. One common situation where this arises is where your jurisdiction has not yet decided a legal question. Your task in this situation is not to determine what the law is and apply that law to your facts. Instead, it is to identify a rule (often from another jurisdiction) and explain to the court why that rule is preferable to other possible rules (which you will identify by looking for splits between federal circuits and between the highest courts in different states).[19]

Consider this example from an employment law case. The defendant, a restaurant, argues that Massachusetts law should not recognize a claim for unpaid overtime by a restaurant employee.[20]

> Plaintiff's Complaint contains three counts for unpaid overtime, all explicitly brought under Massachusetts law. Under Massachusetts law, employers are obligated to pay time-and-a-half only to non-exempt employees who work more than 40 hours in a week. M.G.L. c. 151, § 1A. Restaurants are specifically exempt from time-and-a-half obligations. *Id*.[21] In other words, restaurants do not need to pay overtime under Massachusetts law. *Id.*... Plaintiff attempts to get around the overtime law's (M.G.L. c. 151, § 1A) restaurant exemption by characterizing her overtime claim as a Wage Act (M.G.L. c. 149, § 148) claim for unpaid wages based upon an alleged failure to pay overtime due under federal law. This theory fails for two reasons.
>
> First, Massachusetts courts have never recognized a Wage Act claim for unpaid overtime due under federal law....[22]
>
> Second, this Court should not follow *Lambirth* or *Carroca v. All Star Enter. & Collision Cir., Inc*., the federal cases upon

19: This often entails making a public policy argument, which is one reason why law professors love to assign problems involving purely legal issues. See Chapter 7 for more on policy arguments.

20: In her brief, the plaintiff argued that Massachusetts law should recognize such a claim.

21: This is the rule that the defendant would like the court to adopt.

22: This sentence and the first sentence in the next paragraph identify the main reasons the author argues the court should accept the author's rule.

which Plaintiff relies.[23] The Supreme Judicial Court has never decided whether a plaintiff who is exempt from overtime under Massachusetts law may nonetheless bring a Wage Act claim to recover overtime due under federal law. Thus, both *Lambirth* and *Carroca* were decided without the benefit of the SJC's analysis regarding how to reconcile the Wage Act's goal of ensuring prompt payment of "wages" and the overtime law's exemptions for certain industries. The *Lambirth* and *Carroca* courts had to project how the SJC might decide the issue and, in doing so, they read the overtime law express exemption right out of the statute. That was an incorrect result because . . . .

23: Note that there is no application of the law to the facts of the case. Instead, the defendant explains why its proposed rule is better than the plaintiff's proposed rule.

Arguing in the alternative

Lawyers are permitted to argue in the alternative. This is a strategy that seeks to increase the client's chance of winning by making one or more fallback arguments in case the court rejects the primary argument.

Alternative arguments do not need to be consistent with one another. For example, in a breach of contract case, a defendant might argue both that there was no enforceable contract and that, even if there was an enforceable contract, the defendant did not breach it. The court cannot accept both arguments because a single contract cannot be both enforceable and unenforceable. But, if the court accepts either argument, the defendant will win. Alternative arguments use a modified multiple CREAC structure. The arguments are nested under a roadmap that gives an overview of the arguments and their relationship to one another. The roadmap may contain a rule if there is one rule that is relevant to all the arguments. It may not contain a rule if the arguments apply different rules. Either way, use roadmapping throughout the argument to remind the reader of how the arguments are related. For example, here is one possible structure for our breach of contract argument.

> The defendant is entitled to judgment in its favor because the plaintiff cannot prove its breach of contract claim. To prove a breach of contract, the plaintiff must establish: (1) that there was a valid contract; (2) that the plaintiff performed; (3) that the defendant breached; and (4) that the plaintiff was damaged.[24] Here, there was no valid contract because the parties' agreement was not supported by consideration. But even if the contract had been supported by consideration, the plaintiff still could not prevail because the defendant performed as obligated under the agreement.[25]
>
> **A. The contract is unenforceable because it is not supported by valid consideration**[26]
>
> > [The author provides a CREAC arguing that the contract is unenforceable.]

24: There would be a citation here to primary authority.

25: This roadmap paragraph gives an overview of the arguments and how they relate to one another.

26: This the author's primary argument.

27: This is a fallback argument in case the court rejects the primary argument.

B. If the contract is enforceable, defendant still is not liable because there was no breach.[27]

Even if the court were to find that the contract was supported by valid consideration, the defendant would still be entitled to judgment in his favor because he performed under the terms of the contract.[28]

> [The author provides a CREAC arguing that there was no breach.]

28: Note the use of roadmapping to explain the relationship between arguments. For an explanation of the use of the subjunctive mood here, see Section 43.6.

15.6 Point headings

Refer to Section 11.3 for a discussion of section headings and point headings in your writing.

15.7 Facts

The factual background for a complex predictive analysis is not that much different than for a simple analysis, so consider the advice in Chapter 13. A complex analysis can call for sophisticated fact statements, however. For example, if the factual background is long and complicated enough, you may need 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.

Depending on the rules of your jurisdiction and the house style of your office, these headings can sometimes be persuasive. If you are able to write persuasive fact headings, make sure you do not argue, as argument is never proper in a fact section. You'll find advice regarding persuasive fact headings Chapter 32 (in complaitns), Chapter 34 (in trial briefs), and Chapter 35 (appellate briefs).

Sometimes, you won't have all of the needed facts from a client's file or interview. When this happens, be sure to make a note in the fact section explaining what information you need to gather. Then, note in your CREACs where the results could change based on missing key facts.

Legal Contexts

16 Humans in the legal context

Link to book table of contents (PDF only)

Figure 16.1: 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 16.7. Photo © 2007 Mike McC. CC license: https://perma.cc/Q2GF-TZWK.

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

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

3: *Id.*

Brian N. Larson

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 request to be 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.

16.1 Respecting one another

Every major branch of cultural ethics suggests that people owe other people a basic level of respect, if not love. Something like the Golden Rule is a regular feature of 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."[1]

U.S. jurisdictions recognize similar expectations. For example, the Texas Lawyer's Creed requires that lawyers "treat counsel, opposing parties, the Court, and members of the Court staff with courtesy and civility."[2] Lawyers are expected to be "committed to [the] creed for no other reason than it is right."[3]

16.2 Titles and names

Working in the law requires you to be sensitive to others in a variety of ways, and one way concerns 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.
- 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 show respect by referring 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 would address and refer to her as 'Judge' even if she retires from this position.
- 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 an 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 151.

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 you 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

You may find yourself addressing people with names from other cultures, either in court or in the boardroom. 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, e.g., 'Mr. Xi Jin Ping.'

In some other cultures, the given name comes first, but there are two family names, one a patronymic (inherited from the father) 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.

16.3 Personal pronouns

You may have noticed that some folks sign their emails indicating what their pronouns are. This practice serves at least two functions: First, if you are a person who expresses your name or 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 pronouns lets those around you know that you are sensitive to variations in gender identity.[6]

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

6: For an example of how to indicate your pronouns and gender-related title in your email signature, see Figure 28.1.

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://perma.cc/5ZQY-GLNC.

16.4 Civil discourse in law school (and beyond)

One challenge in any academic environment is permitting students to explore and debate ideas in a safe way. 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 speak respectfully to people around whom you sometimes feel disrespect or 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. Similarly, if you are a trans lawyer and your firm has a client who is anti-trans, you must show them respect, despite reasons for you not to like them.[9] You will always refer to a judge as 'Your Honor,' even if you feel she has unfairly ruled against you out of personal malice.

9: Your mental health and dignity matter. So if find yourself in a work environment where you or people like you are routinely belittled, by your colleagues or your clients, you should speak up to your supervisors. If they can't or won't act, you may be best advised to move on.

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 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 the professor) is failing to comply with this guideline, you should reach out to the professor to discuss it. If your professor 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.

16.5 Guiding one another with peer review

As a preliminary matter, you should engage in peer review or other collaboration with students in your law school classes only where expressly authorized by your teacher. Consider the advice in Chapter 41.

You should look forward to opportunities to perform review of your peers' work in legal communication. According to Seneca the Younger (c. 4 BCE – 65 CE): *Homines dum docent discunt.* "People learn while they teach."[10] The wisdom of this classical author is borne out by contemporary research.[11]

Chew and Pryal[12] 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, giving peer feedback enhances your analytical skills. Peer review gives you a chance to see how others have approached the problems on which you are 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 [assignment] 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."[13]

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.[14] Doing frequent peer-review work teaches you how to look for the important variations in structure and style that will help to make the HR manual you will write recognizable and useful to your clients.

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

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

11: 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).

12: Alexa Z. Chew & Katie Rose Guest Pryal, *The Complete Legal Writer* 445-47 (2d ed. 2020).

13: Melissa Meeks, *Making a Horse Drink*, The Eli Review Blog (Nov. 10, 2016), https://perma.cc/UD47-DVWJ.

14: See Chapter 40 for guidance on how to approach new genres that you are not familiar with.

> employers expect recent law school graduates to execute all four skills.[15]

15: Alexa Z. Chew & Katie Rose Guest Pryal, *The Complete Legal Writer* 445-47 (2d ed. 2020) (citing Alexa Z. Chew & Katie Rose Guest Pryal, *Bridging the Gap Between Law School ad Law Practice* 13, SSRN (January 1, 2015), https://perma.cc/7NB6-8PGP).

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 increase 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 course skills.

16.6 Correcting others' errors

You will often witness those with whom you work making mistakes. You will make a few yourself. When you correct colleagues, 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 or not you actually hold the underlying beliefs. 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).[16] Only if the erring party still refuses to amend their ways do you take them to task in public.

16: *See* Section 28.2.

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 private, measured correction, then when you make mistakes, you will not be publicly embarrassed either.

16.7 Cultural differences

Much like personal greetings, whether hand-shaking, bowing, or making a *wai*,[17] excellent communication is not necessarily the same the world over. As Oates and Enquist noted in 2006:

17: See Figure 16.1 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.[18]

18: Laurel Currie Oates & Anne Enquist, *The Legal Writing Handbook: Analysis, Research, and Writing* 850 (4th ed. 2006). The authors included these ideas in their new edition. *See* Laurel Currie Oates, Anne Enquist, Jeremy Francis, & Amanda Maus Stephen, *Legal Writing Handbook: Analysis, Research, and Writing* 833, 868 (9th ed. 2024).

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. To those who grow up with them, such assumptions and preferences arise without reflection and operate to make common ground for them, often quite invisibly. To an outsider, this invisibility makes such assumptions and preferences hard to figure out.

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. Our best advice is to pay attention and follow cues from your clients, fellow attorneys, and others in every situation.

Let's 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 is 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—such as wishing them well—and then moving to the more direct American style. So in the absence of information, you should try your best and take it easy, but make sure the use the information that you *do* have. If you show openness and adaptability, most readers will be generous with you, even if you make mistakes now and then.

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're 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. As in all areas, pay attention to prior communications and the approaches of those around you to decide how best to proceed.

This is also the case with citing sources. 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.[19]

Finally, plagiarism may not be regarded as a significant problem in some cultures.[20] 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* something that someone else has written without citing the original might not be considered a problem at all. Contrast the American law school, and to a great extent legal practice, where 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.

19: And if you are writing in a new genre or context, you may want to consider the advice in Chapter 40.

20: See the fuller discussion of plagiarism in Chapter 41.

17 Sources of American law & precedent

Brian N. Larson

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. It also introduces the function of precedent in this system and the binding and persuasive effects court opinions have on courts and parties. This chapter presents 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!

17.1 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 the law. In other words, it creates legal obligations or consequences for at least some people. *Secondary authority* consists of everything else, including commentaries, model statutes, restatements of the law, etc. There is also a distinction between *mandatory* (or *binding*) and *persuasive authority*.[2] Mandatory authority is primary authority that potentially governs your problem, question, or client in this case; persuasive authority is everything else.

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 (such as a law review article) 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 class, for example, you will consider federal statutes and the U.S. Constitution; in contracts and property classes, the statutes and common law of the states.[3] You may also encounter the laws of sovereign tribal nations within the U.S. and its territories.

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 uses the terms slightly differently, as indicated in the text. Some lawyers and judges conform to this approach as well, though there is great diversity in their practices.

2: Some folks refer to 'mandatory' authority and others to 'binding'—either term is fine. But note that both terms have other meanings in other contexts in the law.

3: But you may not stop there. Many torts classes, for example, rely on model rules based on traditional and common-law approaches. For more on model laws and codes, see Chapter 12 and Section 17.4 starting at page 152.

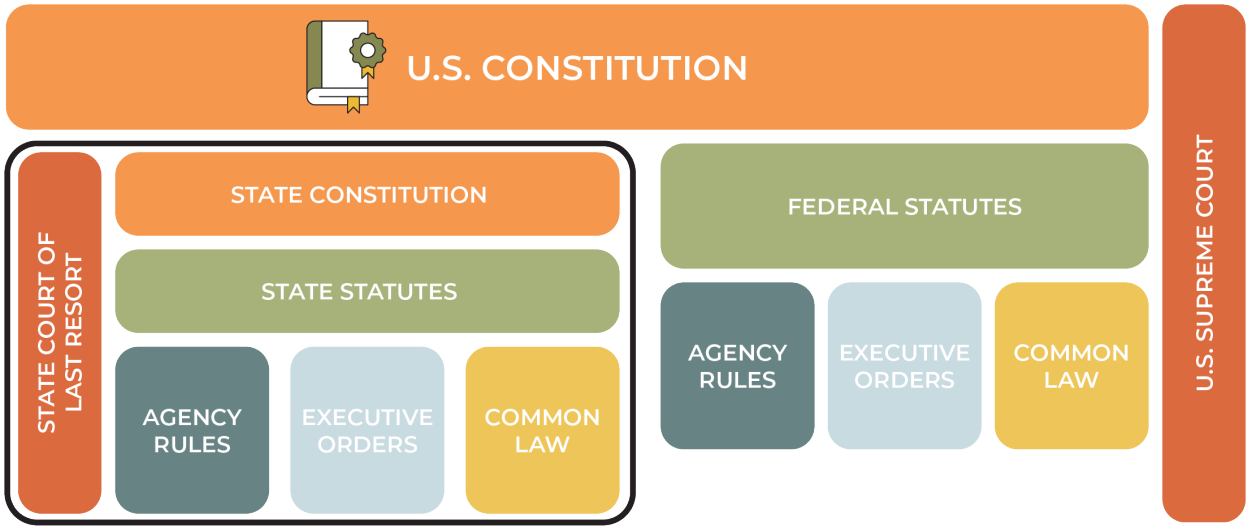


Figure 17.1: Hierarchies of legal authorities, federal and state. Each authority must be consistent with dictates of those above it. Courts interpret authorities at every level. Orange bars indicate highest authorities for each hierarchy. The figure oversimplifies the relationships between the state and federal system in that it depicts state laws as being subject only to the federal constitution; in fact, they are also subject to federal laws under the Supremacy Clause. Image: Oleksii Bychkov https://www.oleksiibychkov.com.

17.2 Government as a source of law

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 17.1. The following subsections consider these sources.

The people

A constitution, depicted in orange in Figure 17.1, 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.[4] 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 framers' 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. And for most of the text in it, many Americans were denied any say about it.[5] 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.

4: 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.

5: Only white, male property owners were eligible to vote in most states to ratify the original Constitution and its Bill of Rights. Not until the 15th Amendment in 1870 were Americans of African descent assured the right to vote—a right often denied them for many decades thereafter. Women were not guaranteed the right to vote until the 19th Amendment in 1920. People as young as 18 were not guaranteed the franchise until the 26th Amendment in 1971.

Three-quarters of the states (thirty-eight of them as of this writing) must ratify the amendment for it to become effective. *Id.*

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 usually 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.'

The legislature

Each level of government has a deliberative body, like Congress and state legislatures, that can pass statutes, depicted in olive green in Figure 17.1, though they usually require assent of the chief executive. So, for example, the President signs or vetoes the acts of Congress.[6] As long as they are consistent with the applicable constitution(s), statutes are the highest law of the jurisdiction. All laws 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** on any issue arising under its subject matter within its jurisdiction.[7]

6: A supermarjoity of Congress can vote to override a presidential veto.

7: For guidance on reading statutes, see Chapter 22. Chapter 8 provides further guidance on interpreting statutory language.

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 dark gray in Figure 17.1, 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.[8]

8: For guidance on reading regulations, see Chapter 22. Principles for reading statutes are very similar to those for reading regulations. Chapter 8 provides further guidance on interpreting enacted law.

At the federal level and in most states, the president or governor can promulgate executive orders, depicted in light gray in Figure 17.1. They are **primary and binding authorities** regarding any matter arising from the

operations of the executive branch of the government so long as they are not inconsistent with statutes or regulations.

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 laws 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.[9]

9: For guidance on how to read court decisions, see Chapter 23.

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 statutes or regulations. At the state level, the common law—depicted in gold in Figure 17.1—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),[10] 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 applied within the state of Minnesota and its courts.

10: This opinion appears in Appendix Chapter 51.

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).[11] State courts also create this kind of common law regarding authorities in the states when, for example, they interpret state statutes.

11: 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.[12] The highest, final interpretive source for each authority depends on which hierarchy the authority appears in. In the federal system, 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 state laws, except if they are challenged as violating the U.S. Constitution. In the state systems, 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.

12: **Make sure that you figure out what primary authority a court's opinion relates to as a first step 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**.[13] Above them are circuit courts of appeal, each usually covering a group of states. See Figure 17.2 for the circuit-court 'breakdown.' Opinions of circuit courts of appeal are **primary authorities and binding** within the circuit's territory on matters of federal law.[14] 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.

13: Except that they are binding, of course, on the parties that appear before them.

14: Actually, most of them are not binding, but only because the courts of appeal designate nearly 90% of their opinions as nonprecedential, a matter that has drawn scholarly criticism. *See* Elizabeth E. Beske, *Rethinking the Nonprecedential Opinion*, 65 UCLA L. Rev. 808 (2018).

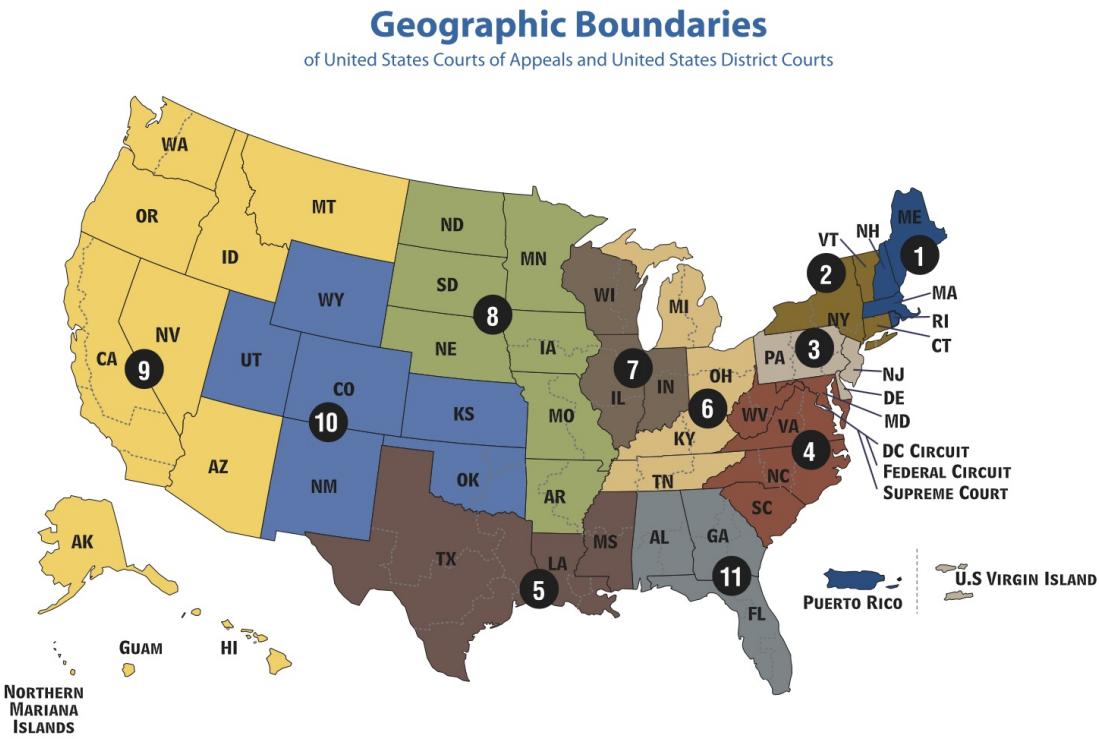


Figure 17.2: At the federal level, the courts of appeal cover groups of states and territories (except for the Federal Circuit, which serves special roles). For example, Texas is in the Fifth Circuit. Map courtesy U.S. federal courts, `http://www.uscourts.gov/about-federal-courts/federal-courts-public/court-website-links`.

The state court systems are structured according to their own constitutions, but are usually similar in many ways to the federal system, 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.'[15]

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 appeals, and beneath them are thousands of district courts, county-level courts, justice courts, and municipal courts. [16]

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.[17]

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

Those who sit on the the bench in the courtroom are generally called 'judges,' but their titles might be 'judge' or 'justice.' Be sure you use the right title, whether writing to them or about them. Their titles can 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)[18] 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 17.5. Before we proceed to discuss private parties' sources, we need to consider one more public source of law.

15: **Make sure you understand when reading a court opinion where the court stands in its own hierarchy, as this is the only way to know whether it is mandatory authority for your problem!**

16: 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.

17: 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.

18: Opinions in which they do so are primary authorities, but they are binding only on the parties before the court doing the interpreting.

17.3 Tribal nations as sources of law

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.[19] 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.

19: We use the terms 'American Indian' and 'Alaska Natives' here to follow governing treaties and U.S. statutes.

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."[20] 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.

20: 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 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.

17.4 Private parties as sources of law

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[21] 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.[22]

21: 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.

22: For guidance on how to read a contract, see Chapter 24. Chapter 8 provides further guidance on interpreting contract language.

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:[23]

- Providing an overview of the law in an 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 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.[24]
- 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.

23: For more on how to use secondary authorities in your research, see Section 12.4.

24: See the reference to such 'serendipity cites' in Chapter 12.

Having identified the principal sources of law and the legal authorities they create, we need to consider the role of precedents in legal decision-making.

17.5 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.[25] There may be multiple levels of appellate review, and if an appeals court remands a case to the trial court for further action, 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.[26]

25: To see where these event fit into the life of a case, review Chapter 18 and Chapter 19.

26: Again, it's worth noting that they are always binding on the parties before the court.

The important principle *stare decisis*—which means to stand with what has already been decided—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 about 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. Trial courts are bound to follow the precedents set by the appellate 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.[27] 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.

27: At least where the U.S. Constitution and federal law are concerned.

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.

It is not always easy or even possible to figure out whether something is dictum, and parties often argue about it in later cases. 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.[28]

28: But you should not represent something you know to be dictum as essential to the court's decision.

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.' This might allow the court in the present case to ignore (or at least seem to ignore) the precedent. (3) It can *criticize* the precedent on the grounds that it does not provide coherent guidance to the court. 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.

17.6 Recap

Whenever you are 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 20 through Chapter 24.

18 The civil case

Brian N. Larson

This chapter describes how a civil case begins and proceeds in federal court. The chapter first discusses claims (also called causes of action), which are the cases and controversies that bring parties into the courtroom. The chapter then explores the bases of the court's jurisdiction over the parties and claims. Finally, the chapter explains the timeline for a civil case.

You should keep two things in mind as you read this chapter. First, this information has been generalized and simplified to make it suitable for an introductory textbook. You will learn about these ideas and processes in greater deal in civil procedure and other law school courses, and you will learn that there are sets of rules at state and federal level that guide these processes, including the Federal Rules of Civil Procedure, Federal Rules of Appellate Procedure, and Federal Rules of Evidence. Second, the vast majority of civil lawsuits do not proceed through this entire timeline from claim to trial—most suits are resolved somewhere during the process through negotiation or other alternative dispute resolution procedures.

18.1 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.
- Some *enacted law*, such as a statute, constitution, or regulation, that gives the plaintiff a private right of 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*.[1] 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.[2]

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:

1: 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. See Chapter 19.

2: The relief sought by the state in a criminal case is imprisonment of the defendant, payment of a criminal fine, or both. *See* Chapter 19.

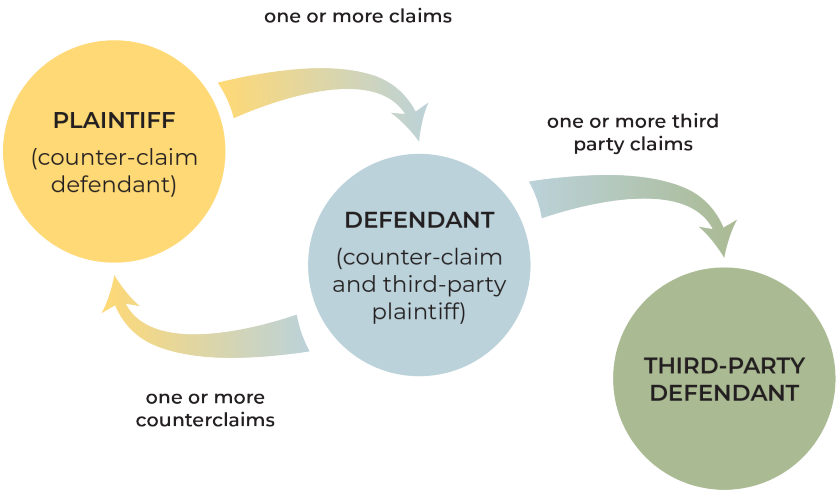


Figure 18.1: A court case can have dozens of parties. Here is a simplified view of one way that a case could develop. Image: Oleksii Bychkov https://www.oleksiibychkov.com.

- *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 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 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. This is true, for example, where the court is adjudicating the estate of someone who has died. In other cases, the plaintiff is bringing the case as a relator on behalf of a minor child or other person incapable of acting in court on its own. 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 some of this complexity 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.')[3] We'll discuss who those parties are when we find them.

Figure 18.1 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 at least one of the claims made by plaintiff has not been disposed of, the lawsuit is still alive.

3: For a discussion of other uses of Latin and French in the law, see Section 42.4 at page 366.

18.2 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.[4] 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.

4: For purposes of this section, there are two types of jurisdiction: geographical and subject matter. Not discussed here are issues of personal and *in rem* jurisdiction, whether a court has power over a particular person or piece of property. 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 and the amount in controversy exceeds a statutory minimum. 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.

18.3 Civil timeline generally

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 Charles Dickens' *Bleak House*.[5] 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.

5: Spoiler alert (if, like many folks, you have not read Dickens): That fictional case, introduced in the first chapter of Dickens' 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.* Every claim, if it is not settled or otherwise disposed of before trial, has a phase where 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 can include testimony by persons and documents obtained during the discovery process (see below). The trial court applies the law to its findings of fact and decides in favor of the plaintiff or the defendant on the claim.
- *Appellate phase.* Sometimes one or both of the parties who took part in the trial phase are dissatisfied with the results and they believe that the trial court made some kind of error that would warrant

reversal. 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 generally do not challenge the trial court's conclusions about the facts, because appellate courts tend to defer to trial courts' factual determinations. The parties may challenge the legal determinations of the lower court—the lower court's error in stating what the law is or in applying that law to the facts it found there.

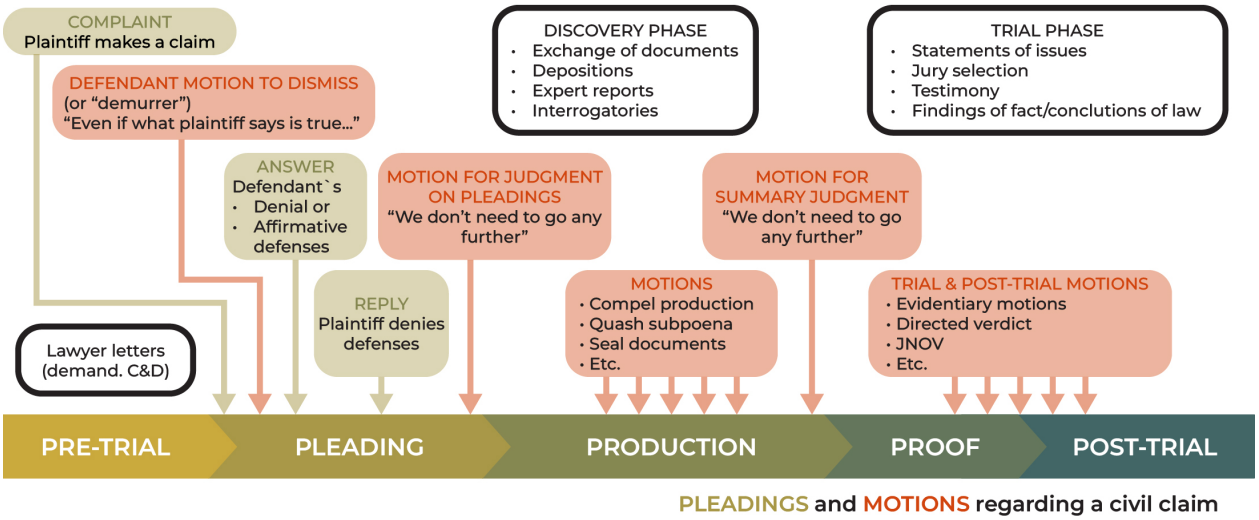


Figure 18.2: Life of a civil claim. Any of the possible motions, shown in orange, can result in an opinion from the court explaining its decision. Image: Oleksii Bychkov https://www.oleksiibychkov.com.

18.4 Civil trial phase

The trial phase comes in roughly three segments: pleading, production or discovery, and proof or trial. Figure 18.2 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. Of course, the parties may negotiate, cajole, and threaten each other before proceeding to a lawsuit. They may submit to mediation or other appropriate or alternative dispute resolution (ADR) in hopes of reaching a settlement before litigation.

And though many cases begin the litigation process, most lawsuits never result in a trial. For example, according to the Florida Office of the State Courts Administrator,[6] of more than 180,000 civil cases disposed of in Florida's state trial courts in 2021–22, only 0.35% of them involved a trial before a jury and 1.03% a bench trial. The cases were disposed of this way:

- Disposed after jury trial: 0.35%.
- Disposed by judge after bench trial, that is, a trial where the judge, rather than a jury, is the fact finder: 1.03%.

6: Florida Office of the State Courts Administrator. *Trial Court Statistical Reference Guide FY 2021–22*. Retrieved from https://perma.cc/458T-W22J.

- Disposed by judge without trial: 16.15% (as with a summary judgment).
- Dismissed because of settlement: 25.68%.
- Dismissed and disposed for other reasons, including default, motion to dismiss, transfer, etc.: 56.79%.

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.[7] Note that the plaintiff does not have to *prove* anything at this point.

7: For more on drafting complaints, see Chapter 32.

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.[8] 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.

8: 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.

In a simple example, if a plaintiff claims the defendant infringed the plaintiff's copyright and alleges 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.[9]

9: See Chapter 5 and Section 20.1 for a fuller discussion of how rule *elements* work.

If the defendant wins this motion to dismiss, 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.' The defendant will later have the burden of proving the factual allegations it makes in support of its affirmative defenses. We will discuss examples when they arise.

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.[10]

10: 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.[11]

11: Parties may also make *declarations* relating to the matter. For more on them, see Chapter 32.

At least in federal court, there will be a *scheduling conference* with a judge and the parties soon after the complaint is filed 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.[12]

12: See the discussion of these burdens and how you communicate to clients a likelihood of success in Section 14.10, with the advice about phrasing probabilities in the subsection beginning on page 123.

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 potentially making one or more of the following motions, among others:

- Judgment as a matter of law (JMOL). Here the judge renders "judgment . . . during a jury trial—either before or after the jury's verdict—against a party on a given issue when there is no legally sufficient basis for a jury to find for that party on that issue."[13]
- Directed verdict. Here the judge takes the "case from the jury because the evidence will permit only one reasonable verdict."[14]
- Judgment notwithstanding the verdict (also called 'judgment *non obstante veredicto*' or JNOV): Here the judge enters a verdict for one party even though the jury has returned a verdict for the other.[15]

13: *Judgment*, *Black's Law Dictionary* (12th ed. 2024). In the Federal Rules of Civil Procedure, the JMOL replaces the directed verdict and JNOV.

14: *Id.*, *Verdict*.

15: *Id.*, *Judgment*.

These motions occur before the parties file appeals. A court granting any of these motions typically writes an opinion explaining its order.

18.5 Civil 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*. [16]

16: For more on the appellate process and its differences from the trial phase, see Section 35.1 and Section 35.2.

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*.[17]

17: *Amicus* briefs are also possible in trial courts, but they are much less common.

In some systems, there is only one level of appeal: For example, in a Wyoming state trial court, if a party is unhappy with the court's determination, it appeals directly to the Wyoming Supreme Court, the court of last resort in that state. In other states, there are two or more levels of appeal, with Oregon, for example, having a Court of Appeals and a Supreme Court. The federal system also has two levels of appeal. So, for example, the judgments of a federal district (trial) court (such as the District of Minnesota) can be appealed first to the applicable circuit court of appeal (from the District of Minnesota, that's the Eighth Circuit). From there, a party can petition the U.S. Supreme Court for a writ of certiorari.[18]

18: 'Certiorari' is an order from the Supreme Court to the court of appeals to forward the record from the lower court for the Supreme Court's review.

An appellate 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.[19] 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. This means very much what it sounds like: The appellate court affirmed some of the trial court's decisions that had been appealed, reversed others, and sent the case back for further action.

19: Remanding the case puts it back in the lower court's hands for further action.

18.6 Recap

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

If you are reading about a lawsuit, make sure you know the structure of it:

- Who is the plaintiff and who the defendant? Or who is the appellant and the appellee?
- 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?

19 The criminal case

Link to book table of contents (PDF only)

Sophia Arnold

Imagine you are a 1L waking up for your early morning criminal law class when your younger brother calls you in a panic. He tells you that he and a few of his friends were on their way home from Colorado and got arrested smuggling drugs into Texas. Your brother explains that the drugs weren't his, that he has no money to be released, and he has no idea what to do.

Unless you have experience in criminal law before attending law school, a criminal law course during law school will likely not prepare you for this situation. This is particularly true if you do not intend to practice criminal law and the extent of your legal education covers only criminal law and criminal procedure. This short chapter serves as a quick guide on what to expect if someone you know is facing serious federal charges and is seeking your guidance. The chapter outlines the timeline of a federal case from pre-investigation to sentencing. State criminal cases generally follow a similar roadmap, but some of the stages of the criminal case operate much differently. Additionally, states have differences in laws, classification of offenses, procedures, and sentencing guidelines. Thus, understanding federal procedure provides a general framework that is applicable across all states. With this overview, it should be much easier to consult any applicable rules at the state level. By the end of this chapter at the very least, you should know enough to correct those who think they know the law after watching one episode of *Law and Order*.

19.1 The investigation

Unlike criminal cases in state courts, where a defendant is typically caught red-handed or arrested shortly after being accused of a crime, federal criminal cases often take months, or even years, after the crime was committed before the defendant is arrested.[1] The hypothetical situation outlined in the Introduction is not the *norm* for federal cases whatsoever. To remember this, think about how long it took the Federal Bureau of Investigation to investigate P Diddy, Donald Trump, and Jeffrey Epstein before they were arrested.

Most federal cases start with a tip to the FBI, Drug Enforcement Administration, Bureau of Alcohol, Tobacco, Firearms, and Explosives, United States Secret Service, or the Department of Homeland Security. Once a tip comes in, the agency must consider the credibility of the tip, gather supporting evidence, and decide whether to turn the file over to the U.S. Attorney's Office, table it, or close it. Agencies gather supporting evidence through witness interviews, search warrants, undercover operations, confidential

1: John D. Rogers, *How Long Do Federal Criminal Investigations Last For?*, John D. Rogers Law (May 31, 2023), https://perma.cc/K2PH-DEJV.

informants, and more. If there is sufficient evidence according to the agency, they will turn the case over to the attorneys.

19.2 Filing of charges

Federal prosecutors may file charges in one of three ways: filing a complaint, indictment, or information.[2] A complaint, written by a law enforcement officer and U.S. Attorney, is necessary when the government wishes to promptly file charges and execute an arrest without delay.[3] Once the complaint is written, it must be sworn to by the law enforcement officer and presented to a magistrate judge who then determines if there is probable cause to issue a warrant for an individual's arrest.[4] A finding of probable cause means that there is evidence sufficient to support a finding that the defendant committed the alleged crime. Complaints are not required in federal court but are used often to make an arrest.[5]

2: Frequently asked questions, U.S. Dep't of Justice, https://perma.cc/R4MN-GTY3 (last visited Nov 11, 2024).

3: *Id.*

4: *Understanding the Federal Court Process: From Complaint to Indictment*, Bukh Law Firm, https://perma.cc/KX23-C4VT (last visited Jan 19, 2025).

5: *Id.*

Most often, federal prosecutors use criminal indictments to formally charge criminal defendants. [6] For federal felony charges, prosecutors are required to charge the defendant by indictment within thirty days of their arrest. If the prosecutor files a complaint for a felony charge, they are *still* required to file an indictment. An indictment is a charging document similar to a complaint; however, it can only be filed after a grand jury true bills it.

6: *Criminal Charges, Indictments, and Complaints*, Lubell Rosen, https://perma.cc/BA4Z-D748 (last visited Jan. 19, 2025).

Most people, when they hear the word 'jury,' automatically think of the group of people who hear a case from start to finish and reach a verdict. However, in the federal criminal justice system, there are technically three types of juries. For purposes of this chapter, we will only cover a trial or 'petit' jury and a grand jury, not an investigative grand jury. Grand juries are greater in size and length of service. They consist of between sixteen and twenty-three citizens who sit for no more than twenty-four months and hear every case presented to them by a U.S. Attorney. Essentially, the U.S. Attorneys compile all the evidence they have collected up to that point and present it to the grand jury, hoping the jury finds that there is enough evidence to pursue the case. If so, the grand jury 'true bills' the indictment. If there is not enough evidence to proceed, the grand jury will 'no bill' the indictment. Defense attorneys are not present at these proceedings, as it is only the prosecutor who gets to present evidence at this stage. Thus, prosecutors can pick and choose which pieces of evidence are presented and which are not.

Another key distinction between a grand jury and a trial jury is their power. A grand jury comes first: it has the power to stop a case from the very beginning and does not require a unanimous vote. For a true bill, there must be at least twelve grand jurors who agree that the case should proceed. In contrast, a trial jury can only stop a case from proceeding after the defendant has already been subjected to the criminal justice system. However, here, each juror has the *individual* power to not convict a defendant because criminal convictions require a unanimous vote. Thus, there is no reliance on another juror required to *stop* an individual from being convicted.

One of the primary reasons federal investigations take so long is because law enforcement officers want to compile enough information not only for the U.S. Attorneys to establish probable cause to arrest a defendant, but also enough to convince a grand jury to true bill the indictment.

Finally, a case may be filed by information. Misdemeanor cases are often filed by information as they do not require a formal indictment because the punishments for misdemeanor crimes are generally less severe. An information is like an indictment; it is a charging document that lists the charges being brought against the defendant. The difference between the two is that the information is prepared only by the U.S. Attorney, who then presents it to a magistrate to determine probable cause. [7] Without presentment to a magistrate, the prosecutor cannot move forward with the case on the information alone. One small exception to this is if the defendant waives their right to criminal indictment.[8] A defendant charged with a felony may waive their right to indictment and allow the U.S. attorney to file charges by information. A defendant might choose to do this to obtain a more favorable plea bargain.

7: *Criminal Complaint*, Legal Information Institute, https://perma.cc/V3P7-6T6A (last visited Jan. 19, 2025).

8: *Criminal Resource Manual* § 206: When Information May be Used, U.S. Dep't of Justice, https://perma.cc/7LG9-F3XH (last visited Jan. 19, 2025).

19.3 Initial appearance or arraignment

A defendant taken into custody must be brought in front of a judge within forty-eight hours. If the defendant is not arrested on a weekday, they will be held over the weekend and brought in front of a magistrate on Monday. Arraignment is the dramatic stage that you see on TV where the defendant comes out for the first time, but often the procedure itself is not too exciting. Most people who aren't familiar with this stage think they are going to potentially hear from the defendant or find out more about the case. However, most times, if the indictment has already been leaked, the defendant and the media are all aware of what is being alleged. Here, the judge reads the complaint out loud to make the defendant aware of what he or she is being charged with.

Figure 19.1: A defendant has rights while in detention and must be brought before a judge within forty-eight hours. Image: Oleksii Bychkov https://www.oleksiibychkov.com.

The judge advises the defendant of their important constitutional rights including the right to counsel, the right to plead guilty or not guilty, the right to remain silent, and the right to be tried by an impartial judge or jury. If the defendant is indigent, they will be appointed counsel. Otherwise, they will be advised that they must retain their own private counsel. The right to counsel attaches at all 'critical stages' not including the initial appearance, as that is the stage when counsel is appointed, or the defendant is advised to hire an attorney. Defendants have the right to counsel when imprisonment is a possible punishment.

Next, the judge asks how the defendant wishes to plead, and almost always the defendant will enter a plea of not guilty. At that point, the defense attorney has likely received no discovery, so even if the defendant seems extremely guilty, there is no good-faith basis supporting their desire to plead guilty. While the decision is ultimately up to the defendant, the defense attorney, as their counselor, needs to inform the defendant that the burden to prove their guilt is on the government. Additionally, at this point, the defense attorney, without seeing the discovery, cannot be certain that there is sufficient evidence for the government to pursue the case.

Often, during the initial appearance, the judge will consider pre-trial release while the defendant awaits trial. If the judge does *not* plan on holding the defendant, they will likely address detention at this stage (discussed below). This is because there is no reason to delay the detention hearing and hold the defendant any longer if the judge agrees that they should be released. On the other hand, when the judge plans to detain the defendant awaiting trial, it is common for defense attorneys to request a set-over (also known as a motion to continue) for a detention hearing a few days later.[9] The defendant may request up to a five-day continuance, while the government can only request three days.[10] Doing so allows the attorney more time to prepare an argument for the defendant's release. This is common as the attorney may have been just recently appointed or retained shortly before or at arraignment and thus is likely not yet familiar with the defendant or their case.

9: 18 U.S.C. § 3142(f).

10: *Id.*

19.4 Release and detention

In federal criminal court, release and detention determinations are governed by the Bail Reform Act. [11] Judges must follow the Act's guidelines when determining whether to detain or release a defendant facing pending criminal charges.[12] A judge may do one of six things at this stage. The judge may choose to release the defendant on their own personal recognizance, meaning they would not have to pay anything to be released.[13] The next two options include a defendant signing an unsecured bond, meaning the defendant would only have to pay if they did not appear, or a secured bond, where a bail amount is imposed, but the defendant must only put up collateral and if they don't appear, their collateral is taken.[14] Other options include allowing release, but with certain pre-trial conditions.[15] Conditions could include 24/7 monitoring, check-ins with pretrial services, not committing new crimes, etc. These conditions must be the "least

11: *Criminal Resource Manual* § 26: Release and Detention Pending Judicial Proceedings (18 U.S.C. § 3141 et seq.) U.S. Dep't of Justice, https://perma.cc/8LMG-R698 (last visited Jan. 19, 2025).

12: *Id.*

13: 18 U.S.C. § 3142.

14: *Id.*

15: *Id.*

restrictive condition or combination of conditions necessary to 'reasonably assure' the defendants' appearance as required and to 'reasonably assure' the safety of any person and the community."[16] The last two options the judge has are to temporarily detain the defendant if they are not a U.S. citizen, or to detain the defendant until trial by imposing no bail at all.

16: 18 U.S.C. § 3142(c)(1)(B).

If the judge is convinced that the defendant poses a danger to the community based on their criminal history or the nature of the offense, the judge may order no bail or impose several pre-trial conditions. Importantly, there is no constitutional right to bail; defendants have the right only to ask for bail. The judge will also consider whether the defendant is a flight risk.[17] This includes whether the defendant has the financial resources to disappear, their ties to the community, and how many times the defendant has had a warrant out for their arrest or failed to appear for court. Other factors the judge may weigh are the mental health of the defendant, the weight of the evidence against them, their financial resources, and what kind of conditions upon release would ensure the defendant's compliance.[18] If a defendant is unhappy with the outcome of their hearing, their detention may be readdressed in all stages up to the trial stage.[19]

17: *Criminal Resource Manual* § 26, U.S. Dep't of Justice.

18: *Id.*

19: *Id.*

A detention hearing is necessary when the judge orders that the defendant be held awaiting trial because no number of conditions will secure their release or keep the community safe.[20] It is presumed that no conditions will do so under certain circumstances including: the defendant committed a crime of violence, an offense with a potential of imprisonment or death, an offense with a maximum term of imprisonment of ten years or more or any felony if the person has two or more convictions for offenses, or upon a motion by the government or court where the defendant is a serious flight risk or a there is a serious risk that the defendant will obstruct justice.[21] At this hearing, both parties would argue for and against release.

20: 18 U.S.C. § 3142, available at https://perma.cc/2QD4-HWUR.

21: *Criminal Resource Manual* § 26: Release and Detention Pending Judicial Proceedings (18 U.S.C. § 3141 et seq.) U.S. Dep't of Justice, https://perma.cc/8LMG-R698 (last visited Jan. 19, 2025).

19.5 Preliminary hearing

A preliminary hearing is required when a complaint has been filed, but no indictment has been secured. It is also required for a misdemeanor case, unless the prosecutor files an information.[22] Here, the complaint serves as a placeholder to hold the defendant until an indictment is obtained. Remember, a complaint is used to detain a defendant quickly. The federal prosecutor is required to formally charge a defendant within thirty days after their arrest.[23] If charged with a felony, the defendant must be formally charged by indictment.[24] Sometimes, grand juries won't be scheduled until another month and thus, the preliminary hearing serves to ensure there is probable cause to charge the defendant with the crime without making the defendant either wait in custody or deal with pending charges while released.

22: Fed. R. Crim. P. 5.1(a)-(b).

23: 18 U.S.C. § 3161(b) (2023).

24: U.S. Const. amend. V.

The preliminary hearing must be held within fourteen days after the initial appearance if the defendant is being held in custody, and within twenty-one days if the defendant is released.[25] At this hearing, unlike the grand jury phase, the defense attorney is present, both sides can present evidence, and

25: 18 U.S.C. § 3161(b) (2023).

both sides can call witnesses.[26] This hearing gives defense counsel an idea of the evidence that will be presented at trial. In some states, the rules of evidence do not apply the same to preliminary hearings as they do at trial. Thus, some states may allow hearsay evidence to come in. Additionally, there is no jury present at this hearing, only the judge. If the judge finds the evidence insufficient, the case will be dismissed. If the judge finds the evidence is sufficient, the case will proceed. An easy way to remember a preliminary hearing is thinking of it as a mini trial, ensuring there is enough evidence to hold the defendant and/or move forward. At this stage, the defense attorney has already reviewed the discovery and chosen which pieces of evidence to introduce to cast doubt on the prosecution's case.

26: *Id.*

19.6 Discovery

The discovery phase is where the defense and prosecution exchange information about the case.[27] The government must provide defense counsel with access to the evidence they intend to use at trial and any exculpatory evidence (evidence that could prove the defendant's innocence).[28] Defense counsel must provide the government with the witnesses they plan to call at trial (both lay and expert witnesses) and sometimes additional documents if requested.[29] This eliminates surprise at trial and ensures that both sides make an informed decision about proceeding to trial or resolving the case via a plea bargain.

27: Fed. R. of Crim. P. 16.

28: *Id.*

29: *Id.*

During the review process, there are sometimes thousands of documents to comb through, and it is therefore critical to stay organized. Certain federal cases may call for an entire room filled with documents. After an attorney completes their own discovery review, it is likely they will have a meeting with the defendant and complete an in-person discovery review. Defense attorneys aren't typically allowed to send copies of discovery to the defendant and thus, all reviews occur in person. After reviewing discovery with the defendant, the attorney will likely begin completing any research and considering what pieces of evidence will likely be admissible at trial. The attorney will use this to bargain with the prosecutor in hopes of reaching a favorable plea offer.

If it appears that the case is going to trial, the attorneys will likely begin filing evidentiary motions. These motions are typically filed several weeks or months before trial.[30] These motions ask the court to admit or exclude pieces of evidence. Types of evidentiary motions include but are not limited to motions to suppress, motions to admit or exclude, or motions for a ruling on hearsay. To help determine whether one of these motions should be filed, the attorney considers how the evidence was obtained, how the evidence would be admitted, and whether doing so would benefit their trial strategy. Motions to suppress (typically written by defense attorneys) are not commonly granted in federal court. Thus, the defense attorney may focus more effort on strategy.

30: Fed. R. Crim. P. 12(b)(3).

19.7 Pre-trial motions

As briefly mentioned above, pre-trial motions are motions written in preparation for trial. At this point, the attorneys may have an idea of what is going to be presented at trial and wish to exclude the evidence through a motion to suppress. Once the judge rules on the motions, the parties may re-negotiate and either take a plea offer or adjust their trial strategies accordingly. It's possible that after a ruling on a motion to suppress, a U.S. Attorney may even dismiss the case based on the lack of admissible evidence for trial. Although, in federal court, federal agents investigate for long periods of time and thus, it is unlikely that the exclusion of one piece of evidence would destroy their case. This is more commonly seen in state court. A motion to dismiss some or all the charges can be filed on several grounds including: insufficient evidence to support the charges, the charging document does not allege enough to prove a crime occurred, the charging document has errors, and the defendant's constitutional rights were violated.

A party may file a motion to change venue (the location of trial) if there is a likelihood that the jury pool is tainted by bias or pretrial publicity. These motions are often filed when the defendant is a celebrity, or where the alleged crime was particularly brutal or heinous.

Although not a pre-trial motion, grounds for a motion for appeal may occur at the pre-trial motions hearing. Further, improper admission or exclusion of the evidence may be grounds for an appeal. After a judgment is entered, attorneys must file a notice of appeal within fourteen days.[31] The government may not appeal an acquittal (when the defendant is found not guilty). Some of the reasons to file an appeal include errors in jury instructions, ineffective assistance of counsel (and other violations of constitutional rights), incorrect application of sentencing guidelines or other errors, new evidence, or misconduct by either the prosecutor or jury.[32]

31: Fed. R. App. P. 40.

32: *What are the Grounds for an Appeal in Federal Courts?*, The Keleher Appellate Law Group, LLC, https://perma.cc/3XYQ-47NQ (last visited Jan. 20, 2025).

19.8 Trial

Jury Selection

The first day or so of trial consists of picking a jury. The court will randomly select many individuals from voter registrations in the area to come to court to possibly be chosen to sit on a jury of twelve (most commonly) with a few alternates. Depending on the court, either the attorneys or the judge will question prospective jurors.[33] According to Federal Rule of Criminal Procedure 24, judges have broad discretion in choosing how to conduct 'voir dire,' as the process of examining potential jurors is called.[34] In federal court, it is more common for judges to preside over voir dire, while in state court, it is typically the attorneys while the judge merely acts as a referee. Whether the questioning is done by the judge or attorneys, the questions may not include or allude to specific facts of the case as the sole purpose

33: Jonathan S. Tam, *Jury Selection in Federal Court*, Dechert LLP (May 2020), https://perma.cc/G59N-XJSS.

34: Fed. R. Crim. P. (Rule 24).

here is to access the jurors' qualifications, biases, and whether they are open to considering the full range of sentencing.[35] Most often, in federal court, the judge handles explaining to the jury the standards of proof while in state court, attorneys often present the standards of proof. The judge likely does so to ensure the juror understands their duty to only convict the defendant if they believe, beyond a reasonable doubt, that the defendant committed the alleged crime.

35: *Id.*

The attorneys or the judge will then ask questions based on preliminary questionnaires the potential jurors filled out prior to their selection. In federal court, the Administrative Office of the U.S. Courts determines the contents of the preliminary questionnaires which only cover basic questions. However, the attorneys may also create their own questionnaires if permitted. This allows attorneys to ask any follow up questions in person and use their time more efficiently during voir dire.[36] Their questions typically include questions about their education, family members, marital status, experiences with lawsuits, hobbies/associations, and opinions regarding law enforcement.[37] Questions may even include seemingly irrelevant questions like what kind of TV shows the potential juror enjoys watching. Based on these answers, both sides already have a general idea of who the potential juror is. For instance, if a potential juror's father is a police officer, the defense might want to strike that juror out of fear that they will not be able to fairly assess the testimony of a police officer called as a witness. If a potential juror watches true crime documentaries in their free time, the attorneys may worry the juror will think they know more than the average jurors and thus, would be more likely to sway others inside following their theory of the case rather than what the evidence shows. For example, for those of you who saw the Netflix movie "Juror #2," one member picked for the jury was formerly a detective in another state. Neither side caught this, and it resulted in the detective doing his own independent investigation (jury misconduct) and his opinion highly swayed everyone else. Also, one woman who spent most of her time watching true crime was seen in deliberation trying to sway other members by making assumptions based on scenarios seen on TV. These are the kinds of people the attorneys should note when picking a jury.

36: Jonathan S. Tam, *supra*.

37: *Id.*

There are two different kinds of 'strikes' that attorneys on both sides have. One type of strike is a strike called 'challenge for cause.' These strikes are unlimited so long as the attorney has a valid reason for thinking the juror cannot be impartial.[38] Challenges for cause must be related to bias, conflict of interest, or inability to follow the law.[39] If the challenge is not related to one of those reasons, the attorneys may use one of their few peremptory strikes. Peremptory strikes are more interesting in that the attorney does not have to state the reason to anyone.[40] However, if the reason seems to be based on race, ethnicity, gender, or sexual orientation, there may be a constitutional violation and the attorney must provide a neutral reason for the strike.[41] Each side is given a certain number of peremptory strikes.

38: *Wainwright v. Witt*, 469 U.S. 412 (1985); *United States v. Wood*, 299 U.S. 123 (1936); Fed. R. Crim. P. 24(a).

39: *Id.*

40: Fed. R. Crim. P. 24(b).

41: *Batson v. Kentucky*, 476 U.S. 79 (1986); *see also J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

Trial

The trial commences when the prosecutor begins their opening statement. In law school, if you take a trial advocacy class, your professor will likely explain the importance of coming up with a theme, developing a catchphrase, and starting and ending with the most important information. Sometimes, the best way to begin an opening statement is to start from the beginning; however, most times, starting at the climax is the best way to grab the audiences' attention.

Catchphrases may seem cliché in everyday life but given the amount of legal jargon used during trial, a simple five-word catchphrase could be the perfect way to engage the jury and create a moment where everyone feels aligned. The O.J. Simpson trial is a great example of creating a theme that turns a domestic violence case into a case about racial inequality. "If the glove does not fit, you must acquit!" This statement left no room for misunderstanding.

Attorneys may never know the full truth of the story. Instead, they craft compelling narratives from the information gathered and strategically choose which parts to emphasize. Think of one of your favorite books that was later adapted into a movie, perhaps based on a true story. Notice how two people can tell the same story in two entirely different ways. The attorney's job is to tell the story and present it in a way that everyone understands, believes, and remembers. This is no small feat when standing before a jury of twelve whose only commonality may be their presence before you that day.

Juries can be unpredictable, which is why some individuals elect to have a bench trial rather than a jury trial. In a bench trial, the judge determines the fate of the defendant. Remember, the defendant has a right to the jury trial and thus, it is their choice to have a bench trial. Some reasons to do so would be wanting the expertise of a judge, who can focus on the facts, who will not be tainted by public opinion (at all or as easily as a lay person), and who can use their expertise to hopefully come to a 'fairer' outcome. However, more commonly the defendant elects a jury trial in hopes that they have a better chance at acquittal (the state convincing several individuals of the defendant's guilt vs. one) with a jury trial rather than a bench trial.

While a jury trial may seem advantageous, there are potential drawbacks. Jurors can lose focus, become bored with the facts, or misunderstand the evidence if the attorney is not a great trial advocate. A single distracted juror could hold on to one piece of evidence heard early on after missing what was said by a key material witness, and still push for conviction. Their opinion alone can stop the defendant from acquittal. For this reason, having an engaging attorney who can effectively present to a jury is essential.

After opening statements comes the questioning of witnesses. There are two types of witness examinations: direct examination and cross examination. Direct examination occurs when that party calls their own witnesses to the stand hoping the witness's testimony builds their case. Both sides have the opportunity to call their own witnesses and question the opposing side's witnesses during cross examination. On direct examination, the

attorney is looking to establish the facts supporting their case; on cross, the goal is to cast doubt of the credibility of the witness and challenge the testimony given. When an attorney can demonstrate that the witness is giving conflicting testimony, the witness may be impeached. Once a witness has been impeached, there are serious doubts about their credibility.

Although there is no limit to how many witnesses may be called, they must be selected carefully.[42] Both sides are required to disclose which witnesses they intend to call prior to trial.[43] Those unfamiliar with criminal law may not know that most evidence comes in through testifying witnesses. This includes statements, photos, videos, phone calls, writings, or objects. Witnesses explain their knowledge of the evidence and confirm its relevancy, authenticity, and chain of custody (tracking the movement of an item of evidence from the moment it was obtained to its introduction at trial). Importantly, after the prosecutor presents its case through testifying witnesses and physical evidence, the defense attorney may move for acquittal.[44] Defense counsel will choose to do so if they believe there is insufficient evidence to convict the defendant at this point.[45] If denied, its then the defense attorney's turn to present their case using the same methods. Like defense counsel, prosecutors also get the opportunity to cross examine the defendant's witnesses or rebut the defendant's case (which is only something the government gets to do, not the defendant). Defense counsel is then allowed to move for acquittal one more time and, if denied, the parties present their closing arguments.[46]

42: Fed. R. Evid. 611(a) (2023).

43: Fed. R. Crim. P. 16.

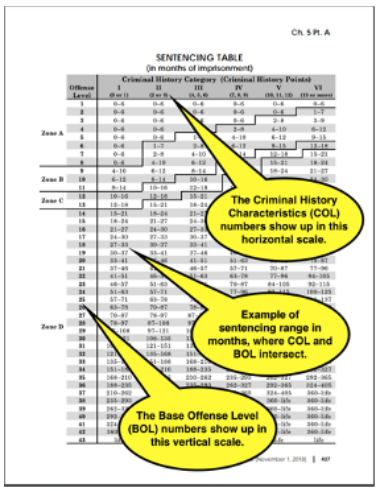
44: Federal Bureau of Investigation, *A Brief Description of the Federal Criminal Justice Process*, FBI, https://www.fbi.gov/how-we-can-help-you/victim-services/a-brief-description-of-the-federal-criminal-justice-process.

45: *Id.*

46: *Id.*

Notably, the burden of proof is on the prosecutor and thus, presenting every piece of evidence that establishes the defendant's guilt may not always be the best choice. Sometimes, presenting too many facts may confuse the jury or open the door to many additional counter-arguments by the defense. One misstep by either party places them at risk of destroying their credibility with the jury. For instance, in the O.J. Simpson murder trial, what would have happened if the prosecutor never had O.J. try on the glove? Experienced trial attorneys never do something for the first time at trial unless they are certain that it will be beneficial to the case.

The trial concludes after both sides present their closing arguments. This is essentially a summary of everything presented during trial. Here, counsel may highlight the significant holes in the opposing counsel's arguments, bring the jury's attention to alternative explanations, or use this as an opportunity to emphasize the life of the victim or the accused. Once they are finished, the jury will deliberate in private for as long as they need to come to a consensus. Importantly, this consensus must be unanimous. If the jury comes back with a not guilty verdict, the defendant is free. If the jury comes back with a guilty verdict, the final part of the process is sentencing.



19.9 Sentencing

While a jury determines the guilt or innocence of a criminal defendant, sentencing is up to the judge in federal court. Federal sentencing operates

much differently than state sentencing as the federal system uses *sentencing guidelines* to help determine a range of possible sentences for defendants. Ranges are calculated by considering four components: (1) the offense level score, (2) the criminal history score, (3) adjustments based on additional facts in the case, and (4) any factors that may call for an upward or downward departure outside of the guideline. The guidelines are only advisory, and the judge may depart from the sentencing guidelines if they wish. However, the guidelines are heavily influential in all federal sentencing hearings.

The offense level score is simply the score listed in the Federal Rules of Criminal Procedure for that alleged offense. This number is located on the left-hand side of the chart above.

The criminal history score is calculated based on the defendant's previous convictions.[47] Both felonies and misdemeanors count as prior sentences; however, there are some lower-level misdemeanors that do not count toward the criminal history score including but not limited to: disturbing the peace, leaving the scene of an accident, or careless/reckless driving.[48]

47: 2018 Chapter 4, United States Sentencing Commission (2019), https://perma.cc/9QM2-VGY4 (last visited Nov 11, 2024).

48: USSG § 4A1.2(c).

Simple adjustments one may see to the offense score is if the defendant does not fit into the average offender's role in the alleged crime. For these reasons, the defendant may be adjusted to a mitigating role or an aggravated role based on their involvement. Mitigating roles are seen when someone is a minimal participant, one who "lacked the knowledge or understand of the scope and structure of the enterprise."[49] A minor participant is one, "less culpable than most other participants, but whose role could not be described as minimal."[50] These roles may call for a two-to-four-level decrease in score.[51] An aggravating role is warranted when the defendant is the organizer or leader in the crime involving five or more persons or the crime was "otherwise extensive."[52] A mitigating role may provide for a two-to-four-level decrease while an aggravating role may result in a two-to-four-level increase.[53]

49: Aggravating and Mitigating Role Adjustments Primer §§ 3B1.1 & 3B1.2 U.S. Sentencing Commission, https://perma.cc/KF2V-7SPZ.

50: USSG §3B1.2, comment. (n.5).

51: *Id.*

52: *United States v. Laboy*, 351 F.3d 578, 586 (1st Cir. 2003) (quoting *United States v. Dietz*, 950 F.2d 50, 53 (1st Cir. 1991)).

53: *Id.*

While the mitigating role adjustment applies to the offense score, upward and downward departures apply to the criminal history score. A departure from the sentencing range is necessary when the range does not adequately represent the seriousness of the defendant's criminal history.

Grounds for upward departure

An upward departure means that the criminal history score under-represents the seriousness of the defendant's criminal history or under-represents the defendant's likelihood to continue committing crime and thus, the sentencing range should include higher sentences. Just a few examples of considerations are those that include evidence that the defendant was pending trial or sentencing during the time of the alleged offense or that the defendant has been involved in similar misconduct that did not result in a criminal conviction.[54] Just a few examples, out of several, are provided here:

- Defendant's state of mind and degree of planning or preparation

54: USSG §4A1.3(a)(2)(E); *see also United States v. Allen*, 488 F.3d 1244, 1258 (10th Cir. 2007) (sentencing court cannot depart upward based on uncharged, unrelated misconduct); *United States v. Rice*, 358 F.3d 1268, 1276–77 (10th Cir. 2004) (district court cannot use similar uncharged conduct to increase both the defendant's offense level and as a basis for a departure under §4A1.3), *cert. granted*, judgment vacated on other grounds by *Rice v. United States*, 543 U.S. 1103 (2005); *United States v. Hunerlach*, 258 F.3d 1282, 1286–87 (11th Cir. 2001).

- Number of fatalities and manner of death
- *Significant* physical injury resulted
- Victims suffered psychological injury much more serious than that normally resulting from the offense.
- Person was abducted, taken hostage, or unlawfully restrained
- Property loss or damage not accounted for in the guidelines
- Weapon or dangerous instrument used or possessed during crime

Grounds for downward departure

As opposed to an upward departure, a downward departure is when the criminal history score over-represents the seriousness of the defendant's criminal history or the likelihood that they will continue to commit crime. There are certain crimes that do not allow downward departures such as repeat sex offenders against minors and armed career criminals.

- Defendant does not depend on criminal activity for a livelihood
- If the size and strength of the victim or other physical characteristics in comparison to the defendant warrant a downward departure
- Persistence of the victim's conduct
- Defendant committed a crime to avoid greater harm
- Defendant was under duress or was coerced
- Defendant committed the crime while suffering from a significantly reduced mental capacity and that contributed substantially to the offense

No reason to depart

Some characteristics of the defendant or offense warrant neither an upward nor downward departure.

- Race, sex, national origin, creed, religion and socio-economic status
- Lack of guidance as a youth and similar circumstances
- Physical condition—alcohol dependency or abuse
- Financial difficulties or economic pressure
- Fulfillment of restitution obligations

19.10 Summary

After reading this chapter, you should be equipped with enough knowledge to explain the stages of a federal criminal case. These cases vary greatly in length, complexity, and consequences. Thus, it is important to advise your loved one to hire an attorney while also offering enough insight to ease their concerns shortly after an allegation is made. Moreover, it is important to consult the applicable rules, as this chapter provides only a brief overview of the procedures to anticipate. Lastly, recall that no case is identical to another, as the system is designed to ensure fairness while also tailoring the case to the specific circumstances of the individual defendant.

20 Outlining rules in legal texts

Brian N. Larson

As a legal practitioner, you will depend on the primary sources of the law as you do everything from writing memos and briefs for a client's case, to closing a deal protecting your client's interest, to advising your client on a course of action. It's critical to be able to read the law and figure out what it means and determine how it applies to your client's scenario. Chapter 3 and Chapter 5 give you some sense of the role that rule-based reasoning plays in the laws. However, it can be difficult to absorb the content of rules in primary sources of the law, which are often written in highly stylized or even archaic ways.

As Chapter 17 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.

1: For a discussion of secondary authorities, see Section 12.4 and Section 17.4.

This chapter is the first of five that give advice about how to read *primary* authorities. Chapter 21 discusses legal citations and their role in legal texts, information helpful for reading any type of legal text. Chapter 22 continues with advice specifically for reading enacted law, and Chapter 23 discusses decisional law, particularly court opinions. Finally, Chapter 24 explores reading contracts as primary authorities.

But this chapter discusses how to outline a rule when you find it in any primary legal text. You need this skill to use what you will learn in those other chapters.

20.1 Overview of outlining rules

It is essential to outline a rule in a form you can use to apply to the set of facts in your client's problem. This might seem trivial to you if you think about simple rules, but the law is full of not-very-simple rules, and we shall see below that even some simple-looking rules can turn out to have their own complexities. Some students are not fans of outlining when it comes to writing their own work, but outlining to break down rules written by others is essential work for lawyers.

This chapter outlines several different kinds of rules, one each for conjunctive elements, disjunctive elements, factor-based balancing, and totality-of-the-circumstances rules. It also considers how to handle exceptions to rules. As we shall see, many rules include components of multiple kinds at once.

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 rule's normative consequence to apply.[2]

2: See Section 3.2 for a discussion of the 'operative facts lead to normative consequence' formulation of legal reasoning.

20.2 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 to outline it, we convert it to a list of conditions or statements, *every one of which* must be true of the operative facts for the normative consequence—that the person has committed an offense—to be true.

> **Texas drunk-driving statute**
>
> A person commits an offense *if every one of the following* is true:
>
> - I. The person was intoxicated . . .
> - II. . . . while operating . . .
> - III. . . . a motor vehicle . . .
> - IV. . . . in a public place.

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

20.3 Disjunctive element rules

Let's consider a disjunctive rule, relating to the legal terms applicable to bids made at an auction. When you bid at an auction, you say how much money you are willing to pay, sometimes in a rapid back-and-forth with other bidders. As you will learn in your contracts class, a sale comes with more terms than just sale price. The question is, what contractual terms accompany your bid when you make it at the auction? Here is the answer in Colorado:

> [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). The normative consequence here is that your bid will embody (that is, be subject to) terms or conditions—like how and when you will make payment—if the operative facts satisfy the condition. This might seem pretty simple to outline:

> **Bid terms version 1: Prepositional phrase isolated**
>
> Bids embody terms if the terms are made known by *any one or more of the following*:

- I. an advertisement . . .
- II. . . . a posting . . .
- III. . . . another publication that meets one or more of these requirements
  - A. bidders are aware of it
  - B. bidders should be aware of it

Note how this outline isolates the prepositional phrase "of which bidders are or should be aware" in the last disjunctive element. Grammatically speaking, though, it could apply to, or be distributed across, all three disjunctive elements. This might, in effect, change the rule into a partially conjunctive one

Bid terms version 2: Prepositional phrase distributed conjunctively

Bids embody terms if the terms are made known by publication that meets *both of the following* requirements:

- I. The publication consists of *one or more of the following*
  - A. it is an advertisement
  - B. it is a posting
  - C. it is another publication
- II. The publication meets *one or more of the following* requirements
  - A. bidders are aware of it
  - B. bidders should be aware of it

By outlining the rule in both of these ways, you can see that where you put that little prepositional phrase matters a lot. Now think about which outline makes more sense. Under "Bid terms version 1," Colorado auctioneers could advertise terms on an obscure website serving consumers in the northeastern United States and satisfy the rule. Under "Bid terms version 2," bidders are subject to the terms regardless of their form of publication, but only so long as the bidders knew or should have known of them. This restricts the publication to places more accessible to bidders. Which is the meaning that you think the court intended? How might you find out? Is there a way this court could have written its rule to make that more clear?

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 42.5.

20.4 Nested types

So, even simple rules can turn out not to be that simple. But in the law, it's common for rules to have structures much more complex than the Colorado auction rule above. Consider the rule against age discrimination in the federal Age Discrimination in Employment Act (ADEA):

> 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 consequence, 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. Let's try outlining the rule:

> **Federal Age Discrimination in Employment Act (ADEA)**
>
> An employer commits an unlawful act if it does *both of the following*:
>
> - I. The employer commits *one or more of the following* acts:
>   - A. fails or refuses to hire any individual
>   - B. discharges any individual
>   - C. discriminates against any individual with respect to any *one or more of the following* things:
>   - 1. compensation
>   - 2. terms of employment
>   - 3. conditions of employment
>   - 4. privileges of employment
> - II. employer's act in I. was because of the individual's age.

The resulting outline shows the nesting. Note that in one way, this rule's nesting of conjunctive and disjunctive elements is superficially more complicated than the auction-bid rule in the previous section. But in another way, this rule seems clearer because it does not have a troublesome phrase of which we have to determine the scope.

So far, so good: We have conjunctive and disjunctive elements, and we know they can be mixed and nested. There are two other kinds of rules,

balancing or factor-based rules, and totality-of-the-circumstances rules, that we should discuss.

20.5 Factor & 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. According to the Copyright Act of 1976:

> 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.

This statutory text is hardly a great starting point for figuring out fair use. 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. Worse, the statute does not even tell you how the factors matter: For example, if the character of the use is commercial, does that weigh *for* or *against* finding fair use? To discover how courts assess these factors, you must read cases.

Reading cases, you will discover there are two, or maybe three, subfactors of the first factor: If the secondary use transforms the original work, giving it new meaning, the courts favor fair use; if the use is commercial, the courts disfavor fair use; and (maybe) if the secondary user acted in good faith, the courts favor fair use. The text of the third factor hints that "amount" and "subtantiality" might be two different things, too, and that's what courts have found. [3] Here I am merely outlining the rule. In your legal analysis, you would add a citation for each outline to an authoritative text.

3: We could look at how this works with the other two factors, too, but for purposes of this chapter, we'll dissect only the first and third factors.

> **Federal copyright fair use standard**
>
> A (secondary) use made of a copyright-protected work is fair use if the following factors weigh in favor of finding fair use:
>
> - Factor 1. If the purpose and character of secondary use is one favored by copyright policy, fair use is supported. To the extent the following facts are present, this factor supports fair use; otherwise it does not.
>   - The secondary use transforms the original work, giving it new meaning.
>   - The secondary use is non-commercial.

    - (According to some cases) The secondary user acts in good faith.
- Factor 2. Nature of the copyrighted work: If the nature of the copyrighted work is one that copyright policy is particularly concerned with protecting, this factor does not support fair use.
- Factor 3. Amount and substantiality: If either of the following is true, this factor does not support fair use:
    - The secondary use includes a great quantity of the copyrighted work.
    - The secondary use includes a key or especially valuable part of the copyrighted work (the 'heart of the work').
- Factor 4. Market and value: If the secondary use reduces the market for or value of the copyrighted work, this factor does not support fair use.
- Factor X. Though courts rarely consider factors outside the four required by the statute, a special case might call for it.

But what about weighing the factors and subfactors? What if the secondary use is commercial but highly transformative? How does the first factor come out? What if the secondary use is non-commercial and highly transformative, making Factor 1 strongly pro-fair-use, but Factors 2 through 4 weigh against fair use? It turns out you can't just tally up the factors and look for a majority.

With factor-based rules, it is often essential to add notes to your outline about how the courts weigh the subfactors and 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 (*2–4*) weigh against it. If you do not note that in your outline of the rule, your analysis may be blind to a critical issue.

20.6 Totality-of-the-circumstances rules

The final type of rule is the totality of the circumstances. Consider this example:

> [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 (Ill. App. Ct. 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.

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 46, is not overtly described there as a totality-of-the-circumstances, but the sample student analyses in Section 46.3 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, maybe even making the kind of 'case walk' I discouraged in Section 14.6 when discussing case examples. You would describe a couple cases and then compare and contrast them with your problem point by point.

20.7 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, which is designed to protect publication of certain kinds of information from claims of defamation:

> 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). Let's consider how to outline this:

Ohio privileged report statute

- I. A publication is privileged if the defendant proves all the following are true:
  - A. It was fair and impartial
  - B. It reported any one or more 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, assuming the defendant wants to claim a publication is privileged, the defendant must 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 or is unable to prove *II*, the defendant wins. If the plaintiff proves *II*, defendant's publication is *not* privileged, and defendant may be back on the hook for defamation.[4]

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.

4: Note, though, that all this outlining we have done does not include the actual rule for when a defendant is liable for defamation. That's in a different section of this statute!

REALITY CHECK! Isn't that outline hopelessly complicated?

Looking at the *Ohio privileged report statute* outline in the previous couple of paragraphs, 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 with confidence—any question about the application of this rule or its exceptions without

having outlined the rule? After twenty-five years of practice experience, the answer for me is 'no.'

20.8 Outlining alternatives

A final point about outlining: As the Ohio statutory rule we discussed in the previous subsection demonstrated, there is often not just one way to outline a rule. 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.

Ohio privileged report statute, revised I(B)

- 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 cause

This revision simplifies the outline of the rule and thus may simplify your efforts to analyze the problem. It might also simplify the structure of your written analysis, but see Chapter 11 for more on that.

What you will discover is that you may revise your rule outlines as your research progresses. This is especially true if whole sections of the rule prove inapplicable to your problem. You may find that you trim away parts of the rule that are not relevant for purposes of your problem.[5]

5: Chapter 22 addresses this in a more substantial discussion of the ADEA from Section 20.4.

Understanding legal citations | 21

Brian N. Larson

Chapter 20 introduced you to how to brief the rules you find in legal texts. Before you move on to reading enacted law such as statutes and decisional law such as court opinions, it will be helpful for you to understand the rhetorical role and some technical characteristics of 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. 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.[1]

This chapter first explains the key purposes of legal citations, including an exhortation for students to keep a reasonable perspective, not overstating or understating the importance of citations. It explains where you can find all the rules for legal citations and finally offers a couple examples of how to create legal citations yourself.

1: See Chapter 3 for an overview of the premise-and-conclusion structures of legal arguments.

21.1 Weight? Date? Can I locate?

Most citation forms in legal writing satisfy the reader's need for three pieces of information,[2] which I summarize with this phrase: *Weight? Date? Can I locate?*[3]

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.[4] *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.

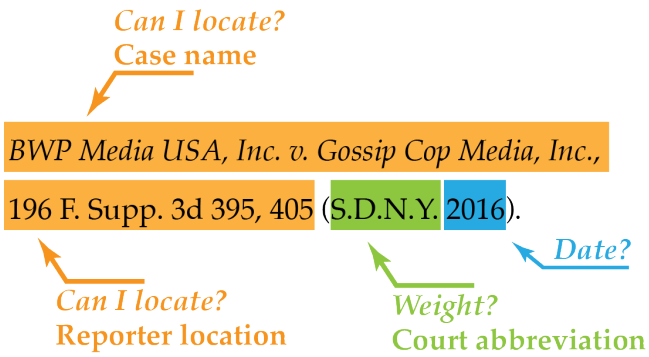
2: The discussion in this section benefits significantly from the perspective of Professor Alexa Chew. *See generally* Alexa Z. Chew, *Citation Literacy*, 70 Ark. L. Rev. 869 (2018).

3: 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.

4: Find a discussion of the need to update your research at Section 23.4.

Example from *BWP*

How does that look in practice? Let's consider a paragraph from an opinion by Judge Katherine Polk Failla, captioned as "*BWP Media* version 1" below. The citation for this excerpt is *BWP Media USA, Inc. v. Gossip Cop Media, Inc.*, 196 F. Supp. 3d 395, 405 (S.D.N.Y. 2016). Before we read the excerpt, let's analyze this citation to see how it provides information about weight, date, and location:



Here, we can see that the case's name and the reporter location (196 F. Supp. 3d 395, 405) provide us location information. Though the reporter location, starting at page 395 in volume 196 of the third series of West's *Federal Supplement*, by itself represents a unique document location, it's not a very handy way to refer to the opinion. That means that the case name is useful. But because a single case may precipitate multiple opinions, the case name is not sufficient to locate *this* opinion. The rules therefore require both. The court abbreviation tells us this is an opinion from the United States District Court for the Southern District of New York, a trial court. The date tells us the date the court released its opinion.

Let's see how Judge Polk Failla uses citations to other cases.

***BWP Media* version 1: Judge Polk Failla**

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).

The first thing you might note about the in-line citations in this excerpt is how disruptive they are. A twenty-word citation appears in the middle of the first sentence of the excerpt, and a forty-nine-word citation ends the same sentence, making it very difficult to read. But they convey important information to law-trained readers who work to parse these complex sentences. Consider this read out:

- A federal court of appeals case, *Cariou*, supports the first clause of the first sentence.
- *Cariou* in turn drew support from a 2006 Second Circuit appellate opinion, *Blanch v. Koons*. *Blanch* would be binding on Judge Polk Failla, because the Southern District of New York lies within the Second Circuit. (The *Cariou* cite is abbreviated because Judge Polk Failla had previously cited it.)
- A 1994 U.S. Supreme Court case, *Campbell*, supports the second clause of the first sentence.
- *Campbell* quotes an 1841 opinion written by a famous Supreme Court Justice, Joseph Story, lending the depth of tradition to the *Campbell* opinion.
- The explanation in the block quotation is language that the Seccond Circuit adopted in a more recent case from 2014, *Swatch*.

Example without citations

Still, those inline citations are hard to handle. What if we read the same excerpt stripped of citations to (and quotations from) cases:

> ***BWP Media* version 2: No citations**
>
> 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.

"*BWP Media* version 2" is much easier to read for a layperson. But based solely on it, no law-trained reader would be satisfied that Judge Polk Failla had established any of the points of law she asserts.

Of course, "*BWP Media* version 1," with the citations and quotations, could still be subject to criticism on a wide variety of fronts. But "*BWP Media* version 2" is simply not recognizable as legal writing in the professional sense.

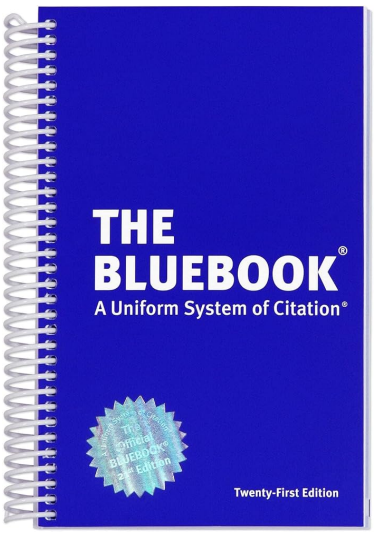
It might be possible to adapt a less disruptive in-line citation system, like that of the American Psychological Association or APA.[5] APA has some technical shortcomings, though, that make it less than an ideal candidate.

5: 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.

You might also think that we could drop the citations into footnotes so that they are less disruptive but still provide all the same information on the same page. In fact, some scholars and judges have suggested that, and some judges have begun using footnotes. But other scholars and judges have noted that footnotes require readers to interrupt their reading even more substantially—to look to the bottom of the page—to find needed information.

So for now, you should expect to write in-line citations according to the longstanding conventions in the legal community.

Understanding citations' importance



For many lawyers, citation according to the rules in the *Indigo Book*, *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 in hopes of training you to satisfy the expectations of *all* legal readers.

21.2 Citation styles & manuals

Generally, most folks will talk about legal citations needing to conform to the *Bluebook*.[6] 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

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

expect you to refer to *that* citation guide when justifying a decision about how something should be cited.

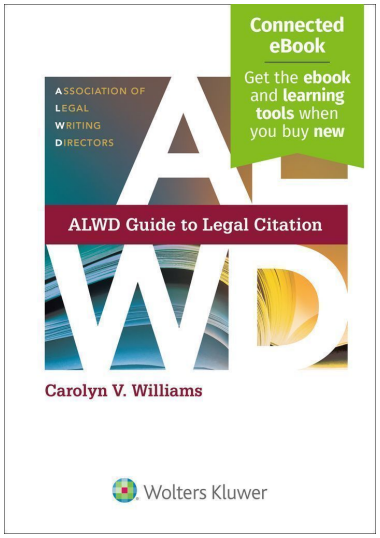
The two best-known citation guides are the *Bluebook* and the *ALWD Guide*.[7] Another popular—and free—option is the *Indigo Book*.[8]

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. It has traditionally 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. 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 seventh, which came out in 2021, and it is based on the twenty-first edition of the *Bluebook*, which came out in 2020. There was a year where the *ALWD Guide* was 'out of sync' with the *Bluebook*. As of this writing, the *Indigo Book* was last updated in 2023, and it is in sync with the 2020 *Bluebook*, but like the *ALWD Guide*, it was out of sync for a year.

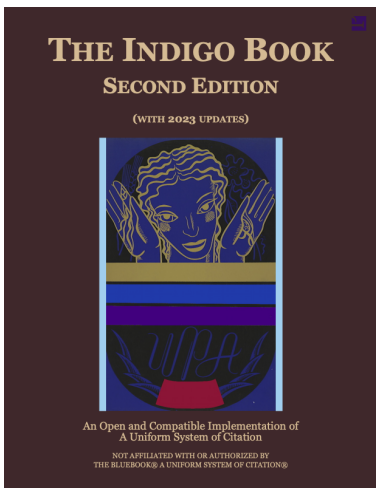
Given the frequency with which the *Bluebook* has typically been updated with new editions, it's likely there will be a twenty-second edition around time that this book is published. But fear not! If you use the most-recent-but-one edition of the *Bluebook* or any citation guide based on it, you should 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.



7: Carolyn V. Williams, ed., *ALWD Guide to Legal Citation* (7th ed. 2021).

8: Christopher Sprigman, Jennifer Romig, et al., *The Indigo Book: An Open and Compatible Implementation of A Uniform System of Citation* (2d ed. 2022, 2023 revs.), https://indigobook.github.io/versions/indigobook-2.0-rev2023-2.html.



21.3 Constructing your own citations

That's a lot of details about why we have legal citations, how the legal system differs from others, and where you can find the rules for legal citations. But for now, it would be nice if you could have a basic introduction to how

to construct three basic types of citation: A court opinion in a published reporter, a court opinion in an online database, and a federal statute. This section provides that.

Opinion in a published reporter

Rather than reinvent the wheel, I quote here the entirety of Rule 11.1 from the *Indigo Book*.[9]

> R11.1 Elements of a full citation. When providing a full citation to a case, you should generally include the following:
>
> 1. case name [italicized];
> 2. volume number, reporter, first page;
> 3. pincite (the exact page number you are referring to, if necessary) [see "Pincites and 'can I locate?' " below];
> 4. court, year . . .;
> 5. explanatory parenthetical (if necessary);
> 6. prior or subsequent history of the case (if any [and if necessary]).
>
> **Examples:**
>
> *Leonard v. Pepsico, Inc.*, 88 F. Supp. 2d 116, 127 (S.D.N.Y. 1999) ("Plaintiff's understanding of the commercial as an offer must also be rejected because the Court finds that no objective person could reasonably have concluded that the commercial actually offered consumers a Harrier Jet."), *aff'd*, 210 F.3d 88 (2d Cir. 2000).
>
> *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356 (1953) (per curiam) (affirming baseball's exemption from the scope of federal antitrust laws).

9: Christopher Sprigman, Jennifer Romig, et al., *The Indigo Book: An Open and Compatible Implementation of A Uniform System of Citation* (2d ed. 2022), https://indigobook.github.io/versions/indigobook-2.0.html. Note that the rules quoted from *Indigo Book* in this section of this chapter are not from the current version of the *Indigo Book*, which includes 2023 revisions. This copying is permissible under the Creative Commons license under which the *Indigo Book* is published.

Pincites and "can I locate?"

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). ***You will ALMOST ALWAYS give a page number***, unless the document you cite is not paginated or uses section numbers (§) or paragraph numbers (¶) instead. (There are situations where you really are citing a whole opinion and won't need a pincite, but they are quite rare in your 1L year.) 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 486. 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*.

Unpublished/unreported opinion

Here again, I quote from the *Indigo Book*, this time Rule 12.4.

R12.4 Special Note on Pending and Unreported Cases: Some cases or opinions are not assigned to reporters. They generally can be found in one of the following three sources:

> R12.4.1. LEXIS and Westlaw cases: Citations to these electronic databases are similar to regular citations, except that they (a) replace the case code with a docket number and a database code supplied by LEXIS or Westlaw, and (b) include the full date of the decision in the following parenthetical, not just the year.
>
> Citations to these electronic databases should be formatted as follows: <Case Name>, <case docket number>, <database identifier and electronic report number>, at *<star page number> <(court, full date)>.
>
> > **Example:** *Yates v. United States*, No. 13–7451, 2015 U.S. LEXIS 1503, at *40 (Feb. 25, 2015) (Citing Dr. Seuss, Justice Kagan explained, "[a] fish is, of course, a discrete thing that possesses physical form.").
> >
> > **Example:** *State v. Green*, No. 2012AP1475–CR, 2013 WL 5811261, at *7 (Wis. Ct. App. Oct. 30, 2013) (rejecting Green's argument that there was a reversible error due to bailiff's distribution of leftover Halloween candy to the jury).
>
> R12.4.2. Slip opinions: A slip opinion is a published decision by a court that has not yet been included in a reporter. If there is a slip opinion for an unreported case, but it's not in LEXIS or Westlaw, include the docket number, the court, and the full date of the most recent major disposition of the case:
>
> > **Example:** *Beastie Boys v. Monster Energy Co.*, No. 12 Civ. 6065 (S.D.N.Y. Dec. 4, 2014).
>
> R12.4.3.Opinions only available online, but not in an electronic database: Some cases, particularly ones that are pending, may be accessed only through a court's website. If so, include the URL.
>
> > **Example:** *Macy's Inc. v. Martha Stewart Living Omnimedia, Inc.*, No. 1728, slip op. at 1 (N.Y. App. Div. Feb. 26, 2015), `http://www.nycourts.gov/reporter/3dseries/2015/2015_01728.htm`.

Federal statute

And we go back to the *Indigo Book* one more time for citations to the United States Code.

> R16.1.2 U.S. Code: For citations to the U.S. Code (the preferred citation): <Name of Statute [optional]>, <title> U.S.C. § <section number> <(year published)>.
>
> 1. The U.S.C. is codified once every six years. Therefore, citations to the U.S.C. should be to the appropriate codifying year (e.g., 2000, 2006, 2012[, 2018]). Cite the most recent edition that includes the version of the statute being cited.
> 2. Supplements: If you are citing to a statute that may have been amended after the most recent official codification, be sure to consult the supplements, which are published each year between codifications and are cumulative.
>
> **Examples:**
>
> Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 387 (2012).
>
> Lanham (Trademark) Act, 15 U.S.C. §§ 1051-1141n (2012).
>
> Communications Act of 1934, 47 U.S.C. § 223 (2012 & Supp. I 2013).

Reading enacted law 22

Brian N. Larson

In enacted law, like statutes and regulations, our legal system tends to privilege the language used. 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. This chapter provides an overview of reading enacted law, using a specific statutory provision applied to a hypothetical problem. Note that this chapter refers to a single federal statute as a proxy for all federal and state enacted laws, including constitutions, statutes, and regulations. The steps described here for interpreting and applying a federal statute are analogous to the steps you would use to interpret those other enacted laws.

Statutes, especially federal statutes, can have very complicated structures, so it pays to read the texts wisely. For example, the passage from section 623 of the ADEA, the federal statute against age discrimination discussed in Section 20.3 starting at page 179, is just a small fragment of that part of the statute. It is simplified there for purposes of illustrating a disjunctive rule. If you spend time reading all of section 623, you will want to spend that time wisely. But if you miss a key provision, your client could pay dearly.

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

1. Explore its context by locating it within a table of contents or skimming the whole statute.
2. Explore its organization.
3. Where applicable, consider its status in subsequent legislation, regulations, and court decisions.
4. Brief it, creating an outline of it.[1]

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

Throughout this chapter, there are references to the statutory excerpt in Appendix Chapter 45. Marginal numbers in blue circles[2] in this chapter correspond to blue, circled numbers at key points in the statutory excerpt. To provide a meaningful context for the discussion that follows, Section 22.1 provides a brief hypothetical problem.

1: See Chapter 20 for guidance on briefing rules.

2: Like the one here:

22.1 Problem scenario

Imagine that you are an attorney and that an old friend, Eddie Chen, contacts you about a problem. Mr. Chen is, by all accounts, a handsome man. He is fit and takes excellent care of his health and grooms and dresses himself meticulously. Having just turned 38, he has begun to gray slightly

along the temples, and his face has begun to show small creases across his forehead and small wrinkles around his eyes—probably because of his very expressive and frequent smile.

Chen has put his good looks and STEM education to use selling medical devices for Doll Face, Inc., a leader in products for physicians doing plastic surgery and other cosmetic interventions. Most of his peers at Doll Face, all of whom are in their late 20s and early 30s, are regular users of their company's products (and thus the services of some of their customers). Chen, however, refuses to have any botox, fillers, or other invasive cosmetic work done. Nor will he dye his hair. He says he believes in aging naturally.

Doll Face recently laid Chen off. Until his termination, his sales production was above average in all the metrics that Doll Face tracks for sales reps. After his termination, a friend at Doll Face printed out and gave to him an email chain from a week earlier in which several of Chen's superiors discussed his appearance. It includes comments from several different folks about Chen's age, referring to him as looking "long in the tooth" and perhaps "ready to be put out to pasture." The email chain strongly suggests that Chen would be let go because of his age and provides no evidence for any other basis for his termination.

Chen wants to know whether he has a claim for age discrimination. Another attorney at the firm alerted you to section 623 of the federal Age Discrimination in Employment Act (ADEA), which appears in title 29 of the Unite States Code.

22.2 The operative language

You pull a copy of Volume 22 of the United States Code from the small law library across the hall at your firm. You would have looked it up online but for the fact that your computer's operating system is undergoing an automatic update, and that means you probably won't be able to use it for 45 minutes.

You turn to section 623,[3] and it does appear to have the operative language you are seeking:

> (a) Employer practices. It shall be unlawful for an employer
>
> > (1) 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;

You can isolate the key language from the lengthy language of section 623(a)(1) by eliminating the words that are not relevant to the client's problem: "It shall be unlawful for an employer . . . to discharge any individual . . . because of such individual's age . . . ." This immediately seems to favor Mr. Chen's claim. You note, however, that this is just the first subsection of section 623, which has thirteen subsections ((a)-(m)) and is more than 4500

3: Marked in Appendix Chapter 45 with this marker:

words long! You can read the whole thing in Appendix Chapter 45. But to do a good job, you must not read only section 623, and you should not spend an equal amount of time on all the subsections of 623. You should start by considering the statute's context.

22.3 The section's context

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. In federal statutes, sections are arranged into a chapter of the statutes, and chapters themselves are organized into a 'title.' So it is with the ADEA. Section 623 is one of fifteen sections that make up Chapter 14 of Title 29 of the U.S. Code.

This context can tell you much about your operative language:

- First, it can tell you the purpose of the statute.
- Second, the context can provide definitions for key terms.
- Third, the statute should inform you if any executive or administrative agency has rule-making authority over the subject matter of the statute.
- Fourth, the context can help you identify exceptions to your operative language.

Reviewing all this context just to allow you to interpret the forty-one words of section 623(a)(1) may seem a little overwhelming, but you should not panic for the reasons we note below.

The easiest way to see the context of section 623 is to move a level up, to the listing of sections in chapter 14.[4] Taken together, this whole chapter is the ADEA. The table of contents for the chapter identifies the following sections:

- 621. Congressional statement of findings and purpose.
- 622. Education and research program; recommendation to Congress.
- 623. Prohibition of age discrimination.
- 624. Study by Secretary of Labor; reports to President and Congress; scope of study; implementation of study transmittal date of reports.
- 625. Administration.
- 626. Recordkeeping, investigation, and enforcement.
- 627. Notices to be posted.
- 628. Rules and regulations; exemptions.
- 629. Criminal penalties.
- 630. Definitions.
- 631. Age limits.
- 632. Omitted.
- 633. Federal-State relationship.
- 633a. Nondiscrimination on account of age in Federal Government employment.
- 634. Authorization of appropriations.

4: Marked in Appendix Chapter 45 with this marker:

Section 621[5] provides legislative purpose, which is part of the enacted law and can often function to help you interpret ambiguous or vague provisions in the text of the statute. You would read this section and note the purpose.

Note that legislative notes follow each section of the statute. One of the notes after section 621[6] tells you the official name of the statute, "Age Discrimination in Employment Act of 1967." You should record this, too, because a proper citation of the statute should include the official name.[7] Be cautious with legislative notes, however, as they are in no way binding. Only the language of the actual statute is binding.

Many of the other sections of the ADEA may have a bearing on your problem, including section 626 (relating to enforcement).[8] But we'll focus on three in the subsections below, relating to executive rule-making, definitions, and exceptions.

5: Marked in Appendix Chapter 45 with this marker:

6: Marked in Appendix Chapter 45 with this marker:

7: *See Indigo Book* rule 16.1.1; *ALWD Guide* rule 14.2(a); *Bluebook* rule 12.3.1(a). For more on citations, see Chapter 21.

8: This section does not appear in the excerpt in Appendix Chapter 45.

Rule-making authority

If a federal statute delegates rule-making authority to the executive branch, the rules and regulations the executive branch adopts have the effect of law. In that case, the statute itself is an incomplete picture, and you need to review the regulations to see how they apply. In the ADEA, section 628[9] grants that authority to the Equal Employment Opportunity Commission (EEOC), including authority to "establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest."

Understand, at the outset, that the EEOC may not actually have adopted any applicable regulations. Section 628 says only that it "may" do so. Sometimes, statutory authorizations of rule-making *require* that an agency make rules. Nevertheless, you cannot know until you check the Code of Federal Regulations (CFR) to see whether the EEOC has adopted regulations affecting your problem.

9: Marked in Appendix Chapter 45 with this marker:

Finding definitions

You will find definitions of terms used in statutes in a wide variety of places. First of all, note that terms in statutes are not necessarily capitalized to indicate that they are defined in the statute. This contrasts with the typical practice in drafting contracts, where any defined term is usually capitalized throughout the agreement.[10] Thus, you cannot assume that a term you see in a provision like section 623(a) has not been defined somewhere else; you have to check.

It is easiest to locate a term's definition when the statute defines it at the point where you see it used. For example, section 623(i)(9)(B)[11] alerts the reader that the term "compensation," at least as used in that subsection, "has the meaning provided by section 414(s) of title 26." You should have no trouble finding that definition.

10: See Section 24.1 for a discussion of capitalizing defined terms in contracts. Note Section 44.12's guidance against capitalizing terms unnecessarily elsewhere.

11: Not marked in Appendix Chapter 45.

But we cannot look only *within* a statutory section for relevant definitions; we must check the broader context. We know, for example, from our review of the contents of chapter 14 that section 630[12] provides definitions, and by its own terms, section 630's definitions are applicable to all of the chapter. To confuse matters a little, section 630(*l*) provides a different definition of "compensation" than the one from section 623(i)(9)(B). In that situation, you would expect the definition in 623(i)(9)(B) applies only to its immediate context, and the definition in 630 applies to the rest of the chapter.

12: Marked in Appendix Chapter 45 with this marker:

Based on the comments in the previous section, you should recognize that administrative rules and regulations may define a statutory term if the statute grants rule-making authority to the executive.

It's also possible that a portion of the statutory compilation like Title 29, which governs labor and includes the ADEA, might have a chapter dedicated to definitions. But we can see from the title's table of contents[13] that it does not have a chapter dedicated to definitions.

13: Marked in Appendix Chapter 45 with this marker:

Finally, the United States Code, like many state statutory compilations, has some definitions that are the default for certain terms for the whole compilation. In the U.S. Code, you'll find them in Title 1, Chapter 1.[14] There, in section 1,[15] you will find some general guidance on interpreting gender, number and verb tense. Sections 2 through 8 address interpretation of several particular words, including section 4's definition[16] of the word "vehicle," a term that has often been the focus of philosophical discussions about vagueness in the law.[17]

14: Marked in Appendix Chapter 45 with this marker:

15: Marked in Appendix Chapter 45 with this marker:

16: Marked in Appendix Chapter 45 with this marker:

Of course, the definition of a statutory term simply may not exist in the statute or regulations. In that case, you need to look at the case law interpreting the statute to see whether courts have given it a definition.

17: For an example of a 'vehicle' conundrum, see Section 6.1.

Finding 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. Consider the operative language in section 623(a) of the ADEA. The language there is unqualified: "It shall be unlawful for an employer . . . to discharge any individual . . . because of such individual's age . . . ." But just a few subsections away, in 623(f),[18] we learn that it "shall not be unlawful for an employer . . . to take any action otherwise prohibited under subsection[] (a) . . . where age is a bona fide occupational qualification" for the job. An an example of a BFOQ might be where the employer is casting an actor to play a teenager in a movie. There, a youthful appearance is a BFOQ in actor candidates, and a fifty-something actor probably would not have a claim under the ADEA if passed over for someone much younger.

18: Marked in Appendix Chapter 45 with this marker:

You can see immediately that Doll Face might make this kind of argument in the case of Mr. Chen's termination, arguing that youthful looks are essential in the company's salespeople.

But the exceptions to section 623 don't live only within section 623. Consider section 631,[19] cryptically titled "age limits." Its subsection (a) provides:

19: Marked in Appendix Chapter 45 with this marker:

> **Individuals at least 40 years of age**
>
> The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

This exception would appear to be fatal to Mr. Chen's claim against Doll Face, as we know he is only thirty-eight years old.

Don't panic!

As we saw from this section of this chapter, you cannot assume that all the information you need to apply a statutory section to a problem appears only within that section. To apply the forty-one words of section 623(a)(1), you need to check the whole of section 623, applicable parts of Chapter 14, and perhaps even Chapter 1 of Title 1 of the U.S. Code. These tasks may seem overwhelming when you are first learning about applying statutes to legal problems.

But don't panic. First, early in your law school experience, you will likely get pretty clear guidance from your professors about where to look. Second, you will get more comfortable knowing where you need to look—and when—as you get more experience. And finally, you should recognize that part of your professional value as a lawyer is that you understand these complexities. If it were easy, anyone could do it!

But the next section provides you some relief, too, by helping to identify parts of the statute you probably do not need to read or analyze as carefully.

22.4 The section's organization

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. For example, you can quickly determine that many of the subsections of section 623 do not apply to Mr. Chen's 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.

You need at least to browse the other subsections of 630 before applying subsection (a). But you have no evidence that any employment agency or labor organization was involved in Chen's case, allowing you to avoid analyzing subsections (b) and (c).[20] And this is true for most of the other subsections of section 630. But as we discussed above, subsection 623(f), which recognizes age may be a BFOQ, might be applicable to your problem, because it identifies an exception to 623(a) potentially relevant here.

20: Not marked in Appendix Chapter 45.

All the steps in this and previous sections of this chapter allow you to proceed to actually briefing and outlining (or drawing the shape of) the statutory provision at issue in your problem.[21] But you have a little more

21: For guidance, see Section 20.1.

work to do before you can apply the statute to Mr. Chen's problem. In our system, the statute is only the beginning. Many events that happen after the legislature adopts the statute can affect its application.

22.5 Subsequent history

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

As a preliminary matter, you should note that we have been looking at a copy of the U.S. Code in a hard-copy book dated 2018.[22]

22: See the volume title pages in Appendix Chapter 45 with this marker:

A lot could have happened since then, even in the Congress. So you need to look for one of the sources online (or for the print supplement to this volume of the 2018 edition) to confirm that the statutory language has not changed.

One critical step is to *Keycite* (on Westlaw) or *Shepardize* (on Lexis) the statute to verify that it is still good law. These tools provide brightly colored flags to indicate whether the statute's validity is in doubt.

How you perform the other steps necessary to *update* the statute 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. For example, you can click on "Notes of decisions" in Westlaw on the screen where you are viewing section 623, and it will show you an index of topics and identify court opinions that have cited, and potentially interpreted, section 623 in relation to those topics. You might learn, for example, that even if Mr. Chen were forty years old or older, the type of evidence he has so far would not be enough for him to sustain his claim against Doll Face.[23] Similarly, looking at the same statutory provision on Bloomberg Law, you could quickly see whether there is a current statutory proposal that could affect your client's claim. Finally, you might look at the section on Lexis and click on the link that identifies other citing references to the statute: They can link you to any applicable regulations or to law review articles and other secondary materials that might help you interpret and apply the statute.

23: For help reading and interpreting court decisions, see Chapter 23.

These tools 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 as the paid services do. 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 that free access to the commercial services will represent your practice experience.

22.6 Concluding thoughts

Nothing in the law is ever free of complexity. If you perform all the steps in this chapter, you may find that a statutory provision has a straightforward application to your legal problem. But you may also be left with a statute that has ambiguous or vague language. If that's the case, your effort is not at a dead end: You can use the tools for interpreting texts that Chapter 8 provides. At that point, however, you should be prepared to move into the advocate's role: You will likely have to persuade an opposing party or judge that your interpretation and application of the statute are correct.

Reading opinions of courts | 23

Brian N. Larson

23.1 Introduction

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 a tool for understanding a case. *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.[1] I concur.

1: *See, e.g.*, Christine Coughlin, Joan Rocklin, & Sandy Patrick, *A Lawyer Writes: A Practical Guide to Legal Analysis* 55-59 (4th ed. 2024).

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).

23.2 Opinion's context

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.[2] You may want—or need—to find it again later.

2: See the discussion of research logs—and their importance—in Section 12.3.

23.3 Opinion's organization

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 facts 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 51 and Chapter 52. Different research services provide different formats for reports of opinions, and you should learn them in law school.

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.

23.4 Opinion's status

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.

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 to your next authority.

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

23.5 Briefing the opinion

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 and include in your brief the following information, in addition to the information noted above:[3]

- 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?

3: These questions build on Christine Coughlin, Joan Rocklin, & Sandy Patrick, *A Lawyer Writes: A Practical Guide to Legal Analysis* 59-64 (4th ed. 2024) and Bryan A. Garner, *The Redbook* § 15 (4th ed. 2018).

Reading contracts 24

Elizabeth Sherowski

When parties enter into a transaction, lawyers use contracts to record the parties' obligations to each other.[1] Think of a contract as the 'rules' governing the parties' conduct related to the transaction. Some common examples of contracts include residential leases, agreements for the sale of goods or property, and agreements for the sale or acquisition of businesses.

Contracts are often long and confusing to read. They are dense with information and sometimes include convoluted language like 'the party of the first part' and 'on or before the fifth day following the receipt of the goods.' But this doesn't mean that we should not read them—in fact, it means we should read them extra-carefully. It's our job as lawyers to be able to 'translate' contracts into language that we—and our clients—can understand.

24.1 Contracts are different than other legal texts

As you discovered in previous chapters, there are a number of legal genres, and each one has its own quirks and conventions that will inform how you read it. Here are some conventions of contract genres.

Purpose. The purpose of writing a contract is to memorialize the agreement between the parties. Because contracts document complicated transactions, the documents themselves are fairly complicated, with lots of terms laid out in very specific language. A contract is designed as a reference document; it is not intended to be read from beginning to end like a novel, or even like a legal argument. This influences both the audience and the style of the document, as we will see below.

Audience. Unlike some legal genres, contracts are written for multiple audiences. First and foremost, contracts are written for the *parties* to the agreement—the contract expresses what the parties are agreeing to do. Contracts are also written for *successor parties*, who may be stepping into the obligations outlined in the contract, although they were not originally a party to the agreement. For example, if Company A acquires Company B in a merger, Company A may become responsible for any contracts that Company B entered into before the merger, and Company A can only figure out what those obligations are by reading Company B's previous contracts. Finally, contracts are written for *interpreters*, usually courts or other decision makers (like arbitration panels or mediators), who must determine whether a party has breached the terms of the contract in a lawsuit or other dispute resolution action.

1: This chapter focuses on contracts that record agreements where the parties have negotiated the terms of the deal. There are other types of contracts that do not involve negotiation (like the 'Accept Terms of Service' button that you click when you install an app or sign up for a service). Whether the contract you are reading was negotiated or not, it's important to read the terms carefully to understand the parties' rights and responsibilities under the terms of the deal.

Style. Stylistically, contracts are unlike any other legal genre. Because they are designed to memorialize, rather than to inform or persuade, contracts use stylistic techniques that you may not have seen before in your other legal reading.[2]

2: See Chapter 36 for advice about how lawyers choose their style(s) for drafting.

Archaic language. While many genres of legal writing have embraced the *plain language* movement and discarded archaic, old-fashioned legalese, the genre of contract drafting has been slower to do so. Therefore, while you will rarely see archaic language like 'Further, affiant sayeth naught' and 'whereupon it is ordered and adjudged by this court' in modern judicial opinions, you may still see archaic language like 'now, therefore, in consideration of the mutual provisions contained herein,' or 'indemnify, defend, and hold harmless' in modern contracts.[3]

3: Since the late 1990s, the Plain Language movement has advocated for clearer and more modern language in contract drafting. *See* Joseph Kimble, Writing for Dollars, Writing to Please: The Case for Plain Language in Business, Government, and Law 47-48 (2012); Michael Blaise, *The Rise of Plain Language Laws*, 76 U. Miami L. Rev. 447 (2022). But lawyers have been drafting contracts in legalese for over 400 years, and it takes time to unlearn ingrained habits. So as you read contracts, you will see a range of language from very archaic and confusing to very modern and clear. Hopefully soon the latter will overtake the former.

Sections and headings. Most modern contracts are divided into sections by topic, and each section is labeled with a heading. Headings can be helpful in locating information, especially within longer contracts. Note, however, that many contracts contain a *headings clause*, which states that the headings are included only for informational purposes and are not actually part of the agreement. Although a section may be labeled 'Payments,' that section alone may not define all the payment obligations of the parties. An interpreter of the contract could still find a payment obligation for one of the parties embedded in another section of the agreement. And the section labeled 'Payments' may contain terms governing other aspects of the deal in addition to the payment terms.

Defined terms. Consider this contract term:

> XYZ Industries, a California Corporation ("Seller") agrees to sell its Fashionista Line of women's clothing (the "Goods") to ABC Retailers, an Ohio Corporation ("Buyer").

Lawyers use *defined terms*, like "Seller," "Goods," and "Buyer" here, as a shorthand way to refer to parties or things mentioned in the contract. Defined terms are usually capitalized throughout the contract and always refer to the same person or thing. Using defined terms can save space, avoid unnecessary repetition, and make the contract easier to read.

Drafting. We refer to the process of creating a contract as 'drafting,' rather than 'writing,' because, unlike memos and briefs, contracts are hardly ever written from scratch. Instead, contract drafters use *precedent documents* to guide the creation of their contracts. These precedent documents can be previously drafted contracts, contract templates from form books or online services, or AI-enhanced drafting tools that solicit information from the drafter and then use artificial intelligence to arrange that information into the first draft of the contract. Therefore, it's quite common to see similar, or even identical, language in similar contracts.

24.2 The structure of a contract

This section discusses many typical parts of a contract. Its notes make frequent references to the example contract in Appendix Chapter 49.[4]

4: If you are using an electronic copy of this text, the notes here link to Appendix Chapter 49, and the notes there link back here.

Most contracts begin with an introductory section that explains who the parties are and what type of agreement they are making. This section will usually contain a title and an *exordium* (a statement identifying the parties). It may also contain *recitals*, a background section which explains the reasons behind the agreement. Some longer contracts may also have a section at the beginning which lists the *defined terms* used in the contract.[5]

The *title* identifies what type of agreement the parties are making.[6] Depending on the type of contract you are reading, you may see titles like 'Residential Lease Agreement,' 'Agreement for the Sale and Purchase of Business Assets,' or 'Celebrity Endorsement Agreement.' Contract titles are generally written in general terms; you're much more likely to see a title like 'Stock Purchase Agreement' than 'Manufacturing Corporation Stock Purchase Agreement Between XYZ Asset Management and ABC Widget Company.'

The *exordium* identifies the parties to the transaction and often includes the parties' contact information.[7] The exordium also uses defined terms to show the reader how the parties will be identified in the rest of the contract. The exordium usually includes the date that the contract was signed.[8]

The exordium may be followed by *recitals*[9] (also called *'whereas clauses'* because they historically began with that word). Recitals provide the reader with a general idea of why the parties are entering into the agreement. However, because they come before the words of agreement, recitals are generally not thought of as part of the actual agreement and are not considered binding on any future interpretation of the contract.[10]

More complex contracts may include a *defined terms* or *definitions* section, which lists the defined terms used throughout the contract. If the contract you are reading has one of these sections, be sure to bookmark that page (or pages). If the contract you are reading does not have a defined terms section, this means that the contract's drafters provided any necessary defined terms wherever those terms first occur in the contract[11] (use your word processor's 'find' function to locate defined terms in these contracts).

Following the introductory material, most contract drafters begin the main body of the contract with *words of agreement*.[12] This section can be clearly written (e.g., 'the parties agree as follows') or written in archaic legalese (e.g., 'now, therefore, in consideration of the mutual promises contained herein, the aforementioned parties hereby agree as follows'). No matter how they are expressed, the words of agreement signal to the reader that the introductory material has concluded and what follows are the actual terms of the agreement.

After the words of agreement, most contracts state the central obligation(s) of the agreement.[13] This exchange of promises is a general statement of what each party is promising to do as part of the transaction (you'll learn in Contracts class that each party must promise something of value, otherwise the contract fails for lack of consideration). For example, Company Y promises to allow Company Z to use a certain piece of Company Y's intellectual property, and Company Z promises to pay Company Y a certain amount of money in exchange. Note that this section does not get into

5: It is less common but possible that the defined terms will appear near the end of the contract or even in a separate schedule or appendix.

6: See the example contract in Appendix Chapter 49 at page 456.

7: See the example contract in Appendix Chapter 49 at page 456.

8: The date listed in the exordium reflects when the contract was signed, but not necessarily when the contract takes effect. The contract may specify an "effective date" after the date of signing when the provisions of the contract become enforceable.

9: See the example contract in Appendix Chapter 49 at page 456.

10: *See, e.g., Virginia Fuel Corp. v. Lambert Coal Co., Inc.*, 781 S.E.2d 162 (Va. 2016). The parties can agree, however, to incorporate the recitals into their contract.

11: See the example contract in Appendix Chapter 49 at page 456 for an example of this 'define-as-you-draft' style.

12: See the example contract in Appendix Chapter 49 at page 456.

13: See Appendix Chapter 49 at page 456.

specifics, like the length of the term of the license, or who is responsible for attorneys' fees in the event of a dispute—the rest of the contract will contain all the particulars of the agreement.

With those formalities out of the way, now we reach the heart of the contract—the terms of the deal. The types of terms and how they are organized will be explained in Section 24.3 and Section 24.4.

After stating the terms of the deal, most contracts then include *boilerplate*[14] or *administrative terms*.[15] These are terms that contain information about how the contract will be executed. Many of these terms are standard, so you may see the same term used across many different types of contracts. For example, many contracts contain a provision stating that, in the event of a contract dispute, the parties agree to send the matter to arbitration rather than immediately filing a lawsuit. This provision might look the same in a consumer contract, a commercial lease, and a corporate merger agreement because it's not about the subject matter of the contract—it's about how the parties will act towards each other in the event of a dispute.

14: The term 'boilerplate' comes from the days when printers used embossed metal plates to print documents. Plates that could be used repeatedly in a variety of documents came to be known as 'boilerplate' after the metal sheets that reinforced steam boilers.

15: See the example contract in Appendix Chapter 49 at page 461.

Contracts end with a *testimonium*[16]—Latin for 'witness' or 'attestation.' Like its counterpart the exordium, the testimonium can be written in plain English ('Executed by the Parties on the date above') or in archaic legalese ('Witnesseth our hands and seals this 14th day of May in the year of our Lord 2024'). However it's written, the testimonium signals that all the terms of the contract have been stated, and the parties are agreeing to them by signing below.

16: See Appendix Chapter 49 at page 462.

Many contracts have *ancillary documents* attached at the end, such as schedules or exhibits.[17] *Schedules* (also sometimes called *appendices*) are documents that provide additional information about the terms of a contract. Traditionally, lawyers have read the content of the schedule as if it were included in the actual contract document. For example, in a transaction for a sale of business assets, the list of assets being purchased may be long and complicated. Rather than including all this information in the body of the contract, many drafters will put that information into a schedule at the end of the document. This allows the drafter to draft the exchange of promises as 'Buyer agrees to purchase the assets listed in Schedule A (the "Goods"),' rather than including the extensive list of items in the exchange of promises.[18] *Exhibits* are illustrations or samples of information referenced in the contract, like schematic drawings or sample ancillary agreements. Unlike schedules, exhibits are traditionally not read as if they were included in the actual contract (unless the contract requires that they should be read that way).[19]

17: See Appendix Chapter 49 at page 462.

18: See another example of using a schedule to list contract terms in Appendix Chapter 49 at page 456.

19: Some lawyers use the terms 'schedule' and 'exhibit' interchangeably. What we call these ancillary documents is not especially important; what matters is whether the parties intended the document to be incorporated into the agreement or to merely illustrate a concept without becoming part of the agreement. Effective contract drafters will specify in the agreement how the ancillary documents, whatever they are called, should be interpreted. See the example contract in Appendix Chapter 49 at page 456.

24.3 The contract's terms

In most contracts, the terms are organized *topically*—each section of the document contains all the obligations relating to a certain topic, like payments, remedies, delivery of the goods, etc. Some contracts are organized *chronologically*—sections are arranged in the order in which the obligations occur. For example, in an agreement for the sale of real property, the

contract would first list the pre-purchase obligations, like financing and due diligence, then list the obligations that would occur when the deal closes, and finally list the obligations relating to the purchaser taking possession of the property. And some contracts use *both topical and chronological* organization, where obligations are sorted by topic and the topics are then arranged in chronological order.

Regardless of how they are organized, there are four basic types of contract terms: covenants (also called obligations), rights, prohibitions, and declarations. The type of term will dictate whether the parties are required to, permitted to, or prohibited from doing something. These types of terms can be further modified by representations, conditions, and exceptions. Identifying which type of term you are reading will help you figure out the parties' duties to each other.

Covenants or obligations are terms that require a party to take a certain action. If the party does not do what the covenant requires, the party will be in breach of the contract. Common obligations include paying someone a certain amount of money, delivering a product by a certain date, and maintaining property or equipment in good condition. You can identify covenants by the use of the verbs 'shall' or 'will' (or, less frequently, 'must'[20]). Here are some examples of covenants:

> Seller shall deliver, and Buyer shall accept, the Aircraft at Buyer's address.[21]
>
> Tenant will pay Landlord the sum of $1050.00 per month as Rent for the Term of the Agreement.
>
> Lessee shall pay the cost of all repairs made during the Rental Period, including labor, material, parts, and other items.[22]

20: Some drafters reserve the use of 'must' for *conditions precedent*: conditions that must occur before a thing can happen (for example, 'students must take Math 1 before taking Advanced Calculus'). Most drafters do not make this distinction and treat all types of conditions the same. However, most drafters prefer to use 'shall' or 'will' as the operative verbs in obligations.

21: In all these examples, the capitalized words are defined terms that have been explained elsewhere in the contract.

22: See provisions describing covenants or obligations in Appendix Chapter 49 at page 457 and page 461.

Rights permit a party to do something if the party wants to. While covenants are obligatory (the party must do the thing), rights are permissive (the party can decide to do the thing or not). For example, in most leases, if a tenant does not pay the rent, the landlord has the right to evict the tenant, but is not required to do so if the landlord favors another course of action. You can identify rights by the use of 'may' or 'has the right to.' Here are some examples of rights:

> Lessor may recall any or all equipment upon ten (10) days written notice to Lessee.
>
> The Parties may extend the Agreement by mutual written consent not less than sixty (60) days before the expiration of the Agreement.
>
> In the event of Buyer's default or bankruptcy, Seller has the right to terminate this agreement immediately upon written notice.[23]

23: See provisions describing rights in Appendix Chapter 49 at page 458 and page 459.

Prohibitions are the opposite of covenants and rights. Instead of requiring or permitting something, prohibitions prohibit a party from taking an action. You can identify prohibitions by the use of the verbs 'will not' or 'shall not'

(or, less frequently, 'must not' or 'may not'). Here are some examples of prohibitions:

> Tenant shall not allow any other person to use or occupy the Premises.
>
> Landlord will not increase the rent during the term of this Lease.
>
> Consultant must not distribute the Documents to any third party.[24]

24: See provisions describing prohibitions in Appendix Chapter 49 at page 459 and page 459.

Declarations are statements that describe information related to the agreement. They do not technically impose obligations on the parties; rather, they state something about the agreement and, in doing so, make it true. There are no easy-to-find words that identify declarations; they are simply contract language that does not fall into any of the above categories. Here are some examples of declarations:

> Florida law governs this Agreement.
>
> Seller is a manufacturer and distributor of widgets in the United States and Canada.
>
> The pool is available for use by Tenants from 9:00 am until 9:00 pm every day.[25]

25: See examples of declarations in the in Appendix Chapter 49 at page 458 and page 458.

Representations and warranties are a subset of declarations. If you see the language '[Party name] represents and warrants that' before a declaration, this means that if the other party relies on that declaration, and the declaration is not true, the other party can seek remedies in contract or in tort. For example, if a contract for the sale of real property includes the provision 'Seller represents and warrants that the property is connected to the municipal sewer system,' and after the sale it turns out that the property is in fact not connected to the sewer system, the Buyer, who made the purchase relying on the truth of that declaration, can sue the Seller for breach of contract (or, less commonly, for the tort of misrepresentation).[26]

26: See an example of a representation and warranty in Appendix Chapter 49 at page 457.

Any of the types of terms described above can be further modified by *conditions*. A condition is an event that triggers a right, obligation, prohibition, or declaration. For example, a buyer may have the right to cancel its purchase if the seller is more than a month late delivering the goods. The seller delivering the goods late is the condition that triggers the buyer's right to cancel. If the condition never occurs because the seller always delivers the goods on time, the buyer will never have the right to cancel the agreement (at least not under that particular provision). Conditions are expressed in contracts as 'if . . . then' or 'in the event.' Here are some examples of conditional contract terms:

> If Seller delivers the Goods after the delivery date, then Seller will pay a penalty of 10% of the purchase price (a condition + a covenant).
>
> Landlord may enter the Apartment without notice in the event of an emergency (a condition + a right).

> In the event the Equipment is not maintained in good working order, Lessor will not return the Security Deposit (a condition + a prohibition).[27]

27: See examples of conditions in Appendix Chapter 49 at page 457 and page 458.

Contractual duties can also be modified by *exceptions*, which allow one rule in the contract to temporarily supersede another rule. For example, 'Seller will deliver a shipment of Goods every Monday during the term of the Agreement, unless Monday is a national holiday, in which case Seller will deliver the goods on the Tuesday following the national holiday.' Tuesday delivery is an exception to the general rule about delivery taking place on Mondays.[28] You can identify exceptions by the words 'unless,' 'except,' and 'notwithstanding.' Here are some examples of exceptions:

28: Note that the exception (Tuesday delivery) is triggered by a condition (Monday being a national holiday).

> Tenant will not keep any animals as pets, except as authorized by a separate written Pet Addendum to this Agreement.
>
> Unless extended by the mutual written consent of the Buyer and Seller, the Closing Date shall be within three (3) business days of Buyer's delivery of the Goods.
>
> Notwithstanding any said repossession, or any other action which Lessor may take, Lessee shall be and remain liable for the full performance of all obligations.

24.4 Some tips for reading contracts

Reading a contract involves a lot of flipping around from one place to another, and it's easy to lose your place when you're reading on a screen. For this reason, many contract experts recommend reading contracts in hard copy.[29] If you choose to read your contract on paper, it's also helpful to have pens and highlighters to mark up the document and some scrap paper for taking notes. You can use diagrams or flow charts to help you understand how the pieces of the contract work together.

29: *See, e.g.*, Sterling Miller, *Ten Things – How to Read a Contract*, Ten Things You Need to Know as In-House Counsel (Aug. 28, 2019), https://perma.cc/SX4E-Q3AA; Michael F. Fleming & Kenneth A. Adams, *Reviewing Business Contracts: What to Look for and How to Look for It*, ACC Docket (December 20, 2021), https://perma.cc/R7VK-UPA2.

The best place to start when reading a contract (after the title and exordium) is by skimming the *topic headings*. You can use the headings to make a list of the topics covered in the contract, then go back and fill in the list of terms as you read the provisions. It helps to get an overall picture of the structure of the contract before diving into the details.

As you begin to read the substantive provisions, note the *term* of the agreement. When does it start? Remember, it's not always the day the contract is signed. When does it terminate? Are there any conditions that could cause the agreement to terminate early?

Almost every contract will have *payment terms* somewhere in the document. Make sure that you understand who is paying whom, how much they are paying, and when and how to make those payments. If any of that information is ambiguous or missing from the contract, flag it for further review, and make sure your client doesn't sign the contract until any confusion on this issue is resolved.

Next, examine the duties that each party has to the other party. What are the obligations of each party? What rights do the parties have? Is there anything the parties are prohibited from doing? Are there any time constraints or other conditions or exceptions on these duties? Put all this information in your list under the appropriate topic headings.

Take note of any *representations and warranties*[30] in the contract. If your client is representing and warranting that something is true, make sure that it actually is true or will become true by the time the contract goes into effect.

In contracts, parties allocate the risk that something will go wrong in the performance of the agreement. Look for terms like *indemnification*, *insurance*, *liability*, and *hold harmless* to identify the ways that risk is allocated in the contract. These provisions could limit recovery if something goes wrong in the performance of the contract. Make sure that the other party's failure to perform will not negatively impact your client.[31]

Every contract should have provisions that explain the procedure for dealing with an alleged breach of the contract. Often the non-breaching party will have a duty to notify the breaching party of the alleged breach, and the breaching party will have a *right to cure* the breach. This process prevents the parties from having to litigate every little thing that goes wrong with the deal. However, if a provision is particularly important, there may not be a right to cure in the event of a breach. Be sure to note any contract terms that could result in immediate litigation or termination if breached (especially terms that your client is responsible for performing).[32]

If all else fails, and the parties need to litigate (or use some other dispute resolution process), the contract should specify where the action will be brought (*venue*), which jurisdiction's law will apply (*choice of law*), and any time limits on such actions (*statute of limitations*).[33] You should familiarize yourself with the contract law of the jurisdiction whose law will govern the contract.[34]

Be sure to note any schedules or exhibits attached to the contract. Read these carefully to make sure they contain what the contract says they should contain. If a schedule or exhibit is intended to be read as part of the agreement, make sure that the contract specifies this.

You will interpret the language of contracts using many of the same *canons* applicable to other legal texts.[35] So, as you read, watch out for inconsistencies in the contract's terms. If one section says that the initial payment is $20,000 and another section says the initial payment is $2,000, this could be a typographical error or a difference in understanding between the parties. Either way, you'll want to flag the inconsistency and make sure your client doesn't sign the contract until the confusion is resolved.

Also look for places where terms are used in a way that could lead to an ambiguous interpretation. A common example is the use of the term 'by' to indicate deadlines for performance. When a payment is due 'by the fifth day of each month,' does that deadline include or exclude the fifth day? It's possible to read it both ways, so this is an ambiguous term. It would

30: Don't confuse representations and warranties with other types of warranties that you may learn about in Contracts class, like the warranty of merchantability or a warranty that the goods are free from defects. Representations and warranties describe facts or conditions that are true *at the time the contract is executed*, while the other types of warranties are *future promises* to bear the risk of something going wrong during the performance of the contract. To see the difference, compare the representation and warranty at page 457 in Appendix Chapter 49 with the warranty of good quality at 460. The representation and warranty refers to Consultant's current status, while the warranty of good quality is Consultant's promise about the quality of work that will be done in the future.

31: See a sample insurance and indemnification provision in Appendix Chapter 49 at page 460.

32: See Appendix Chapter 49 at page 457 and page 460 (and note that neither provision is located in the section labeled "Termination").

33: See Appendix Chapter 49 at page 462 for an example of jurisdiction and venue provisions.

34: Every state in the U.S. has adopted some version of the Uniform Commercial Code (UCC), so the general principles of commercial law are similar in every jurisdiction. However, the UCC does not govern every type of contract (e.g., employment contracts, service agreements), so you will also need to familiarize yourself with the law that governs the type of contract you are reading.

35: See Chapter 8 for more.

be clearer to require the payment to be made 'on or before the fifth day of each month.'

The hardest part of reading a contract is identifying what's *not* included in the agreement. Are there possible remedies that are not explicitly stated because they would occur automatically under the governing law? Has the drafter failed to provide specific information about how to perform a contractual duty? Matters that are not specified in the contract will be governed by (1) the relevant law (e.g., the UCC or other statutes, regulations, or common law) or (2) the 'normal course of dealing' (the parties' previous conduct towards each other).

Check that your contract isn't missing any important terms by looking at other similar contracts.[36] Try to find contracts in the same jurisdiction and subject area as the contract you are reading and note what terms are included. If all your samples include a disclaimer of a statutory provision, but your contract does not, you should check with your supervisor to see if this was a simple omission or if there is a legal or business reason that the drafter elected not to include this provision.

36: See Section 36.4 on finding 'precedent' contracts and Section 36.5 on adapting them for your use.

24.5 A final thought

Any time that we learn how to read in a new genre, especially a new legal genre, it's slow going at first. We are like tourists in a new country—everything is strange and new, there may be a language barrier, and we often get confused. Reading contracts is no exception. When you're first starting out, it may take you an entire morning, or even an entire day, to get through a medium-sized contract. But each time you practice your contract-reading skills, you will get a little bit better and a little bit faster. Things that once seemed strange and unfamiliar will start to become routine. Soon, you will be reading contracts like a lawyer.

25 Cognitive contexts

Link to book table of contents (PDF only)

Joshua Aaron Jones

When asked what a lawyer does, most people respond with traditional concepts such as 'write' or 'argue.' That's often true. However, lawyers also teach. To teach is to impart knowledge or train someone.[1] Whether educating a client, educating others about the client's position, or educating colleagues in continuing legal education courses, teaching—imparting knowledge—through writing and advocacy are at the core of the lawyer's daily tasks. Sometimes the purpose is to simply provide information, so another may be better informed, such as when your client needs to make a decision based on your research, or to persuade, such as through a verbal negotiation, demand letter, or court filing.

Perhaps most importantly, as an attorney, you must continuously educate yourself.[2] During law school, you will sometimes feel that a professor is 'hiding the ball'; that could be true, but more likely, the concept is multi-faceted and complex and requires deeper independent additional teaching of yourself so that you can fully realize the concept. Even when you gain expertise in an area of law, no two cases are the same, and you must always refresh and confirm your current understanding of the law and figure out how it applies to the unique facts of the case at hand. Woe be the lawyer who enters court not realizing an important precedent was recently overturned!

The author's interest in and rapid growth of mind, brain, and learning science (MBLS) prompted the inclusion of this chapter. MBLS is a rapidly growing field of study that examines how the mind, brain, and nervous system work together to support learning. The field draws on insights from neuroscience, psychology, education, and other disciplines to understand how people learn and develop. MBLS research has implications for a variety of educational practices, including curriculum development, instructional design, and assessment. Though during law school you are not called upon to design a curriculum, your success depends on understanding the fuller curriculum at your school—context for each class, how each professor approaches that curriculum through instructional design, and frequent self-assessment to ensure your progress.[3]

For you, the law student and future lawyer, knowledge of MBLS can help you become a stronger, self-regulated learner through metacognition—reflecting on how you think and learn. This is a rapidly evolving field. With new theories and research emerging every day, you should stay aware of new developments that might strengthen your metacognition.[4] MBLS can also help you better understand your audiences and inspire new Universal Design for Learning (UDL) techniques that increase the accessibility of your legal writing and oral presentations.

1: Teach, Cambridge Adv. Learner's Dict. & Thesaurus, https://dictionary.cambridge.org/us/dictionary/english/teach (last visited Feb. 19, 2025).

2: For a list of attorney continuing education requirements in each state, see *CLE Requirements for Attorneys*, Lawline.com, https://perma.cc/8E5B-6UL6 (last visited Feb. 19, 2024).

3: You may be surprised that few professors have numerous graded assignments to build your final grade. Unlike legal writing courses, your other classes may only have a mid-term and a final. Though the ABA is considering new standards that would require more frequent formative assessments in every course, you would be wise to plan several self-assessments, spaced throughout the semester, to gauge your progress in a course.

4: There are numerous MBLS academic journals available such as Mind, Brain, and Education (Wiley), Journal of Neuroscience (Scrip), Trends in Neuroscience and Education (Elsevier), and Journal of Educational Psychology (APA).

This chapter offers a basic overview of education principles, such as learning theories, learning taxonomies, and Universal Design for Learning so that you can understand how humans learn, which will improve your learning and teaching. These concepts will be helpful during law school and throughout your career.

25.1 Learning theories

Learning theories are frameworks that explain how people learn. They provide insights into how learners acquire, process, and retain new information. Teachers and trainers, and even lawyers, use learning theories to develop effective instructional strategies. There are dozens of learning theories, but the following are the most widely accepted. However, keep in mind that no single learning theory is perfect. Each has strengths and weaknesses. The best approach to learning is to use a combination of theories so that individuals can benefit from personalized instruction. As you consider these theories, consider which type of learning theory works well for you and how you might use these with various audiences—clients, opposing counsel/clients, judges, juries, and colleagues at continuing education events. Hopefully, you'll realize that a combination of approaches usually works best.

Behaviorism

Behaviorism focuses on observable behaviors. This theory emphasizes the role of rewards and punishments to shape behavior—a concept known as conditioning. You may recall from psychology class the story of Pavlov's dog. Ivan Pavlov, a Russian physiologist, noticed that when his assistants entered the room, his dogs would salivate; they had come to associate an assistant's presence with being fed. The Pavlovian Response is an example of classical conditioning.[5]

5: Cindy Nebel, *Behaviorism in the Classroom*, The Learning Scientists, https://perma.cc/X3F7-Y8VR (last visited Oct. 1, 2023).

Key concepts

- **Stimulus.** An event or object that triggers a response.
- **Response.** A behavior that is elicited by a stimulus.
- **Conditioning.** A process of associating stimuli with responses.
- **Reinforcement.** A stimulus that increases the likelihood of a behavior occurring.
- **Punishment.** A stimulus that decreases the likelihood of a behavior occurring.

Example. Use rewards and punishments to reinforce desired behaviors, such as in-class games or 'gamification.'[6]

6: Gamification (GF), Interaction Design Found., https://www.interaction-design.org/literature/topics/gamification (last visited Feb. 19, 2025).

What's that sound?

Most people associate Pavlov's discoveries of conditioned reflex with his use of a bell to trigger dogs' salivation. Yes, there was more than one dog! In fact, he used many sound devices in his experiments, usually a metronome.

Brett McCabe, *Hopkins Researcher Discovers Everything We Know About Pavlov Is Wrong*, Johns Hopkins Magazine (Winter 2014).

Cognitivism

Cognitivism considers mental processes, such as thinking, problem-solving, and memory. According to cognitivists, humans acquire new knowledge by constructing mental models of the world. Those models help us interpret and understand new information.[7]

7: Gabrielle Lamonte, *Understanding Cognitivism: A Learning Theory*, EducaSciences (Aug. 25, 2023), https://perma.cc/Y8L9-88L8.

Key concepts

- **Mental models.** Cognitive representations of the world that learners use to understand and interpret new information.
- **Schemas.** Mental frameworks that organize knowledge and guide learning.
- **Cognitive load.** The amount of mental effort required to process information.
- **Learning strategies.** Techniques that learners use to acquire and retain new knowledge.

Example. Using mnemonics to remember the elements of a crime or the CREAC writing paradigm.

Constructivism

Constructivism emphasizes active learning. Constructivists believe that learners develop knowledge through experience and interaction with the world around them. In law schools, the Socratic Method and clinical classes place students at the center of learning so they can make realizations through doing. Constructivist approaches play a key role in professional identity development.[8]

8: Ratna Naranya et al., *Constructivism—Constructivist learning Theory*, Handbook of Educ. Theories 169 (IAP Information Age Publishing, G.J. Irby et al., eds. 2013).

Key concepts

- **Active learning.** Learners are actively involved in the learning process, rather than passively receiving information.
- **Meaningful learning.** Learners construct meaning from their experiences and interactions with the world around them.
- **Zone of proximal development.** The range of tasks that a learner can accomplish with assistance from a more knowledgeable peer, professor, or supervisor.

Example. Learning legal analysis by researching and writing a law office memorandum, the primary work of your first-year legal writing course.

Humanism

Humanism focuses on the individual learner's unique needs and motivations. Humanists believe people can reach a state of self-actualization to become the best version of oneself.[9]

Key concepts:

- **Self-actualization.** The process of becoming the best version of oneself.
- **Self-concept.** A person's belief about themselves and their abilities.
- **Maslow's Hierarchy of Needs.** A theory that proposes that people are motivated to satisfy their basic needs before pursuing higher-level needs, such as self-actualization.
- **Positive psychology.** A branch of psychology based on humanism that has individuals focus on their character strengths so that they may flourish in life.

Example. You write a scholarly paper as an independent study or law review note with support and direction from a supervising professor. This theory supports the idea of self-regulated, independent learning.

9: Susan R. Madsen and Ian K. Wilson, *Humanistic Theory of Learning: Maslow*, Encyc. Sci. Learning 1471 (Springer 2012).

Connectivism

Connectivism highlights the importance of connections in the learning process. The theory suggests that humans are constantly learning and adapting to new information and experiences. Connectivists believe people are connected to a vast network of information and resources, from which they can learn and grow.[10]

Key concepts

- **Networked learning.** Learning that takes place through connections to other people, resources, and ideas.
- **Meaning making.** The process of constructing meaning from new information and experiences.
- **Adaptability.** The ability to learn and adapt to new information and experiences.

Example. Conduct research with Westlaw, Lexis, BloombergLaw and other electronic databases.

10: George Siemens, *Connectivism: A Learning Theory for the Digital Age*, 2:1 Int'l J. Instructional Tech. and Distance Learning 3 (2005); Stephen Downes, *New Technology Supporting Informal Learning*, 2:1 J. Emerging Tech. in Web Intelligence 27 (2010).

25.2 Learning taxonomies

Like learning theories, there are many learning taxonomies. Learning taxonomies are frameworks for organizing types of learning and how they relate. Educators use learning taxonomies to classify learning objectives and to assess learners' progress towards those objectives.

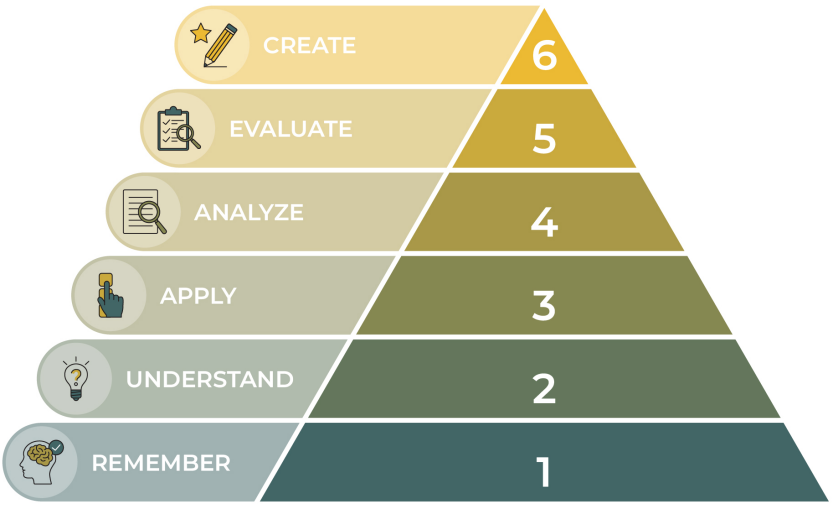


Figure 25.1: Bloom's taxonomy, cognitive domain. Image: Oleksii Bychkov https://www.oleksiibychkov.com.

Bloom's Taxonomy is probably the most well-known learning taxonomy. Benjamin Bloom created the model in 1950s, and David Krathwhol revised it in 2001.[11] It classifies learning objectives into three domains:

- **Cognitive.** Thinking skills, such as remembering, understanding, applying, analyzing, evaluating, and creating.
- **Affective.** Attitudes, values, and emotions.
- **Psychomotor.** Motor skills.

In the cognitive domain, Bloom's Taxonomy identifies a hierarchy to classify learning objectives, from simple to complex. The simplest learning objective is remembering facts, while the most complex learning objective is creating new ideas.

The SOLO Taxonomy is another widely used learning taxonomy, developed in the 1970s by John B. Biggs and Kevin F. Collis.[12] This model helps describe how students learn over time in five stages:

- **Unorganized.** Learners have little or no understanding of the material.
- **Pre-structural.** Learners have a superficial understanding of the material.
- **Uni-structural.** Learners can identify and describe individual concepts or facts.
- **Multi-structural.** Learners can identify and describe relationships between different concepts or facts.
- **Relational.** Learners can see the overall structure of the material and how the different concepts and facts fit together.

Bloom's Taxonomy and the SOLO Taxonomy are widely used. Other commonly referenced taxonomies include Barrett Taxonomy of Higher Order Thinking Skills,[13] the Marzano Taxonomy of Educational Objectives,[14] Harrow's Taxonomy of Psychomotor Objectives,[15] and Krathwohl's Taxonomy of Affective Objectives.[16]

Learning taxonomies can be used for a variety of purposes, such as developing learning objectives, assessing learner progress, and instructional design. They also help to ensure that learning objectives are clear and

11: Leslie Owen Wilson, *Anderson and Krathwhol Bloom's Taxonomy Revised*, Quincy College (2016), https://perma.cc/X7EE-8VQ3.

12: SOLO stands for Structure Observed Learning Outcomes. John B. Biggs and Kevin F. Collis, *Evaluating the Quality of Learning: The SOLO Taxonomy* (1982); *see also* John B. Biggs, *SOLO Taxonomy*, https://perma.cc/G386-WRYS (last visited Oct. 1, 2023).

13: Susan Masland Tatham, *Comprehension Taxonomies: Their Uses and Abuses*, 32:2 Reading Teacher 190 (1978).

14: Jeff Irvine, Marzano's New Taxonomy as a Framework for Investigating Student Affect, 24 J. Instructional Pedagogies 1 (July 2020).

15: Anita H. Harrow, A Taxonomy of the Psychomotor Domain (Longman 1972).

16: David Krathwohl, Benjamin Bloom, & Bertram Masia, *Taxonomy of Educational Objectives: Handbook II: Affective Domain* (1964).

measurable, and that instruction is aligned with the learning objectives. In other words, what is it that you want the audience to learn, and how do you know the learner has achieved that point of understanding? The taxonomies can help improve learning by making the process more efficient and engaging. However, learning taxonomies have limitations. For example, students may not progress through the different levels in a linear fashion, and classmates may progress at different rates. For example, when representing two parties, each of them may not have the same capacity for learning and one may reach a fuller understanding before the other.[17]

As a law student, you can use the learning taxonomies to better understand where you are on the path to developing skills and concepts. Self-meta-analysis is an invaluable skill for self-regulated learning, a major part of a lawyer's work.

17: Representing two parties in the same case can be tricky. Be aware of your jurisdiction's rules about conflicts of interests. For example, in most jurisdictions, a lawyer cannot represent both spouses in a divorce, and when a conflict of interest becomes apparent but can be permissible, the Rules of Professional Responsibility require disclosures and signed consent. *See* Model Rules of Pro. Conduct r. 1.7 (Am. Bar Ass'n 2023).

25.3 Universal Design for Learning

Universal Design for Learning (UDL) is an instructional design method that ensures learning materials are accessible for all learners, regardless of individual differences. All learners have different strengths and weaknesses, and though UDL principles are important for accommodating persons with disabilities, the design techniques benefit a wide pool of students, even those without disabilities.[18]

18: CAST, Universal Design for Learning Guidelines version 3.0 (2024), https://perma.cc/C4JX-VVCN.

Lawyers should consider these concepts when designing documents, discovery requests and responses, exhibits, and marketing materials:

Whether an intentional effort towards effecting UDL, many suggestions for legal writing, such as use of plain language while avoiding jargon or best practices for document design and typography, are UDL techniques. For example, using bold headings and appropriate spacing between headings and the narrative text help all readers move their eyes across the page more easily and help readers process the document's roadmap more efficiently. As a lawyer, you can create visual aids that help explain the law to a client who may have deficient reading skills. Law students can use UDL to redesign class materials, create flowcharts, and improve outlines.

You should always check your documents for maximum accessibility, which can easily be done in Microsoft Word, Adobe Acrobat Pro, and Google Docs.[19] Though these functions primarily look for design that may be problematic for screen-reading technology, they are also based on UDL principles and can benefit a wide audience.

19: Each of these platforms has a support page where you can learn tools within each application. YouTube is also a great source for tutorial videos. When you feel stumped with technology, take initiative to find the solution. A simple web search can quickly solve problems without troubling a supervisor. Take initiative and be self-sufficient!

What's your type?

Students and teachers have long bought into the misconception that humans have one learning style or another: visual, aural, reading/writing, and kinesthetic (VARK). There are more than 70 learning styles. And you may think that you only have one or the other. However, humans engage many sensory and cognitive process when learning, not just one.

In fact, a 2009 study showed there is no evidence that optimal learning occurs when instructors deliver material to match a student's learning *preferences*.

Nancy Chick, *Learning Styles*, U. Vanderbilt: Cntr. Teach. (2010), https://perma.cc/PS38-HCU9.

25.4 Scaffolding & chunking

No matter the learning theory, taxonomy, or combination to which you subscribe, two concepts will always benefit your self-regulated learning and your audiences' learning: scaffolding and chunking.

Scaffolding

Consider yourself as a new law student. Legal writing, with its precise language and structured logic, often overwhelms novice law students. Your legal writing professor would never ask you to write an appellate brief during the first week of class. Enter scaffolding—a teaching method that bridges the gap between novice and expert by providing temporary support as students climb toward mastery. If your professor asked you to write an appellate brief on the first day, without guidance, you would drown in procedural rules and rhetorical expectations. Scaffolding breaks complex processes into achievable steps: example analysis, drafting and revising, and eventually independent drafting. Similarly, you cannot expect your clients to fully understand the panoply of options you uncovered through complex research without beginning your meeting with the basic information. Scaffolding information in chunks helps an audience feel that challenging concepts can be realized. Scaffolding is more than a teaching or learning tactic; it is a philosophy that recognizes mastery as a journey, not a destination.

Scaffolding originates from psychologist Lev Vygotsky's *zone of proximal development*,[20] which posits that learners thrive when tackling tasks just beyond their current ability—if they receive expert guidance. For example, your professor might dissect a well-crafted legal memo, such as each piece of the CREAC writing paradigm, highlighting how its analysis connects facts to precedent. Over time, you internalize these techniques and apply them independently.

This approach aligns with Bloom's Taxonomy and other learning taxonomies, which prioritize progressing from foundational skills (e.g., memorizing the IRAC structure) to advanced critical thinking (e.g., evaluating judicial reasoning). Scaffolding also reduces cognitive overload by segmenting complex tasks. A student researching a multi-issue case, for instance, might first focus on identifying relevant statutes before synthesizing arguments.

20: Saul McLeod, *Vygotsky's Zone of Proximal Development*, SimplyPsychology (Mar. 25, 2025), https://perma.cc/CWY8-7HMM.

Technique

- **Modeling.** For example, *thinking aloud* while walking through examples or creating examples.
- **Practice.** Drafting and revising with feedback from an expert.
- **Incremental complexity.** For example, drafting parts of a memo or brief before drafting an entire memo or brief.
- **Feedback.** In a client or CLE audience context, engaging with the listener to ensure understanding can offer an opportunity for your provision of feedback and clarification.

Scaffolding's principles extend beyond law school. Junior attorneys often learn by shadowing mentors—observing how seasoned lawyers draft discovery requests before attempting their own. Law firms might use document automation software that guides associates through complex filings, mirroring the structured support of academic scaffolding. Learning these concepts now will help you be a stronger supervising attorney, including supervision of law student clerks, newer associate attorneys, legal assistants, and paralegals.

Chunking

Imagine walking into a library where every book is dumped into a single heap. The chaos would make finding information nearly impossible. This is how the human brain often perceives raw, unorganized legal material—a jumble of statutes, cases, and rules. Chunking, the process of breaking complex information into smaller, logical units, acts as a librarian for the mind. By grouping related ideas, chunking transforms overwhelming data into structured knowledge. In this chapter, we explore how this cognitive tool shapes legal education, empowers students, and sharpens professional advocacy.

Law professors routinely use chunking to help students navigate the density of legal concepts. Consider how a professor might teach a complex case such as *Brown v. Board of Education*, 347 U.S. 483 (1954), the seminal case on desegregation of American public schools. Instead of presenting the case as a monolithic text, they dissect it into digestible sections: the factual background, the central legal issue, the court's holding, and the 'separate but equal is inherently unequal' concept. This approach mirrors how experts —you as a law student and eventually as a practicing attorney—naturally analyze cases, one piece at a time. This method of thinking and analysis will also translate to how you communicate with various audiences.

The Socratic Method, a hallmark of legal education, also relies on chunking. Professors guide students through layered questions, incrementally building an argument. For example, a criminal law professor might ask, 'What's the actus reus here?' followed by, 'Does the defendant's intent match the statute's mens rea requirement?' Each question isolates a component of the analysis, training students to think in discrete, manageable steps.

Legal writing instructors chunk with frameworks like IRAC (Issue, Rule, Application, Conclusion) or CREAC. By dividing analysis into these four

stages, students learn to organize their thoughts systematically. A memo might first identify the issue (Can a landlord enter a tenant's apartment for inspection without notice?), state the governing rule (Cal. Civ. Code § 1954), apply it to the facts (The landlord must provide reasonable notice. . .), and conclude. This structure prevents overwhelmed first-year students from drowning in ambiguity.

Law school inundates students with information—casebooks thick enough to double as doorstops, outlines that sprawl for dozens of pages. Chunking combats this overload by creating cognitive 'folders' for storage and retrieval. When studying for exams, a student might break the elements of negligence into four parts: duty, breach, causation, and damages. This not only aids memorization but also clarifies how concepts interrelate.

Consider outlining, a rite of passage for law students. A chunked outline for Constitutional Law might start with broad topics (Judicial Review, Federalism), then subtopics (Commerce Clause, Taxing Power), and finally key cases about those concepts. This hierarchy mirrors the brain's preference for categorized information, making review sessions more efficient.

Even exam strategies benefit from chunking. Instead of panicking over a fact pattern involving multiple torts, you can methodically chunk your response:

1. Step 1: Identify the issues—intentional torts (battery, assault).
2. Step 2: What are the rules for those intentional torts?
3. Step 3: Consider defenses.
4. Step 4. How do the rules apply to the facts?
5. Step 5. Conclusion—what should be the outcome for the precise question asked by the professor?

This methodical approach transforms a chaotic prompt and your brain, full of information from several classes, into a clear roadmap that your audience—the professor—can understand. Again, these methods will carry into your law practice and help you explain complex topics to your clients, opposing counsel, subordinates, colleagues, judges, and juries.

To harness chunking, start small. Rewrite a convoluted court opinion into a bullet-point summary. Use headings like *Facts*, *Issue*, and *Takeaway* to force structure onto chaos. When outlining, limit each section to three to five subpoints—any more defeats the purpose. Seek feedback: Does your memo's "Analysis" chunk flow logically? Does your client leave meetings with a clear to-do list?

Remember, chunking is iterative. A deposition outline might undergo five drafts as you condense questions into themes. A closing argument might be restructured to lead with the strongest chunk of evidence. With practice, chunking becomes second nature—a way to tame the wilderness of legal complexity.

Chunking is more than a study hack or writing tactic; it's a fundamental alignment with how the brain processes information. By embracing this strategy, you'll not only survive law school but thrive in practice, where the ability to simplify without oversimplifying defines great lawyers. Whether

you're briefing a case, counseling a client, or persuading a judge, chunking turns chaos into clarity—one deliberate piece at a time.

25.5 Summary

Though you may never have an actual classroom, you should consider your study space a classroom, and you should envision your future office, courtrooms, and other venues as classrooms. The law is a teaching profession—the imparting of information from yourself, the professional, to an audience that needs the knowledge you hold. Writing and speaking, whether to inform or to persuade, are the tools through which you will educate others. A strong foundation in learning theories, learning taxonomies, teaching methods, and evolving MBLS will help you be a competent, self-regulated learner who can better assist clients, persuade opposing counsel, judges, and juries, and inform colleagues. The law degree is not a destination in your learning journey, and you are your life-long teacher.

26 Material contexts

Susan Tanner

As a law student preparing to enter the legal profession, understanding material contexts is crucial to your development as an effective advocate. The financial barriers, resource constraints, and time pressures discussed in this chapter aren't just abstract concepts—they're practical challenges you'll face throughout your career. Whether you plan to work in the public service, private practice, or nonprofit sector, your ability to navigate these material restrictions while maintaining high professional standards will significantly impact your effectiveness as a lawyer. By examining these contexts now, you'll be better prepared to address systemic barriers to justice, manage limited resources, and develop sustainable practices that serve both your clients and your professional goals.

In legal practice, money and resources play pivotal roles that often go unnoticed. These material contexts have profound implications for access to justice, the provision of legal services, and the overall fairness of the legal system. This chapter critically examines the influence of money and resources on legal practice, shedding light on the financial barriers faced by individuals seeking legal representation, the constraints faced by lawyers in balancing client needs and maintaining their reputation, and the impact of time constraints. Drawing on social science data and legal research, we aim to foster a deeper understanding of the complex dynamics at play in the legal profession.

26.1 Financial barriers

Financial stakes and costs of litigation

The financial burden associated with legal representation remains a significant barrier in accessing justice for many individuals. A considerable proportion of wronged parties find themselves unable to engage a lawyer due to high initial consultation fees, retainer costs, and other associated legal expenses.[1] Often, these costs outweigh the potential benefits of a lawsuit, especially in cases where the financial stakes are low. This dynamic serves as a gatekeeping mechanism that filters out smaller claims, leaving many wronged parties without a viable path to legal redress.

1: Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 Wisc. L. Rev. 101.

Disproportionate impact on lower-income groups

Studies demonstrate that the lack of financial resources disproportionately impacts lower-income groups, leading to a justice system that caters

predominantly to those with greater financial means.[2] For example, a report by the Legal Services Corporation found that 86% of the civil legal problems reported by low-income Americans received inadequate or no legal help in 2017.[3] The justice gap between low-income and high-income litigants is not merely an issue of economics but also one of systemic inequality, as it perpetuates social and legal disadvantages for vulnerable populations.

Criminal defendants face similar challenges. The limited availability of public defenders and their often-overwhelmed caseloads force many defendants to either rely on inadequate representation or resort to self-representation.[4] Self-representation is a particularly fraught choice, as most laypeople are ill-equipped to navigate the complexities of the legal system.[5] This issue leads to questions of whether a legal system that purports to offer equal justice under the law can truly do so when resource constraints severely limit the quality and availability of representation.

2: Marc Galanter & Thomas Palay, *Tournament of Lawyers: The Transformation of the Big Law Firm* (1991).

3: Legal Services Corporation Report, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans* (2017), https://perma.cc/V9BX-AAS6.

4: Lynn Langton & Donald J. Farole, Jr., Bureau of Justice Statistics Selected Findings: Census of Public Defender Offices, 2007 (Jun. 17, 2010).

5: Christine E. Cerniglia, *The Civil Self-Representation Crisis: The Need for More Data and Less Complacency*, 27 Geo. J. on Pov. L. & Pol'y 355 (2020).

26.2 Public defenders & the right to counsel

The Sixth Amendment to the United States Constitution guarantees the right to counsel in criminal prosecutions, a right the Supreme Court further delineated in *Gideon v. Wainwright*, 372 U.S. 335 (1963). The Court held that states are required to provide counsel to indigent defendants charged with felonies. This decision ostensibly forms the bedrock for equitable access to justice in the criminal legal system, but public defenders are often constrained by material contexts. Despite the constitutional mandate, numerous challenges affect the public defender system.

One primary concern is the overwhelming caseloads that many public defenders face. Research indicates that public defenders often handle caseloads that far exceed national guidelines, affecting their ability to dedicate adequate time and resources to each case.[6] In certain jurisdictions, some public defenders report handling as many as 200 to 300 cases simultaneously, a burden that raises questions about the efficacy and fairness of the legal representation provided.[7]

The crisis in public defense is further exacerbated by systemic underfunding. Studies have shown that this underfunding often results in inadequate legal representation, thereby compromising the constitutional right to counsel.[8] Inadequate representation manifests in various forms such as less thorough case investigations, fewer filed motions, and decreased likelihood of taking cases to trial. This inadequacy not only undermines the defendant's right to a fair trial but also places additional burdens on other parts of the criminal justice system, such as jails and probation services.

6: Nicholas Pace, Malia Brink, Cynthia G. Lee, & Stephen F. Hanlon, National Public Defense Workload Study (RAND Corp. 2023), https://perma.cc/SN8P-BNP4.

7: Id.

8: James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 Yale L. J. 154 (2012).

26.3 Legal Aid & legal services

Just as public defenders face resource constraints in criminal cases, Legal Aid organizations and civil legal service providers struggle with similar

challenges in civil matters. These organizations play a crucial role in addressing the justice gap by providing free legal assistance to low-income individuals in cases involving housing, family law, public benefits, and other essential needs. A 2022 Legal Services Corporation study[9] found that these organizations must turn away nearly half of all eligible clients due to resource limitations, leaving millions of Americans without necessary legal assistance.

9: Legal Services Corporation, *Legal Services Corporation Report, The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans (2017).*

Like public defenders, civil legal service attorneys often manage overwhelming caseloads while operating under strict funding constraints. Many Legal Aid organizations rely on a combination of federal funding, state grants, and private donations, creating constant uncertainty about resource availability. This instability affects both the quantity and quality of services they can provide, forcing difficult choices about which cases to accept and how to allocate limited resources.

For students considering public interest careers or planning to incorporate pro bono work into their practice, understanding these systemic constraints is essential. Legal Aid organizations often offer internships and post-graduate fellowships that provide valuable experience in managing resource limitations while serving vulnerable populations. Additionally, many private practitioners partner with these organizations through pro bono programs, helping to bridge the resource gap while fulfilling their professional obligation to improve access to justice.

26.4 Pro se litigants

In cases where legal representation is financially out of reach, individuals may resort to self-representation, known as pro se litigation. However, navigating the legal system without legal expertise presents significant challenges. Pro se litigants face disadvantages such as lack of legal knowledge, unfamiliarity with court procedures, and limited access to legal resources.[10] These challenges often result in unequal outcomes and hinder access to justice for those who cannot afford legal representation.

10: Christine E. Cerniglia, *The Civil Self-Representation Crisis: The Need for More Data and Less Complacency*, 27 Geo. J. on Pov. L. & Pol'y 355 (2020).

You may someday find yourself going up against a pro se litigant, or filing an appeal on behalf of someone who formerly represented themselves and had an unfavorable outcome. These realities can pose special challenges.

When facing a pro se litigant, legal professionals must navigate a complex landscape that goes beyond the usual adversarial nature of the judicial system. There is a delicate balance to be struck between fulfilling one's ethical obligations to the court and representing one's client effectively. The American Bar Association's Model Rules of Professional Conduct suggest an attorney has a duty of fairness to the opposing party and counsel.[11] This obligation becomes especially poignant when the opposing party lacks formal legal training.

11: Model Rules of Pro. Conduct r. 3.4 (Am. Bar Ass'n 2023).

One of the most immediate challenges you may encounter is the need to adjust your communication style. Legal jargon and procedures that are second nature to you can be incredibly daunting to a layperson. In this

context, there is an inherent power imbalance that can compromise the integrity of the judicial process. While you should not compromise the quality of your representation, you may find it beneficial to explain legal terms and procedures more explicitly than you would when dealing with opposing counsel.

Another significant challenge arises from procedural aspects. Pro se litigants may not be aware of deadlines, proper filing procedures, or even the most basic aspects of courtroom decorum. Courts have, in some cases, displayed a certain level of leniency towards procedural errors made by pro se litigants. However, this is not a uniform practice and varies from jurisdiction to jurisdiction.[12] Your obligation here is to maintain a sense of fairness without overstepping the boundaries of your role as an advocate for your client.

12: Jona Goldschmidt, *How Are Courts Handling Pro Se Litigants?* 82 Judicature 13 (Jul.–Aug. 1998).

Ethical issues can arise when you encounter pro se litigants. For instance, some argue that a lawyer should offer legal advice to a pro se opponent in the interest of fairness and justice. However, this raises concerns about conflicts of interest and might be at odds with your responsibility to your own client.[13] The rules of professional conduct often provide limited guidance in such grey areas, necessitating the use of personal judgment guided by ethical principles.

13: Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation, NCSC: Court Statistics Project*, 20 Caseload Highlights 1 (Jan 2013).

Implications for appeals

When it comes to filing an appeal after a pro se litigant has had an unfavorable outcome, the issues are further complicated.[14] The appellate court will scrutinize not just the merits of the case but also the procedural fairness accorded to the pro se litigant. Any perceived procedural unfairness, even if unintentional, may provide grounds for remand or even reversal.[15] Thus, dealing with pro se litigants demands an extra layer of caution in order to preserve the record for appeal.

14: For strategic considerations relating to appeals generally, see Section 35.1 and Section 35.2.

15: *Martin v. D.C. Ct. of Appeals*, 506 U.S. 1 (1992).

Working with pro se litigants necessitates a recalibration of both procedural tactics and ethical considerations. While the primary duty of a lawyer remains towards his or her own client, the justice system also requires a degree of fairness and equity that can make interactions with pro se litigants uniquely challenging. These challenges call for a nuanced approach, grounded in an understanding of both the letter and the spirit of the law.

26.5 Influence of resources on legal practice

Financial and time resources have a substantial impact on legal practice, affecting both law firm dynamics and the ability to address client needs effectively. Below are expanded discussions on how financial considerations within law firms and time constraints can influence the provision of legal services.

Law firm dynamics and financial considerations

Financial considerations are a cornerstone in the operation of law firms, fundamentally shaping how they operate. One major influence is the billing structure, which generally falls under hourly billing, flat fees, or contingency fees. Hourly billing encourages thoroughness but may dissuade potential clients who fear uncontrollable costs. Contingency fees, on the other hand, provide access to legal representation for clients who might not be able to afford upfront costs but can also drive firms to pick only the cases with the highest likelihood of success.[16]

16: Stephen Daniels & Joanne Martin, *It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs' Practice in Texas*, 80 Tex. L. Rev. 1781 (2002).

Client selection is often driven by a law firm's focus on profitability. Cases that promise significant financial returns are generally prioritized, which frequently results in a concentration on corporate clients or high-value claims. Consequently, individuals with lower-value claims or those who can't afford premium legal services can find themselves underserved or completely unrepresented.[17] This aspect raises ethical and social justice concerns, contributing to a growing justice gap in society.

17: Marc Galanter & Thomas Palay, *Tournament of Lawyers: The Transformation of the Big Law Firm* (1991).

Resource allocation within a law firm also heavily relies on financial considerations. Firms may allocate more skilled labor and better research tools to high-value cases, thereby further exacerbating disparities in the quality of legal representation available to different segments of society. Such internal allocation can result in what legal scholars term "two-tiered justice," where the quality of legal representation one receives is directly proportional to one's ability to pay.[18]

18: Hadfield, Gillian K., *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 Mich. L. Rev. 953 (2000).

Time constraints and balancing client needs

Time is another resource that significantly influences legal practice. Lawyers often have to juggle multiple cases, administrative duties, and the continual need for professional development. The billable hour system, common in many law firms, puts additional pressure on attorneys to allocate their time efficiently.[19]

19: Steven J. Harper, The Tyranny of the Billable Hour, N.Y. Times (March 28, 2013), https://www.nytimes.com/2013/03/29/opinion/the-case-against-the-law-firm-billable-hour.html.

These constraints can impact client service in various ways. Due to time limitations, lawyers might have to decline cases that require significant investment in time but offer low financial returns. Even when cases are accepted, time pressure can affect the quality of legal services, potentially leading to rushed analyses, inadequate client communication, or limited research.

Balancing client needs becomes particularly challenging under time constraints. For instance, time-sensitive cases can push less urgent matters down the priority list, regardless of their overall significance or the client's needs.[20] Furthermore, time pressures can force lawyers to narrow their roles, focusing only on immediate legal tasks rather than offering holistic solutions that address the broader life circumstances affecting a client's legal situation.

20: William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 Rutgers L. Rev. 1 (1991).

Reputation & balancing client needs

The reputation of a lawyer or law firm serves as one of the most vital intangible assets in the legal profession. A solid reputation can open doors to new clients, facilitate partnerships, and establish a lawyer as a trusted authority in specific areas of law. Nevertheless, this focus on reputation can introduce complexities in balancing client needs, as lawyers face the constant interplay between ethical considerations, client expectations, and professional standing.

The ethical obligations that lawyers have often require them to act in the best interests of their clients.[21] This commitment sometimes clashes with reputation management, especially when a case is highly controversial or politically sensitive. For instance, taking on a highly unpopular client could tarnish a lawyer's reputation, but declining representation due to unpopularity could be considered an abdication of ethical duties. Therefore, lawyers must make critical decisions that uphold their ethical obligations without severely compromising their reputation.[22]

21: Model Rules of Pro. Conduct r. 1.3 (Am. Bar Ass'n 2023).

22: Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 Mich. L. Rev. 338 (2000).

Clients often come to lawyers with a range of expectations about the legal process and potential outcomes. Meeting these expectations can be crucial for a lawyer's reputation, as satisfied clients are more likely to provide referrals and positive reviews. However, client expectations are not always realistic or ethical. For example, a client may push for a rapid settlement to avoid the hassle of prolonged litigation, even if such an approach is not in their best interest. Balancing these client expectations while also securing the most favorable outcome can be a tightrope walk, especially when considering the long-term impact on the lawyer's reputation.

The legal community, including peers, judges, and legal scholars, significantly influences a lawyer's reputation. Lawyers are often wary of how their actions in a current case could impact their status or credibility in future cases. As a result, lawyers may avoid certain legal strategies or arguments that, while beneficial to a client, could be viewed as contentious or unorthodox by the legal community. This self-imposed restraint can sometimes compromise the vigor of client representation, leading to ethical dilemmas.[23]

23: David Luban, *Lawyers and Justice: An Ethical Study* (1988).

The need to maintain a favorable reputation while fulfilling ethical duties and meeting client expectations forms a complex balancing act. Decisions made in the course of legal representation often involve intricate calculations weighing the potential benefits and drawbacks for both the client and the attorney's professional standing. The stakes are further elevated by the highly public nature of legal work, where any misstep can be scrutinized and criticized, affecting future client relations and career advancement.

26.6 Managing your limited resources

Understanding the material contexts that shape the legal landscape is not just advantageous—it's imperative. Money, resources, and time constraints

act as formidable determinants that affect both the legal system at large and the day-to-day realities of legal practice.

The financial aspect is a pivotal point of concern, as it directly impacts the accessibility and equity of legal services. As a future legal professional, you need to be acutely aware of how financial barriers restrict many individuals from seeking the legal help they need. This limitation is manifest in the overwhelmed public defender system and the rise of pro se litigation. If you find yourself in the public sector, you will likely grapple with resource constraints that can hamper your ability to provide adequate defense. Conversely, if you enter private practice, the economic drive to focus on profitable cases will pose ethical and practical dilemmas about whom to represent and how to allocate resources.

Within law firms, resources are often deployed with an eye towards maximizing profit. As a new associate, you will be subject to billing pressures and may find yourself assigned to cases based on their profitability, rather than the legal challenges they present or their social impact. You will also need to navigate the internal politics of resource allocation, as higher-value cases often receive more attention and better staffing. This creates a divide in the quality of representation offered to clients with differing financial means, a disparity you should be prepared to address either directly or indirectly in your practice.

Addressing Resource Constraints

The legal profession continues to develop innovative approaches to address resource constraints while maintaining high-quality legal services. Understanding these strategies will help you navigate similar challenges in your own practice, whether you work in public service, private practice, or the nonprofit sector.

Innovative service delivery models

Law practices increasingly employ innovative service delivery models to expand access while managing costs. Limited scope representation, where attorneys handle discrete parts of a case rather than full representation, allows clients to access legal services at a lower cost while enabling lawyers to serve more clients efficiently. Some firms have adopted sliding scale fees based on income, helping bridge the gap between pro bono services and full-rate representation. Legal incubators, often sponsored by law schools or bar associations, help new lawyers establish sustainable practices serving moderate-income clients through shared resources and mentorship.

Technology solutions

Technology offers increasingly sophisticated tools for managing resource constraints. Electronic case management systems can improve efficiency and reduce administrative overhead. Virtual law offices and remote services can decrease overhead costs while expanding geographic reach. Online document assembly platforms and automated forms can streamline routine tasks, allowing lawyers to focus on more complex aspects of representation.

Generative AI tools, including those integrated into legal research platforms like Lexis+ AI and Westlaw CoCounsel (subbrands that frequently change names), present new opportunities for enhancing legal work efficiency. These tools can assist with initial document drafting, legal research summaries, and case analysis. For example, AI-powered brief analysis tools can quickly identify relevant precedents and suggest counter-arguments, potentially reducing research time. Similarly, AI-enhanced document review can help attorneys process large volumes of discovery materials more efficiently.

However, the integration of these technologies requires careful consideration of ethical obligations and practical limitations. Attorneys must:

- Independently verify all AI-generated content for accuracy and completeness
- Maintain direct oversight of all substantive legal work
- Understand the limitations and potential biases of AI tools
- Ensure compliance with ethical duties of competence and confidentiality
- Disclose AI use to clients when appropriate
- Regularly assess whether AI tools actually improve client service and outcomes

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Moreover, technology adoption must be balanced against broader professional obligations and client needs. This is particularly crucial when serving communities with limited technological access or in practice areas where personal interaction is essential. The rush to adopt new technologies should never compromise the fundamental duties of direct client communication, thorough legal analysis, and zealous advocacy.

Lastly, maintaining a good reputation while complying with ethical duties will be a recurring theme in your career. Your actions in high-profile or complex cases can have a lasting impact on your professional standing, but these considerations should never compromise your ethical obligations to your client.

By understanding these material contexts, you will be better equipped to navigate the complexities of legal practice. These aren't merely theoretical issues; they are practical challenges you will face throughout your career. Acknowledging and tackling them will not only make you a more effective lawyer but also contribute to a legal system that aims for justice and equity for all.

Legal Communication

Overview of correspondence 27

Brian N. Larson

Writing is the lens through which lawyers focus their legal knowledge. Communication is critical in the practice of law, and most written legal communication will use one of the three formats covered in this and the next three chapters. This chapter provides a brief overview of the three that follow it, explaining the major differences between email (Chapter 28), memorandum (Chapter 29, and letter (Chapter 30) genres, and offering advice about when to use one or the other—or when to prefer an oral conversation or meeting instead. Chapter 31 then takes up a sub-genre of letters, the demand letter. This chapter also briefly discusses ethical concerns with some communication technologies.

27.1 Defining correspondence genres

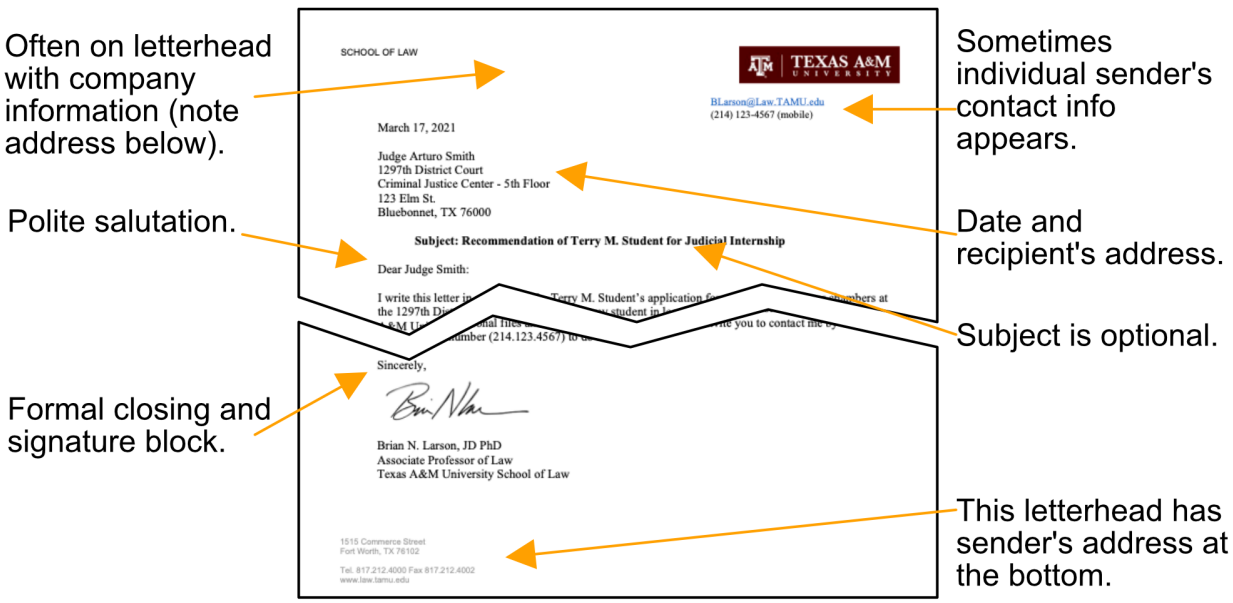


Figure 27.1: A letter is the most formal correspondence, with salutation and signature, often on letterhead.

There are formal differences between letters and memos. 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.' The address appears at the bottom of the example in Figure 27.1. Also near the top of the first page is the date of

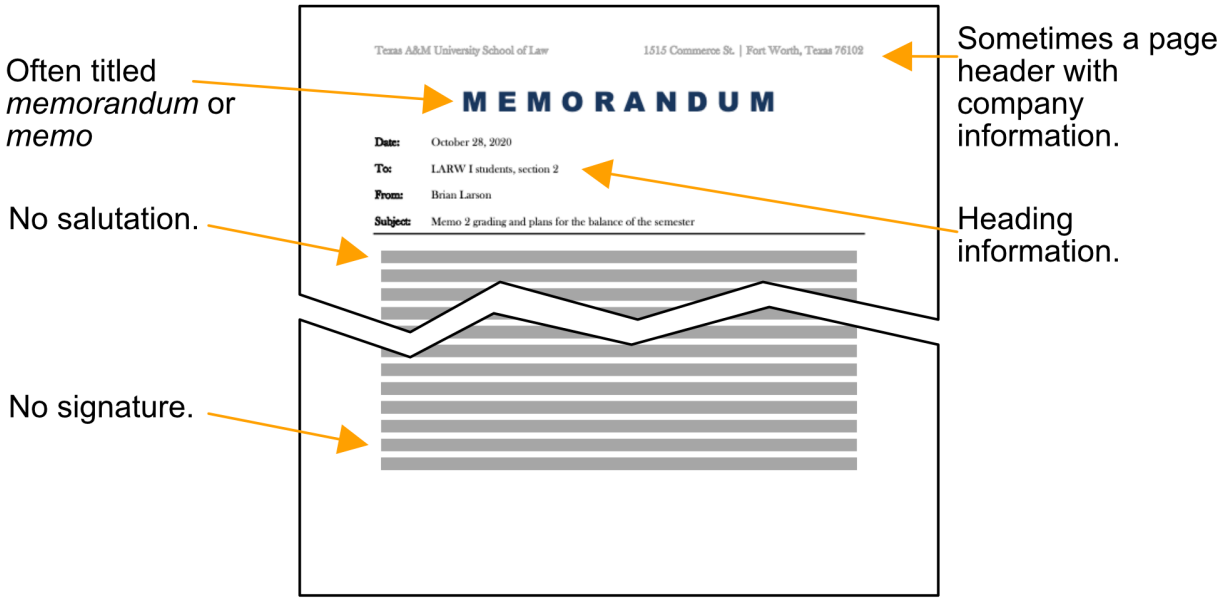


Figure 27.2: A memo is more informal, with no salutation or signature.

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 27.1, 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.[1] It ends with a formal closing, often 'Sincerely,' followed by the sender's signature and printed name and title beneath. Letters are typically no more than two or three single-spaced pages in length, though they can sometimes be much longer. There are, of course, variations, and if you work in or with 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 that letters used to be hand written, were later typed, and are now word processed).[2] Letters were usually used to communicate among individuals and businesses and within a business enterprise over longer distances.[3]

The memorandum or memo[4] as we now know it appeared around the beginning of the 20th century. 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.[5] As business concerns grew more complex, businesses used memos for internal correspondence, and management engineers[6] designed the formal characteristics of memos to make them easy to produce and organize into paper files.[7]

As Figure 27.2 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 do not sign them, as senders of letters

1: See Section 16.2 for more on salutations.

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

3: *Id.* at 488.

4: 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 42.4 beginning at page 366.

5: Yates, *supra* note 2, at 493–95.

6: Many of the businesses at the forefront of these developments were manufacturing companies, so they had engineers, among them engineers who focused on process and management—thus, management engineers.

7: *Id.*

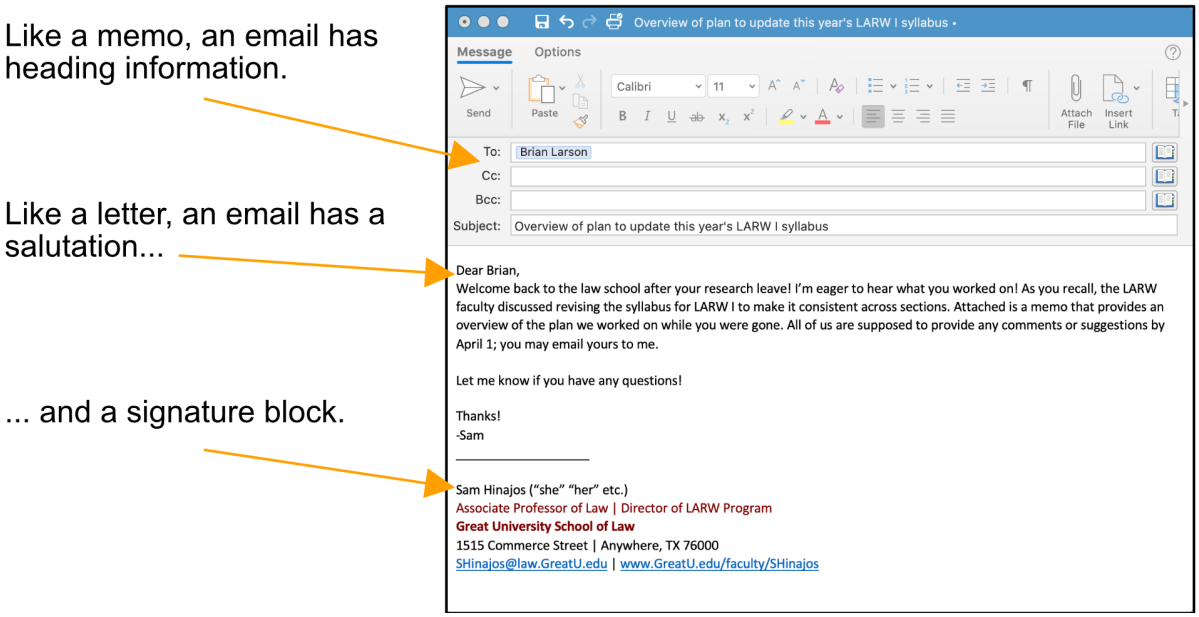


Figure 27.3: A business email combines some features of letters and memos.

do, although in the era of printed memos, the sender might put their initials next to their name on the 'From:' line. For memos, the subject line is mandatory, and it was necessary for earlier filing systems, which would have placed printed copies of memos in paper file folders stored in metal file cabinets.[8]

8: *Id.* at 497.

Law firms fully embraced the memo as a genre because they often needed to document the details of the analyses they carried out for their clients. A letter to a client with legal advice might contain only a summary of the firm's analysis, but the firm's ability to avoid professional liability depended on the firm having a thorough analysis in its files. 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. As a consequence of these functions, memos can vary in length from a single page to hundreds of pages.

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

Around the same time, 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. The email 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 27.3 shows, the heading information, including recipients, 'carbon copy' or 'courtesy copy' recipients, and 'blind copy' recipients, looks like the top of a memo. The subject line is conventionally mandatory in an 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 rather than the

more-formal colon ordinarily used in a business letter. Finally, the email concludes with a signature block, though not a physical signature. As Figure 27.3 shows, the closing in the email—'Thanks!' and the sender's name—is less formal than in a letter, where 'Sincerely,' etc., is the common sign-off. An email will usually not be longer than a letter, perhaps two or three screens of text. Again, there are exceptions in the form of longer emails.

The hybridity of email has worked its way back into traditional print genres. So now, it is not uncommon for an author to prepare a letter, save it as a PDF file,[9] and email the PDF to the recipient. This process may happen when the sender wants to communicate something formally outside their own organization. Similarly, an author might write a memo and email it as a PDF; 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.

9: 'PDF' is short for 'portable document format.'

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

27.2 Choosing a genre

Before you write correspondence, you should choose which genre you are writing. 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 strongly consider doing the same. That provides the greatest chance that you will meet your audience's expectations.[10] 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.

10: For a general guide to knowing your audience, see Section 11.1.

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. Note that even if you send such a communication as a letter, you might send it as a PDF attachment to an email. Moreover, in contemporary practice, it is not unusual for communications like this to be sent as less formal (but still professionally written) emails.
- 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 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 can seem more personal than emails or memos because they appear to be the product of greater effort, though the greater formality of letters can sometimes make them seem less personal.
- 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 legal advice or an analysis, consider the following:

- Legal advice to a client will commonly be in the form of a letter.
- Advice can also be appropriate in email form if (a) the client sought the advice via email or another less-formal communication method, 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 later if 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. Such an analysis 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 or another less-formal communication method and (b) your email system allows you to locate emails relating to particular clients and matters later.

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, or at least by phone or in an online, face-to-face meeting.

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.[11] For such 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 memo to your files) that document what you communicated.

11: The attorney-client privilege protects communications between an attorney providing legal advice and their client 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 these genres are not mutually exclusive.

27.3 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."[12] Second, a lawyer must work not to "reveal information relating to the representation of a client" without permission.[13] Carrying out these requirements means you must maintain appropriate skills, including "keep[ing] abreast of . . .the benefits and risks associated with relevant technology."[14] You may want to think of the ethical issues in terms of *how* you communicate, *what* you communicate, and *with whom* you communicate.

12: Model R. Pro. Conduct r. 1.1 (Am. Bar Ass'n 2018).

13: *Id.* r. 1.6.

14: *Id.* r. 1.1, cmt. 8.

You must consider *how* to keep communications with clients and about client matters confidential. Contemporary technology makes communication possible in 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: *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.[15]

15: 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://perma.cc/K59P-VNSD.

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.[16] 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.

16: Slack is an instant messaging tool used by teams in some companies.

Sometimes, it may be necessary to use these informal channels. For example, if you have an immigration client in India who can only safely and reliably communicate with you via WhatsApp, use that medium to communicate with them, but make sure you understand the security characteristics of the platform, and perhaps how Indian law treats the attorney-client privilege in such situations. And make sure you talk to your client about these risks and issues.

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 of the Model Rules 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 . . . ."[17] When dealing with a court or arbitrator, "[a] lawyer shall not knowingly . . . make a false statement of material fact or law . . . or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."[18] And finally, when dealing with clients

17: Model Rules of Pro. Conduct r. 4.1 (Am. Bar Ass'n 2023)..

18: *Id.* r. 3.3.

or prospective clients, "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services."[19]

19: *Id.* r. 7.1.

In addition to *how* and *what* 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.[20] So if you send a letter to the attorney on the other side, you may not copy their client on it. It's the other attorney's 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.[21]

20: *Id.* r. 4.2.

21: *Id.* r. 1.4(a)(3).

28 Professional email

Brian N. Larson

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 a legal writing class, you should follow the expected 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 work colleagues 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 an email and a letter on the one hand and between an email and a memorandum on the other. Make sure you know why you are choosing one over the other for a particular task; Section 27.1 and Section 27.2 may be particularly useful in helping you to choose.

This chapter first considers what the body of your email text should look like and why. It then reviews technical details about addressing emails, writing subject lines, signing emails, and adding some other contents, if they are needed. In addition to this chapter, you should consider the proofreading and copy-editing advice in Chapter 42 through Chapter 44 before sending any email.

28.1 The email text: Think of your reader

As Section 11.1 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 how much of it might you have to remind them about? Taking the reader's perspective in this way is particularly necessary 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, including 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 of asking that question, the senior attorney is 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 other words, it's pretty easy to read the senior attorney's mind and thus their cognitive environment.

If you can answer the question in the meeting, you will, and the senior attorney will easily understand your answer. 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. In short: You can read their mind. Their actual cognitive environment is pretty similar to the cognitive environment you imagine for them.

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, the senior attorney will easily understand your answer, because their cognitive environment has not changed much, and you don't expect it to. You might write an email like this.[2]

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,

1: *See* Section 11.1. 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 & Irrelevance: Theories, Factors, & Challenges* 69 (Jan Straßheim & Hisashi Nasu eds., 2018).

2: As I note below, this is really not the preferable way of writing an email, even if it *might* work in this instance.

Email Approach 1 seems like a pretty poor response 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 include the following in its first paragraph:

1. (Optional, but recommended) Begin with some kind of affiliative comment,[3] something that humanizes your communication. See *Email approach 2* for an example, which also illustrates the risks of these comments.
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, which 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, further motivating them.
4. Briefly say what you expect them to do, if anything, focusing 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 you want them to do something and what what you want them to do is counterproductive. If the email requires no action, you can say, 'This just an update and requires no further action from you.'

3: See Section 16.7 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.

Now look at *Email Approach 2* below. Note that you recognize the senior attorney's ultimate goals 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 the kid has had a nasty leg break—unbeknownst

to you, of course—you may just be pouring salt into the senior attorney's metaphorical wound.

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. You asked me to confirm that interpretation. 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 widgets in China. 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 direct me otherwise.

[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]

You may also want to be more cautious when using affiliative comments with folks you do not know well or with American readers who may expect a more formal tone from you. Nevertheless, 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.[4]

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 is 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.' Similarly, if they have some other professional title—such as 'Doctor,' 'Professor,' 'Pastor'—you can use that title and their last name. Otherwise, if you don't know the gender of someone, and thus don't know whether to write 'Ms.,' 'Mx.,' or 'Mr.' before their last name, use their whole name: for example, 'Dear Chris Smith.'[5]

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. This may also help you serve your colleagues and clients who suffer from shortened attention spans and are not likely to read more than a screen or two of an email on their smartphone.

4: See Section 16.7 for a further discussion of this issue, but again, be cautious about making assumptions based on the limited information you may possess.

5: Check the advice in Section 16.2 and Section 16.3, too.

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.[6]

6: See particularly the discussion of constructing legal analyses in Chapter 11 and Chapter 14 and the examples in Appendix Section 46.3.

28.2 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.[7] 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.

7: Christine Coughlin, Joan Rocklin, & Sandy Patrick, *A Lawyer Writes: A Practical Guide to Legal Analysis* 336-37 (4th ed. 2024).

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.

You should generally avoid 'copying up,' however. Here is an example of that practice: Imagine you are working regularly with a junior attorney at another firm and you send them a message copying their supervising attorney. Everyone involved will likely 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. Copying up is generally seen as passive-aggressive. You should first try to reach out privately to the person from whom you are not getting what you need before copying up to their bosses.[8]

8: See Section 16.6 for more on this point.

Set your email so that 'reply all' is not the default.[9] 'Reply all' can be dangerous if you say something you intend only for some of the original recipients. The results can be *humiliating* for you and for some recipients.

9: If you are not sure how, search the internet for instructions.

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. Doing so 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.

Don't courtesy copy internal parties to a legal dispute 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. That communication could result 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*."[10]

10: Bryan A. Garner, *The Redbook* 412 (4th ed. 2018).

28.3 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 your reader 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.[11]

11: *Id.*

Some law firms and other employers have automated systems that associate emails with particular clients and matters. This protocol assists them in billing clients and in responding to certain kinds of requests from clients. If your firm uses this practice, your subject line can usually be focused very particularly on the matter that your email handles. Other employers may not have such systems, and there you may want to include the names of the client and key counterparties, if any. Such subject lines can be very helpful when trying to locate an old email. 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 offer from other offers if 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.)

28.4 Email signatures

You already know from Chapter 27 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.
- 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 possible 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 28.1 is the signature I recommend for first-year law students (with the year indicating the year you expect to graduate). Figure 28.2 shows a former signature block of mine. I build the 'Thanks, –Brian' and dividing line into the signature block because I almost always want to thank my recipients. (Of course, if I'm not careful, I might end up with two closings to my email: one that I type and the second one automatically inserted with my signature block. Tailor your approach to your habits!)

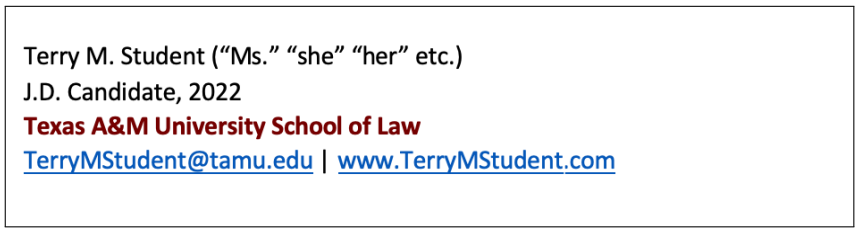


Figure 28.1: A student's email signature

Figure 28.2: The author's former email signature

You should not include any graphics files in your signature, as they can play havoc on mail servers that handle them as separate attachments. I'd also avoid cutesy quotes, religious exhortations, etc.

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] email signature.'[12]

12: For example, 'Mac OS email signature' yields a number of helpful videos and blog posts.

28.5 Other content

There are a few other things to consider when writing an email. They include explaining any attachments, adding a polite closing, and including appropriate disclaimers and warnings.

Attachments

If you are attaching a document to an email, the text of your email should identify any attachment you are sending and why. Good corporate training to prevent phishing and other cyberattacks teaches us not to download or open any attachment unless we know the sender and why they are sending it.

Second, it's important 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.

Finally, if you are sending a word-processing attachment, you should be sure that the attachment shows tracked revisions only if you want the recipient see them. This is true particularly if the recipient is the opposing side or counterparty in a matter. Major word-processing software packages allow you to save a version of the file where you *flatten* it to remove layers of

tracked changes, making the change tracking and other metadata invisible to the recipient.[13] Another way to hide tracked changes and other *metadata* is to save the attachment as a PDF first.[14]

13: You can search the internet for 'view tracked revisions' and 'remove tracked revisions' to learn more. You can keep an unflattened version for your own use, of course, allowing the other party have just a flattened *copy*.

14: For more details, see Section 29.9.

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, which is 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 this 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.

It is not clear in many cases whether a disclaimer like the one in this *Personal email to client* has any legal effect, and it is very likely that readers ignore them, if they notice them at all.[15] Such disclaimers 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 your emails.

15: *Email Confidentiality Disclaimers: Annoying but Are They Legally Binding?*, CenkusLaw, https://perma.cc/VPG6-YKL3 (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 as shown in "Confidential email to client" below. 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.

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.

You are ethically responsible for not disclosing sensitive and confidential client information, 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 the previous example, asking about the alerts and disclaimers and prompting discussions about how and why to keep the enclosed information confidential.

29 Memoranda

Brian N. Larson

This chapter explains the formal structure of a professional memorandum sometimes referred to as an 'office memo' or 'predictive memo' and how to write components of these memos. Like many of the chapters in this part of the book, this one takes a fairly formulaic approach to its topic. While you are in your legal writing class, you should follow the formula unless your professor tells you otherwise. 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, a letter, and an email. Also make sure you know why you are choosing one over the others for a particular task; Section 27.1 and Section 27.2 may be particularly useful to help you decide. Lawyers use memoranda for a wide variety of purposes, many of which are discussed in Chapter 27. Some of these types of memoranda are *sub-genres* of the memo genre. Be attentive to how the memo model you use relates to the purpose of your memo and your audience's needs and expectations.

While reading this chapter, it will be helpful to refer to Appendix Chapter 47, which contains four examples of memos written by students in one of my classes, appearing largely as I expected them to be written. Keep in mind that your supervising attorney or teacher may have different expectations. If you are in doubt about what they expect, ask them.

When setting out to write a memo, you should probably start by planning your approach after reading Chapter 11. This chapter does not provide any in-depth guidance on writing the discussion section of the memo. For that, you should look to Chapter 14 and Chapter 15, depending on whether the memo's subject requires a simple or complex analysis, to determine the structure of the discussion. Finally, you should consider the proofreading and copy-editing advice in Chapter 42 through Chapter 44 before submitting any memo.

29.1 Why learn to write memos?

The office memo, a genre that law students have learned for decades, takes particular forms that are perhaps unusual in other circumstances. They may even be on the outs in law firms.[1] Nevertheless, the structure still has pedagogical value.

1: *But see* Kirsten K. Davis, *The Reports of My Death Are Greatly Exaggerated: Reading and Writing Objective Legal Memoranda in a Mobile Computing Age*, 92 Or. L. Rev. 471 (2013).

Chapter 14 describes the approach to simple legal analyses, and Chapter 15 describes complex analyses, one or the other of which is at the core of almost every piece of analytical legal writing. The genre that most closely mirrors those analytical processes is the office memo. Because law students need to learn the techniques necessary to construct the parts of an 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 practicing attorney still uses this form.

29.2 Formal characteristics

Section 27.1 describes typical formal characteristics of memos and Appendix Chapter 47 provides one example format, based on a template that I provide students in my classes, and used to resolve a hypothetical case of copyright fair use. In the workplace, variations are fairly common. As you gain experience, look around, see how others in your enterprise are creating memos, 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 to your supervisor—changes to the format or structure of the memos others have written, though folks sometimes resist changes of any kind.

Note that Appendix Chapter 47 has four separate examples of office memos written by law students, two referring to each of two phases in the same legal problem. Because it is helpful to understand the formal characteristics discussed below with examples in front of you, the descriptions below have marginal references to numbered segments of those sample memos (look for the blue-circled numbers here and in Appendix Chapter 47).

The introduction portion of the memo may include a couple introductory sentences,[2] followed by a statement of the question presented[3] and a brief answer.[4]

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 are curious about some aspect of the facts or analysis. It's important for the remainder of your memo to provide a structure that makes it easy for such a reader to *skim* the rest of the text.

The remaining major sections of the memo are the factual background,[6] the discussion or analysis,[7] and the conclusion.[8]

Different legal employers use different conventions, like referring to the question presented and brief answer by other names. When you arrive in a new environment, look at how the attorneys around you are doing things and emulate them.

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

2: Marked in the examples in Appendix Chapter 47 with this marker:

3: Marked in the examples in Appendix Chapter 47 with this marker:

4: Marked in the examples in Appendix Chapter 47 with this marker:

5: See the discussion of the basic structure of legal analysis in Section 14.1 and of stating legal questions on Chapter 4.

6: Marked in the examples in Appendix Chapter 47 with this marker:

7: Marked in the examples in Appendix Chapter 47 with this marker:

8: Marked in the examples in Appendix Chapter 47 with this marker:

9: Marked in the examples in Appendix Chapter 47 with this marker:

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] This can be a good spot to reiterate your recommendations and re-identify any key missing information or assumptions. I say 'reiterate' because you will be presenting them elsewhere in the memo, too.

10: See Section 28.1 for details.

29.3 Fixed headings

If you review the example memos in Appendix Chapter 47, 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

In the examples, these headings are in all-capital letters.[11] The use of all-caps here is justified because the headings are very short and thus easier to read whatever their typography. Fixed headings may be set off with bold type as well. Because they are in all-caps, even underlining works fine.[12]

11: See Section 44.1 for our views on all-caps generally—long story short: avoid them.

12: All-caps letters have no parts—like lowercase 'y' or 'g'—that descend below the line of the text, parts that the underlining will intersect with, thus interfering with the reader's comprehension.

In the hypothetical law office where these memos were written, these headings would not change from memo to memo; they would always be the same. Two sections of the office memo might themselves need subheadings to break up their content: The factual background may be long enough to benefit from subheadings and the discussion usually will. 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 and Section 15.6.

29.4 Question presented

First, note that if your memo is addressing a sufficiently complex legal problem, it may have more than one question presented or 'QP.' For example, in a case involving a property dispute, you might first have to ascertain whether your client is the title owner of the property and then whether their neighbor has adversely possessed a portion of that property. Consequently, you might have two questions presented, two brief answers, and two large subsections of your discussion, one addressing each question.

Each 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.

13: Indicated in the examples in Appendix Chapter 47 with this marker:

A question presented usually takes one of two forms: 'under does when' or 'statements and a question.' Both memos in Appendix Section 47.1 use the statements-and-a-question approach, which is a less structured approach to the question presented. Both students in Section 47.2, writing later in their first semester, used the under-does-when approach, a more structured approach.

You can review the statements-and-a-question approach simply by viewing the examples in Appendix Section 47.1. The balance of this section discusses the under-does-when approach. The template for this approach is as follows:

> Under [*relevant law*], is/does/can [*legal question*] when [*legally dispositive facts*]?

Consider the implementation of this model in Student 7's memo in Appendix Section 47.2:

> ***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?

Then consider Student 8's effort:

> ***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?

The following subsections consider the *under*, *does/can/is*, and *when* components in more detail.[14]

14: I'm very grateful to an anonymous reviewer for helping me structure these subsections. I only wish I could give them credit by naming them here!

Under

In the *under* portion of the QP, the writer identifies the governing law for the legal issue, either broadly presented (e.g. 'Under California law') or narrowly presented, as in the example from Student 7 above. However, if the goal is to inform an unfamiliar reader, the more specific the writer can be with the relevant law, the better.

It is possible to state the governing law in a very specific way that is not particularly helpful. So, for example, setting up a QP as 'Under Kansas Statutes Annotated § 60-503,...' is certainly specific and accurate, but unless the client or reader has memorized the Kansas code, they will not know to what area of law this section refers. Rather, it is much more helpful to include a more descriptive phrase such as 'Under the Kansas adverse possession statute, § 60-503,...' instead, or simply use a descriptive phrase in lieu of any specific section reference altogether.

Contrast the approaches that Student 7 and Student 8 took above. Consider why they might have elaborated on the applicable law the way that they did.

Does/can/is

The *does/can/is* clause states the question actually being answered in the memo. Early in a project, clients and writers may ask a broad legal question, such as 'Can I adversely possess property legally owned by my neighbors?'[15] At the early stage, a QP may be broad but it may change once the lawyer conducts some research or discovers additional facts. So, for example, if there are five elements under Kansas statutory law for adverse possession, but the parties are likely to contest only two, then perhaps a more specific legal question will focus only on those two elements. The refined question, the one that appears here in the memo might read like this: 'Is possession open and exclusive?' Thus, the writer has a choice to make here in determining the level of specificity

15: See Chapter 4 for a discussion of scoping your question early in a project.

In the problem Student 7 and Student 8 were working on, the assignment specifically narrowed their question to whether there was fair use, so their does/can/is components are very similar.

When

The *when* clause is probably the most problematic of all portions of a QP, and the place where students make the most mistakes. The goal is for the *when* clause to identify the legally dispositive facts for the elements the author will analyze. In the problem in Appendix Chapter 47, the two factors at issue under fair use were the purpose and character of the client's use, particularly whether it was transformative and commercial; and the substantiality of the cleint's copying, specifically whether she used qualitatively or quantitatively too much of the underlying works. Let's revisit Student 7's effort:

> ***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?

Here, the facts that the client did not provide commentary and that she charged a fee matter under the first fair-use factor; and the nineteen percent of the works copied matter under the second factor. These are legally dispositive facts.[16]

16: Can you see a basis for criticizing the way that Student 7 ordered these facts in their QP?

The biggest concern here is to avoid making any legal conclusion on the legal issues identified. For example, it would have been a poor choice for Student 7 to have written:

> ***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 use was not transformative but was commercial, and the secondary use included a substantial amount of the original work?

The problem with this alternative QP is that it assumes the conclusions that the memo will ultimately derive in its discussion.

Another common student error is simply selecting facts that restate the legal issue, but do not move the issue forward. Imagine that Student 7 had written:

> ***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 original work's owner claims that secondary use was commercial and not transformative and that the secondary use included a substantial amount of the original work?

Here, the student is accurately reporting facts about the other side's claims, but those facts provide no support for their analysis or conclusion. This QP does not identify for the reader the legally dispositive facts are for deciding the specific legal issue regarding fair use.

29.5 Brief answer

There must be a brief answer for each question presented. If a memo addresses a complex problem, there may have been more than one question presented.

Each brief answer in an office memo[17] must:

- Answer the question(s) presented.[18]
- Offer a degree of certainty in the answer(s) consistent with the conclusions that appear at the beginning and end of the discussion section and in the conclusion section of the memo (for example, 'Probably not' or 'Most likely yes').[19]
- Specify the legal point or rule on which the answer turns. This is not necessarily the overarching rule used to resolve the legal problem but is instead the key element or factor upon which the matter rests.
- Link the brief answer 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.

Taking your question(s) presented and brief answer(s) together, the reader should understand what part of the legal rule or rules and what particular fact or facts are most important for answering the question presented.

Consider Student 7's brief answer in Appendix Section 47.2:

17: Indicated in the examples in Appendix Chapter 47 with this marker:

18: You'd be surprised how often students forget that bit.

19: It should also be consistent with the advice in Section 14.10.

> 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.

Here, the author highlights the factors that matter, transformativeness and "heart of the work," and connects them to the facts from the QP to derive and support a conclusion.

A senior attorney reading this memo could use the combination of QP and BA in the student's effort here as the basis for the attorney's overall guidance to the client.[20]

20: Can you imagine how the senior attorney might convert the QP and BA into an email advising the client?

29.6 Factual background

The factual background section[21] should conform with the advice in Chapter 13.

21: Indicated in the examples in Appendix Chapter 47 with this marker:

29.7 Discussion or analysis

No special form of discussion or analysis[22] is required to write a memorandum. Follow the approach set out in Chapter 14 for a simple problem and the approach in Chapter 15 for a complex problem.

22: Indicated in the examples in Appendix Chapter 47 with this marker:

29.8 Conclusion section

The conclusion section of a memo has multiple purposes, described here. Understand first that this conclusion section is different than the conclusion part of a CREAC in your discussion or analysis section; and it is different than any intermediate or summary conclusions in the discussion section of the memo. The conclusion in a CREAC in the discussion presents the legal conclusion on the issue discussed in that CREAC.[23] 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, however, and it's the last part.[24]

23: Section 14.10 provides advice on how to construct such conclusions.

24: Indicated in the examples in Appendix Chapter 47 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.

Start it with the bottom line: What is the answer to each legal question posed in the first page? Doing so 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 a 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 will read every word.

Third, in a legal-writing class as in actual practice, you will often have gaps in your factual knowledge about your client's problem. The conclusion section of the memo is a good place to point out any missing or uncertain facts that could significantly change the outcome of your analyses. It is also a good place to recommend further research into these facts.

Finally, you should consider adding practical advice. Given what you now believe to be true, what might be your client's next move? In your first year in law school, that might be harder to do than it will later become. Just try.

A conclusion can sometimes be only one paragraph long, but if you include all the information described in this section, it may be two or three paragraphs.

One question to ask yourself is this: 'If the reader reads only question presented, brief answer, and conclusion of my memo, what do I *need* them to know?' The conclusion should encapsulate that information.

29.9 File types for saving memos

You will almost certainly write your memos using word-processing software. When you get ready to send a memo, you will have to decide whether 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 that any brand or model of 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:

- PDF format generally locks the file formatting, unlike a word-processing file. Almost any device can thus open and read a PDF with its formatting intact. If you do not know what type of computer will open and read your document, putting it in PDF form ensures the same result.
- 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 moderately savvy computer user. Saving your document in PDF form reduces the metadata available, thereby protecting potentially confidential or sensitive information.

The major downside of a PDF file is that it is much harder to edit once in PDF form. On the other hand, moderately savvy computer users can readily alter a PDF, so it is also important to understand ways to authenticate a PDF or prevent it from being edited without the recipient's knowledge.

As a consequence of the pros and cons of PDF, you'll generally 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.

PDF is a better choice if you don't know whether your audience has the same word-processing software you do; if the document is for use outside your enterprise or you don't wish it to be easily modified; or if you want to minimize the metadata from the underlying word-processing file.

Letters generally 30

Brian N. Larson

This chapter explains the formal characteristics of a business letter in general and of lawyers' letters in particular. Like many of the chapters in this section of the book, it takes a fairly formulaic approach to its topic. While you are in a legal writing class, you should follow the expected 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 work colleagues write their letters and decide whether you should conform your own practices to theirs. This chapter only briefly considers the content of this particular letter, because each letter's contents are governed by the writer's goals and the context.

See Chapter 27 for the formal differences between an email and a letter on the one hand and between a letter and a memorandum on the other. Section 27.1 and Section 27.2 can help you choose one over the other for a particular task. Note, too, that specific genres of letter for specific purposes may vary from this example.[1] If you are writing a letter, you should consider the proofreading and copy-editing advice in Chapter 42 through Chapter 44 before sending it.

1: For example, Chapter 31 discusses one particular sub-genre, the demand letter.

30.1 Formal characteristics of letters

The sample letter is a constructed example of a letter in which a lawyer communicates advice to a client. It exhibits some formal characteristics that are common to business letters, some common only to lawyers' letters, and some that are not very common at all but sometimes appear.

The first page of the letter (appearing on the next page of this text) has several characteristics common to business letters:

- The firm sending the letter has 'letterhead' or stationery, a template used for all firm letters, with the name and logo of the firm in the upper left corner and the name and address at the bottom of the page.
- The name of the individual sender, Mr. Caballero, appears in the upper right corner with his direct-contact information.
- The date the letter is sent also appears in the upper right corner.
- The name and address of the recipient, Ms. Kurakina, appear before the text of the letter. This is sometimes called the 'inside address.'
- There is a salutation to the addressee, "Dear Ms. Kurakina:".[2]

2: Note the use of the colon (:) after the addressee's name. This is a convention in formal correspondence. In emails and informal correspondence, the colon might be replaced by a comma.

AFAKE PLLC
Attorneys & Counselolors

Ashwan Caballero, Member/Attorney
555.555.1234 | ACaballero@AfakeLawFirm.com

August 15, 2025

VIA EMAIL

ATTORNEY-CLIENT PRIVILEGED COMMUNICATION
DO NOT DISTRIBUTE

Ms. Stephana Kurakina, President & CEO
Northwestern Data Systems, Inc.
11100 Wednesday Road West, Suite 200
Vidalia, MN 55555

Re: Sale of WidgetAI® robots to Wintergreen Corp.
Our file: 04583-120012

Dear Ms. Kurakina:

You asked us to determine whether Northwestern Data Systems, Inc. (NDS), may sell its WidgetAI® robots under Title 50 of United States Code to Wintergreen Corp and, if not, whether NDS must repay the downpayment of Wintergreen. We conclude that Title 50 prohibits sale of WidgetAI® robots to Wintergreen and that NDS must return to Wintergreen the downpayment it made on the robots by January 30, 2026.

The "Robot Sale and Service Agreement" between NDS and Wintergreen, dated August 30, 2024, provides that NDS will deliver 25 WidgetAI® robots to Wintergreen, with an "Expected Delivery Date" of December 31, 2025. § 9. NDS and Wintergreen acknowledge in the contract that WidgetAI® robots incorporate "artificial general intelligence." § 2. The contract further provides that NDS need not deliver any products or services to Wintergreen "to the extent doing so would violate any law of the United States." § 28. Finally, the contract provides that NDS must return any downpayment paid by Wintergreen if NDS fails for any reason to deliver the robots by the Expected Delivery Date, with the refund due within 30 days after the Expected Delivery Date. § 10.

Components of the first page that are common to lawyer letters but less common in other business letters include the following:

- Because Mr. Caballero has sent this as a PDF via email to Ms. Kurakina, the "**VIA EMAIL**" appears in the upper right-hand corner. If he had sent it by other means, that might be indicated, for example '**VIA FEDEX OVERNIGHT**,' '**VIA CERTIFIED MAIL**.' Many letters do not indicate the method of transmission.
- The legend near the top indicating that the letter is subject to the attorney-client privilege would appear only in a letter from an attorney to their own client. Other letters do not contain this legend. The privilege legend is just a prominent reminder to the client that this letter should not be distributed outside the narrow confines of the client's senior management.
- Some firms use subject information such as that appearing before the salutation beginning with "Re:". This may make it easy to distinguish other letters between this lawyer and client based on their subjects. The law firm has added the "Our file" and reference number as an easy way for it to connect a paper or electronic copy of this letter to the client and matter in the firm's law-practice management software.

The second page of the letter has some components common to all business letters:

- It starts with a header in the upper left corner that repeats some information from the first page: recipient's name and the date. Traditionally, this 'running header' information was valuable if a user of the letter printed it and pages got separated from each other. It allows a user to recognize the nature of the letter and to connect the second and subsequent pages to the correct first page.
- A page number also appears in this part of the page for the same purpose.
- Near the bottom right of the second page is the sender's signature block.
- At the bottom left is a "cc:" line, indicating other persons to whom the sender has sent the letter.[3]
- Following the "cc:" line is the legend "Encl." This alerts the reader that there should be an enclosure attached to the letter. In this case, this reference is to the Department of Commerce determination that Mr. Caballero discussed in the text of the letter.[4]
- Some senders will list the enclosures, whether there is only one, as here, or there are several. Others will use only the "Encl." legend to indicate that there is or are enclosures.

The second page also has some components common to lawyer letters, but uncommon to letters generally.

- The privilege legend from the first page is repeated with the rest of the running header in the upper left corner.

3: See the discussion of 'cc:' or 'courtesy copies' on page 244 in Chapter 28.

4: The term 'enclosure' comes from the fact that these additional documents would be enclosed in the same envelope as the letter if it were mailed in paper form. If you will be sending your letter as a single PDF with the enclosures following the letter, you might refer to them as 'attachments' instead.

ATTORNEY-CLIENT PRIVILEGED COMMUNICATION
Ms. Stephana Kurakina
August 15, 2025
Page 2

Wintergreen has admitted in correspondence with NDS that is it majority-owned by the Chinese People's Liberation Army. Wintergreen paid NDS a downpayment of $720 million on September 20, 2024, by bank transfer. NDS used the downpayment to fund its manufacture of WidgetAI® robots and is prepared to deliver the robots by the Expected Delivery Date. NDS does not now have $720 million in cash to repay the downpayment and does not expect to have that amount of cash before June 2026.

Chapter 58 of Title 50 and the regulations under it provide that no "United States person" may sell to any "foreign person" an item on a list maintained by the Department of Commerce. On August 10, 2025, the Department of Commerce amended the list of restricted items under Chater 58 to include "artificial general intelligence." (DoC's determination is attached.)

NDS is a United States person under Chapter 58 because it is a corporation organized under the laws of Delaware, and Wintergreen's ownership makes it a foreign person under Chapter 58. Because of the addition of artificial general intelligence to the Chapter 58 list of restricted items, NDS's sale of WidgetAI® robots to Wintergreen is prohibited by U.S. law.

Failure to deliver the robots is not a breach of the Robot Sale and Service Agreement because the contract permits NDS to withhold them where the sale would be illegal, but NDS is obligated to refund the $720 million downpayment to Wintergreen by January 30, 2026.

We recognize that this turn of events represents a challenging time for NDS. We would be happy to discuss options for proceeding, such as renegotiating with Wintergreen, seeking a sale of the robots to a United States person, or seeking short-term financing to cover the repayment. Please let us know how we may assist.

Sincerely,
AFAKE PLLC

by Ashwan Caballero, attorney at law

AC/nnd
cc: Terrence Nully, Chief Operating Officer, NDS
Encl.

- The name following the formal closing "Sincerely" is that of the firm, rather than that of the individual lawyer. The latter's signature appears, however, followed by a 'by-line' identifying the individual sender.
- In some firms, the individual lawyer's signature would immediately have followed the "Sincerely," and the sender's name would appear without the "by" before it.
- Whether you should use the first or second of these approaches depends on the practices in your firm.

An oddity of this letter, even for a lawyer letter, are the stenographer's codes near the bottom left of the second page: "AC/nnd." These codes indicate who the author of the letter is ("AC" or Ashwan Caballero) and who is the staff member who prepared the letter ("nnd"). That coding made more sense in the era when lawyers dictated letters to a stenographer, the stenographer or typist prepared the letter, and the lawyer signed it. This coding has become less common in modern letters, but I still occasionally see it in letters from more senior attorneys.

Once again, these formal characteristics vary widely from business to business, law firm to law firm, and even individual author to author. If you are working in an a firm or office, you should try to make your letters conform to the conventions in that workplace. Some organizations, in fact, have style manuals that require their employees to conform to particular formal conventions. If, on the other hand, you are practicing in your own firm, you must decide which of these characteristics to include and how.

30.2 Letter contents

The purpose of every letter is to convey some content. In this case, the balance of the first page and most of the second page of the letter consist of the text of the letter, Mr. Caballero's advice to Ms. Kurakina. The context of this particular client and situation should govern the content of the letter.

The advice that the attorney communicates here is likely a condensed summary of a more detailed analysis that the lawyer has done and perhaps saved in the firm's files in the form of a 'memo to the file.' See page 235 for a discussion of this approach and Chapter 29 for guidance on writing such memos. The lawyer's analysis in the sample letter is considerably less detailed than the analysis described in Chapter 15 on complex analysis or even Chapter 14 on simple analysis. Much of that analytical content would be lost on a layperson client. The file memorandum might nevertheless be useful for Mr. Caballero to prepare for a phone call or meeting with the client to discuss this letter.

In contrast to the lack of detail in the analysis, note that a comparatively large portion of the sample letter consists of a recitation of the facts in the matter. This is important so that the lawyer makes it clear what the factual basis of his analysis is. If the client reads this and sees that one of these facts is incorrect, they could reasonably be expected to reach out to the

lawyer with the correct information. The lawyer could then modify the advice accordingly.

Note, too, that the analytical content of this letter might be quite different depending on the recipient. The assumption here is that Mr. Caballero is writing to layperson clients. See Chapter 37 for issues to consider when writing this kind of communication. If, instead, Mr. Caballero knows that Ms. Kurakina or Mr. Nully is trained as a lawyer, he might have chosen to present a more detailed analysis with more citations to authority.

30.3 Recap

The form and contents of business letters are often the results of conventions that have arisen over the years. But the unique purposes for which authors write letters and their understanding of the needs of their audiences often require alterations in the conventional forms.

You should be familiar with the formal characteristics this chapter has described, even if the letters you read or write do not all exhibit them. When writing your own letters, stick to the formal conventions of your firm or employer unless you have a clear reason to depart from them. If you have discretion, use the formal conventions that make sense given your purpose in writing the letter and the needs of your audience.

In terms of letter content, this can vary extraordinarily widely. A letter can be a single page or a hundred pages. The level of detail can be very high or very low. The governing factors are your goals for writing the letter and the needs of your audience.

Demand letters 31

Elizabeth Sherowski

Lawyers write demand letters to convey a client's demand that someone do something (or stop doing something). But don't let the word 'demand' fool you. Harsh ultimatums and demeaning language are usually not effective in achieving the letter's desired result.[1] Demand letters are most effective when they clearly state a polite but firm request. This chapter discusses the conventions of the demand letter and its parts, both with reference to the examples provided in Section 31.4 and Section 31.5. These two examples differ in two key respects: In Section 31.4, the author has written a letter that they would print on letterhead and mail (or put on letterhead in a PDF and email), and the letter addresses the layperson party on the other side of the legal issue. In Section 31.5, the author has written an email to the legal counsel of the party on the other side of the matter.

1: For discussion of an example of a harsh (and ineffective) demand letter, see Jonathan Chait, "Trump Writes Unhinged 'Legal' Letter Demanding That CNN Pay Him Money," New York Magazine (Oct. 18, 2019), https://perma.cc/G4SM-JLVC.

31.1 Conventions of the demand letter genre

Demand letters are a subset of the general legal correspondence discussed in Chapter 27, Chapter 28, and Chapter 30. The genre conventions discussed in those chapters will also apply to a demand letter or email. And since demand letters are often sent to recipients who are not lawyers, some of the conventions for writing for non-legal readers, discussed in Chapter 37, may also be helpful. This chapter will discuss the specific genre conventions involved in writing demand letters.

Audience. The audience for a demand letter is the person who has the power to achieve the result your client seeks.[2] If that person is represented by an attorney, the demand letter should be addressed to the attorney. If the person is unrepresented, the demand letter should be addressed directly to the person. This means that demand letters will have one of two potential audiences: legal readers or non-legal readers. The conventions used in writing for these audiences will differ, as explained in the following paragraphs.

2: Before you start drafting your demand letter, you must make sure that you have identified the correct recipient! Sending a demand letter to a party who does not have the power or ability to resolve the dispute wastes your time and your client's money.

Purpose. Demand letters are a persuasive genre, written to convince the recipient to comply with your request. They are often written before commencing litigation; sometimes an effective demand letter can be all that is necessary to resolve a dispute. For a demand letter to be effective, it must persuade the reader that it is in their best interest (or their client's best interest) to honor the request. Therefore, many of the same advocacy skills used for writing trial and appellate briefs will also be helpful in drafting demand letters.

Style. Whether written for a legal or non-legal reader, demand letters should be professional, polite, specific, and firm. A professional tone and

appearance (and the absence of errors) will increase the credibility of the writer. A demand letter should get right to the point—reader attention will start to wane after about two pages, so try to keep the demand letter limited to one or two pages in length. Stating the problem and the desired resolution clearly and concisely will make it easier for the recipient to comply with the demand, increasing the likelihood that the dispute will be resolved in your client's favor.

31.2 Parts of a demand letter

The introductory material for a demand letter—address blocks, salutation, etc.—are the same as for any other letter or email.[3] If you are sending the demand letter via regular mail, you should choose a delivery method that will confirm that the recipient has received the letter, like certified mail with a return receipt requested.[4] After the salutation (Dear _____:), the conventions of the demand-letter genre kick in.

3: *See* Chapter 28; Chapter 30.

4: Indicated in the examples in Section 31.4 and Section 31.5 at **[1]**.

The first sentences of the letter should *introduce the writer and the client* and then briefly *summarize the issue* that prompted the writing of the letter. This is not the place for great detail—that will come later. The job of the first few sentences is just to orient the reader to (1) who is writing the letter and (2) what the letter is about.[5]

5: Indicated in Section 31.4 and Section 31.5 at **[2]**.

Next, the demand letter should *explain the dispute*.[6] An effective letter will frame this explanation in a way that makes your client seem sympathetic but does not go over the top with emotional appeals or name-calling. Avoid using adverbs ('unfairly,' 'cruelly,' 'irresponsibly,' etc.) to characterize the parties' actions. An excessive use of adverbs makes readers feel like the writer is telling them how they should feel about the situation. It's more effective (and more persuasive) to state the facts in such a way that the reader feels these things (thinking *that's unfair!* or *how cruel!*) without being explicitly told to do so.

6: Indicated in Section 31.4 and Section 31.5 at **[3]**. How does the writer of each letter frame the facts so that the reader sees the hardship or unfairness of the situation?

After explaining the dispute, the demand letter should state the relevant law.[7] How the law is explained is the biggest difference between letters written for legal readers and letters written for non-legal readers. Legal readers expect certain conventions in explanations of the law—rule statements, rule explanations, and citations.[8] Non-legal readers usually do not expect those things.

7: Indicated in Section 31.4 and Section 31.5 at **[4]**.

8: *See* Chapter 14; Chapter 15; Chapter 21.

The statement of law for a legal reader will look a lot like the 'R' and 'E' sections of a CREAC analysis, with a statement of the rule, followed by an explanation (possibly including a case illustration)—and everything will be cited so the legal reader can get further information from those sources. However, the statement will not be as detailed as the 'R' and 'E' sections in a memo or trial brief. Remember that we're trying to keep the letter to one or two pages at most.

An effective demand letter will state the law differently for a non-legal reader. Non-legal readers do not have set expectations about how the law should be explained. They are probably not familiar with reading cases

and statutes, so they will appreciate a writer who paraphrases, translating the confusing legal language into plain English. Since non-legal readers neither expect nor likely understand the meaning of legal citations, it's not necessary to include more than 'Idaho courts have held . . . .' or 'Federal law requires . . . .' to let the reader know that the rule you are explaining has the force of law.[9]

9: Examine the explanations of the law in Section 31.4 and Section 31.5. How have the writers explained the law differently for each of the audiences?

No reader, legal or non-legal, requires an extensively detailed legal explanation. State only the parts of the rule that are relevant for the relief you are seeking. For example, although a statute may allow for treble damages in cases of gross negligence, if your client is not claiming gross negligence, and therefore not seeking treble damages, there is no need to include that part of the statute in your statement of the law. The purpose of this section is not to write a dissertation about the law; the purpose is to justify the relief your client is requesting.

Finally, we get to the moment we've all been waiting for: the *demand*.[10] This is another area where polite but firm language will be more successful than outrageous language or over-the-top statements. Request only what your client is entitled to receive under the law you just explained.

10: Indicated in Section 31.4 and Section 31.5 at **[5]**.

It's possible that there may be more than one remedy to the dispute that will satisfy your client. It's perfectly acceptable to state demands in the alternative, but use 'either . . . or' to make it clear that the recipient has a choice of remedies. It's also possible that fulfilling the client's request requires the recipient to do more than one thing. Use 'and' to make this clear to the reader. You can also use a numbered list if there are multiple steps required, or if the order of performance is important.

Follow the demand statement with *specific instructions* for the recipient.[11] Readers understand instructions better (and are therefore more likely to comply with them) when the instructions are broken down into specific, concrete steps that are presented clearly.[12] Be sure to include specific processes, materials, amounts—anything that will help the reader perform in a way that will satisfy your client.

11: Indicated in the sample **[6]**.

12: *See* FDA, 2001, Guidance on Medical Device Patient Labeling; Final Guidance for Industry and FDA Reviewers (Rockville, MD: Food and Drug Administration).

You should strive to avoid ambiguity in legal writing, and this is especially important when stating specific demands. Provide clear instructions as to where and to whom things or documents should be sent and how to send them. Require the recipient to document proof of their actions. And always, *always* include a deadline for compliance.

Don't forget to specify a consequence for non-compliance.[13] Again, threats or demeaning language will not be effective here; it's much more effective to state the consequences matter-of-factly. Usually one of the consequences will be undertaking legal action. Be as specific as you can in explaining what type of legal action your client will take if their requested remedy is not provided by the deadline.[14]

13: Indicated in Section 31.4 and Section 31.5 at **[7]**.

14: Be aware that the ethics rules in some jurisdictions prohibit attorneys from threatening to initiate a criminal action, administrative proceeding, or attorney discipline in order to gain an advantage in a civil suit. *E.g.*, Cal. R. Pro. Conduct r. 3.10. However, these rules do not prohibit informing an opposing party of the intention to file a civil action when it is warranted.

Finally, close the letter or email with the same concluding information as any other legal correspondence.

31.3 A note about professionalism

Nobody enjoys being yelled at. This is important to remember in all aspects of legal practice, but especially in the use of persuasion to achieve your client's desired result. While it's important to stand up for your client (and yourself, if the situation calls for it), effective legal persuasion proves the truth of the old adage 'You catch more flies with honey than with vinegar.' There are lawyers out there in practice who do not seem to understand this and think that difficult or obnoxious behavior will best serve their clients. While rude behavior and name-calling may occasionally result in a win for the client, it always results in a loss for the attorney's reputation. Therefore, you should make every effort to ensure that your demand letters are well-grounded in the law and professional in tone.

31.4 Demand letter to non-lawyer (U.S. mail)

Bracketed numbers in bold, red text refer to the explanatory comments above.

Baldwin, Fidler, & Dove
1862 Enterprise Dr. Columbus, OH 43221
(123) 456-7890 | BFD_Law.com

September 4, 2022

Ronny Horvath
President, Board of Directors
Blue Jacket Condominium Owners Association
86 Cypress Ln.
Columbus, OH 43081

[1]Via USPS; Certified Mail, Return Receipt Requested

Dear Mr. Horvath:

[2] I am sending this letter to you and the Condominium Owners Association on behalf of my clients, Fred and Diane Rowe, who own the condominium located at 501 Blue Jacket Way in Columbus. The Rowes have contacted the COA several times about damage to their condominium's foundation, but have received no response. They have engaged my firm to pursue this matter and seek a solution to this issue.

[3] Several months ago, the Rowes noticed cracks in the east wall of their basement. An engineer from Structural Engineering Solutions determined that the weight of the soil behind the basement wall is causing the wall to bow and crack. If this situation is not addressed, the wall will continue to deteriorate and eventually collapse. The engineer determined that

reinforcement with steel beams will stabilize the wall and prevent further damage. The engineer's report is attached to this letter.

[4] The condominium association's bylaws require the COA to "provide for maintenance and repair of common areas," which includes the exterior structure of the buildings. Ohio courts have held that this duty requires a COA to pay for foundation repair when such repair is necessary to prevent further damage to the structure. **[5]** Accordingly, the Rowes are requesting that the COA either undertake the repairs immediately at its own expense or reimburse them for privately contracting for the repairs.

[6] Please respond to this letter (via email or U.S. mail), indicating which of the above remedies the COA will pursue, by 5:00 pm September 18, 2022. Please include either (1) a work order for the repairs, including a schedule of when the repairs will take place; or (2) a cashier's check for $5,585.19, the amount that Structural Engineering Solutions will charge the Rowes to undertake the repairs. **[7]** If we do not hear from the COA by that date, we are prepared to file a lawsuit against the COA in Franklin County Municipal Court for the cost of repairs, plus attorneys' fees and court costs.

[8] I sincerely hope that we can resolve this matter amicably and save everyone the time and expense of litigation. Please feel free to contact me if you have any questions about this matter. I look forward to receiving your prompt response.

Sincerely,

/s/ Mikayla Metzger

Mikayla Metzger
mmetzger@BFD_Law.com
(614) 555-4321

MM/jdk

Encl: Report from Structural Engineering Solutions

31.5 Demand letter to attorney (email)

Bracketed numbers in bold, red text refer to the explanatory comments above.

TO: Mari Yamamoto <myamamoto@RubinLaw.com>

FROM: David Mojica <david.mojica@whistlerandberne.com>

SENT: Mon March 21, 2022 3:55 PM

SUBJECT: Request to remove sidewalk tables

Mari:

[2] My firm has been retained to represent Eulayla Farnsworth, the owner of the Southern Grace Gift Shop on Monument Street in downtown Jackson. Her store is located next door to the Bon Temps Cafe, owned by your client, Mississippi Hospitality Group, Inc. I am writing to request that your client remove the outdoor dining area that they recently installed on the sidewalk in front of the cafe.

[3] Last month Bon Temps Cafe placed heavy wrought-iron tables, chairs, and umbrellas on the sidewalk outside the cafe for use by the cafe's patrons. This outdoor dining space blocks the sidewalk, cutting off access to Ms. Farnsworth's store, which is at the end of the block, from customers traveling west on the sidewalk. Since Bon Temps Cafe installed this outdoor dining area, customer traffic at Southern Grace has dropped by 25%. Several customers have remarked to Ms. Farnsworth how inconvenient it was to access her store, because they had to either cross the street where there is no crosswalk or walk against oncoming traffic in the road to get around the outdoor seating.

[4] In placing the chairs and tables on the sidewalk, your client has created a private nuisance by using its property "so as to unreasonably annoy, inconvenience, or harm others." *Biglane v. Under the Hill Corp.*, 949 So. 2d 9, 14 (Miss. 2007). In addition to being a private nuisance, the outdoor seating could also violate Jackson's municipal zoning regulations. Jackson Cty. Zoning Ord. § 5.01.14 (2022) (selling food outdoors is arguably not permitted in Monument Street's C-4 commercial zoning). **[5]** Therefore, my client requests that the outdoor dining area be removed immediately.

[6] If the outdoor dining area is not removed by 5:00pm Monday, March 28, 2022, **[7]** we will be forced to file a zoning violation complaint with the County Zoning Board and also file a private nuisance action in the District 16 Chancery Court seeking injunctive relief against your client. If you have any questions, I can be reached at (601) 123-1234 or this email address. I look forward to your client's prompt action.

Sincerely,

David[15]

15: Assume the sender would include a signature block based on the guidance in Section 28.4.

Complaints 32

Jessica Mahon Scoles

A complaint is the document that starts civil litigation proceedings.[1] But a well-drafted complaint does more than get your client through the courthouse door. It is your first opportunity to tell your client's story to the court, the defendants, and the public. The complaint is also where you begin to form your litigation strategy by deciding which claims to raise against whom.

This chapter discusses pre-filing considerations, pleading requirements, and components and formatting of a complaint. It concludes with a sample.

32.1 Pre-filing considerations

Imagine that a client comes to you, upset that they have been wronged in some way. Perhaps they were injured at work or the contractor they hired to renovate their home didn't complete the work as agreed. You take notes on the client's situation and ask questions to clarify what happened.[2] By the end of the preliminary meeting, the client is anxious to file a lawsuit. Don't run to the courthouse—or, more likely, open your web browser and pull up the court's e-filing portal—just yet. You have work to do to ensure your client's complaint is accurate and effective.

Run if you need to!

I know I just told you not to run to the courthouse. If time has passed between the date of the client's injury and the client's decision to contact you, however, you may need to do some running. Before doing any other work on your client's case, you should determine the statutes of limitations for the types of claims that are common in your client's situation and make sure that their complaint is filed within those statutes of limitations.

Identifying Claims

When a client comes to you with a problem, one of your jobs as an attorney is to translate that problem into a legal claim or claims. For example, perhaps the client who is upset with their contractor has a claim for breach of contract or for deceptive business practices. The first steps in complaint drafting are to determine what claims are available to your client and make a strategic decision about which of their possible claims to include in the complaint.

1: For the life-cycle of the civil case, see Chapter 18. In some cases, a complaint also initiates criminal proceedings. While some of the drafting pointers in this chapter may be helpful for drafting criminal complaints, this chapter is not intended to serve as a guide to drafting criminal complaints. Instead, it focuses on the rules, requirements, and strategies for drafting *civil* complaints. For an introduction to criminal complaints and how they are initiated, see Section 19.2.

2: See the discussion of client interviewing in Section 39.2.

Legal research.[3] Unless you are an expert in a narrow area of law, you will likely need to do some research to determine which claims make sense in your client's situation. One useful starting point for this type of research is a practice guide that discusses the claims and defenses available in your jurisdiction.[4]

Deciding which claims to file. Once you know the claims available to your client, you must begin developing your litigation strategy. In consultation with your client, one of the first strategic calls is deciding which claims to file. Where your client has one or two strong claims, deciding to file them is likely a no brainer. But if some of your client's potential claims are weak or inconsistent with other potential claims,[5] the decision becomes harder. Pleading more claims might increase your chances of prevailing on one of them. But pleading weak claims might also undercut your client's credibility or direct the court's attention away from stronger claims.

Deciding whom to sue. Your litigation strategy also includes deciding whom you will sue. Where multiple defendants are potentially liable for your client's injuries, you generally will have a choice about whether you want to sue all of them or only some of them (subject to any rules about including necessary parties in the lawsuit).

- Will it be difficult to collect a judgment from certain potential defendants while another potential defendant has deep pockets?
- Are some potential defendants in foreign jurisdictions while others are close at hand?
- Are there layers of corporate defendants, such as a holding company and its subsidiaries?

These are the types of questions to think about and discuss with your client.

Fact investigation

Even if you have already interviewed your client, you may need to do additional investigation to ensure that you are complying with your professional obligations. In federal courts, for example, Rule 11 of the Federal Rules of Civil Procedure requires that the "factual contentions [in a complaint] have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." To ensure that your client's complaint meets this standard, you may need to talk to other witnesses, gather additional documents from your client, or otherwise confirm your client's version of events.

As part of the pre-filing fact investigation, some attorneys put together an annotated complaint. This is an internal working document that includes footnotes identifying evidence that supports the complaint's key allegations. When I was a junior associate, it was common to keep the annotated complaint and its supporting evidence together in a paper file. Today, it is more likely that you will store everything electronically using litigation management software. Litigation management software allows you to store and organize the evidence you obtain during discovery, making it easy to

3: For more details on doing legal research, see Chapter 12.

4: If you are drafting a complaint as part of an exam, it is reasonable to assume that you are being tested on whether you can identify claims that might arise in the areas of law covered by your course (or tested by the bar). In such contexts, the studying you did for the exam is your 'research.'

5: Pleading rules often allow plaintiffs to 'plead in the alternative,' meaning that they can choose to plead claims based upon inconsistent legal theories. Plaintiffs' ability to plead inconsistent facts is more limited because of the requirements of Rule 11 of the Federal Rules of Civil Procedure. Under Rule 11, a plaintiff can only plead facts that have evidentiary support or are likely to have evidentiary support after further investigation. It is unlikely that two contradictory sets of factual allegations will meet this standard.

access what you need for drafting motions, preparing for trial, and other work on your case.[6]

6: Chapter 18 provides more details on these phases of the civil case.

Choosing where to file

Sometimes a case can only be filed in one court. For example, if your client has a state-law claim against a citizen of their own state, you will probably have to file that case in state court in your client's home state. Sometimes you will have a choice between multiple courts. For example, if your client's state-law claim is against a citizen of a different state, you will likely have a choice of filing in either state or federal court. When you have a choice of where to file, you should make that choice strategically. Some things that lawyers consider include: (1) how busy the courts are relative to one another; (2) the pool of judges in each court and how likely you are to be assigned to a judge you perceive as 'good' for your client or case; (3) procedural differences between the courts; and (4) differences in the courts' jury systems.

First, different courts manage their caseloads differently to address how busy they are. For example, in Massachusetts, federal courts have a direct calendar system where one district judge and one magistrate judge are assigned to each case from beginning to end. In contrast, most Massachusetts state courts have a master calendar system. No one judge is assigned to a case and the judge who hears a motion may have no familiarity with the case.

Second, some courts have a small number of judges who are more or less uniform in their views on certain issues. Others have a broader bench of judges whose views are more diverse. Depending on your case, you might want to choose one type of court over the other. Is it possible to take this type of forum shopping too far? Many commentators think so. Federal case law supports the idea that a plaintiff's forum selection is entitled to some amount of deference.[7] However, judge shopping—trying to get a case assigned to a particular judge—is generally frowned upon.[8]

7: *See, e.g., Iragorri v. United Techs. Corp.*, 274 F.3d 65, 70 (2d Cir. 2001) ("We are told [by the Supreme Court] that courts should give deference to a plaintiff's choice of forum," and that the degree of deference due depends upon the circumstances).

8: For example, the number of high-profile cases that conservative litigants have filed in the federal district court in Amarillo, Texas, in recent years has raised eyebrows. United States District Judge Matthew Kacsmaryk, whom President Trump appointed in 2019, is the only judge who sits in that courthouse. Thus, litigants who file in Amarillo are almost assured that Judge Kaczmaryk will hear their case.

Third, class-action procedures provide a good example of a situation where differing procedural rules might have a significant impact on your case. Some jurisdictions provide for opt-in class actions; someone is a class member only if they affirmatively choose to join the class. Other jurisdictions are opt-out; anyone who fits the class criteria is automatically a class member unless they affirmatively opt out. Defendants will prefer the former while plaintiffs will prefer the latter.

Finally, different jurisdictions have different rules about the number of people that serve on a jury and whether the verdict needs to be unanimous, for example.

32.2 Pleading requirements

Your complaint must comply with your jurisdiction's pleading standard, the standard that tells you the level of detail you must include in your pleadings. Pleading standards usually fall into two broad categories: fact pleading and notice pleading. In fact pleading jurisdictions, a complaint must contain a detailed recitation of the facts underlying each claim.[9] In contrast, notice pleading jurisdictions require only that the pleadings give the opposing party fair notice of what each claim alleges. In theory, notice pleading standards simplify the pleading process by reducing the level of detail required in complaints and eliminating technical pleading requirements, which specified the precise language required for claims. In practice, however, the fact pleading versus notice pleading distinction is not always helpful.

For example, consider the federal pleading standard. The federal pleading standard theoretically requires notice pleading. Federal Rule of Civil Procedure 8(a) states that a pleading must contain: "a short and plain statement of the claim showing that the pleader is entitled to relief." But, under the *Twombly/Iqbal* standard[10] a complaint that contains only legal conclusions will not survive a motion to dismiss. To survive, the complaint must contain sufficient factual allegations to "plausibly suggest an entitlement to relief."[11] Some commentators have criticized the Supreme Court for effectively converting the federal pleading standard into something other than a notice pleading standard.[12] Fortunately, we can draft an effective complaint without resolving these types of academic debates. In federal court, include the facts that underlie your client's claims. And in other jurisdictions, don't rely on fact pleading or notice pleading labels. Do your research to determine the level of specificity that each court requires for pleadings.

9: *See, e.g.*, Cal. Code Civ. P. 425.10 (complaint must contain a "statement of the facts constituting the cause of action in ordinary and concise language"); Fla. R. Civ. P. 1.110 ("A pleading which sets forth a claim for relief, . . . shall contain . . . a short and plain statement of the ultimate facts showing that the pleader is entitled to relief . . .").

10: The standard gets its name from a pair of Supreme Court decisions: *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Some attorneys further shorten *Twombly/Iqbal* to the cute portmanteau '*Twiqbal*.'

11: *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009).

12: *See, e.g.*, Edward D. Cavanagh, *Making Sense of Twombly*, 63 S.C. L. Rev. 97, 120 (2011) ("Twombly and Iqbal represent a retrenchment from the liberal pleading practices envisioned by the drafters of the Federal Rules as originally promulgated."); A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 Mich. L. Rev. 1, 8 (2009) (noting that *Twombly* and *Iqbal* created "confusion over whether fact pleading has replaced a true notice-pleading regime").

32.3 Components

The rules of civil procedure for your jurisdiction and the local rules of the court where you will file your complaint will specify the complaint's necessary components. For example, Federal Rule of Civil Procedure 10 specifies that a complaint must contain: (1) a caption; (2) one or more claims, which must be divided into multiple counts where the claims arise from different transactions or occurrences and multiple counts would promote clarity; and (3) numbered paragraphs of allegations supporting each count. The other components discussed in this chapter are often included either as a matter of tradition or because a jurisdiction's procedural or local court rules require them.

Make sure to read these rules and keep yourself up to date on any amendments.

Review the rules more than once every forty years!

One memorable experience early in my career involved a dispute with an opposing attorney about the formatting requirements for a certain document. The senior associate on the case and I were flummoxed by the opposing attorney's insistence that we were wrong about the verification requirements for the document. We read and re-read the rules to no avail. Then, a partner solved the mystery for us by explaining that the opposing attorney's understanding of the rule was correct in the 1970s. Our opposing counsel apparently had not read the relevant rules in more than forty years.

Complaints generally contain the following components:

- **Caption.** The caption is the table at the top of every document filed in court that identifies the document. In federal court, it must state the name of the court, the case name (e.g., 'Martinez v. Johnson'), the file number (which the court will provide when you file the complaint), the name of the document (i.e., 'Complaint'), and the names of all parties to the action. If your client would like a jury trial, you may also need to put your jury demand in the caption. *See* Fed. R. Civ. P. 38(b)(1). Check the jurisdiction's procedural and local rules to confirm the requirements to preserve your client's right to a jury.
- **Introductory paragraphs.** Complaints often contain one or more introductory paragraphs that introduce the lawsuit. The contents of the introductory paragraphs vary depending upon the jurisdiction's procedural requirements and the drafting attorney's writing style. Some components you may include are: (1) an explanation of the court's jurisdiction;[13] (2) an explanation of why venue is proper; and (3) a description of each of the parties. In the introductory paragraphs, some attorneys also include a preliminary statement that provides an overview of the case and introduces their case themes. Other attorneys do not include a preliminary statement, preferring to dive right into their client's claims. Below in Figure 32.1 is an excerpt of a preliminary statement from the complaint in *Rix v. Polsinelli*, a sexual harassment lawsuit a law firm partner filed against her firm. How does the preliminary statement shape your understanding of the parties' dispute?
- **Claims or counts with supporting allegations.** The federal pleading standard requires you to plead facts that establish an entitlement to relief under some legal theory. There is no requirement that you specifically identify the legal basis for your claim. Still, most lawyers label the claims they are bringing in their complaint.[14] Beneath the name of each claim or count are numbered paragraphs of factual allegations supporting the claim. One method for drafting a complaint is to create an outline that lists each claim and its elements. Then, as you draft, replace the elements in your outline with factual allegations that show that the element is met.[15] One option for streamlining the complaint is to begin with a section of factual allegations common to all claims or counts and then incorporate those facts by reference in

13: If you are filing in a court of limited jurisdiction, you generally must explain why the court has subject matter jurisdiction. Examples of courts with limited jurisdiction include (1) *all* federal courts and (2) state courts focused on specific subject areas such as family court.

14: In my opinion as a former defense lawyer, labeling each claim promotes clarity. Defense counsel can understand what your client is claiming, which makes it easier to figure out if the defendant is potentially liable. Whether or not you label your claims, you should plead them in clear and concise language. Rule 8 requires "a short and plain statement of the claim," composed of "simple, concise, and direct" allegations. Fed. R. Civ. P. 8.

15: Lawyers debate whether you need to allege facts to meet every element of each claim. The safer practice is to do so.

I.
PRELIMINARY STATEMENT

1. Sexual harassment remains a pervasive problem affecting employees (disproportionately women) across the country. Law firms, often held out as bastions of integrity, are unfortunately no exception—predatory behavior and unequal treatment run rampant.

2. Fifty-five years after Title VII of the Civil Rights Act of 1964 ("Title VII") was enacted, and decades after policies, procedures and training programs to address the problem of sexual harassment became de rigueur, studies confirm that predatory behavior remains a significant problem and is not [improving] in the legal profession. Sexual harassment, particularly by older male partners abusing junior woman colleagues is still today "widespread throughout the legal profession, targeting women (and sometimes men) of all ages and at all career stages." What is worse, "the system for addressing sexual harassment in the legal profession is still broken," so most victims never report their abuse, suffering in silence, fearing retaliation, damage to their careers, or further harassment, while their abusers suffer no consequences.

3. Indeed, law firms—experts on shielding their clients from liability or public scrutiny—foster the perfect storm for shielding the predators they employ. Many that do not report harassment "sa[y] they kept silent because such incidents were endemic at the workplace and seen as acceptable" at the top of the "good old boys" network protecting their fellow senior, male partners, who often bring in hefty profits benefiting the firm. Worse, much of this misconduct, even if reported, remains hidden from public scrutiny as a result of law-firm-friendly, confidential arbitration agreements. These factors combine to create a ''culture of silence that protects perpetrators at the cost of their victims.''

Figure 32.1: Example preliminary statement from *Rix v. Polsinelli*, 2023-CAB-00574514 (D.C. Super. Ct. Sept. 15, 2023).

each claim or count.[16]

- **Request for relief.** This is where you tell the court what remedy your client would like. The most commonly requested relief is monetary damages. But your client may also seek other types of relief, such as an injunction preventing the defendant from taking certain actions. It is common to include a request for 'any other relief the court deems proper.' Whether such language has any legal effect depends upon each jurisdiction's rules.
- **Signature block.** The signature block contains the date and the signature of the attorney who is filing the complaint. Some complaints are also verified, meaning that the plaintiff signs them and swears that the allegations they contain are true.[17] The attorney who files a verified complaint still must sign it.

16: The sample complaint in Section 32.5 takes that approach.

17: For example, the Texas Rules of Civil Procedure require that litigants verify some petitions (the Texas terminology for a complaint) via affidavit. *See, e.g.*, Tex. R. Civ. P. 93.

32.4 Formatting

The procedural and local rules in your jurisdiction will often contain unique formatting requirements for pleadings. For that reason, it is helpful to find a good template or sample so that you can see what complaints usually look like in your jurisdiction. Or you can use legal document generation software to create your template. Either way, don't blindly follow the template. Make sure that you understand why the template's author did

things the way they did. It could be that there were case-specific rules that the template's author had to follow but that do not apply to your client's current situation. It's also possible that the template contains mistakes that its author didn't catch. There is a temptation, for example, to assume that software programs specially designed to generate legal documents must be accurate. But—whether due to user error or the software's own bugs—these programs can and do make mistakes. [18] Your professional duty of competence includes formatting your complaint correctly.

18: A recent study showed that Lexis and Westlaw's new AI research and drafting tools hallucinated (i.e., made things up) 35% and 58% of the time, respectively. *See* Varun Magesh, et al., *Hallucination Free? Assessing the Reliability of Leading AI Legal Research Tools*, 22 J. Emprical Legal Stud. 216 (2025).

32.5 Sample complaint

The sample complaint below concerns a fictitious personal injury case.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JOSEPH P. MARTINEZ, Plaintiff, v. ANNA MARIA JOHNSON, Defendant.	Case No. _____ [19] **Jury Trial Demanded**

19: The court will assign a case number when the plaintiff files their complaint. If the plaintiff files their complaint on paper by visiting the clerk's office, the clerk will write or stamp the case number in this blank. If the plaintiff files their complaint electronically (as court rules generally require), the plaintiff's attorney will receive electronic notice of the case number.

COMPLAINT[20]

20: The term 'case caption' refers to this document title and everything that comes before it.

Plaintiff Joseph P. Martinez, for his Complaint against Defendant Anna Maria Johnson, alleges as follows:

PRELIMINARY STATEMENT[21]

21: Although a preliminary statement is not a required complaint component, it can be an effective way to introduce your client's case. How do you feel about the preliminary statement to this complaint? Does it shape your view of the factual allegations that follow?

1. The dangers of texting and driving are common knowledge. According to the National Highway Traffic Safety Administration, a person sending or receiving a text takes their eyes off the road for five seconds. "At 55 mph, that's like driving the length of an entire football field with your eyes closed." *Distracted Driving*, National Highway Traffic Safety Administration, `https://www.nhtsa.gov/risky-driving/distracted-driving` (last visited Sept. 22, 2023). This action arises from the defendant, Ms. Johnson's, decision to ignore this well-known risk.

2. On July 12, 2023, Ms. Johnson was texting her son when she lost control of her car and veered into oncoming traffic. As a result of the accident, the plaintiff, Mr. Martinez, suffered significant injuries which have made it impossible for him to continue his career as a physical education teacher. Accordingly, he seeks damages to compensate him for his pain and suffering and for his lost wages.

JURISDICTION AND VENUE[22]

3. The court has personal jurisdiction over Mr. Martinez's claims under 28 U.S.C. § 1332(a)(1) because the plaintiff is a citizen of Massachusetts, the defendant is a citizen of Connecticut, and the amount at issue exceeds the jurisdictional minimum.
4. Venue is proper under 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claim occurred in this district.

PARTIES[23]

5. The plaintiff, Mr. Martinez, is an individual who resides in Amherst, Massachusetts. He is a citizen of Massachusetts. Prior to the events at issue in this complaint, Mr. Martinez was a well-loved physical education teacher at a middle school in Amherst.
6. On information and belief,[24] the defendant, Ms. Johnson, is an individual who resides in West Hartford, Connecticut and is a citizen of Connecticut.

FACTS[25]

7. On the afternoon of July 12, 2023, Mr. Martinez was driving his Subaru in the righthand lane of the westbound Massachusetts Turnpike. Mr. Martinez was obeying all traffic laws, including observing the posted speed limit of 65 miles per hour.
8. Ms. Johnson was also travelling westbound on the Massachusetts Turnpike in the center lane. On information and belief, Ms. Johnson was texting back and forth with her son while driving.
9. At approximately 4:15 pm, Ms. Johnson's Toyota RAV-4 suddenly veered into the right lane and crashed into Mr. Martinez's car. The impact from the collision was severe enough that both vehicles were "totaled." The cost of repair for each vehicle exceeded the value of the vehicle.
10. As a result of the crash, Mr. Martinez suffered significant injuries, including a broken nose, a slipped disk, and numerous bruises and contusions. These injuries left Mr. Martinez with limited mobility and continue to cause him significant pain.
11. Because of his injuries, Mr. Martinez has not been able to return to his job as a physical education teacher.

22: A jurisdictional statement is required here because federal courts are courts of limited jurisdiction. The author also included an explanation of why venue is proper.

23: It is standard practice to include a statement that explains who all the parties to the action are. Here, these paragraphs serve a dual purpose: they provide context, and they provide factual support for the jurisdictional allegations.

24: The phrase "on information and belief" indicates that the plaintiff does not yet have evidence to support this allegation. That is usually because the relevant information is in the opposing party's control. Under Fed. R. Civ. P. 11(b)(3), factual allegations based upon information and belief are proper if they "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery."

25: If a complaint alleges several causes of action that depend upon the same factual allegations, including those allegations in a single facts section makes the complaint less repetitive.

FIRST CAUSE OF ACTION

(By Martinez against Johnson for Negligence)[26]

12. The Plaintiff incorporates by reference all allegations in paragraphs 7 through 11 as though set forth herein in full.[27]
13. The Defendant had a duty to act reasonably and use due care while driving a vehicle.[28] This duty included observing the traffic safety laws of the Commonwealth of Massachusetts, keeping an eye on the road, and controlling her vehicle so as to avoid a collision.
14. The Defendant breached that duty by driving while distracted, which caused her to lose control of her vehicle and prevented her from braking before her vehicle collided with the Plaintiff's vehicle.
15. As a result of the accident, the Plaintiff suffered severe and permanent injuries. The Plaintiff's damages include, but are not limited to, past and future medical expenses, past and future physical pain and suffering, past and future emotional pain and suffering, lost wages, and property damage.
16. The Defendant's breach was the direct and proximate cause of all the Plaintiff's damages.

WHEREFORE[29] the Plaintiff prays for judgment against the Defendant in an amount to be proven at trial, but that is estimated to exceed $1,000,000, plus costs, pre-judgment interest, and post-judgment interest.

Dated: September 25, 2023

Respectfully submitted,

By: /s/ Amanda Carter

Amanda Carter, P.C.[30]

Attorney for the Plaintiff, Joseph P. Martinez

26: This heading identifies the legal claim that the plaintiff is bringing and the defendant against which it is brought.

27: As you may recall from the discussion of pleading requirements in Section 32.2, the federal pleading standard requires factual allegations sufficient to "plausibly suggest an entitlement to relief." Here, the complaint meets this requirement by incorporating the factual allegations from the facts section into the first cause of action.

28: This is a conclusory allegation that one of the elements of negligence is met. In a strict notice pleading jurisdiction, this type of allegation would likely be sufficient on its own to allege the duty element of the plaintiff's negligence claim. But, as discussed, in federal court, such an allegation is not sufficient on its own. To meet the federal pleading standard, the first cause of action incorporates by reference the factual allegations in paragraphs 7-11.

29: This is the request for relief. Check the relevant court rules to determine how specific the demand for relief must be. In many jurisdictions, it is acceptable to demand damages 'according to proof at trial.' But, in other jurisdictions (and when seeking default judgment), a more precise damage demand is required.

30: This is the signature block. By filing this signed document with the court, attorney Carter represented that she had complied with the requirements of Fed. R. Civ. P. 11. The /s/ plus the attorney's name indicates that she has electronically signed this document.

33 Affidavits/Declarations

Jessica Mahon Scoles

Imagine that you are representing the plaintiff in the car accident case discussed in Chapter 32. Your client believes that the defendant hit his car because the defendant was texting when she should have been paying attention to the road. How will you prove that the defendant was texting and driving?

Anyone who has seen a legal drama has a sense of how you would prove your case at trial. You would call a witness—perhaps someone who saw the defendant texting and driving or an employee of the phone company who knows what time the defendant's last text was sent—and that witness would testify about what they know.[1]

But what if you are not at trial? What if, instead, the defendant has moved for summary judgment on the grounds that you cannot prove she was texting?[2] At this pretrial stage of litigation, how can you get evidence before the judge that the defendant was texting? Very often, an affidavit or declaration is the solution.

Both affidavits and declarations are sworn written statements. The term 'affidavit' usually refers to a statement sworn before an official who is authorized to administer an oath, such as a judge or a notary public. For example, a police officer seeking a search warrant might swear to the facts that constitute probable cause for the search and then sign an affidavit containing those facts in front of a magistrate judge. A declaration is not signed in front of someone. It instead contains a written statement swearing that the witness is telling the truth. Affidavits and declarations are otherwise very similar. In fact, courts will often accept either an affidavit or a declaration. Thus, going forward, this chapter uses the terms 'affidavit' and 'declaration' interchangeably. In practice, though, before drafting an affidavit or declaration, you should always research whether you are drafting a document that is appropriate for your jurisdiction and your client's situation.

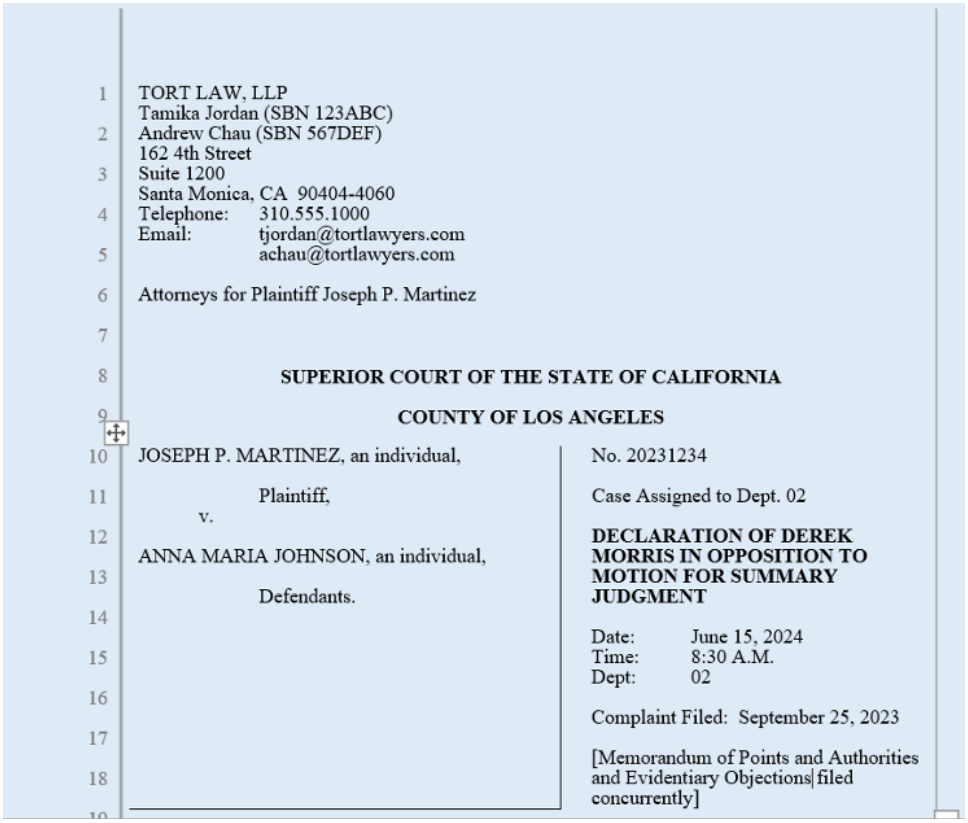
This chapter covers the components of a declaration, how to draft one, and some evidentiary concepts that you will find helpful as you draft.

33.1 Declaration components

In most jurisdictions, there are procedural rules that dictate the format and required contents of declarations. Always read the rules in your jurisdiction—including the local rules of the court you are before, if any—before you start drafting. In general, the components of a declaration are:

1: In this context, testifying means making a statement under oath. A witness's testimony is their statement made under oath.

2: See Section 18.4 for an explanation of where summary judgment fits into the civil suit's timeline.



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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

JOSEPH P. MARTINEZ, an individual,

Plaintiff,

v.

ANNA MARIA JOHNSON, an individual,

Defendants.

No. 20231234

Case Assigned to Dept. 02

DECLARATION OF DEREK MORRIS IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Date: June 15, 2024
Time: 8:30 A.M.
Dept: 02

Complaint Filed: September 25, 2023

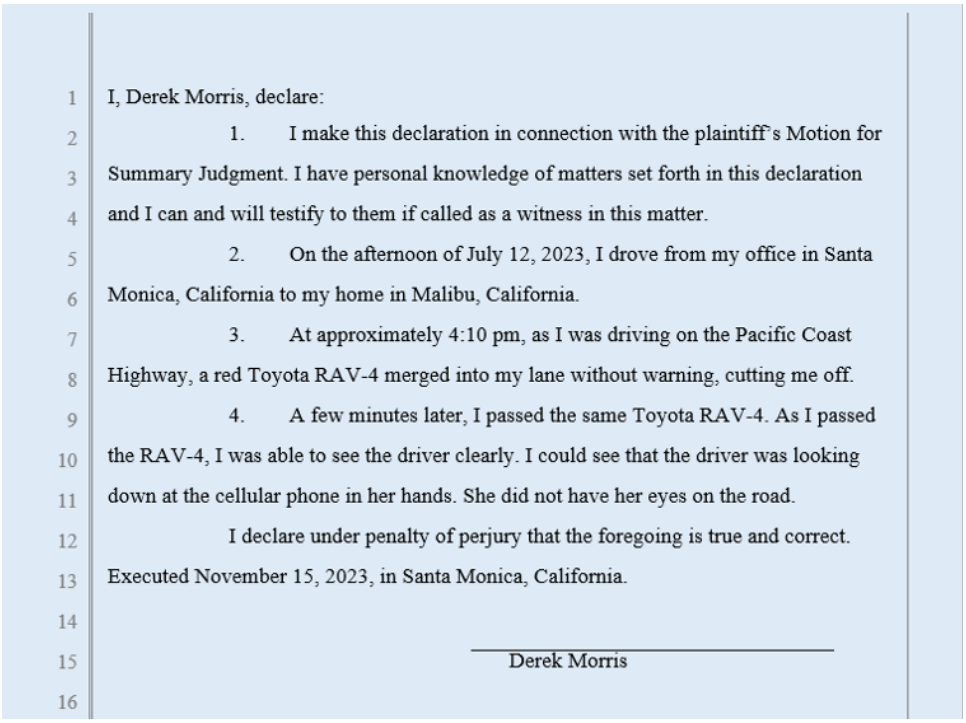
[Memorandum of Points and Authorities and Evidentiary Objections filed concurrently]

Figure 33.1: Declaration caption.

- **The caption.** The caption is the information at the top of a litigation document that tells the court the name of the case and the title of the document. Check the local rules to see if you must include additional information in the caption.
- **A paragraph or paragraphs establishing the capacity of the declarant.** In these paragraphs, the declaration introduces the witness and lays a foundation[3] for their testimony. Who is the witness? How do they know the information about which they are going to testify?
- **Paragraphs of facts supporting the motion.** These paragraphs are the witness's testimony—the information the witness knows that you would like to share with the court.
- **A certification that the testimony is accurate.** The certification is where the witness swears they are telling the truth. In most jurisdictions, there are rules that tell you what the certification must say.
- **A signature block.** The signature block contains the date and the witness's signature.

3: *See* Section 33.3.

Figure 33.1 and Figure 33.2 provide a sample declaration that complies with California law and is formatted to comply with the local rules of the Los Angeles Superior Court. The rules of civil procedure and the court's local rules specify all the required components for the caption in Figure 33.1.



I, Derek Morris, declare:

1. I make this declaration in connection with the plaintiff's Motion for Summary Judgment. I have personal knowledge of matters set forth in this declaration and I can and will testify to them if called as a witness in this matter.

2. On the afternoon of July 12, 2023, I drove from my office in Santa Monica, California to my home in Malibu, California.

3. At approximately 4:10 pm, as I was driving on the Pacific Coast Highway, a red Toyota RAV-4 merged into my lane without warning, cutting me off.

4. A few minutes later, I passed the same Toyota RAV-4. As I passed the RAV-4, I was able to see the driver clearly. I could see that the driver was looking down at the cellular phone in her hands. She did not have her eyes on the road.

I declare under penalty of perjury that the foregoing is true and correct. Executed November 15, 2023, in Santa Monica, California.

Derek Morris

Figure 33.2: Declaration body and signature.

Figure 33.2 exhibits some features typical of all declarations and some required in California. Although the language in paragraph 1 is typical, much of it is not legally required in California. Understanding the relevant rules will help you determine if you can omit this type of boilerplate. In paragraphs 2, 3, and 4, the witness testifies to relevant facts. The testimony establishes that the witness observed first-hand the events about which he is testifying. California law requires the certification in the final, unnumbered paragraph.

33.2 Drafting process

Imagine that you are drafting a declaration in opposition to a motion for summary judgment filed in the car accident case mentioned previously.

First, you must determine what evidence you need to oppose the motion. If the defendant's argument is that you cannot prove she was texting and driving, then you need some evidence that the defendant was texting and driving.

Second, you must determine who has the evidence you need. In this case, let's imagine that a friendly witness will testify to seeing the defendant typing on her phone shortly before the accident.[4]

Third, you must collect the necessary information and organize it in the form of a declaration. For our friendly witness, that means interviewing the witness about what they saw and converting that information into

4: As discussed below, we might also have a document, like a copy of the defendant's phone records, that shows that the defendant was texting and driving. In that case, we need to find an appropriate witness to authenticate the document. The steps for assembling a declaration that authenticates a document and a declaration that contains factual testimony are the same. Only the content differs.

numbered paragraphs in the declaration the witness will later sign. Why not just have the witness write their own declaration? An attorney is the best person to draft a declaration because they can ensure it complies with the rules of evidence,[5] the rules of civil procedure, the rules of ethics, and any other applicable legal requirements for declarations.

5: *See* Section 33.3.

Finally, the witness who will sign the declaration must read it carefully to confirm it is accurate before signing.[6] This step is crucial. Be sure the witness understands that they are signing the declaration under penalty of perjury.

6: Finalizing a declaration is often a collaborative process between the attorney and the witness. The attorney will use the witness's feedback to revise the declaration language until the witness is satisfied that the language is correct.

33.3 Admissibility of your evidence

Because a declaration contains testimony, the same evidentiary rules that apply to oral testimony during trial apply to declarations and affidavits. To draft a declaration or affidavit, you therefore will need to understand a few evidentiary rules.[7]

7: Of course, if you are using this book in your 1L legal writing class, you will not have taken evidence yet. This section discusses some of the most common evidentiary issues that arise when drafting declarations. It is not exhaustive. If a declaration violates any rule of evidence, opposing counsel can object to the declaration's admissibility.

Laying a foundation for testimony

When lawyers talk about 'laying a foundation' for a witness's testimony, they mean eliciting testimony that shows: (1) that the witness has the capacity and knowledge to testify, and (2) that the testimony is relevant to the case. In other words, the goal is to provide context that establishes that the court can properly consider the testimony.

The Federal Rules of Evidence provide that "[e]very person is competent to be a witness unless these rules provide otherwise." Fed. R. Evid. 601.[8] Thus, you will rarely need to include facts in a declaration that show that your witness is competent to testify. In the rare case where competence is a concern, there will be facts that alert you to the need to research a potential competence issue. Perhaps the witness had been drinking heavily before observing the event about which they will testify, for example.[9]

8: I cite to the Federal Rules of Evidence because they are taught in law school and tested on the Uniform Bar Exam. But, at the risk of sounding like a broken record, don't forget to read the evidentiary rules in the jurisdiction where your litigation is pending. They might be different from the federal rules.

9: In most jurisdictions, alcohol use does not render a witness incompetent unless the witness's drinking is so extreme that it impairs their ability to observe and understand events. However, lawyers sometimes make incompetence arguments based upon alcohol use, so this is a situation where you would want to research the rules in your jurisdiction.

You will, however, always need to include facts in the declaration that show that the witness's testimony is based upon personal knowledge. *See* Fed. R. Evid. 602. Personal knowledge is knowledge that the witness obtained through firsthand observation. For example, let's imagine that you locate two potential witnesses in the car accident case that we talked about earlier. The first witness, Derek, saw the defendant texting and driving just before the accident. The second witness, Monique, heard from a friend that the defendant was texting and driving. Derek actually saw the defendant texting and driving, so Derek has personal knowledge of the fact that you hope to prove. Monique does not. If you decide to obtain a declaration from Derek, the declaration will begin with facts that show that Derek was in a position to observe the defendant just before the accident and actually saw the accident. For example, where was Derek when he saw the defendant? How far away was the defendant? Was there anything to obstruct Derek's view?

Finally, you may also need to include contextual facts that establish the relevance of the witness's testimony. *See* Fed. R. Evid. 402. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. Relevance thus depends on what the issues in the case are. In some situations, the relevance (or lack thereof) of testimony is obvious. But if the relevance of a witness's testimony is not immediately apparent, you should include context in the declaration that helps the court understand how the testimony relates to the issues in the case. For example, if Derek testifies that he saw a woman in a red car texting and driving as she sped down the highway, testimony (from Derek or another witness) that the defendant drives a red car helps to establish the relevance of Derek's testimony. This type of contextual information also helps us to tell the client's story more coherently.

Laying a foundation for documentary evidence

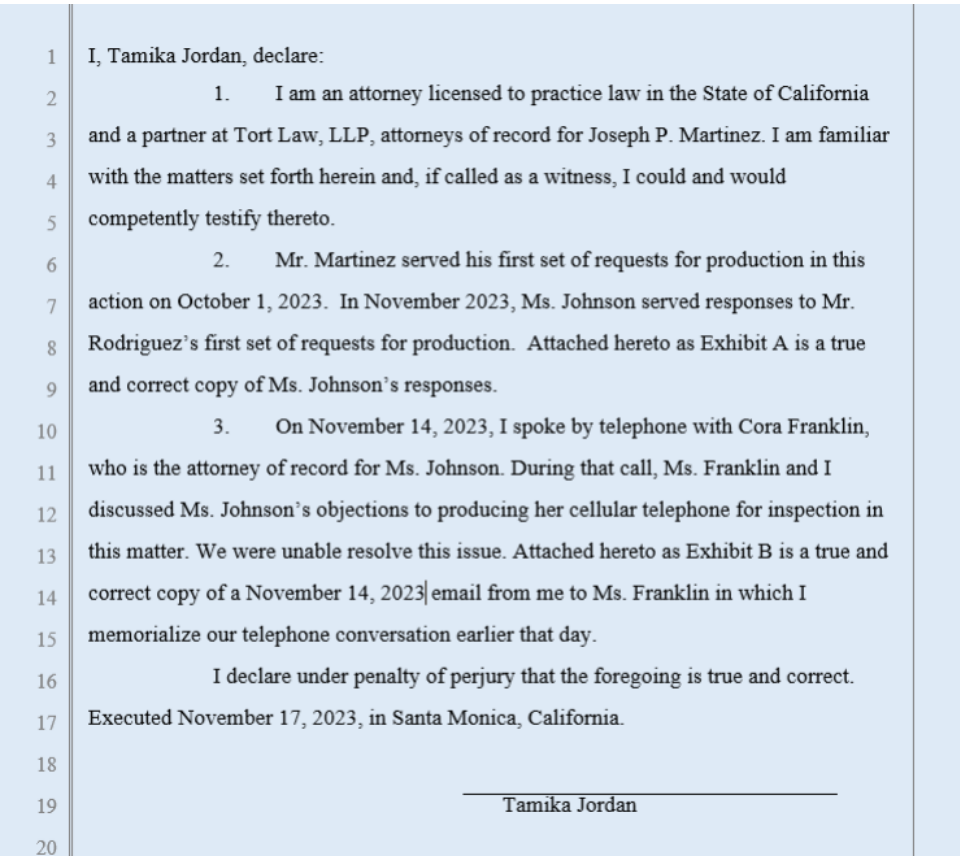
Declarations can also be used to submit documentary evidence that you would like the court to consider when deciding your motion. Documentary evidence includes things like business records and other writings, photos, and videos. In other words, it is evidence that is not witness testimony. Documentary evidence is admissible only if you authenticate it by establishing that the evidence is what you say it is.

- **Attorney declaration.** It is common to authenticate documents during the discovery process. For example, you can ask the opposing party to admit that a document is what you say it is during a deposition or via a request for admission. If you have a discovery response that authenticates a document, you can use an attorney declaration to transmit the relevant discovery to the court.[10] The sample declaration body in Figure 33.3 below is an attorney declaration from the same fictitious personal injury case as our prior sample declaration. In this sample declaration, the attorney authenticates two documents: an email and a set of discovery responses.
- **Witness declaration.** Another option is to have a witness who knows what the document is testify. For example, a phone company employee can testify that Exhibit A to the employee's declaration is a true and accurate copy of a defendant's phone records.

10: Attorneys in a matter also frequently testify in support of discovery motions because they have firsthand knowledge about the litigation itself. For example, an attorney might testify that they called opposing counsel to request a discovery extension and that opposing counsel refused to grant that extension.

Other evidence rules for drafting declarations

- **Hearsay** is a statement that "(1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801. While this definition may seem simple enough, hearsay is a concept that befuddles many trial attorneys. Your declaration may raise hearsay concerns if the witness is testifying about what someone said or if the declaration attaches a document. For example, the Declaration of Tamika Jordan in Figure 33.3 attaches an email.



I, Tamika Jordan, declare:

1. I am an attorney licensed to practice law in the State of California and a partner at Tort Law, LLP, attorneys of record for Joseph P. Martinez. I am familiar with the matters set forth herein and, if called as a witness, I could and would competently testify thereto.

2. Mr. Martinez served his first set of requests for production in this action on October 1, 2023. In November 2023, Ms. Johnson served responses to Mr. Rodriguez's first set of requests for production. Attached hereto as Exhibit A is a true and correct copy of Ms. Johnson's responses.

3. On November 14, 2023, I spoke by telephone with Cora Franklin, who is the attorney of record for Ms. Johnson. During that call, Ms. Franklin and I discussed Ms. Johnson's objections to producing her cellular telephone for inspection in this matter. We were unable resolve this issue. Attached hereto as Exhibit B is a true and correct copy of a November 14, 2023 email from me to Ms. Franklin in which I memorialize our telephone conversation earlier that day.

I declare under penalty of perjury that the foregoing is true and correct. Executed November 17, 2023, in Santa Monica, California.

_____
Tamika Jordan

Figure 33.3: Attorney declaration to authenticate documents.

That email contains words that Attorney Jordan wrote outside of court. Attorney Jordan must therefore consider whether the email is hearsay. If so, the email is only admissible if it fits within a hearsay exception.[11]

- **The Best Evidence Rule** excludes secondary evidence that is offered to prove the contents of a writing. *See* Fed. R. Evid. 1002, 1003. This means that you usually cannot have a witness testify about what is contained in a written document, photo, or recording. Instead, attach the document, photo, or recording to the declaration as an exhibit so that the judge can read the document itself. Use witness testimony only to authenticate the document.
- **Opinion testimony** is only admissible if it meets the requirements for admissible lay or expert testimony. If you would like a witness to testify as to their opinion (as opposed to testifying to what they saw, heard, felt, smelled, or tasted), then different rules apply. *See, e.g.*, Fed. R. Evid. 701–706. Research regarding the admissibility of opinion testimony is in order.

11: The many exemptions and exceptions to the hearsay rule are outside the scope of this chapter. I suggest consulting your favorite practice guide about evidence to learn more.

Affidavits and declarations are some of the most common documents drafted by attorneys. Fortunately, drafting them is usually routine and straightforward. Just be sure to check the procedural, evidentiary, and local rules for your jurisdiction so that you can ensure that the court won't reject your affidavit or declaration.

34 Trial briefs

Stephanie Rae Williams

Trial briefs are a type of persuasive writing to a trial court or other fact-finding tribunal.[1] Some jurisdictions use the term 'trial brief' to mean the one document each party must file just before trial, discussing all proposed evidence and jury instructions. On the other hand, in many trial courts, parties file multiple trial briefs of varying length before, during, and after trial, whenever the judge asks for briefing or someone files a motion. Your professor or supervising attorney might refer to them as 'motion briefs' or 'trial court briefs' or by some other name.

Trial briefs differ from appellate briefs in formality and audience, but use the same overall CREAC structure. Thus, whatever the exact format of your trial brief, you will need to introduce the court to the legal issue, honestly but persuasively state the relevant facts, and illustrate and apply the law the judge needs to know to decide your question, and advocate for your client's position. Like memos and other legal documents, trial briefs can be fairly formulaic.

1: This chapter refers to the trial brief audience as 'judge' or 'trial judge.'

Start your trial brief drafting process with an outline of your CREACs, the development and use of which Chapter 14 describes more fully. Section 11.2 discussed the iterative legal writing process. Re-read Chapter 11, especially Section 11.2, and use that process to help you craft your trial brief. In addition to that chapter and this one, you should consider the proofreading and copy-editing advice in Chapter 42 through Chapter 44 before submitting any brief.

34.1 Persuasion in trial briefs

Before discussing the nuts and bolts of trial brief sections, let's take a moment to consider persuasion. Persuasion is not an argument that simply asserts one party is right and the other is wrong. Instead, persuasion is an attempt to modify behavior through appealing communication.[2] Just Google 'civility in court' or any similar phrase, and you will find articles from many judges telling you they are not persuaded by purported arguments that are not persuasion and are really attacks on opposing counsel, exaggerated language, and misstatements of the law or record.

2: This is Prof. Williams' definition. *See also* Dictionary.com; Brooke Tully, *Persuasion versus Manipulation*, BrookTully.com (Oct. 13, 2021), https://perma.cc/7JZA-DP3U.

Instead, to constitute appealing communication, your trial brief must be organized, supported by facts and law, clear, and always honest. You should use CREAC to craft a very precise, clear, and therefore persuasive, trial brief.

34.2 Trial briefs & local rules

To be persuasive, trial briefs also must follow the judge's briefing rules. Many state court divisions and federal court districts have 'Local Rules' detailing procedures for items filed in those courts, covering everything from labeling exhibits and making objections to the sections in a trial brief.[3] Trial court judges often post their own more specific requirements, sometimes called 'Local Local Rules,' which address matters such as trial brief cover pages, word-count requirements, and section labels just for those judges' courtrooms.[4] For your first-year writing class, carefully follow your assignment details, and in practice, be sure you know your court and judge's rules before you start outlining your trial brief.

Most local rules require trial briefs to have four main parts: an introductory section; a statement of facts; an argument; and a conclusion. This chapter discusses the sections in the order they ordinarily appear in a trial brief. However, as noted above, you should draft holistically, letting your research and knowledge of the facts drive your outline and repeating steps as needed.

3: For an example of extensive local rules, see the Illinois Nineteenth Judicial Circuit's rules at https://19thcircuitcourt.state.il.us/1254/Local-Court-Rules.

4: *See* https://perma.cc/GBY8-UD7J for Judge Brantley Starr's representative local local rules as of May 16, 2025.

34.3 Introductory sections

A trial brief begins with an introductory section. Traditionally, this is called the 'Introduction,' but some local rules ask for a 'Summary of the Argument' or something similar. In this initial section, you should clearly state the issue and the relief you are requesting. Many readers will skim your brief. This first section is your chance to quickly show why you should win—and to keep the judge or judicial law clerk reading.[5]

Your introduction should be brief. A good rule of thumb is to use roughly one paragraph in your introductory section for each main point heading in your argument. Thus, if you have point headings I. and II. in your argument, you should have about two paragraphs in your introduction.

Use CREAC for the small-scale organization of each of these introduction paragraphs.[6] Start each paragraph with your conclusion on the issue. Then, give your overarching rule statement from your argument rule sentences, referencing your rule explanations from your CREACs. Next, provide the most important facts for your client. Finally, conclude again, based on your side-by-side fact comparisons and your application of the rule to your facts.

This box shows part of an imperfect but helpful introduction from a student's one-CREAC trial brief on whether police violated the Fourth Amendment by entering a home's protected curtilage, the land residents treat as if it is the home.

5: Trial brief introductory sections serve a purpose similar to that of the question presented and brief answer in many objective memos. They inform the reader of the question you are approaching and the answer you have found. See Section 29.4 and Section 29.5. In persuasive writing, however, you should stress the facts and law that are best for your client, and your answer—the outcome of your argument—will naturally and confidently be the answer your client desires.

6: See Chapter 14 for full treatment of using CREAC.

I. INTRODUCTION

This Court should balance the Fourth Amendment curtilage factors of protection and use in the Government's favor, and therefore should not suppress the evidence from the search of the root cellar. Courts find two factors in the curtilage test most important: protective steps and use. When residents take few steps to protect the privacy of the land near the home from the view of passersby, with no fences or foliage covering the area, the land is unlikely to be curtilage, especially if residents use the land for business or invite the public onto the land. The Mills family left the root cellar door open and the contents in plain view of their visitors, with only a "grassy area" and no trees or shrubs hiding the cellar from the driveway. Moreover, the family kept orchard business records, a desk, and a shredder in the cellar. Therefore, this Court should deny the suppression motion.

Notice the way the writer stated the desired relief—denying the motion to suppress—at the beginning and end of the introduction. Then the writer listed the key legal rules quickly, in only two sentences. The writer then summarized the facts best for the police, while applying the key points from the courts to those facts, and concluded. Also note where this introduction could be clarified, like how the key facts connect to the writer's conclusion.

This curtilage trial brief had only one point heading, on the dispositive factors of protection and use,[7] so this introductory section needed only one paragraph. When you write a trial brief with multiple point headings (and thus multiple discussion subsections), your introduction will necessarily be longer. Nonetheless, you should follow this same basic structure of one short paragraph per section, using general CREAC format (albeit shortened and modified for introductory purposes) within each introduction paragraph.

7: You can see a version of this brief in Appendix Chapter 48.

As you become a more sophisticated legal writer, you might use a 'hook' or interest catching device tied to your theory of the case in your introductory section. Use the hook as your first sentence of the introduction to immediately pull in the reader. Here are some hooks Prof. Williams' students wrote as the first sentences to their introductions.

- **From a case about a baking reality TV show exclusivity contract.** "Kim wanted to have her cake and eat it too, taking her show winnings yet still setting up a competing bakery."
- **From a trademark infringement case.** "Doug Denali, an entrepreneur with a passion for pets, developed a safety-oriented, luxury pet stroller that pet parents could buy without breaking the bank."

Later, you should work these hook ideas into your whole trial brief, as discussed in Section 34.5.

As a final note on introductions, remember that you might want to wait to formally write the introductory section until after you have drafted your statement of facts and CREACS. And whenever you write the introduction, remember the iterative process of editing, and update your introduction after you write the statement of facts and your CREACS.[8]

8: For more on the iterative nature of legal writing projects, see Chapter 11.

34.4 Statement of facts

After the trial brief's introductory section, include a short statement of facts and procedural history, with citations to the record.[9] Trial brief statements of facts should include all of the legally relevant facts and key background facts, using quotes and specific details, and avoid legal argument or extraneous details.[10] Prof. Williams tells her students to use persuasive subheadings in the statements of facts when possible under the applicable local rules, but this is a judgment call. The longer the statement of facts, the more helpful subheadings will be.

9: In practice, you might need to prepare an appendix to a trial brief. The appendix should follow the local rules to include any deposition or trial testimony and motions or other filings you cite, so the judge and your opponent can easily see the factual support for your points.

10: For more guidance, see Chapter 13.

The most effective way to draft the fact section is to tie it closely to your CREAC argument section. Your writing will evolve as you gain experience, but for your first trial briefs, follow more or less this order, and keep cycling through these steps as you revise:

- Outline your argument, using the techniques discussed in this text.
- Use your argument outline to determine which facts you will use for each application in the CREACs. Make a bullet point for each of these facts under your outline's statement of facts heading.
- Organize your fact bullets in a logical way, often using chronological order, but sometimes grouping your facts topically.[11] If allowed under court and other applicable rules, add draft topical subheadings to your bullet points now, using short, persuasive phrases about the facts. If you have to force these subheadings and you have little content under each, you might not need them. Use fact subheadings when they help you tell a persuasive story by organizing complex or long facts, or when they help summarize key facts. Finally, even if you need to delete factual subheadings later under your rules, using them can help you organize a persuasive statement of facts, like removing a scaffold once you've built the building it facilitated.
- Check the record documents and make sure you are accurately listing each fact. Do not write general summaries, but list precise details and use readable quotes.
- Revise your argument outline to include all the legally relevant facts from your bullet points.
- Use your outline to write your first draft of the argument section. Once you have the draft, make sure all facts you used in your applications are on your statement of facts list. Also remove any fact bullets from the draft facts section that you realize you do not need for the argument or as key background facts that help you ethically and fully present the issues.
- Now draft your statement of facts completely. Check the record as you write, and make sure to correct any misstatements you have in your statement of facts or argument.
- Add a brief summary of the procedural history near the end of your facts or as a separate trial brief section after the statement of facts, reminding the court why you are filing the brief. I prefer doing this as a separate section of the trial brief, but some local rules ask advocates to end their fact sections with prior history.

11: And note the discussion of adverse facts in Section 13.5.

- You may close this prior history section with a request for relief, weaving this request—which is not technically a fact—into the procedural history. For example, you could close with: 'Mills now appeals the denial of his suppression motion, asking this court to reverse and remand.' Some lawyers prefer not to put their request for relief at this point.

Again, unless your assignment or local rules do not allow subheadings in a statement of facts, consider using persuasive subheadings in your facts. These are not point headings, but are quick summaries to lead the judge through your facts and remind the reader of your theory of the case. For a skimming reader, these headings help reinforce your key points, especially if your rules allow you to list them on your table of contents. Subheadings in a statement of facts should be internally consistent, but can follow any format you like and that court rules permit. Thus, you can use full sentences or short phrases. Just be honest and avoid legal argument.

Consider this slightly modified example of fact subheadings from a trial brief by Amazon Web Services in its opposition to a motion for a restraining order (filed January 12, 2021, in the Western District of Washington).

- A. Parler Testifies It Conducts the "Absolute Minimum" of Content Moderation
- B. Parler Enters an Agreement with AWS for Web Hosting Services Which Required Parler "Not to Use AWS for Harmful Content"
- C. AWS Reports Over 100 Parler Posts to Parler in Violation of the Agreement
- D. AWS Exercises Its Right to Suspend Parler's Account

Even if you do not know anything about this case, these headings give you the idea that AWS claims that Parler violated its contract and gave AWS no choice but to suspend Parler's account. Notice the writer did not make any legal arguments and used only undisputed facts, building credibility. Each subheading also uses the same tense, sentence structure, and format.[12]

12: See Section 11.3 and Section 15.6 about our guidance on capitalizing and punctuating headings, which is slightly different than what AWS did here.

Here are two more examples, showing some of the fact subheadings from the student work quoted previously:

- From the baking reality TV show case:
  1. Kim "Just Wanted To Make It Big" And "Did Not Carefully Read" The Contract
  2. Defendants Used Exclusivity Clauses To Cultivate Talent

- And from the trademark case:
    1. "Horrified by PetRover's Prices," Denali founded SAFERover in 2019, stating he was motivated to make pet strollers safe and affordable.
    2. SAFERover admitted its "cheaper value" helped it "take off" in online and brick and mortar sales, in Texas, Louisiana, and Oklahoma.

These samples also follow consistent formats and convey the most important facts.

This chapter focuses heavily on facts, because they are such an important part of most trial briefs. However, the longest part of most trial briefs is the argument, which uses CREAC to advocate to the judge how they should apply the law to the facts.

34.5 Argument

Trial brief argument sections are very similar to appellate brief argument sections. Both rely on CREAC structure and use point headings to guide the court. In fact, the skills you need for trial briefs draw on many chapters of this text. Therefore, this section reminds you where you can find guidance, and provides an example simple CREAC trial brief.

To write your trial brief argument, use the CREAC and point heading organizational structures discussed in Chapter 14 and Chapter 15, and the persuasive techniques discussed in various other chapters.[13] Also, follow the statement of fact and argument section drafting order listed in Section 34.4 to draft your argument with the best possible connection to the facts. These chapters and sections of this text discuss each part of the CREAC structure, including explanatory rule illustrations presenting the law, applications of the law to case facts, and counter-arguments.

Finally, use the themes in your introduction hook and statement of facts subheadings to help you write your argument point headings and topic sentences. Repeating your theory of the case this way will help persuade the judge. Consider the hook, fact subheadings, argument point headings, and CREAC topic sentences as linked items that also must stand alone. Some readers will skim past your headings but read your topic sentences, while others will only read the headings, perhaps only in the table of contents.

In Appendix Chapter 48, you can review a draft trial brief several of Prof. Williams' students wrote together. This brief includes notes showing each CREAC step. The example is overinclusive in several areas, but shows you what a one-section trial brief argument might look like.

13: See Chapter 7, Chapter 9, and Chapter 10, all of which provide useful bases for developing persuasive arguments. Section 11.1 offers guidance on analyzing your audience to influence their beliefs and actions; Section 13.5 on addressing facts that are negative for your client; and Section 14.9 on constructing (and by implication, defusing) counter-arguments.

34.6 Conclusions

Trial briefs often have two conclusions, one formal conclusion at the end of the brief, under the 'Conclusion' heading, and one mini-conclusion at the end of the argument. Jurisdictions (and law professors) have differing views on how much content you should include in a formal conclusion section. Some recommend making only a bare request for relief in the formal conclusion and keeping the substantive summary at the end of the argument section. Others suggest a basic statement of why the facts do or do not meet the legal factors or elements, based on the CREACs. Your approach might also vary based on the complexity of your argument. For example, you might have a mini-conclusion at the end of each argument subsection, as well as a conclusion section listing relief sought on multiple claims or motions.

Thus, the official conclusion section of your trial brief can be as brief and straightforward as this:

> **IV. CONCLUSION**
>
> For these reasons, the McSherrys respectfully request this Court deny the motion for sanctions.
>
> [Your signature block would follow here.]

On the other hand, a mini-conclusion does not have a separate heading, but includes the substantive summary for your entire trial brief argument or a complex subsection. In a simple analysis, this conclusion might be a single sentence after your final application paragraph. Many writers also include mini-conclusions at the end of each subsection, based on the complexity of the arguments. In a complex analysis of multiple issues, one mini-conclusion should be a separate paragraph after the last CREAC to summarize all of your CREAC conclusions for the court. Think of this final mini-conclusion as a summary score card for judges, reminding them why your client should prevail. For example, a straightforward two-CREAC trial brief argument section will include:

- CREAC on main point one
  - C
  - R
  - E
  - A
  - C (possible mini-conclusion on CREAC 1)
- CREAC on main point two
  - C
  - R
  - E
  - A
  - C (possible mini-conclusion on CREAC 2)
- Mini-conclusion 'scorecard' on both CREACs

Consider this mini-conclusion from a student trial brief on behalf of a lender in a bankruptcy problem, where the debtor had asked the district court to reverse a bankruptcy judge's decision that involved weighing and balancing many statutory factors:

> In summary, this court should affirm. The factors of maximizing income and employment weigh most heavily under the law, and here balance for LoanDay and affirmance, because Douglass did not seek full time work at a salary commensurate with his education. Additionally, by failing to return LoanDay's calls, Douglass did not properly negotiate repayment, and his lavish food costs show he did not minimize his expenses. Thus, while payment history might weigh for good faith, overall Douglass showed bad faith and the bankruptcy court properly ruled for LoanDay.

This student persuasively buried the worst factor below the winning factors and reminded the court of the trial brief's overall conclusion on each substantive subsection. By doing so, this mini-conclusion is honest and credible, while also organized to have the best possible impact for the client. Then, in the ultimate, official conclusion section at the end of the brief titled 'conclusion,' the student could simply request affirmance.

Remember, in practice you should follow court rules and any applicable house style from your office, and use the conclusion approach that best conveys your argument to the court based on your case's unique facts and complexity.

34.7 Final thoughts

Many trial judges place lists of good writing tips for trial briefs on their court web pages or discuss these tips in law review articles.[14] All of them suggest that lawyers:

- Know the local rules and file briefs on time;
- Outline before writing;
- Be brief;
- Be honest about the facts and the law, using proper citations; and
- Be civil.

As you move from your first law school trial brief to practice, keep these rules in mind.

14: *See, e.g.*, Morey L. Sear, *Briefing in the United States District Court for the Eastern District of Louisiana*, 70 Tul. L. Rev. 207, 208–24 (1995).

35 Appellate briefs

Jessica Mahon Scoles

Appellate briefs are a type of persuasive writing. In these briefs, the appellant and the appellee explain to the appellate court why the decision of the court below should be affirmed or reversed. When an appellate court affirms a lower court decision, it is deciding that the lower court got it right: The lower court decision will stand. If the appellate court decides that the lower court got it wrong, it can reverse, essentially deciding that the opposite party should have won. Or it might remand, sending the case back to the lower court for further proceedings in light of the appellate court's decision.[1] As you learned in the introduction to Chapter 34, trial briefs and appellate briefs are similar in many ways. I thus will refer you back to Chapter 34 frequently. Trial briefs and appellate briefs also differ in some important ways because of differences in the audience for and purpose of the two types of briefs. I will be sure to let you know about those differences too.

This chapter begins with a roadmap of the appellate process. It then discusses some differences between trial level motion practice and appeals. Finally, it provides pointers for drafting the required components of a brief and for formatting your brief.

1: Regardless of the parties' roles in trial court, the party who files the appeal is the appellant (or sometimes the petitioner). The party opposing the appeal is the appellee (or respondent). For more, see Section 18.5.

35.1 Roadmap of an appeal

Most law school appellate advocacy classes and moot court competitions give students an assembled appellate record for a procedurally proper appeal and ask the students to write a brief and make an oral argument for one side. In a real appeal, the contents of the appellate record and the issues preserved for appeal are the product of attorneys' strategic decisions (or, in some cases, strategic mistakes). Understanding the basics of the appellate process, and where brief writing and oral argument fit into that process, provides context for your work in law school and beyond.[2]

Most court cases start at the trial court level.[3] They reach appellate courts when one of the parties to the trial-court action appeals. This section provides a brief general overview of the appellate process, depicted in basic form in Figure 35.1. To understand the specifics of the appellate process in your jurisdiction, read the rules of appellate procedure (along with a good practice guide).[4]

- **When can a party appeal?** Before there can be an appeal, there must be an appealable order. Usually, this means that the trial court must enter a final judgment that disposes of all claims by all parties. Interlocutory orders—orders that decide a legal question without

2: For more on how the appellate phase fits into the life of a civil case, see Section 18.5.

3: See Chapter 18.

4: This chapter will ***remind you repeatedly to read the rules***, just as Chapter 32 did. Why? Many lawyers either don't read the rules at all or read them in a cursory manner. This is a recipe for failure, particularly in appellate courts. Appellate courts are even more rules oriented than trial courts. And opportunities to correct procedural mistakes in appellate court are fewer (or even nonexistent in some situations).

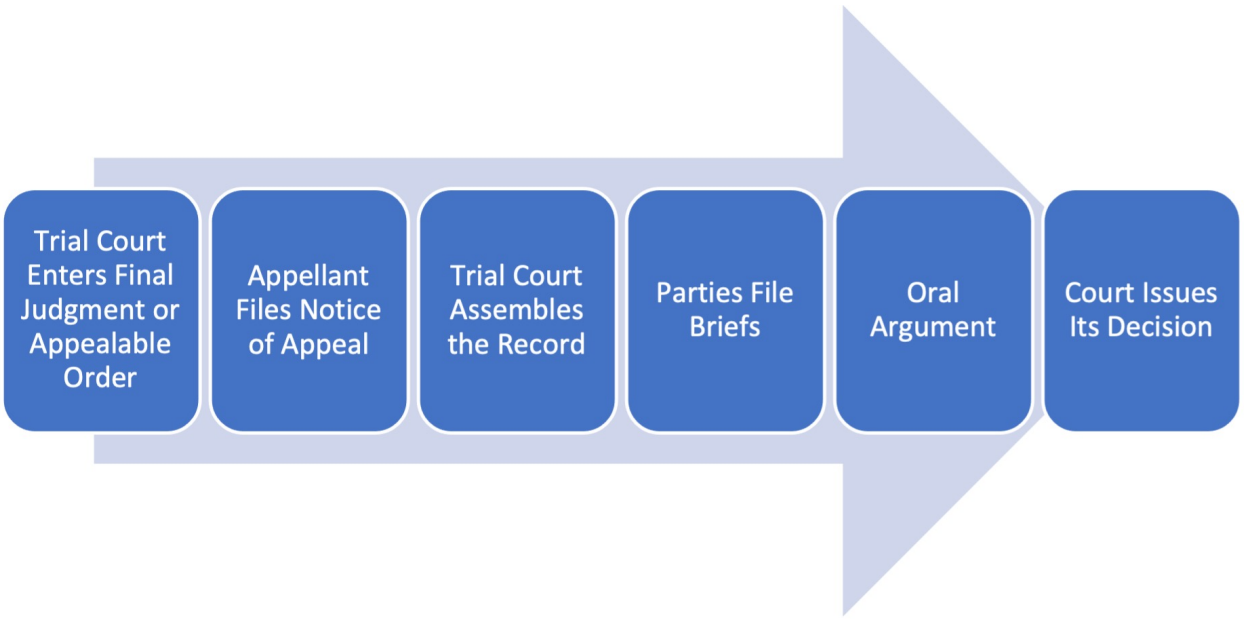


Figure 35.1: The appellate timeline.

disposing of all claims—generally are not appealable.[5] Appealing from a non-appealable interlocutory order is a common procedural defect in real court cases. However, it is unlikely to be an issue in your legal writing classes or in moot court. Appellate courts ordinarily dismiss a procedurally defective appeal without argument on the merits. A procedurally defective appeal, thus, does not make for a particularly interesting law school problem.

- **Should I appeal?** I hope it goes without saying that you should not file a frivolous appeal; doing so is grounds for sanctions. *See, e.g.*, Fed. R. App. P. 38. However, just because your case clears the low bar of 'not frivolous' does not mean an appeal is a good idea. Your client's dissatisfaction with the trial court's decision is not, by itself, a basis for an appeal. And many unhappy clients would be better off with an attorney who counsels them honestly instead of spending billable hours filing an appeal that is unlikely to succeed. To have any chance of succeeding on appeal, you must have a solid argument for why the trial judge got it wrong. For example, perhaps the trial judge made a mistake or you have an argument that the law should be changed or clarified. The decision whether to appeal should also take into account practical considerations such as your client's budget and business goals, and whether an appeal will increase the odds of a favorable settlement.[6]
- **How do I file an appeal?** If you do decide to appeal, the first step is generally to file a notice of appeal in the trial court.[7] This notice must be filed before the deadline to appeal expires. A timely notice of appeal is usually a jurisdictional requirement. This means that the appellate court cannot hear your case if you file your notice of appeal late.

5: Some interlocutory orders are appealable under the collateral order doctrine, which permits appeal of an interlocutory order that (1) conclusively resolves (2) an important issue separate from the merits of the action 3) that is "effectively unreviewable on appeal from the final judgment in the underlying action." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009). The collateral order doctrine is a narrow exception to the general rule that interlocutory orders are not appealable.

6: Also consider the some of the ethical considerations when deciding whether to appeal that are discussed in Chapter 26 and Section 27.3.

7: To confirm timing and procedural requirements, check the rules in your jurisdiction. (That's right. I said it again.)

- **Why is the record important?** The documents filed in the trial court become your record on appeal.[8] Appellate courts generally consider only the evidence in the record. The parties' ability to introduce new evidence on appeal is extremely limited. Parties to an appeal are also generally limited to raising issues that were preserved in the trial court.[9] Parties may point to the record to demonstrate that they preserved the issues they wish to argue.
- **How does briefing work?** The briefing schedule for appeals will be set out in the court rules or a scheduling order from the court. The appellant usually files their opening brief first. Then the appellee has an opportunity to review the opening brief before filing their response brief.[10] Rules may allow for additional briefs, such as replies.
- **When is oral argument?** Maybe never. In many intermediate appellate courts, most cases are decided 'on the briefs' without any oral argument. Many appeals are so straightforward that oral argument is unnecessary.[11] Furthermore, the courts simply cannot hear oral arguments for every appeal. For example, the most recent statistics from the Administrative Office of the U.S. Courts show that in 2023 the percentage of federal appellate cases in which oral argument was granted ranged from thirteen to forty-eight percent, depending upon the circuit.[12] If the court decides to set oral argument, they will notify the parties of the argument date and time well in advance.

8: This statement is something of an oversimplification. There may be procedural steps that allow parties to designate which documents in the trial court file become part of the appellate record, for example.

9: The most common ways to preserve issues are to argue them in the trial court or to object when a judge prevents you from arguing them.

10: In law school classrooms and moot court competitions, it is common for the appellant and appellee to file their briefs simultaneously. This type of simultaneous briefing schedule is rare in real appeals.

11: An appeal may be straightforward because the appellant did not have a solid basis for appeal, or because the trial judge made an obvious mistake, for example.

12: *See* Table B-10, U.S. Courts of Appeals: Cases Terminated on the Merits After Oral Arguments or Submission on Briefs, by Circuit, During the 12-Month Period Ending September 30, 2023, USCourts.gov, https://perma.cc/B73G-WHW5.

35.2 How does appellate work differ from trial work?

In many law schools, students will work on a simulated trial brief before working on a simulated appellate brief. If your law school takes this approach, you may be wondering how appeals differ from trial work. Although precise details differ from jurisdiction to jurisdiction, Table 35.1 shows some of the common differences between trial and appellate courts. Think about how these differences might influence your approach to brief drafting.

There are certain things that are true about most judges regardless of whether they sit on a trial or appellate court. They are busy. Both trial and appellate judges handle large dockets of cases and must read and make decisions on hundreds of briefs each year. And both trial and appellate judges care about reaching the 'correct' decision in every case.[13]

But the differences between trial and appellate work can lead to a very different atmosphere and style of litigation in the two types of courts. Appellate attorneys are generally more removed from the contentiousness of trial work and often have the luxury of more time to research and write their briefs than trial attorneys do. It is also all but guaranteed that the appellate attorney's work will be carefully read by multiple judges.[14] These differences can make appellate court seem less hectic and more academic than trial court. As a former colleague who is now an appellate lawyer

13: It is no secret that a judge's political leanings can influence their view of what a 'correct' decision looks like. And that is truer at the appellate level than the trial court level because trial court judges are bound to follow the decisions of higher courts even if they disagree with those decisions politically. Appellate courts have more freedom to change the law (provided they do not act inconsistently with any relevant authority from a higher appellate court).

14: It would take the fingers on more than one hand to count the number of times during my career as a litigator that a trial judge told me at the start of a motion hearing that they had not read my brief.

Table 35.1: Trial courts vs. appellate courts

	Trial court	Appellate court
Number of judges	Single judge	Multiple judges sitting in a panel
Deadlines	Shorter deadlines; you may have as little as a few days to file a brief	Longer deadlines; you may have weeks or months to draft your brief
Court docket	Very, very busy; judge may have more than 500 active cases	Hears fewer cases than the trial court because most cases settle before trial (preventing any appeal) and not every final judgment is appealed
Court staff	Judges may or may not have dedicated law clerks for research help; trial judges in the same court may have no research help or may share a pool of research attorneys or law clerks	Judges often have assigned law clerks for research help; appellate judges may also have a pool of research attorneys to provide additional support
Evidence	Attorneys can use discovery to obtain evidence as the case progresses	Court works from a fixed record

once told me, "The only people yelling in appellate court are the trial attorneys handling their own appeals."

35.3 Components of a brief

Let's start our discussion of appellate brief components by comparing the common components of trial and appellate briefs, as listed here.

Trial briefs

- Introduction
- Statement of Facts
- Argument
- Conclusion

Appellate briefs

- Question Presented
- Standard of Review
- Statement of the Case
- Summary of the Argument
- Argument
- Conclusion

Questions presented

The question presented is often the court's first introduction to your case. For that reason, it should be as brief as possible while still providing sufficient context to be understood by a reader with no knowledge of your case. Often, you can accomplish both goals by drafting a question presented that combines your legal issue, a reference to the relevant law, and a short description of the key facts. However, where your brief raises a purely legal question—a question of what the law should be—you may choose to omit the facts of your case. The following box provides *formulas* for offering a question presented that ensure the question contains the necessary components.

Formulas for questions presented

1. Under [law], + **can [issue]** + *when [facts]*?
2. **Whether [issue]** + under [law] + *when [facts]*.
3. *Do [facts]* + **meet [legal test]** + under [law]?
4. *Facts.* **Is [issue]** + under [law]?

The three examples that follow are based upon a question that I litigated in a real appeal. Under the relevant law, my client could obtain dismissal of a defamation lawsuit against him if he could show that the allegedly defamatory statements were "petitioning activity" under the Massachusetts anti-SLAPP statute.[15] Consider this example:

15: See Section 15.5 for more on purely legal questions.

> Does this case arise out of petitioning activity?

Do you understand this question presented? I do, but only because I wrote it. Because it only contains the legal issue, it's much too vague. It should be rewritten to include the facts and the law. Consider an alternative:

> Does a lawsuit against a defendant [Facts:] for statements made while attempting to settle a legal dispute [Issue:] arise out of petitioning activity [Law:] under Massachusetts's anti-SLAPP statute?

This version of the question is clearer because it contains the missing components of our question presented formulas. Where does this third example fall?

> Should a lawsuit against a defendant be dismissed under Massachusetts's anti-SLAPP statute where the lawsuit arises out of petitioning activity?

This example seems pretty similar to the good example above. So, what's wrong with it? Recall that my client will win if he can show that he was sued for petitioning activity. This question assumes that my client's conduct was petitioning activity. In other words, it assumes that an element of the legal test is met. It should be rewritten so that the question is *whether* the legal test is met—i.e., whether there was petitioning activity.

Give careful thought to the phrasing of your question presented.[16] You

16: You may find the discussion of questions presented in the memo genre in Section 29.4 useful here, as well.

can subtly persuade the court through word choice. For example, the two questions presented below come from *DeBoer v. Snyder*, 772 F.3d 388, 398 (6th Cir. 2014). *DeBoer* was one of the consolidated cases that the Supreme Court heard in *Obergefell v. Hodges*, 576 U.S. 644 (2015), the Supreme Court case that held that state bans on same-sex marriage are unconstitutional. Can you tell the outcome for which each of the brief writers was advocating?

***DeBoer* Example 1**

Tennessee's [laws] embrace the traditional definition of marriage—the legal contract solemnizing the relationship of one man and one woman—and do not recognize out-of-state marriages of same-sex couples as valid in the State of Tennessee. Did the District Court err in granting a preliminary injunction to Plaintiffs, three same-sex couples who married in other states, requiring the State of Tennessee to recognize their out-of-state marriages?

***DeBoer* Example 2**

Whether Tennessee's anti-recognition laws violate Plaintiffs' right to equal protection of the laws under the Fourteenth Amendment by excluding all legally married same-sex couples from the protections and obligations of marriage on the basis of their sexual orientation and gender in order to treat same-sex couples and their children unequally.

Standard of review

The appellate standard of review tells the appellate court how much deference it must give to the trial court. In some cases, the standard of review dictates the outcome of a case. For example, an appellate court that reviews a trial court's decision for abuse of discretion cannot reverse a decision with which it disagrees unless the trial court acted unreasonably, arbitrarily, or erroneously. If the appellate court reviewed that same decision *de novo*,[17] the appellate court could reverse simply because it disagrees with the trial court. In other cases, the standard of review has little to no impact on the outcome. Regardless, you will need to include a section in your brief that explains the standard of review.

17: See the explanation of this standard below.

Many attorneys treat the standard of review as a rote procedural requirement. They cut and paste standard-of-review language from one brief to the next without considering how the standard of review impacts their argument. Don't be like those attorneys. Research the standard of review, consider how it impacts your argument, and write a standard-of-review section that is persuasive and explains to the court how the standard of review impacts your argument—or at least be selective about the template from which you cut and paste.

The length of the standard-of-review section will vary depending upon

both the standard of review and whether the appropriate standard of review is disputed. For example, it takes more to argue that the standard of review *should be* de novo than to explain that the standard of review *is* de novo.

I present the standards of review in order from the standard requiring the most deference to the trial court to the standard requiring the least deference to the trial court. Listing the standards in order is easy in a theoretical context like this textbook. In practice, parsing the differences between the standards is not always easy. For example, the substantial evidence and clearly erroneous standards look pretty similar on paper. But courts generally describe the substantial evidence standard as more deferential to the trial court than the clearly erroneous standard. [18]

18: In what way? That's a good question. I wish I had a good answer.

Abuse of discretion. This standard of review is just what it sounds like. The appellate court can reverse only if the trial judge abused their discretion. This standard is good for appellees because it is the standard most deferential to the trial court.

Substantial evidence. Appellate courts use this standard of review to review a jury's findings of fact. The appellate court can reverse only if the record does not contain sufficient evidence from which a reasonable jury could make the challenged factual findings. This standard of review is slightly less deferential to the trial court than the abuse of discretion standard but still good for the appellee.

Clearly erroneous. The clearly erroneous standard of review is used to review a trial judge's findings of fact. Like the substantial evidence standard, the clearly erroneous standard is deferential to the person who saw the witnesses' live testimony (i.e., the judge). As the name of the standard of review suggests, an appellate court that applies the clearly erroneous standard of review is looking for errors in the trial judge's decision. The appellate court can reverse only if the trial judge clearly made a mistake.

De novo. An appellate court that reviews an issue de novo owes no deference to the trial judge. Any professor who writes a book chapter on appellate briefs is duty bound to explain that this is because 'de novo' means 'anew' in Latin. This standard is the least deferential to the trial court. It is therefore the best standard of review for the appellant.

The following sample standard of review below is adapted from one of my own appeals. It involves an unusual rhetorical situation where the appellate cases that discussed the standard of review did not decide what that standard actually was. I nonetheless tried to follow my own advice in this chapter and tell the court how the standard of review applied to my case. How did I do?

Sample standard of review section

An appellate court reviews the denial of a special motion to dismiss for abuse of discretion or error of law. *Baker v. Parsons*, 434 Mass. 543, 550 (2001). However, "with respect to the first prong of the test—whether conduct as alleged on the face of a complaint qualifies as protected petitioning activity—it does not appear that the courts have deferred to the motion judge but rather have made a fresh and independent evaluation." *Blanchard v. Steward Carney Hosp., Inc.*, 89 Mass. App. Ct. 97, 103 (2016), *aff'd in part, vacated in part*, 477 Mass. 141 (2017)) (citations omitted). Similarly, if the "second prong of the two-part test does not implicate credibility assessments, it is arguable that appellate review should be similarly de novo." *Id*.

Here, the trial court made a legal error when it incorrectly applied the burden-shifting framework. It also abused its discretion when it concluded without explanation that (1) claims based upon alleged abuse of process did not arise from petitioning activity; and (2) the [plaintiffs] had a legitimate purpose for bringing this suit where they submitted no evidence to support that contention. Both are grounds for reversing the decision reached below.

Statement of the case

Appellate courts refer to the fact section of a brief as a 'statement of the case.' When writing an appellate brief, your goal is to tell your client's story in a way that advances the client's argument without being dishonest or sacrificing credibility. Your statement of the case should include both substantive and procedural facts. The tips in Chapter 34 about writing an effective statement of facts for a trial brief are equally applicable to appellate brief writing. Chapter 13, about facts in the law, also has some helpful information.

Argument summary

In most appellate courts, the rules require that you include a section that summarizes your argument. Many summaries of the argument contain a dry rehashing of the argument's key points. That approach is a mistake. Much like the introduction in a trial brief, the summary of the argument in an appellate brief is not only your chance to give the court an overview of your argument, but also an opportunity to preview your case themes.[19] Does the summary of the argument below effectively accomplish both of those goals?

[SAMPLE] SUMMARY OF THE ARGUMENT[20]

> The Child Welfare Act requires participating states to make foster care maintenance payments to group homes "to cover the cost of (and costs of providing)" the most basic necessities such as food, clothing and shelter to children who have been taken

19: A case theme is a unifying idea that ties a case together. Themes help a reader make sense of a case by putting evidence and legal arguments into the context of a persuasive narrative.

20: From the Appellant's Opening Brief in *Cal. All. of Child & Fam. Servs. v. Allenby*, 589 F.3d 1017 (9th Cir. 2009).

out of their homes and made dependents or wards of the state. Even though the State of California applies for and receives federal funding under the Child Welfare Act, it deliberately underfunds and fails to make foster care maintenance payments that cover the cost of (and the cost of providing) these basic necessities. Indeed, the district court determined that the State covers a mere 80% of such costs. California does not dispute this finding. The State's deficient payments not only violate federal law, but they also threaten the well-being of California's most vulnerable children.[21]

21: This first paragraph provides an overview of the case and begins to develop the Appellant's theme. Who is the villain in this story?

Notwithstanding these undisputed facts, the district court erroneously concluded that California "is in substantial compliance with the [Child Welfare Act]" and "federal law has not been violated." In reaching this result, the district court made a series of fundamental legal and interpretive errors.[22]

22: This second paragraph identifies the legal error that the Appellant contends the trial court made.

23: The summary of the argument then provides a numbered list of reasons why the trial court's decision was wrong. Numbering is one way to help the court understand the structure of your argument.

First,[23] the district court erroneously concluded that the Child Welfare Act does not require the State of California to make foster care maintenance payments which cover all of the costs of providing the basic necessities set forth in the Child Welfare Act, but that mere partial payments are sufficient. This holding contravenes well-established canons of statutory interpretation, the plain language and purpose of the Act and the DHHS' application of the statutory language. Based on the plain language of the Act, it is clear that the State must cover all of the costs of (and the cost of providing) the items set forth in the Act.

Second, there is no legal or statutory support for the district court's determination that the State need only be "substantially compliant" with the Child Welfare Act. The district court simply plucked this standard from dictum set forth in a footnote in *Missouri Child Care Ass'n v. Martin*, 241 F. Supp. 2d 1032, 1046 n. 7 (W.D. Mo. 2003),[24] which notably does not cite any legal authority for this proposition. This Court and numerous other courts interpreting the Child Welfare Act and similar federal statutes have held that mere substantial compliance with federal law is insufficient as a matter of law.

24: Citations are not required in the summary of the argument. Why do you think the author chose to include a citation here?

Third, the district court incorrectly held that the Child Welfare Act contains an exception that permits the State to take budgetary considerations into account in determining the amount of "foster care maintenance payments."[25] The district court acknowledged that there is no "lack of funds" exception expressly set forth in the Child Welfare Act. Nevertheless, the district court implied and judicially constructed an exception based on Congress' failure to expressly prohibit states from taking budgetary considerations into account. This interpretation ignores this Court's well-established precedent that exceptions are not to be implied and cannot be judicially created, and conflicts with the longstanding rule that Congress would not specify exemptions in one part of a statute and leave others to

25: Note the effective use of topic sentences throughout the summary of the argument.

> judicial creation. More fundamentally, this exception swallows the statute.
>
> Fourth, even if this Court finds that the district court was correct in concluding that the State of California need only "substantially comply" with the Child Welfare Act, it is clear the district court erred in holding that the State of California satisfies this standard. Substantial compliance requires compliance with every reasonable objective of the statute. Here, the objective of the statute is to cover the cost of the items enumerated in the definition of "foster care maintenance payments." Since the State does not cover those costs, the State is not in substantial compliance with the Child Welfare Act.
>
> Based on these errors,[26] the district court erred in granting the State of California's Motion for Summary Judgment and denying the Alliance's Motion for Summary Judgment. The State's foster care maintenance payments do not cover, by a substantial percentage, the average actual costs of providing the enumerated items in the Child Welfare Act. Accordingly, the Alliance respectfully requests that the Court reverse the district court's Order and Judgment.

26: Here, the author ties together the argument by explaining why the identified errors justify reversal of the trial court's decision.

Because the summary of the argument serves a purpose similar to an introduction in a trial brief, the discussion in Chapter 34 about trial brief introductions will also help you structure an effective summary of the argument.

Argument

The argument section of your brief will have one or more arguments introduced by point headings. Each argument will provide the court with a reason why the lower court's decision should be affirmed or reversed. You should structure your argument so that the appellate court can easily follow it. Fortunately, this book provides a wealth of information on how to effectively structure arguments[27] and how to reason and persuade.[28] Here are a few additional tips to help you write a compelling argument.

27: See Chapter 14 and Chapter 15.

28: See Chapter 5 through Chapter 9.

- **Give careful thought to the structure of your argument.** When I was a staff attorney at the Massachusetts Appeals Court, my specialty was poorly written briefs. When a judge became frustrated by sloppy organization or dense prose, the case file would wind up on my desk. The judges' most common complaint was that they could not figure out how the pieces of the argument fit together. As one judge put it, "I just want to know how many of these arguments I need to accept for the appellant to prevail!" Unfortunately for that appellant, if a judge cannot understand how you win, you have already lost. Thus, if you take just one thing away from this chapter, it should be the importance of roadmapping your argument. The court needs to understand not only the individual pieces of your argument, but also how those pieces fit together. For example, if the court can reverse if

it agrees with any of the three arguments you raised in your brief, say so.

- **Strategically decide which arguments to include.** Your initial case assessment may suggest fifteen different non-frivolous arguments for reversal, but should you include them all in your brief? Some factors to consider include: (1) whether you can adequately cover all the arguments within the applicable page or word limit; (2) whether raising weak arguments will undermine your credibility and thereby negatively impact your strong arguments; (3) the potential for confusion if you raise too many arguments; and (4) whether it makes strategic sense to preserve an argument for appeal to a higher appellate court. At the end of the day, there is no one right answer. Keep in mind that judges often assume that an attorney who files a brief containing fifteen arguments is throwing slop against the wall to see what sticks.
- **Consider the order in which you present your arguments.** Attorneys often lead with their strongest arguments. But, in some cases, a different argument order will make more sense. For example, if one of your arguments provides context that makes the other arguments easier to understand, you will probably want to lead with that argument.
- **Address the other party's arguments head on.** Brainstorm the arguments the other party is likely to make (or, if you are the respondent, read the other party's brief). Then, consider how you will address those arguments in your brief. There is no one right way to deal with counter-arguments, but ignoring the other party's arguments is usually the wrong way. That's because judges are likely to assume that your failure to address an argument means that you don't have a good response. Here is a non-exhaustive list of options for addressing the other party's arguments.

    - **Draft a rule that forecloses the other party's argument.** As you learned in earlier chapters, rule drafting offers opportunities for persuasion. Sometimes, the rule that applies to your client's situation is an open question.[29] But even in a case where there is an established rule, the precise contours of that rule are often debatable.[30] This means that—within the bounds of ethics and credibility—you can state your rule in the form and structure that favors your client. If you do so, and the court agrees with your rule statement, you can often effectively preempt the other party's argument.
    - **Distinguish cases upon which the other party will rely.** An effective legal research strategy is one that allows you to find all of the binding authority relevant to your issue. That means that your research process should uncover the authorities upon which your opponent will rely.[31] In your argument, explain why those authorities don't undermine your client's position. Distinguish them, or better yet, explain why the authorities actually support your client's position.
    - **Include counter-analysis.** Counter-analysis or counter-argument involves raising and addressing the other party's best argu-

29: See Chapter 9 and Section 15.4.

30: See, generally, Chapter 5 and Chapter 8; see also Section 9.2,

31: For guidance on doing so, see Chapter 12.

ments.[32] New legal writers often begin their counter-analysis with a long description of the argument they expect the other side to make. The problem with this approach is that it can make the other side's position look appealing; after all, you are making their argument for them. Avoid this pitfall by structuring your counter-analysis so that you attack your opponent's arguments as soon as possible. For example, don't say 'The plaintiff may argue X'; instead say, 'Any argument that X is true fails because . . . .'

32: See Section 14.9 for guidance.

The example that follows is an excerpt from the respondents' brief in *Federal Communications Commission v. Fox Television Stations, Inc.*, No. 10-1293 (2nd Cir. Nov. 3, 2011). The FCC is the federal agency that regulates broadcast television networks, which are networks that viewers can watch with an antenna (as opposed to with a cable or streaming subscription). In the early 2000s, the FCC adopted a broad definition of indecency that allowed them to fine broadcasters for fleeting uses of swear words on live television broadcasts. In their brief, the respondent television networks argue that the FCC's indecency rule is unconstitutional. As you read, note how the networks address the FCC's arguments.

Respondent brief in *FCC v. Fox Television Stations*

A. This Court Should Overrule *Pacifica* [the case on which the FCC relies].

Pacifica's foundations were built on sand. This Court upheld the FCC's indecency regime based on its perception, as of 1978, that broadcasting had "a uniquely pervasive presence in the lives of all Americans" and that it was "uniquely accessible to children." 438 U.S. at 748–49. Petitioners claim that nothing has changed in the ensuing decades—that broadcasting is still unique and that "broadcast speech [thus] may be subject to greater content-based restrictions (with respect to indecency and otherwise) than other forms of communication." Pet. Br. 42.

This simply defies reality. Obviously, the media marketplace has changed radically in ways that render both of *Pacifica*'s assumptions invalid. For every other medium, this Court has consistently struck down attempts to regulate indecency, *see, e.g.*, *Sable*, 492 U.S. at 131 (sex chat lines); *Reno*, 521 U.S. at 885 (Internet); *Playboy*, 529 U.S. at 826–27 (cable signal bleed), and there is simply nothing "unique[]" or special about broadcasting today that would justify a different result here. *Fox*, 129 S. Ct. at 1820–22 (Thomas, J., concurring). This Court should now overrule *Pacifica*, and with it the FCC's authority to punish broadcast speech. *See id.* at 1821–22.

1. ***Broadcasting Is Not Uniquely Pervasive.***

Petitioners argue that broadcasting is still "a pervasive medium of communications." Pet. Br. 44. That careful phrasing implicitly concedes, however, that broadcasting is no longer uniquely pervasive. Americans today, including children, spend more time engaged with cable and satellite television, the Internet, video games, and other media than they

do with broadcast media. "Pervasiveness" no longer justifies subjecting broadcasting to greater suppression of indecency than other media.

At the outset, petitioners are forced to concede an inconvenient fact for their position: 87% of American households today subscribe to cable or satellite services, and only a small percentage of Americans relies on the airwaves to receive television directly. Pet. Br. 44. . . . This Court has already noted correctly that cable is just as " 'pervasive . . . in the lives of all Americans' " as broadcasting. *Denver Area*, 518 U.S. at 745 (plurality opinion) (citation omitted). . . . The Internet—just an obscure Defense Department project in 1978—is now another extraordinarily pervasive medium of communication. . . . Video games were also largely nonexistent in 1978, but today millions of users immerse themselves in them for hours on end. *Brown*, 131 S. Ct. at 2748–49 (Alito, J., concurring). Given the "pervasiveness" of these alternative media, petitioners' claim that broadcasting has "retained a dominant position in the media universe" has no credibility.

The Court's conception of "pervasiveness" was focused on the fact that a broadcast signal "confronts the citizen . . . in the privacy of the home." *Pacifica*, 438 U.S. at 748; *see also id.* at 759 (Powell, J., concurring). This notion at the heart of *Pacifica*—that broadcasting barges into the home uninvited like the unavoidable noise of a sound truck, *cf. Kovacs v. Cooper*, 336 U.S. 77 (1949) (plurality opinion)—was never accurate. *Cf. Pacifica*, 438 U.S. at 748–49.

Broadcast television cannot be viewed inside the home unless consumers take affirmative steps to receive those signals by setting up antennas and (if necessary) digital converter boxes and by purchasing televisions to view them. In this respect, there is no constitutionally relevant distinction between broadcasting and cable, satellite, or Internet services to which the public must subscribe. . . .

2. ***Broadcasting Is Not Uniquely Accessible To Children.***

. . .

B. Even Under *Pacifica*, The FCC's Expanded Indecency Regime Is Unconstitutional.

Even if the Court does not overrule *Pacifica*, it should recognize that Pacifica's outdated assumptions cannot support the FCC's expansion of its indecency regime beyond the narrow confines of *Pacifica* itself. *See, e.g., Fox*, 129 S. Ct. at 1828 n.5 (Stevens, J., dissenting) ("the changes in technology . . . certainly counsel a restrained approach to indecency regulation, not the wildly expansive path the FCC has chosen"). While this Court has not explicitly "held that Pacifica represented the outer limits of permissible regulation," *id.* at 1815, in light of today's media marketplace, it must do so now. The FCC's current enforcement policy, which subjects even isolated expletives or brief, scripted images to multi-million-dollar fines, cannot survive First Amendment scrutiny under any standard. The government's restriction of broadcast speech must at least be narrowly tailored to serve a substantial governmental

interest. *See FCC v. League of Women Voters*, 468 U.S. 364, 380 (1984); Pet. App. 14a. The FCC's new indecency policy fails both requirements: (1) There is no substantial governmental interest in shielding children from momentary exposure to isolated words or images as opposed to content equivalent to the Carlin monologue; and even if there were, (2) the FCC's new policy is in no way tailored to advance that interest because it is wildly under- and over-inclusive.

1. ***The FCC's Interest Is Not Substantial.***

The FCC has a governmental interest in protecting children from "indecency" only where the material at issue is egregiously offensive and can plausibly threaten the "physical and psychological well-being of minors." *Sable*, 492 U.S. at 126. In *Pacifica*, Justice Powell stressed in his concurrence that the government's interest stems from a child's inability to protect himself from material that would be "shocking to most adults" and that "may have a deeper and more lasting negative effect on a child." *Pacifica*, 438 U.S. at 757–58 (Powell, J., concurring). Similarly, this Court's other cases involving restrictions on "indecency" focused on graphic sexual material that was overtly pornographic. *See Sable*, 492 U.S. at 117–18 (dial-a-porn); *Denver Area*, 518 U.S. at 752 (plurality opinion) (statute aiming at "pictures of oral sex, bestiality, and rape"); *Playboy*, 529 U.S. at 811 (" 'sexually explicit adult programming' " that "many adults themselves would find . . .highly offensive").

Petitioners nonetheless assert a general interest in protecting children from offensive speech, Pet. Br. 41, ignoring the fundamental difference between protecting children from graphically indecent content and protecting children from any merely momentary exposure to a word or image. In declining to decide that "an occasional expletive . . .would justify any sanction," *id*. at 750, *Pacifica* specifically recognized the distinction between such momentary exposures and Carlin's language, which had been chosen for its offensive quality and "repeated over and over as a sort of verbal shock treatment." *Id*. at 757 (Powell, J., concurring).

. . .

The only case that petitioners cite to support some broader governmental interest in shielding children from offensive language is *Bethel School District No. 403 v. Fraser*, 478 U.S. 65 (1986), but that turned on the " 'special characteristics of the school environment,' " *Morse v. Frederick*, 551 U.S. 393, 405 (2007). If the child in that case had given the same vulgar speech "outside the school context, it would have been protected." *Id.* (citing *Cohen v. California*, 403 U.S. 15 (1975)).

. . .

2. ***The FCC's Current Enforcement Policy Is Not Narrowly Tailored.***

. . .

Conclusion

Your brief will end with a conclusion. See Section 34.6 for more on writing conclusions.

35.4 Formatting your brief

The formatting requirements for appellate briefs tend to differ from those for trial briefs in the same jurisdiction. Be sure to carefully read the rules of appellate procedure and the local rules, if any, of the particular court. Consider converting the relevant formatting rules into a checklist that you can use to proofread your final brief. A good practice guide or reliable sample brief can streamline this process.

Formatting briefs can be frustrating and time consuming, particularly if you are not proficient with word processing software. Make sure to allow plenty of time for formatting and proofreading your document. And don't forget to doublecheck the formatting of your brief after you have converted it to a PDF or printed it for filing.

One common appellate-brief formatting requirement that you are unlikely to encounter at the trial court level is tables.[33]

33: Though these tables are generally not *required* in trial briefs, you may sometimes see them in longer briefs, especially in federal district court.

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Figure 35.2: Table of contents of amicus brief filed by the American College of Obstetricians and Gynecologists and other physicians' groups in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022).

Appellate briefs generally must include a table of authorities and table of contents near the beginning of the brief. The table of authorities lists the authorities cited in the brief. The table of contents tells the reader where they can find both specific brief sections (e.g., the Summary of the Argument) and specific arguments. The partial table of contents in Figure 35.2 is from an Amicus Brief filed by the American College of Obstetricians and Gynecologists and other physicians' groups in *Dobbs v. Jackson Women's Health Org*. As you can see, the point headings do double-duty in an appellate brief. They not only provide structure in the argument section, but also give the reader an overview of the argument in the table-of-contents section.

36 Simple contracts

Elizabeth Sherowski

Unlike motions or briefs, contracts are rarely written from scratch. Instead, contact drafters begin with *precedent documents* and adapt those documents to meet a client's needs.[1] This chapter explains basic contract drafting principles, including how to select and modify precedent documents. It also discusses how to revise (*mark up* or *redline*) contracts that were drafted by another party to a deal.

This chapter assumes that the reader is familiar with the basic types of contract provisions (covenants, rights, prohibitions, and declarations) and their modifiers (representations, conditions, and exceptions). Those are explained in Chapter 24.

36.1 The goals: Clarity & precision

All legal writing should strive for clarity and precision, but clarity and precision are especially important in drafting contracts. While a poorly worded sentence or an errant comma can damage a writer's credibility in an appellate brief or law firm blog post, the same error in a contract could cost a client large sums of money or materially disadvantage them in a deal.[2]

Ambiguity is the mortal enemy of the contract drafter. Drafters should strive for the clearest and least ambiguous language possible in every sentence. Here are some techniques that drafters can use to increase clarity and precision and avoid ambiguity:

Write in plain English. Contract drafters are notorious for using archaic legalese: 'whereas,' 'heretofore,' etc. While such terms can serve as elegant shorthand for more convoluted legal concepts,[3] for the most part, contracts are easier to read (and write!) if the drafter uses plain English. Contracts are written for wide variety of audiences with varying reading skills,[4] many of whom may not have legal backgrounds. Plain English, shorter sentences, and the absence of legalese will make your contracts easier to read and understand.[5]

Use active voice.[6] In active voice, the subject of the sentence performs the action ('the lawyer filed the motion'). In passive voice, the subject of the sentence receives the action ('the motion was filed by the lawyer'). Native English speakers prefer active voice because it uses fewer words and communicates concepts more clearly. Active voice also focuses the reader's attention on the actor. For this reason, drafters should use active voice when drafting contract provisions like obligations, rights, and prohibitions.

1: Don't confuse these with court precedents, discussed in Section 17.5.

2: *See Drafting Errors: The Case of the Million Dollar Comma*, Pace Int'l L.J. Blog (Oct. 13, 2011) https://perma.cc/7LM7-G6ED.

3: *See* Lori N. Johnson, *Say the Magic Word: A Rhetorical Analysis of Contract Drafting Choices*, 65 Syracuse L. Rev. 451, 487 (recommending the use of terms of art like "time is of the essence" where they fulfill a legal rhetorical function).

4: See Chapter 24 for a discussion of the audiences for contracts.

5: Chapter 42 also provides helpful guidance.

6: See Section 43.5 for more guidance.

Table 36.1: Contract provisions in active and passive voice

Active Voice	Passive Voice
Tenant will pay rent on or before the fifth day of the month.	Rent will be paid on or before the fifth day of the month.
Seller may grant Distributor a limited license for the use of Seller's logo and branding materials.	Distributor may be granted a limited license for the use of Seller's logo and branding materials.
Lessee will not use the Equipment for any purpose not authorized under this agreement.	The Equipment will not be used for any purpose not authorized under this agreement.

A provision written in active voice is always clear about who should perform the obligation, claim the right, or refrain from action. Compare the examples in Table 36.1.

In the active-voice examples, the reader can clearly understand to whom the obligation, right, or prohibition belongs. In the passive-voice examples, readers may not be able to tell who must carry out the obligation, hold the right, or refrain from doing the prohibited action. Using active voice helps the drafter avoid potential ambiguity about who should or should not be doing what.

Use modal verbs consistently.[7] *Modal verbs* are auxiliary ('helper') verbs that express necessity or possibility. For example, in the phrase 'shall deliver,' 'shall' is the modal verb expressing the necessity of the main verb, 'deliver.' Contract drafters use modal verbs to signal whether a provision is an obligation, a right, or a prohibition ('shall deliver' indicates an obligation, while 'may deliver' would indicate a right).[8] Unfortunately, drafters have not historically agreed on which modal verbs are preferred.[9] Some drafters use 'shall' to indicate an obligation, while others use 'will.' For clarity, you should use the same modal verbs consistently throughout the contract. If you use 'shall' to express the buyer's obligation to pay, you should also use 'shall,' rather than 'will' or 'must,' to express the seller's obligation to deliver. A chart of commonly used modal verbs is below.[10]

Obligations	Rights	Prohibitions
shall	may	shall not
will	is entitled to	will not
must	has the right to	must not
		may not

Accentuate the positive. Don't use prohibitions when other, more positive provisions will do the job. For example, if a tenant is allowed to use the pool between 9:00 am and 9:00 pm, a drafter could express this in the following ways:

- Right: Tenant may use the pool between 9:00am and 9:00pm
- Declaration: The pool is available for Tenant's use between 9:00 am and 9:00 pm

7: Chapter 43 is entirely devoted to verbs. As they are the action in your sentences, it's worth studying carefully.

8: The absence of a modal verb can indicate that a provision is a declaration. 'Seller is a company that produces and distributes widgets in the United States and Canada' is identifiable as a declaration because it lacks a modal verb to accompany the main verb 'is.'

9: *See* Chadwick C. Busk, *Using Shall or Will to Create Obligations in Business Contracts*, 96 Mich. Bar J. 50 (Oct. 2017).

10: Some drafters reserve the use of 'must' for conditions precedent. See Chapter 24 for details about this type of contact term.

- Prohibition: Tenant will not use the pool outside of the hours of 9:00 am to 9:00 pm.

The first provision, expressed as a right, is preferable. The sentence uses active voice, and the modal verb "may" makes clear that the provision grants Tenant a right to use the pool. While the second provision, a declaration, communicates the same idea, it doesn't explicitly grant a right by using the word "may." The third provision, drafted as a prohibition, is the most confusing. Read very literally, it only prohibits use outside of the pool's open hours, but it never does what the provision was supposed to do—expressly give Tenant permission to use the pool between 9:00 am and 9:00 pm. Because the second and third provisions merely imply the right, the first provision is the preferred way to draft this idea.

Organize provisions. For maximum clarity and precision, drafters should organize the provisions topically. Most contract drafting experts recommend creating a section for each main category of provisions (payment, shipping, termination, etc.) and including all the provisions concerning that topic in that section.[11] If a provision deals with more than one topic (i.e., payment for shipping), the writer should place it in only one of the two possible sections.[12] Once the topical sections are complete, the drafter may arrange them either chronologically (in the order that the actions specified by the contract will occur) or in order of importance to the deal.

11: *See, e.g.*, Ben. L. Fernandez, Transactional Drafting 64-65 (2022).

12: This situation involves a judgment call by the drafter. Put the provision in the section where you think it makes the most sense, or see if the industry you're drafting the contract for has conventions about where to place these types of provisions. It's perfectly acceptable to use cross-references (for example, putting a note in the Payment section letting the reader know that payment for shipping is covered in the Shipping section).

36.2 Two ways to draft a contract

The scrivener

In the *scrivener*[13] method, the parties negotiate their terms before the drafter begins preparing the contract. Usually, the parties will provide the drafter with a *term sheet*, a list of the agreements that the parties want to include in the contract.[14] The term sheet may be a highly detailed list or a short email saying something like 'draft a contract for the sale of the Virginia Road property to ABC Development for $420,000.'

The advantage to drafting contracts this way is that you have almost all the material you need before starting your first draft. You can more easily organize the material with a good view of the contract's big picture.

However, even the most detailed term sheet will invariably omit some necessary information. Issues may become apparent that the negotiators did not consider, such as legal requirements that are non-negotiable.[15] So even though a term sheet will help you construct a solid first draft, remember that it's *only* a first draft, and you will still likely need to consult with the negotiators for additional information.

13: A *scrivener* or *scribe* is a copier of manuscripts. Compare the scrivener, who copies what is already written, with the transcriptionist, who takes down dictation as it is being spoken.

14: You can see a sample term sheet for a venture capital transaction here at *Series A Term Sheet Template*, Y Combinator, https://perma.cc/Z8TW-K9QR. The template file is available at https://perma.cc/98WE-GNCE.

15: A classic example is when the parties agree to waive something that is non-waivable by statute.

The transcriptionist

In this method, the negotiations and the contract drafting occur simultaneously. As the negotiations proceed, the drafter begins drafting the contract

terms that the parties have agreed upon, updating the draft as the parties agree on more terms.

This method is more logistically challenging than starting with a completed term sheet, but you can still write an effective contract using this method. The keys to successful drafting as a transcriptionist are meticulous note-keeping and strict version control (see Section 36.6).

36.3 Drafting basic provisions

Whether you have a completed term sheet or a collection of notes from the previous day's negotiations, the process for drafting basic contract provisions is the same. For each agreed-upon item, determine whether a party must do something (obligation), may do something (right), or may not do something (prohibition). Then, construct a provision using the following formula:

Party + modal verb + main verb + agreed upon item

Start with the name of the party who will be obligated to, permitted to, or prohibited from something. Then add a compound verb, composed of the appropriate modal verb, plus how the agreement obligates/permits/prohibits a party's actions or inactions in the relationship. For example:

Party	Modal Verb	Main Verb	Agreed-Upon Item
Seller	will	deliver	the Goods

This gives you a basic framework upon which you can add more details about how the parties will carry out the obligations/rights/prohibitions.[16] Let's say the parties also agreed that the delivery would take place at Buyer's warehouse and that the delivery should take place by July 21, 2025, at the latest. You could add that information to the framework you already created, generating the example in Table 36.2.

16: Notice that using this formula ensures that you will draft your provision in active voice, making it easier to read and comprehend.

Be careful not to tack on too much information in one provision. If an agreement specified all of the above information, plus requiring the Seller to obtain the warehouse manager's signature on the invoice to verify that the delivery was made, trying to put all that into one provision would result in something like this:

> Seller will deliver the Goods to Buyer's warehouse on or before July 21, 2025, with delivery verified by the warehouse manager's signature on the delivery invoice.

Table 36.2: Basic provision with additional information

Party	Modal Verb	Main Verb	Agreed-Upon Item	Additional Information
Seller	will	deliver	the Goods	to Buyer's warehouse on or before July 21, 2025.

That's a lot for most readers to comprehend from one sentence. Because this information contains two requirements (where/when to make delivery and how to verify it), it makes more sense to draft it as two obligations:

- Seller will deliver the Goods to Buyer's warehouse on or before July 21, 2025.
- Buyer's warehouse manager will verify delivery by signing the invoice.

36.4 Selecting precedent documents

Precedent documents are easy to find. They are available in every medium, from sophisticated online legal databases to simple Google searches. A simple online search for "residential lease" will bring up an astonishing number of samples you can use as precedent documents.[17] You can narrow your search, both on Google and in the paid services below, by specifying the jurisdiction (i.e., "Georgia residential lease"). But even after narrowing your search by contract type and jurisdiction, how can you be sure that the precedent document you select is the best one for your project? Consider the following:

17: See the discussion of document selection for genre discovery in Section 40.3 for more ideas.

Don't reinvent the wheel. Usually, the very best source of precedent documents is the file of documents that your firm or organization has already drafted. Because law firms and other legal organizations tend to specialize in specific types of transactions, the odds are good that someone in your office will have drafted a similar agreement in the past. Documents prepared by others in your office have the additional benefit of already being written in your firm's *house style*,[18] which will reduce your editing time. And, of course, using in-house precedent documents will save you time and save your client money.

18: A house style is a set of rules standardizing drafting conventions (e.g., whether to use 'shall' or 'will' to draft obligations) and typographical choices regarding the presentation of documents (e.g.: font, indentation, numbering, etc.).

The Big Three. Lexis's Practical Guidance, Westlaw's Practical Law, and BloombergLaw's Transactional Intelligence Center offer extensive precedent document resources to their paying customers. The forms in these collections have been designed by lawyers who are experts in the field, and they often link to other resources that can assist with drafting, like information about similar deals or summaries of applicable laws. If your firm or client is willing to pay for the use of these services, this is a great place to start, especially if you're working in a developing or unfamiliar area of the law.

Newer paid services. Recently, several online contract drafting services have sprung up, promising to provide quality contract forms (or AI-generated contracts) at a lower price point than the Big Three or even for free. However, the precedent documents provided by these services tend to be more general and designed for use by non-legal professionals. For example, many of the free non-disclosure agreements provided by these services don't consider the type of information being protected or the relationship dynamics between the parties, both of which can materially affect a non-disclosure agreement's validity. If you ask one of these services to draft a non-compete agreement, it may not tell you that some state

statutes prohibit certain types of non-compete agreements. The precedent documents provided by these services may require substantial additional work to bring them up to the high standard your client expects, so be very careful when using them.[19]

Consider the source. Many reputable organizations produce sample contracts that you can use as precedent documents. For example, the Georgia Apartment Association, which represents operators of multi-family housing, provides its members with an extensive online library of leases and other related forms that consider the intricacies of Georgia landlord-tenant law.[20] But because the GAA is an organization that serves landlords, its forms will be drafted so that the terms favor the landlord. So this collection of forms would not be a good source of precedent documents if you wanted to draft tenant-friendly real estate forms.

Whole document vs. clauses. All of the sources mentioned above will have a combination of entire documents and individual contract clauses that you can choose from. Using complete contracts as precedent documents will ensure that you aren't omitting any important information, while using specific individual clauses will allow you to include things that the parties have agreed upon that may be uncommon in standard contracts. It's OK to incorporate both types of precedents into your drafting. However, if you use this approach, be cautious. Some standard clauses may relate to other clauses in the template, and excluding one from your selections could impact the provision that you borrowed.

There's safety in numbers. Especially if you are drafting a contract in an area of law that you're not familiar with, you're always better off using more than one precedent document. Collect at least three full precedents and compare them to see what provisions are similar and different.[21] Doing so reduces the chance that you will fail to include an important provision.

Compare potential precedents with the term sheet. As you locate potential precedent documents, compare them with the deal's term sheet or notes. While you may not find precedents that contain exactly the same terms that your client wants, you'll likely find precedents that substantially overlap with the terms your client has provided. Remember that you can always add a few new provisions if necessary.

19: In addition, it's not ethical to charge a client for something they could have done online by themselves. You're being paid for your expertise, so if you use these forms, you should be applying extra analysis and advice in order to give your client their money's worth.

20: *See* GAA Forms & Leases, Atlanta Apartment Association, https://perma.cc/ZS4B-Q8BQ.

21: Though contracts are a kind or *genre* of legal document, there are many different sub-genres of contracts. Using the *genre discovery* approach described in Chapter 40, you can discover where the type of contract you are drafting is subject to conventions among attorneys or parties.

36.5 Adapting precedent documents

Once you have all your precedents assembled, decide how you want your draft organized. Remember that we want to organize topically and then arrange the topical sections in order of importance or chronologically. It may be the case that the precedent you located uses this organizational structure already. If so, great! That's one less thing you have to do. But if you need to re-organize all or part of the precedent document, it's best to do so early in the process, before you start adapting the specific terms.

Once you have an organizational scheme that you can live with, it's time to go term by term, inserting the information from your notes or term sheet

into the precedent document's terms. Make sure that every item on the term sheet or in the notes finds a home in the document. If you have some terms that don't seem to fit anywhere in your template, you'll need to locate additional clauses that you can add to your template to accommodate those terms.

When all the provisions in your agreement match the terms of your deal, the editing process begins. Rather than trying to edit everything in the document all at once, make multiple passes through the document, focusing on a different area with each pass. For example, use one read-through for checking your modal verbs. Are the same verbs used consistently throughout the document to express obligations, rights, and prohibitions? Then, read through a second time for defined terms. Did you use them consistently throughout the document; did you use consistent capitalization; and did you refer to the same thing every time you used a defined term? Continue with these focused read-throughs until you have checked all of the following:

- Modal verbs
- Defined terms
- Quantities and amounts (including payments)
- Cross-references
- Headings and numbering
- Font, spacing, and appearance

After you have finished adapting and editing, you have a *working draft*. In a negotiated deal, this draft will then be sent to the party on the other side of the deal for their input, using a process called "markup" or "redlining."

36.6 Redlining

A redline is a negotiation. Party A writes up its proposed terms in a draft contract and sends them to Party B. Party B reviews each proposed term and either (1) leaves the term as it is, which means that Party B accepts the proposed term; (2) strikes out the entire term, meaning that Party B rejects the proposed term altogether; or (3) suggests changes to the term. If Party B suggests changes to the term, the changed term is still part of the negotiation—now the term, with Party B's suggested changes, is back in Party A's court, where Party A can do any of the three things listed above. This process goes back and forth until both sides are satisfied with the terms of the deal.

Attorneys call this 'redlining' or 'markup' because the changes are being recorded right there in the document. You can use *Track Changes* in Word, *Suggesting* mode in Google Docs, the *Collaboration* feature in a contract management lifecycle (CML) platform, or a virtual-reality conference room in cyberspace. But it's important to be able to see how each party has changed the document each time it goes through this cycle. Remember: Don't just change the document—document the changes.

As lawyers exchange and mark up contract drafts, it's very easy to lose track of the most current version. *Versioning* or *version control* is the method drafters use to maintain those different versions, keep track of the changes made to the document, and ensure that all parties are working with the latest iteration of the contract. Imagine how frustrating it would be to spend several hours redlining the other side's draft, only to learn that the version you spent all that time redlining was several weeks out of date.

You must have a clear system for version control to prevent errors, confusion, or even potential legal disputes. The good news is that it's not usually the individual drafter's responsibility to create a version control system. Your office or your contract management software should have a system that assigns version numbers or other codes to each contract iteration. This numbering system will indicate when the draft was created or updated and possibly who created or updated it. Using this system will ensure that all parties are working with the most current version of the document and also that they can reference previous versions to see what has been changed.

36.7 Summary

Many law students enter law schools dreaming of high-stakes litigation and courtroom drama. However, even if a student becomes such a lawyer, they will still encounter contracts virtually every day. Attorneys must have strong contract drafting and analysis skills, whether reading agreements to which they are a party, interpreting contracts for a client, or drafting a new deal's terms for a client. With the continual and exponential rise of technology, such as large language model generative artificial intelligence, transactional work, such as contract drafting, offers a new and exciting urgency to master these skills. Much like a jigsaw puzzle, contract development requires analysis, planning/research, and careful execution. The task may seem tedious, but helping a client document an important business decision, such as the merger of two limited liability companies, or a life decision, like an adoption, is just as rewarding as a jury verdict.

37 Writing for non-lawyer clients

Link to book table of contents (PDF only)

1: You may also find it helpful to consider the information in Chapter 26 when evaluating your clients' needs.

2: David. A. Binder, et al., *Lawyers as Counselors, A Client-Centered Approach* (2019).

Krista Bordatto & Susan Tanner

This chapter explores the adjustments that lawyers must make when presenting legal analysis to those who do not have have a formal legal education.

Effective communication is a fundamental skill for lawyers, especially when presenting legal analysis to non-lawyer clients. This chapter delves into the essential shifts that lawyers must make when communicating complex legal concepts to individuals without a legal background. By exploring strategies for clarity, plain language, and client-centric communication, we aim to equip lawyers with the tools necessary to effectively engage and empower non-lawyer clients.[1]

37.1 Diverse backgrounds & knowledge gaps

Non-lawyer clients come from various backgrounds and possess varying amounts of knowledge of legal concepts. Lawyers must understand the diversity among their clients and identify potential knowledge gaps. This section emphasizes the importance of recognizing clients' perspectives, cultural differences, and prior experiences with the legal system.[2]

Understanding clients' perspectives. Lawyers writing for non-lawyer clients must recognize that their clients may approach legal matters from different perspectives. Each client may have unique goals, concerns, and priorities. Lawyers must engage in active listening and effective communication to fully grasp clients' perspectives. Remember, lawyers are advocates for clients, which requires understanding client goals. For instance, when working with a client seeking a divorce, understanding their emotional journey, concerns about child custody, or financial stability can help tailor legal writing to address the emotional needs and concerns that attach to major life changes.

Cultural differences & language considerations. Cultural differences and language barriers can significantly affect how non-lawyer clients perceive and understand legal information. Lawyers should be sensitive to cultural nuances and adapt their writing accordingly. For example, when working with clients from diverse cultural backgrounds, lawyers should avoid legal jargon or complex terminology and instead use plain language that is accessible and easily understood. Moreover, recognizing the potential language barriers that clients may face, lawyers should make efforts to provide translated materials or offer interpreter services if needed. Additionally, by using client-centered communication, as discussed in Section 37.3 and Section 37.6, you can better understand how cultural

differences can influence your relationship and how you communicate with your client.

Prior experiences with the legal system. The non-lawyer client will either have an opinion of the legal system based on previous positive or negative experiences, or no opinion at all. Those with previous positive experiences, such as adoption or purchasing a home, may be over-confident that all cases will have positive results. Likewise, non-lawyer clients who have had negative experiences may make negative assumptions about future interactions with the legal system. Either way, clients may be apprehensive in trusting the legal process, the lawyer, or both. Lawyers need to acknowledge and address these experiences to build a rapport and establish trust with their clients. By demonstrating empathy, transparency, and clear communication, lawyers can help alleviate any apprehensions and empower clients to actively participate in their legal matters.

Initial meeting. When a client first contacts a lawyer regarding a potential legal case, the lawyer must recognize that the client may not be familiar with the legal process, terminology, or the potential financial implications of their case. Typically, the lawyer will schedule an initial meeting to explain the legal procedures, potential damages recoverable, and the client's role in the case. During this initial meeting, the lawyer may provide educational materials written in plain language, use visual aids or diagrams to explain complex concepts, and address any concerns the client may have about the litigation process. Once a client retains the lawyer, the lawyer has an ethical duty to keep the client informed on the progress of their case. Typically, clients are updated through letters or electronic communications, such as e-mail.

37.2 Letters in a personal injury matter

Consider an example letter written regarding a personal injury case involving a non-lawyer client who has been injured in a car accident. The first example below was written without regard to unique non-lawyer client needs. The second example improves the communication with clarity, plain language, and empathy.[3]

3: The example letters in this chapter provide just the text of the applicable letters. If you would like to see how they might appear in the actual letter-genre formatting, see the example in Section 30.1.

Original letter

RE: Personal Injury Claim

Dear Ms. Jones:

We are writing to update you on the progress of your personal injury claim. After conducting a thorough investigation and reviewing all available evidence, we have determined that liability in this matter rests solely with the opposing party. Our legal team is confident in establishing their negligence and liability in court.

Our team of experts has assessed the damages sustained as a result of the accident. We have quantified your economic damages, including medical expenses, lost wages, and property damage. Additionally, we are in the process of evaluating non-economic damages such as pain and suffering, emotional distress, and loss of enjoyment of life.

Given the strength of our case, we will proceed with filing a complaint in court to initiate legal proceedings. This will involve preparing legal documents, serving the opposing party, and engaging in the discovery process to gather additional evidence.

We will keep you updated throughout the legal process, and our team is prepared to represent your best interests every step of the way. Should any developments or important deadlines arise, we will promptly inform you.

Please do not hesitate to reach out to our office if you have any questions or concerns. We appreciate your trust in our firm and remain committed to achieving a favorable outcome for you.

Sincerely, etc.

Revised letter

In the revised letter, the content is broken up into different parts using headings and legal terms have been either explained further or changed to simple, everyday language. Additionally, the tone of the letter is empathetic to the client's position.

RE: Your Personal Injury Claim

Dear Ms. Jones:

We hope this letter finds you well. We want to provide you with an update on your personal injury claim and explain our next steps.

Who is at Fault

Through our investigation and careful analysis of the evidence, we have determined that the other party involved in the accident is responsible for what happened. They acted negligently, which means they were careless and did not take proper precautions.

The Impact on You

We understand that the accident has had a significant impact on your life. Our team of experts has assessed the damages you suffered, including medical expenses, lost wages, and the damage to your property. We are also considering other damages, such as the pain and emotional distress you have experienced and how it has affected your quality of life.

What Comes Next

> Based on the strength of your case, we will be taking legal action by filing a complaint in court. This is an important step that allows us to formally start the legal process. We will be preparing the necessary documents and serving them to the other party. We will also be gathering additional evidence through a process called discovery, which helps build a stronger case.
>
> Throughout this process, we will keep you informed about any updates or important deadlines. Our team is here to represent your best interests, and if you have any questions or concerns, please don't hesitate to reach out to us. Your trust in our firm is valued, and we are fully committed to achieving a positive outcome for you.
>
> Sincerely, etc.

37.3 Client-centered communication

Lawyers must adjust their communication style and language to match the client's level of understanding. Avoiding jargon, using plain language to explain legal terms, and providing accessible explanations are crucial elements in effectively communicating legal analysis to non-lawyer clients. This section explores techniques for assessing and adapting to clients' comprehension levels.

Assessing the client's comprehension level. To tailor communication effectively, lawyers need to gauge the client's comprehension level. This can be done through active listening, asking open-ended questions, and observing the client's responses during meetings or discussions. Understanding the client's familiarity with legal concepts, their educational background, and their ability to absorb complex information will help determine the appropriate approach to communicate legal matters.

Simplifying legal terminology and concepts. Lawyers should avoid using legal jargon or technical language that may confuse or overwhelm non-lawyer clients. Instead, they should strive to simplify legal terminology and explain complex concepts in plain language. Consider providing analogies or real-life examples that relate to the client's experiences or interests. For instance, when explaining the concept of "burden of proof" in a criminal case, a lawyer could use the analogy of a scale, explaining that the burden lies on the prosecution to tip the scale in favor of guilt.

Using visual aids and illustrations. Visual aids, such as charts, diagrams, or infographics, can enhance understanding and retention of information for non-lawyer clients. These visual representations can simplify complex legal processes or concepts, making them more accessible. For instance, a flowchart outlining the steps involved in a personal injury claim can help the client visualize the progression of their case and understand their role at each stage.

37.4 Letters in an estate planning matter

When working with non-lawyer clients in estate planning matters, lawyers often encounter complex legal terms and intricate planning strategies. To tailor communication, a lawyer can begin by using a conversational tone and avoiding technical terms. They can provide visual aids, such as a family tree diagram, to illustrate the distribution of assets. Additionally, they can explain the purpose and benefits of specific legal documents, such as wills or trusts, using relatable examples, such as ensuring the smooth transfer of assets to loved ones after one's passing.

Original letter

RE: Estate Planning Matters

Dear [Client's Name],

We are writing to discuss the importance of estate planning and how it can help protect your assets and ensure your wishes are carried out. As your legal representatives, we want to assist you in this process and provide guidance on the necessary steps to take.

Wills and Trusts

One of the primary tools in estate planning is the creation of a will or trust. These legal documents allow you to specify how you want your assets to be distributed after your passing. They also allow you to name guardians for minor children, designate an executor or trustee, and provide instructions for your healthcare preferences.

Power of Attorney and Healthcare Directives

In addition to wills and trusts, it is important to consider establishing a power of attorney and healthcare directives. A power of attorney grants someone you trust the authority to make financial and legal decisions on your behalf if you become incapacitated. Healthcare directives, such as a living will or a healthcare proxy, outline your preferences for medical treatment in case you are unable to communicate your wishes.

Probate and Estate Administration

When a person passes away, their estate goes through a legal process called probate. This involves validating the will, paying debts and taxes, and distributing the assets to the beneficiaries. Our firm has extensive experience in probate and estate administration and can guide you through this process with care and efficiency.

Please contact our office at your earliest convenience to schedule a consultation. During this meeting, we will discuss your specific needs and develop an estate plan tailored to your

circumstances. We are committed to protecting your interests and ensuring your wishes are honored.

Sincerely, etc.

Revised letter

In the revised letter, the content has been adjusted to simplify complex legal concepts and provide a clearer understanding of estate planning. The inclusion of a family tree diagram helps the client visualize how their assets may be distributed among potential beneficiaries. The use of plain language and clear explanations aims to make the letter more accessible and client-friendly.

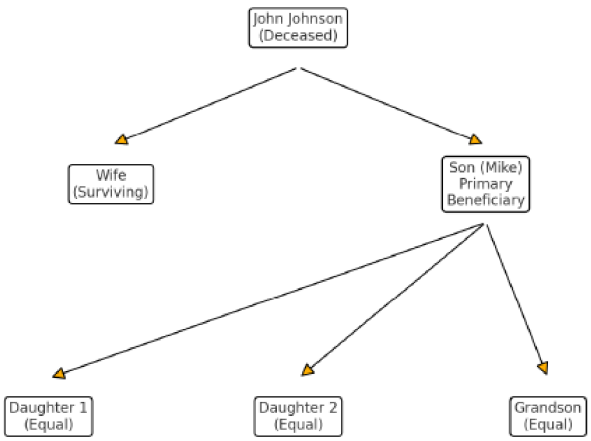
RE: Estate Planning Matters

Dear [Client's Name],

We hope this letter finds you well. We want to emphasize the importance of estate planning and how it can help safeguard your assets and ensure your wishes are respected. As your legal representatives, we are here to assist you throughout this process and provide clear guidance on the steps involved.

Wills and Trusts: Protecting Your Legacy

Creating a will or trust is a crucial part of estate planning. These legal documents allow you to outline how you want your assets distributed and who should manage them after your passing. By doing so, you have control over ensuring your loved ones are taken care of according to your wishes. We have prepared a family tree diagram to help you visualize the potential beneficiaries and how your assets may be distributed.



Power of Attorney and Healthcare Directives: Decision-Making Support

In addition to wills and trusts, it is essential to consider establishing a power of attorney and healthcare directives. A power of attorney grants someone you trust the authority to make financial and legal decisions on your behalf if you are unable to do so. Healthcare directives, such as a living will or healthcare proxy, allow you to express your medical treatment preferences. These documents ensure that your wishes regarding healthcare and financial matters are honored if you are unable to communicate them yourself.

Probate and Estate Administration: Efficient Asset Distribution

After your passing, your estate will go through a legal process called probate. Our experienced team can assist with probate and estate administration, guiding your loved ones through the necessary steps of validating the will, settling debts and taxes, and distributing assets to the intended beneficiaries. Our goal is to streamline this process and minimize any potential burdens on your loved ones during a challenging time.

We kindly request you to contact our office at your earliest convenience to schedule a consultation. During this meeting, we will discuss your specific needs, answer any questions you may have, and develop a comprehensive estate plan tailored to your unique circumstances. Your peace of mind and the protection of your interests are our top priorities.

Sincerely, etc.

37.5 Clarity & plain language

Simplifying complex legal concepts. Justice Clarence Thomas famously said the "beauty is not to write a five-cent idea in a ten-dollar sentence" but instead "to put a ten dollar idea in a five cent sentence."[4] When writing to clients, the goal should be that any type of client can understand what you are saying. Often complex words and sentences are used to describe complex topics, which can confuse the client. Instead, everyday words and plain language techniques should be used as much as possible.

4: Justice Thomas explained that he writes opinions to be accessible to the average person during a speech at Harvard.

Using plain-language techniques.[5] Plain language is clear, concise, well-organized, and easy to read. Using plain language is the best way to ensure that the client understands the legal analysis the first time. There are multiple techniques; the most important ones are discussed more in-depth below.

5: Chapter 42 provides a general introduction to writing as this section recommends.

a. **Word choice.** Eliminate legal language when common words will adequately convey the message. For example instead of using words like *aforementioned* or *subsequent to* use words like prior and after.

Although Latin words such as *bona fide and arguendo* are common in case law, it is better to replace those words with English words that clients will understand immediately.

b. **Sentence length.** Use short sentences when practicable. A good rule of thumb is to avoid sentences over 20 words. If you need to use a longer sentences for a list or series, tabulation can improve readability.

c. **Active voice.**[6] Use active voice to clearly identify the action and who is performing the action. The general rule for active voice is to follow the sentence format of subject + verb + action/object. Passive voice is appropriate in some circumstances, such as when you do not want to name the subject or the subject in unknown. Outside of limited circumstances, active voice is preferred. Passive voice generally adds length to sentences and can be confusing for the reader. Consider the following:

   Passive: The man was hit by the car.

   Active: The car hit the man.

6: See Section 43.5 for further details on active and passive voice.

d. **Compound constructions:** Compound constructions occur when three or four words are used when one or two words would work. Consider the following:

   Compound Construction: The judge ruled in favor of Bob.

   Eliminates Compound Construction: The judge ruled for Bob.

37.6 Client-centric communication

Active listening & empathy

Client-centric communication is key to fulfilling your ethical duty to "explain a matter to the extent reasonably necessary to permit a client to make informed decisions regarding their representation."[7] While lawyers are likely in the best position to understand legal consequences, clients are generally in the best position to understand non-legal consequences that could have huge personal ramifications. A client may not be able to fully articulate their concerns and goals, which is why using active listening techniques and empathy when communicating is so important. This is especially important when writing to non-lawyer clients. Consider this case update from a lawyer representing a client who is scared of going to trial.

7: Model Rules of Pro. Conduct r. 1.4(b) (Am. Bar Ass'n 2023).

> Dear Sally,
>
> We are writing to let you know that we have been unable schedule mediation with the defendant. Unfortunately, trial will proceed on June 15 at 1:00 P.M.
>
> Please make sure you arrive on time.
>
> Sincerely,

As you can probably imagine, a client who is afraid of going to trial may be upset to receive this letter. Consider a rewritten letter that incorporates empathy and shows that the lawyer was actively listening to the client's concerns.

> Dear Sally,
>
> We hope you are doing well. We are writing to give you an update on your case and explain the next steps.
>
> During our last meeting, you expressed that you would prefer to try to come to an agreement with the other side rather than going to trial. We immediately reached out to the other side to schedule mediation, where a neutral party could assist in resolving your case. Unfortunately, the other side has not agreed to mediation and our trial date is approaching.
>
> While there is still time for mediation, we may be unsuccessful at resolving this case without a trial. We understand this is not the way you wanted to resolve this case, but we will make sure you are as prepared as possible in the event we must go to trial.
>
> Trial is currently scheduled at 1:00 P.M on June 15, 2024. My assistant will be reaching out to you to schedule a time to come in, so we can go over what to expect and address any concerns you may have. We appreciate the trust you have placed in our firm.
>
> Sincerely,

Context & explanation

Legal communication is not simply about conveying the law; it is about making the law understandable and accessible to those who may not have a background in legal studies. The longer lawyers practice, the harder it becomes to remember that not everyone understands the law and legal system like lawyers do. Many times, clients hear about a legal concept or process for the very first time from their lawyer. When clients approach a lawyer, they often come with a set of concerns, anxieties, and questions. These apprehensions are not solely about the legal issue at hand, but also about how the legal process works and how it might affect them. Therefore, it becomes imperative for lawyers to provide context and offer explanations that demystify the complexities of the law.

Context lays the foundation for understanding. When explaining a legal concept, lawyers should consider starting with a broader overview before narrowing down to specific details. For instance, if a client is facing a contractual dispute, it may be beneficial to explain the general principles of contract law and its overarching purpose before diving into the specifics of the client's case. Receiving this broader context, clients can better appreciate the nuances of their specific situation. Furthermore, the legal system is interwoven with historical, social, and political factors. Recognizing and

explaining these connections can offer clients a more comprehensive understanding of their legal position. For example, understanding the historical context of a particular statute can elucidate its intent and application.

Every client is unique, bringing in their own set of experiences, knowledge, and concerns. Lawyers should strive to tailor their explanations to the individual needs of the client. For a business owner, explaining the economic implications of a legal decision might be crucial, while for another individual, understanding the personal or familial consequences might take precedence. Attorneys must gauge the client's prior knowledge. If a client already has some understanding of a legal concept, a lawyer might risk alienating them with overly simplistic explanations. Conversely, overly technical explanations can confuse and overwhelm a client with no legal background.

While it's crucial to maintain accuracy and precision in legal explanations, lawyers must strike a balance with clarity. Legal jargon, while precise, can be confusing for many clients. Lawyers should be prepared to rephrase and clarify concepts in plain language, without sacrificing the integrity of the legal information. The primary role of a lawyer is not just to represent and advocate but to educate and guide. By providing context and tailored explanations, lawyers can empower their clients, fostering trust and confidence in the legal process. This not only enhances the lawyer-client relationship but also promotes a more informed and engaged citizenry.

37.7 Document design

Structure for readability

Whenever you are writing to a non-lawyer client, it's critical to make the document as easy as possible for the client to read and understand. If the purpose of the document is to provide a case update, it's good practice to provide a brief recap of where the case was at during the last update or meeting. The document should be organized using headings, moving from general topics to more specific information. As discussed in Section 37.5, using plain language is key, even in headings. The information under each heading should only pertain to that heading.

Enhance readability

- **Consistent formatting.** Uniformity in fonts, spacing, and margins gives the document a professional appearance and ensures that the reader can easily navigate through the content. For instance, consistently using a serif font like Times New Roman for body text and a sans-serif font like Arial for headings can create a clear distinction between the two.
- **Visual aids.** Where appropriate, consider incorporating charts, graphs, or tables to simplify complex data or timelines. Visual aids can provide a quick snapshot of crucial information, aiding in comprehension.

- **White space.** Avoid cluttering the page. Adequate spacing between sections, paragraphs, and around the margins can make the document more inviting and less intimidating to the reader.
- **Bulleted and numbered lists.** Lists visually break down information, making it easier for readers to process. Numbered lists are particularly helpful when presenting sequential steps or ranked items, while bulleted lists are suitable for non-sequential or equally weighted points.

It is beneficial to seek feedback on the document's design and content. Having a colleague or a non-lawyer review the document can offer insights into areas of potential confusion or ambiguity. Regular revisions based on feedback can significantly improve the document's clarity and readability.

Visual communication

When you are dealing with a complex legal topic, a client that has no experience with the legal process and everything in between, visual aids can be extremely helpful. Visual representations can help lawyers communicate ideas more effectively, no matter what type of client they have. Like the family tree in the revised letter in Section 37.4, visual aids can be diagrams, charts, photos, or similar kinds of displays. Using tools like these can assist the lawyer in mitigating difficulties with language or cultural barriers as well.

In addition to helping the lawyer communicate with the client, the client can also use these visual depictions to communicate questions, concerns, or goals. By presenting information in a way that gives the client the tools to make informed decisions, clients can effectively participate in the legal process.

37.8 Other considerations

Ethical implications

While you do not have to communicate with your client every day to comply with the Model Rules of Professional Conduct, you must keep your client updated on important matters such as, but not limited to responses from opposing counsel, motions filed, changes in the law that could impact the case, and scheduling of hearings.[8] Many times, you will provide these types of updates in writing. Offering monthly updates is a best practice, even when there have been no substantial changes. By doing so, you not only ensure you are complying with the Model Rules, but also providing the client with peace of mind that their case is in trustworthy hands.

8: Model Rules of Pro. Conduct r. 1.4(a) (Am. Bar Ass'n 2023).

Proofreading

It may seem like a no-brainer, but lawyers must proofread everything. Often lawyers will have legal assistants or paralegals draft court documents, responses to opposing counsel, and client update letters. This is perfectly fine, if the lawyer proofreads the document and verifies the legal analysis. Misspellings, grammatical errors, and incorrect citations can be not only frustrating to the reader, but also damaging to the lawyer's creditability. Finally, the lawyer is the signing authority, which means that any misstatement of law or fact is the lawyer's responsibility.

38 Oral arguments before a court

Link to book table of contents (PDF only)

Elizabeth Sherowski

The legal genres discussed in this chapter and in Chapter 39 differ from the rest of the chapters in this section: They discuss spoken, rather than written, types of legal communication. While a great deal of the work that lawyers do involves written communication, lawyers also need to be able to talk through legal analysis with courts, clients, and other legal professionals. This chapter discusses making legal arguments in front of courts, while Chapter 39 discusses communicating with clients and other legal professionals.

38.1 Oral argument conventions

Oral argument is a genre of legal communication that involves lawyers making arguments out loud before a judge, magistrate, or panel of judges. Here are some conventions of the genre relating to purpose, audience, and style.

Purpose. An oral argument is a semi-rehearsed spoken presentation that attorneys make to the court. Although the attorney making an oral argument has often already submitted a written motion or brief that explains the argument they are making, oral argument is an opportunity for an attorney to summarize their argument, emphasizing certain legal points, as well as an opportunity for the court to ask questions to clarify the attorney's argument.

Audience. The audience for oral argument depends on the type of court where the argument is made. Arguments in trial courts are made to a single judge or magistrate, who alone has the power to grant or deny the attorney's motion. Arguments in appellate courts are made to a panel of judges, where a majority of the panel must find in the attorney's favor for the appeal to succeed. Whether the audience is a single judge or a panel of judges, the court has usually read the attorney's motion or brief and the opposing counsel's motion or brief and is prepared to question the attorneys about their arguments and their responses to the opposition's arguments.

Style. Again, the type of court where the argument is made will determine the argument's style. Arguments in trial courts are usually more informal and conversational, while arguments in appellate courts are more formal. Regardless of the type of argument, attorneys should always remember that the court is in charge of how the argument will proceed. While the court will allow the attorneys to explain their arguments, the judge or panel will often (although not always) interrupt the attorneys with questions.

These questions let the attorneys know which areas of the argument the court wants more information about, so it is in the attorney's interest to answer the questions completely to the court's satisfaction.

38.2 The attorney's role in oral argument

The attorney's role in oral argument is to help the court understand the arguments made in their brief or motion. To accomplish this, the court asks the attorney questions while the attorney is presenting their argument to the court. But this does not mean that oral argument is an interrogation or has an adversarial posture. On the contrary, the most effective oral arguments function as conversations between the attorney and the court. Think of oral argument as a sophisticated dinner party conversation, where the court has brought the law and the attorney has brought the facts. In this conversation, the attorney and the court weave those elements together to (hopefully) agree why the attorney's client should prevail in the matter.[1]

1: Thanks to Prof. Monte Smith for this dinner party analogy.

While parties may always request oral argument when they file their motion or brief, not every case is granted oral argument. Often, the parties elect to let their briefs speak for themselves—we call this 'resting on the brief.' In such cases, parties can waive their right to oral argument. In other cases, such as when clear precedent exists in the jurisdiction or the appeal or motion raises a relatively uncomplicated issue, the court may determine that oral argument would not be helpful to them or would not be an effective use of the court's time and deny the parties' request for oral argument.

38.3 Procedure for oral argument

Each advocate is granted a certain amount of time, usually between fifteen and thirty minutes, to make their argument to the court. The party who filed the appeal or motion will argue first, since they have the burden of persuasion. The moving/appealing party may also have an opportunity for a short rebuttal argument after the responding party has argued.

Each attorney will begin their argument by outlining their main points—this is the argument roadmap. The roadmap will be followed by a more detailed discussion of each point. At any time during the argument, the court may interrupt the attorney to ask questions or seek clarification of a point.[2] When interrupted, the attorney must pause their argument to answer the court's question.

2: Some courts have adopted an oral argument model where attorneys are allotted a few interruption-free minutes to talk before the questioning starts. *See, e.g.*, Clare Cushman & Jim Duff, *Oral Argument, Significant Changes in Format*, Supreme Court Historical Society (Oct. 10, 2021), https://perma.cc/4JPF-D5N9. But in most courts, interruption is fair game from the moment the attorney starts speaking.

Attorneys are responsible for managing their allotted time, although sometimes the court provides a timer or a system of warning lights to let the attorney know when they are close to the end of their time. When an attorney's time runs out, they must stop their argument. Although the attorney may ask the court for permission to briefly conclude the point they were making, the court can choose to grant or deny this request.

After both attorneys have argued, the court will usually announce that it is taking the matter under advisement and will give the parties a timeframe in which to expect the court's decision on the matter. However, in some motion hearings, especially those that are held in trial court to resolve pretrial matters, the court may issue a ruling from the bench immediately at the conclusion of the argument. Most of the time, however, the parties must wait to receive the court's decision.

Before the COVID-19 pandemic, most oral arguments took place in person, in court. Post-pandemic, many courts have allowed attorneys to make oral arguments online using videoconferencing software like Zoom or Microsoft Teams. This chapter will note the specific techniques associated with each of those oral argument venues.

38.4 Preparing for oral argument

The first step to prepare for oral argument is to become extremely familiar with all the arguments made in the parties' written briefs. This includes becoming familiar with the legal authority underlying each of the arguments and how that authority applies to the client's case. While you don't need to memorize the information from all the cases cited in the briefs, you should be very familiar with the facts and the reasoning of especially important or persuasive cases. You should know the strengths and weaknesses of all the arguments in favor of your client, as well as those of the arguments in your opponent's briefs.

You should also be familiar with facts of your case—either the evidence in a trial motion or the record below in an appellate argument. It's helpful to prepare an index or digest of the information contained in the case file, including the information's location. Judges will often ask advocates where in the record they can find certain information, and effective advocates will have that information ready for a prompt response.

You should also know the court rules that govern oral argument. These rules will outline the procedure for requesting oral argument, the amount of time that advocates will have to present their argument, and any other matters related to oral argument procedure in that court. Also be aware that some judges have their own 'personal' rules that apply in their courtroom. These are usually available on the court's website.

While written briefs may contain any number of arguments, oral argument is best limited to the strongest two or three arguments for the client's position. Trying to cover too many arguments in the short time available for oral argument can result in superficial treatment of important issues or can make the advocate appear rushed.

After selecting the arguments to present, you should brainstorm all the possible questions that the court might raise about those arguments. How will you distinguish unfavorable precedent? Do the arguments raise any policy concerns that could impact the court's decision? Create an outline of possible answers for questions that the court is likely to ask. The good news

is that you don't have to think of these questions and responses all on your own. Ask for help from colleagues (both experts and non-experts in the law you are arguing) in preparing potential questions and answers. Your colleagues can also help you brainstorm ways to transition from answering a question back into the main points of your argument.

Research shows that judges prefer arguments that begin with a roadmap, or an executive summary of the arguments that the advocate will be making.[3] Your roadmap should emphasize the theme of the argument and highlight its strongest points. If you are presenting more than one main point in the argument, help your listeners by adding language that guides the listener through the argument: 'The lower court's decision should be reversed for two reasons. First, the statute under which Mr. Green was prosecuted is unconstitutionally vague. Second, all the evidence that the state presented in its case in chief was obtained during a search that violated Mr. Green's Fourth Amendment rights.' In this example, telling the court how many arguments you will be making and labeling those arguments 'first' and 'second' gives the listener reference points to where you are in the argument. Later, when you turn to the Fourth Amendment, you will state that you have moved to the second argument, thereby reminding the court about how the arguments fit together.

3: Joseph Regalia, *Oral Argument Tactics*, write.law, https://trainingtools.thomsonreuters.com/legalsoftskills/oral-arguments (resource is behind a pay wall).

It's also a good idea to prepare a couple of conclusions for your argument: one paragraph-length conclusion that briefly summarizes your argument and prays for the relief that your client is requesting, and one sentence-length conclusion that you can use if you are running short on time ('For the foregoing reasons, we respectfully request that this court affirm the lower court's holding. Thank you.')

If you're the moving party or appellant, don't forget to prepare a list of possible rebuttal points for arguments you expect your opponent may make. You'll want to limit yourself to one or two, but having some in your pocket makes it easier to craft a rebuttal on the fly.

Once you have the raw materials of your oral argument—the roadmap, arguments, legal authority, answers to possible questions, and rebuttal material if necessary—it's time to organize them into a set of notes you can take with you to the podium. It's not advisable to take up a large stack of papers or a giant binder that you have to flip through constantly to locate the information you need for your argument. Instead, use a complete and thorough but streamlined method.[4]

4: *E.g.*, UMKC School of Law, *Oral Argument Instructional Video*, Vimeo.com (Feb. 28, 2022), https://vimeo.com/683028971.

You will want to practice, or moot, your arguments several times before the actual argument. These practice arguments will help you see your presentation through the court's eyes by pointing out gaps or weaknesses in the argument. Practice arguments also give you a chance to become more comfortable with answering questions and then transitioning smoothly back into the prepared argument. And if you are the movant or appellant, don't forget to also practice your rebuttal.

If you are able, you should record yourself practicing your argument. Many new advocates find this embarrassing at first, but watching yourself make

your argument is the best way to find out if you're speaking too quickly, using a monotone, displaying any distracting physical or verbal tics, etc.

38.5 Presenting oral argument

You have finished with all the preparation and practice, so there's only one thing left to do—present your oral argument to the court. Here are some tips for presenting a professional, polished oral argument.

Oral arguments in general

Observe courtroom decorum. A courtroom is unlike any other environment in our daily lives. It is one of the most formal settings you may ever encounter, outside of a presidential state dinner or a visit with royalty. Advocates should remain deferential to the court at all times. Address the judges as 'Your Honor' or 'Judge/Justice Lastname.' Make sure you have permission from the court before you approach the podium or begin your argument. Also remember that you are visible to the bench while your opposing counsel is presenting their argument, so look alert and composed.

Do not read. Oral argument should be a conversation between the advocate and the court. Reading from your notes (or worse, from your brief) is not conversational. Additionally, if you're looking down at your notes to read, you're not looking at the court, thereby missing a powerful chance for persuasion. One way to avoid the temptation to read from your notes is to not write out full sentences—instead, use bullet points with short phrases.

Speak slowly and clearly. It's very common for people to talk quickly when they are nervous, and oral argument can be a very nerve-wracking experience. During your practice sessions, you should get feedback on the pace of your speech and adjust accordingly. The court can't rule in your favor if it doesn't understand what you are saying.

Stop immediately when interrupted. As soon as the court speaks, you must stop speaking at once—even if you're in the middle of a sentence. (Make a note of where you stopped so that you can get back to it after you have answered the question). Allow the court to ask its question, even if you feel that the judge is rambling or you know what the judge is getting at before they have finished speaking. While the judge is asking the question, focus your attention on them and listen carefully. And don't feel that you must to answer immediately after the judge finishes speaking. It's okay to pause a minute and think before you answer the question.

Welcome questions from the bench. Rather than thinking of a question from the bench as an interruption of your argument, think of the question as an opportunity to prioritize points you were already going to make. Through their questioning, the judges are letting you know what issues they are concerned about. By answering their questions, you are addressing

those concerns. Remember, this is a conversation, not an adversarial posture, so try not to appear annoyed when the court asks a question.

Answer questions directly, then elaborate. If the question can have a 'yes' or 'no' answer, you should start with that. Most judges prefer a succinct answer, followed by an explanation. They do not want to wait through a lengthy explanation to learn where the answer is going. For this reason, you should also avoid editorializing or pandering to the court ('That's a great question, your honor') in your answer. Just answer the question you're asked.

Finish your answer, then segue back into your argument. Once you have answered the question, you don't need to wait for the court's permission to continue with your argument. In fact, the few seconds following the end of an answer are one of the few times that you can take control of the argument's direction. If you want to move on to a different point, this is the time to do that. If you want to continue with the argument you were making before the court asked the question, this is the time to do that.

Don't panic if the court asks a question you don't know the answer to. Remember that it's fine to take a minute to think about the question before you respond. Because you know the arguments and legal authority so well, you should be able to compose a decent answer to just about any question with a few seconds of thought. If you need more than a few seconds, ask the judge to restate the question (you can also do this if you just didn't understand what the court was asking). And if the question asks for something you don't know, it's okay to admit that. You can offer to research the issue and follow up with the court later if it's important.

Watch your time. If you reach the one-minute mark in the argument and the court is not asking a question, that's a great time to start your prepared paragraph-length conclusion. It's *not* a great time to launch into a new argument or introduce a new legal authority—you are almost guaranteed to run out of time. If you find that you just have a few seconds left at the end of the argument, use your sentence-length conclusion, thank the court, and sit down. If you get a question as your time runs out, remember to ask the court for permission to briefly answer the question. Then answer it briefly (i.e., in a sentence or two).

Present a responsive rebuttal. As noted in the previous section, you will want to go into oral argument with several prepared points on rebuttal. However, the most effective rebuttals respond to something that opposing counsel or the court emphasized during the argument. Be prepared to tweak your prepared points slightly to make them more responsive to the opposing argument and the court's interests. Also, your time will fly by, so limit your rebuttal to one or two brief points at the most.

Online oral arguments

There are some additional matters to consider if you will be presenting your oral argument remotely using a platform like Zoom or Microsoft Teams. First, you should follow best practices for any online meeting: Make

sure that your environment and background are quiet, well-lit, and free from distractions; test the software in advance of the argument to make sure there are no technical issues; and mute your microphone when it is not your turn to speak.

Next, make sure you understand the court's online argument procedures. (These are usually posted on the court's website or provided to advocates in advance of their argument). How will the judges signal that they want to ask a question? Will an on-screen timer be provided, or will you be expected to keep your own time? What should you do if the screen freezes or the call is cut off?

Finally, be mindful of how you appear on camera. Make sure that the camera is set at eye level and frames your face. When addressing the court, make eye contact with the camera, rather than the images of the judges on your screen (this will feel weird, but looking at the images of the judges rather than the camera gives the impression that you are looking away from the court). If your camera remains on when you are not speaking, make sure you sit still and maintain a neutral expression during your opponent's argument.

Listen carefully to what your opponent says. If you have rebuttal time, you may want to address one or more of their points. If you don't have rebuttal time, you may want to move for leave to file a supplemental brief responding to something your opponent said, especially if they misstated a fact or binding legal authority.

38.6 Sample oral arguments

As these sample oral arguments demonstrate, the best oral arguments are a conversation between the court and counsel. With practice and thorough preparation, you will be well on your way to successfully navigating that conversation.

Bernardo v. Napolitano (U.S. District Court for the District of Massachusetts)

This trial court hearing on a motion to dismiss is less formal than the other two example arguments here, as most trial-level oral arguments are.[5] Attorneys speak from counsel table, rather than from a podium, and the tone of the argument is more conversational. Although the single judge does not ask very many questions, both attorneys give direct, helpful answers and then effectively transition back to the rest of their argument.

5: Available online at https://www.uscourts.gov/cameras-courts/bernardo-v-napolitano.

Weidman v. Hildebrant (Ohio Supreme Court)

The appellant's attorney, Chad Ziepfel, begins his argument by effectively laying out the issue before the court and his client's position (although he does seem to be reading a little in his introduction).[6] His answers to

6: Available online at https://www.ohiochannel.org/video/supreme-court-of-ohio-case-nos-2022-0837-2022-1042-weidman-v-hildebrant.

the justices' questions are direct and respectful, and he does a nice job returning to the theme of his argument (that the court should defer to the legislature on this issue) in his answers. The appellee's attorney, Todd McMurtry, is unable to get to his scripted introduction because the Chief Justice asks him to start with the issue that was being discussed last in the previous argument. He respects the court's authority and complies with their request.

Pellegrino v. TSA (United States Court of Appeals for the Third Circuit)

This court allows the attorneys to speak uninterrupted for five minutes before questioning begins.[7] Both attorneys make good use of this time to lay out clear roadmaps for their arguments, using 'first,' 'second,' etc. to preview the argument's organization. Both attorneys also do an effective job of 'packaging' their answers by leading with a direct answer and following up with reasons in support of that answer. Also note the small black box with lights located in the corner of the speaker's podium—the lights turn from green to yellow when the speaker's time is running low.

7: Available online at https://player.piksel.tech/v/refid/3CA/prefid/15_3047.

39 Other oral genres

Elizabeth Sherowski & Brian N. Larson

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 and client counseling meetings, and informational presentations. Before proceeding with this chapter, you may find it helpful to review the ethical concerns addressed in Section 27.3, which apply to all genres.

39.1 Elevator pitches

1: This section focuses on elevator pitches to other legal professionals. If you are making your pitch to a nonlawyer, consider the advice in Chapter 37.

You should always have an elevator pitch ready.[1] An elevator pitch is a brief statement about who you are that you can use when introducing yourself in professional contexts. Consider this scenario: You are at the federal courthouse in your city. In the elevator, you are standing next to a woman 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 and title. 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. Your pitch should quickly identify your current role and your organization. It should also convey 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 after law school. Of course, you may very well not know the answer to those questions 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 you interested in X?'

Your pitch will tell the listener something about your background and perhaps about you as a person. This might be as simple summarizing your undergraduate training or previous work experience. Ideally, though, it will tell the listener something memorable, and do all this in thirty seconds or less.

Here's an example:

My name is Martin Frankel, but everyone calls me 'Gus.' I'm a first-year law student at Texas A&M University. I'm most interested in securities regulation, 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 monkey urine on a research expedition for Cornell's College of Biology. 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, Gus might not get through the whole thing before his listener interrupts with a comment. This judge might note 'I'm an Aggie, too,' as Gus finishes his second sentence, or 'I was at the SEC before private practice,' as he finishes the third. You should welcome these interruptions and follow them where they go. In such cases, you may or may 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 people to want to understand who you are, you should think first about what impression you want to make and then adjust your pitch accordingly.

39.2 Interviewing & client counseling

Lawyers are information gatherers. One of their main sources of information is their clients (or potential clients). Whether a lawyer is meeting with a prospective client for an intake interview or sitting down with an established client to provide legal advice, they should remember several basic principles of effective client communication: being prepared, listening, being responsive, and following up.[2]

2: The guidance in Chapter 37, covering communications with clients and other nonlawyers, may also be useful.

Preparation. Before any client meeting, the lawyer should thoroughly prepare themselves. This preparation will help the lawyer use their meeting time effectively and not waste the client's or the lawyer's time. For an initial

Figure 39.1: Interviewing witnesses and counseling clients are tasks that require lawyers to be prepared, to listen actively, and to follow up. Image: Oleksii Bychkov https://www.oleksiibychkov.com.

interview with a prospective client, this preparation begins with obtaining basic information about the client and their legal issue. Most law offices use either an initial intake form or a brief interview with a legal assistant or paralegal to obtain this basic information (the client's name and contact information, the legal problem that they face, and any previous experience that the client has with the legal system, regarding either the current matter or other matters[3]). The lawyer should review the intake form or the assistant's notes to familiarize themselves with this information. For a meeting with an established client, the lawyer should review the client's file to bring themselves up to date with the latest actions taken on the client's behalf. Regardless of the type of client meeting, the lawyer should use the information they currently have about the client to draft a short agenda for the client meeting. This agenda should be more than a mere checklist of questions—it should outline all the information that the lawyer needs to obtain during the meeting and list possible methods of obtaining that information. Can the client provide the information narratively? Are there documents the client could provide that could help the lawyer gather the information?

3: For new clients, this initial information gathering is also the time to run a *conflict check* to ensure that the lawyer's office is able to take the potential client's case. There's no point in spending time meeting with a potential client if the lawyer is ethically barred from taking the representation. For an overview, see *Conflict Check Basics: What Every Legal Professional Should Know*, CARET Legal, https://perma.cc/4C6M-5HFU.

Plan ahead for how notes will be taken during the meeting. Having the lawyer both ask questions and take notes means that they will not be able to focus their full attention on either task. Some lawyers prefer to use their phone or a small digital recorder to record the meeting. Other lawyers bring a note-taker (usually a paralegal or legal assistant) to the meeting so that the lawyer can focus their full attention on the client. The lawyer should always let the client know if the meeting will be recorded, or if notes will be taken and kept, and inform the client who will have access to the recorded information.

Once the client (or potential client) arrives at the office, it's tempting to just dive right in and get to the heart of the matter—but doing so is a mistake. Instead, use the first few minutes of the meeting to build rapport with the client. The lawyer's tone should be businesslike but personable and respectful. Take a few minutes to ask how the client is doing, and really listen to the response. This engagement lets the client know that they can trust the lawyer and makes the rest of the information-gathering process go more smoothly. Make sure that the client is comfortable: Do they need a place to hang up their coat? Would they like a glass of water? A client who feels at ease in the lawyer's office will provide better information. Most people who come in to meet with a lawyer are doing so because they need help with a difficult situation. The more the lawyer can do to make the client comfortable, the easier it will be for the client to overcome their reluctance to discuss difficult or sensitive matters and to be fully forthcoming with important information.

In an initial interview with a prospective client, remember that there is a secondary purpose to the meeting. In addition to obtaining information from the client, the meeting also serves as a chance for the lawyer to convince the client that this law firm is the best firm to handle their case. However, this does not mean that the lawyer needs to engage in a hard sell to the client. Instead, the best way to convince a potential client to hire your firm is to present a professional, competent, and caring environment for

the initial meeting. The lawyer should make sure that the client is not kept waiting, make sure that the lawyer has all the necessary information and materials ahead of the meeting, and make sure there are no unnecessary distractions while the lawyer and client are meeting.

Listening. Client meetings are most effective when the lawyer adopts a helpful attitude. The lawyer's job is to listen to the client's concerns and explain the client's options in the current legal situation. This means that for the lawyer, listening to the client is just as important as talking to the client. In fact, client meetings are most effective when the client does most of the talking and the lawyer does most of the listening. These meetings are not the time for the lawyer to drone on and on about the law. A good interviewer uses the ability to listen and be curious about others to gain information and develop the client's story.

In order to help the client provide the lawyer with the most effective information, the lawyer should mostly ask open-ended questions (questions that call for a narrative answer, rather than a 'yes' or 'no'). For an initial intake interview, it can be helpful to allow the client to tell their whole story first, before the lawyer begins asking follow-up questions. During this initial disclosure, the only question the lawyer should ask is 'and then what happened?' or 'please tell me more about that.' While the client tells their story, the lawyer can note areas to ask follow-up questions about once the client finishes their story. For a meeting with an established client, it's usually not necessary for the client to retell their whole story. Instead, the lawyer should direct the client's attention to important areas ('When we met last time you mentioned that you and your neighbor were having a dispute over the maintenance of your shared driveway. How has that been going since we last spoke?')

Responsiveness. Throughout the meeting, the client should feel like the lawyer is listening to what the client is saying. This seems obvious, but it's actually harder than it looks. As lawyers, our thoughts are often racing ahead to the next question we want to ask, or analyzing the client's statement in legal terms, rather than giving the client our undivided and focused attention. Using a technique like active listening[4] can be helpful in these situations. Active listeners make a conscious effort to hear not only the words that another person is saying but, more importantly, the complete message they are communicating.

Active listeners use cues like eye contact or nodding to let the speaker know that they are paying attention. Active listeners also avoid attaching judgment to the speaker's statements, instead reflecting back what the speaker has said ('it sounds like you have had several conflicts with your neighbor in the last few months'). An occasional question communicates that the lawyer is listening and understanding the client's message. It's also helpful to ask questions to clarify certain points. 'What do you mean when you say . . . ?' 'Is this what you mean?' Finally, active listeners summarize the speaker's comments periodically, both to let the speaker know that they are listening and to make sure that the listener is understanding the speaker's story correctly.

4: For more information on developing active listening skills, see Lindsey P. Gustafson, Aric K. Short & Neil W. Hamilton, *Teaching & Assessing Active listening as a Foundational Skill for Lawyers as Leaders, Counselors, Negotiators, & Advocates*, 62 Santa Clara L. Rev. 1 (2021)

Follow-Up. At the end of the client meeting, the lawyer should summarize what they have learned, as well as any advice or next steps for the lawyer or the client. This is also a good time to set up the next time that the lawyer and client will touch base, whether that is to obtain further information or to follow up on how the lawyer's advice was implemented. The follow-up could be another in-person meeting, or it could be any other form of communication that the client prefers.

You may find it helpful to see illustrations of several of the points mentioned above in a video of a simulated client interview. We recommend Eliza McDonald, Client interview—Laws Lawyers Society.[5]

5: Eliza McDonald, Client interview—Laws Lawyers Society, YouTube, https://youtu.be/mQI2RRETb04

- The interviewer begins the meeting by welcoming the potential client and reassuring her that the information she shares will be kept confidential.
- The interviewer allows the client to tell the whole story first, then follows up with clarifying questions.
- The interviewer uses open-ended questions and active listening techniques throughout the interview.
- The interviewer ends the meeting by confirming the client's contact information and promising to follow up after conducting some research into the issue.

39.3 Informational presentations

Lawyers are often called upon to present complex information. Although this is often done in writing, it is not uncommon for lawyers to also need to present complex information in conversation with colleagues or clients. This information can be the results of your legal research and analysis, an explanation of a new development in the legal field, or a presentation regarding other matters. Regardless of the content, you want the presentation to keep your listener's attention and make efficient use of your busy listener's time.

People sometimes think that an oral presentation doesn't require as much preparation as a written presentation, but this perception is incorrect. A thoughtful, well-organized oral presentation requires a substantial amount of preparation. When preparing your presentation, you should focus on the organization of the information and the clarity of the presentation.

Organization

A well-organized presentation will start with the most important information, focus on results rather than process, and use organizational cues like roadmaps and signposts to help the reader navigate the presentation.

Start with the most important information. In most situations, your listener will not have unlimited time to listen to your presentation. Colleagues and clients are busy, and their time is valuable. Therefore, it's imperative to structure informational presentations so that they inform the listener as

efficiently and effectively as possible. If you have been asked to analyze a legal issue, your presentation should begin with the answer to the question you were asked. If you are presenting on a new development in the legal field, your presentation should begin with the key takeaway—how does the new development impact your colleagues or clients? Don't worry about giving your listener background information or context; you will have time to provide that information later in the presentation, and your listeners will have the opportunity to ask questions if they need additional information.

Talk about results, not process. A common mistake that presenters make is to focus on their process, rather than their results. Although you undoubtedly did a good deal of research to prepare for the presentation, your listener is less interested in how you researched or analyzed the issue, and more interested in the results of that research or analysis. For the same reason that you begin the presentation with the most important information, you should focus the rest of the presentation on *what* you learned, rather than *how* you learned it.

Use organizational cues to help your listener. In a written analysis, we can use visual cues like paragraph breaks and headings to help the reader navigate and make sense of information. These visual cues are not always available in an oral presentation,[6] so we must use auditory cues, like roadmaps and signposts. Roadmaps are short outlines of the information that you will be presenting. For example: 'We should be successful on our motion to dismiss for two reasons. First, the plaintiff will have trouble establishing a close temporal connection between the accident and her arrival at the scene. Second, under Texas law, the plaintiff's relationship to the decedent doesn't meet the test for a "close familial relationship," as required by the statute.' Signposts are cues that you give the listener when you are moving through the argument. For example: 'Turning to the second point, the close familial relationship requirement . . . .'

6: If you have access to presentation software like Google Slides or Power Point, you can use visual cues as well as auditory cues to orient the reader to the presentation's information. But not all informational presentations provide the option to use presentation software.

Presentation

When you are making your presentation, you should focus on creating a conversational tone, answering listeners' questions succinctly, and managing your time effectively.

Create a conversational tone. There's nothing wrong with using notes to make sure that you cover everything you intend to, but the surest way to lose your listener's attention is to read your presentation word-for-word from your notes. Additionally, if your eyes are focused on your notes instead of your audience, you miss a powerful chance to connect with your listeners. Instead, you should focus on creating a conversational tone, which sounds like you are informing the listener, rather than lecturing or reading to them. The easiest way to resist the temptation to read your notes out loud is to write your notes in bullet points, rather than in complete sentences. When nerves take over, as they often do during public speaking, we tend to default to reading what's in front of us. If we only have bullet points or a list of topics, we are forced to engage the conversational part of our brain

to present the information. So rather than writing out the entire roadmap word-for-word as in the previous section, instead you could write 'Motion successful—2 reasons—temporal connection/family relationship.'

Answer questions succinctly, then explain. No matter how thorough your presentation, your listener will probably have some questions about your research, analysis, or conclusion. Part of your preparation for the presentation should consist of brainstorming possible questions and drafting answers to those questions. Whether you have an answer prepared or not, answers to listener questions should begin, whenever possible, with a succinct 'yes,' 'no,' 'probably,' or other short answer, followed by a longer explanation. Leading with the ultimate answer to the question tells the reader where your answer is going, so it's easier for them to follow what you're saying.

Sometimes you will be presenting information that your listener may not want to hear. It may be that your research has revealed that your client is unable to recover what they have lost, or the new legal development you are reporting on will have a negative impact on your practice. Even if that's the case, it's still important to lead with the answer or key takeaway, even if it's not what the listener wants to hear. It's better to be honest so that the listener understands the reality of their situation and can take action appropriately.

Manage time effectively. Your listener is busy, and their time is valuable. You will usually know how much time the listener has allotted for your meeting, and you should tailor your presentation to fit within that time frame and allow time for questions. So, if your supervisor has scheduled a thirty-minute meeting to review the results of your research on a legal issue, you should allot about twenty minutes to present your information and ten minutes for questions. Whether the listener wants to ask questions throughout the presentation or hold their questions until the end is up to them, but either way you should have enough time to both cover all the information you need to cover and address any questions or concerns the listener may have. Use your phone or another timing device to keep yourself on track during the presentation.

Working in new genres | 40

Susan Tanner

You have probably heard that law school is less about learning the law than it is about learning to think like a lawyer. But thinking like a lawyer involves both a method and a domain knowledge, meaning you must master both the analytical process of legal reasoning and the substantive knowledge of legal rules, principles, and conventions that give that reasoning its context and meaning. And, for legal writing specifically, that means understanding not just writing techniques in isolation, but also how different legal documents function within the legal system, what purposes they serve, and how various audiences expect them to be structured and written. Educational researcher Daniel Willingham theorizes that what we commonly understand to be a universal trait—critical thinking—is actually domain-specific. In other words, we must understand much about our field to know how to solve problems in it. And we will use that knowledge in transformative ways—in different contexts and situations. Just like you do in law school more generally, when you learn the art of legal writing, you are learning not just how to write within specific genres, but also fundamental skills that you will use later in your career when you are tasked with writing something you've never written before.

Every lawyer eventually encounters unfamiliar types of legal documents. Whether you're transitioning from law school to practice, switching practice areas, or taking on a new kind of case, you'll need to master new genres of legal writing throughout your career. Legal communication does not occur in a vacuum; it is shaped by social contexts, institutional norms, and specific audience expectations. This chapter introduces the concept of *genre discovery* as an essential tool for legal writers. Through genre discovery, you will learn not just to mimic formats but to grasp the nuanced purposes and contexts of different types of legal communication.

Genre discovery involves a deliberate analytical process that allows legal writers to engage with unfamiliar genres of legal communication. It encourages you to move beyond surface-level observations and to carefully examine the structural, functional, and rhetorical components of each genre. In genre discovery, students dissect existing examples to identify recurring patterns, discern the rhetorical purposes, and understand the intended audience for each genre.[1]

1: Amy J. Devitt, *Generalizing about Genre: New Conceptions of an Old Concept*, 44 Coll. Composition & Commc'n 573-86 (1993).

Genre discovery can help legal writers to understand the broader social and institutional frameworks within which legal genres are embedded. For example, as this text explains in Chapter 34 and Chapter 35, a legal brief submitted to a court serves a specific role within the adversarial system, designed to persuade a judge or jury. Alternatively, a legislative bill operates within the democratic governance framework and aims to provide clear guidelines for societal conduct. Recognizing these contexts

enhances students' abilities to adapt their communication to meet the specific requirements and expectations of different genres.[2]

2: Vijay K. Bhatia, *Worlds of Written Discourse: A Genre-Based View* (2004).

40.1 Understanding & analyzing legal genres

Legal writing, like all forms of communication, exists within genres that have developed over time through repeated similar situations. A genre emerges when people repeatedly communicate for similar purposes to similar audiences, leading to conventional patterns in content, structure, and style. Just as you can recognize a horror movie (dark lighting, suspenseful music, isolated settings) or a romance song (emotional lyrics about love, particular chord progressions, themes of relationships), you can identify distinct legal genres by their characteristic features.

For example, when friends text each other, they often use informal language, abbreviations, and emojis. Birthday cards typically contain well-wishes, perhaps a joke, and a personal message. These patterns emerge because these communications serve specific purposes for specific audiences. The same principle applies to legal writing: Specific forms emerge to serve specific legal purposes.

You have already been introduced to several different legal writing genres: memos, briefs, and letters just to name a few. Rather than the arduous task of learning each type of writing apart from other genres, a more robust understanding of genre theory can help you to adapt your writing to new contexts in the future. Genre theory, which explores the categorization and analysis of texts based on their shared characteristics and functions, can help you do just that. For example, in this text we have already discussed ways to use the same CREAC structure across multiple types of legal documents. Genre theory helps us expand this basic recognition to become deeper thinkers and writers.

Genres are not mere static forms but rather dynamic social actions that are shaped by specific contexts and purposes. As Carolyn Miller asserts in a groundbreaking essay, genres emerge within rhetorical situations and are deeply influenced by social and cultural factors.[3] Legal writing is no exception, as genres such as legal opinions, briefs, and contracts are constructed to achieve specific legal aims and conform to established conventions within the legal community.

3: Carolyn R. Miller, *Genre as Social Action*, 70 Q.J. Speech 151 (1984).

Understanding genres involves recognizing their social dimensions. In the legal context, genres serve as shared resources that enable legal professionals to navigate and communicate effectively within the legal system. By becoming aware of the conventions, expectations, and purposes associated with specific legal genres, writers can tailor their texts to meet the needs of legal audiences and achieve desired outcomes.

Genre theory, as applied to legal communication, focuses on recognizing and understanding the conventions and expectations of different genres within the legal profession. [4] It explores how genres function within specific social contexts and the purposes they serve.

4: Alexa Z. Chew & Katie Rose Guest Pryal, *The Complete Legal Writer* (2d ed. 2020).

40.2 Engaging in descriptive analysis of legal texts and analyzing examples of legal genres

Think of the world of legal writing as a vast library with different sections. In one corner, you've got your legal memos; in another, there's a shelf full of contracts. Then there are the pleadings and appellate briefs, each with their own unique style and rhythm.[5] As future legal professionals, it's like you've got a library card that grants you access to all these sections. Navigating this vast library of legal writing might feel like you've just entered a maze with countless paths. Just imagining the day when you'll be called upon to craft documents in each of these genres can seem overwhelming. But here's the good news: you don't need to memorize every nook and cranny of this library. Instead, it's all about learning the art of adaptation.

5: For more on these genres and others, see Chapter 27 through Chapter 36.

Think of it this way: Instead of trying to remember every single rule for each genre, focus on becoming fluent in the language of legal writing itself. Dedicating time now to hone your adaptability will save you time and frustration later. By doing so, you're not just preparing for one genre; you're gearing up for any and all legal writing challenges that come your way. It's about equipping yourself with a versatile toolkit, so when the time comes, you won't be flipping through rulebooks. Instead, you'll confidently pen your piece, knowing you've mastered the essence of legal communication.

Start by picking up samples from each 'section' or genre. It's like getting a feel for a new book—by skimming through a few pages, you'll begin to see the distinct patterns and language each genre uses. For instance, ever wonder why contracts have such detailed clauses, while legal memos seem more straightforward? Or why a plea agreement uses certain phrases that you won't find in an appellate brief? This kind of knowledge is essential, both for class assignments and for the more complex tasks you'll undertake in your future legal career. When you can identify the key characteristics that set each genre apart, such as format, specialized language, and the unique writing strategies each employs, you will be able to more easily get a sense of how to write in a new genre.

The beauty of this exploration is that it's not just about understanding the layout of the 'book' but also getting the bigger story behind it. When you're drafting a memo for your boss or putting together a plea for the court, it's like choosing the right book for the right reader. A judge might prefer a legal thriller, while a client might lean towards a clear and concise guidebook. Recognizing who your 'reader' is and what they're looking for can help you craft a piece that resonates and achieves its purpose.

40.3 Adapting to new legal genres

When you need to write something new—let's say your first motion to dismiss or your first merger agreement—where do you start? A good approach is to find strong examples of similar documents that have worked well in the past. This section explains how to locate reliable examples of legal documents and evaluate their utility for your writing tasks.

Locating examples

A comprehensive search for examples should begin with internal firm resources. Most law firms maintain document management systems containing previously drafted and vetted documents that conform to firm standards. These repositories serve as valuable sources of successful documents that have been used in actual matters. Additionally, experienced attorneys within your firm may share examples from their practice, providing insight into strategic and practical considerations that shaped the documents' development.[6]

6: Section 32.4 offers suggestions for finding or using examples when formatting complaints; Section 36.4 and Section 36.5 for writing contract.

Commercial legal databases constitute another essential source of examples. Bloomberg Law's Transactional Intelligence Center database specializes in transactional documents and is particularly useful for corporate and securities work. Westlaw's Practical Law and Lexis's Practical Guidance offer extensive form libraries with detailed annotations explaining key provisions. Each platform also maintains databases of court filings that demonstrate effective approaches to litigation documents.

Bar associations frequently publish materials containing sample documents, often accompanied by commentary on drafting decisions. Similarly, continuing legal education programs regularly include annotated examples that illustrate current best practices. Practice guides and treatises supplement these resources by explaining the legal principles underlying document structure and language choices.

Evaluating examples

When assessing potential models, consider several key factors:

Authority. Evaluate the source's professional standing and track record. For litigation documents, examine the outcome of the matter. For transactional documents, consider the reputation of the drafting firm or organization. Documents from highly regarded practitioners or institutions generally reflect sophisticated approaches to legal drafting.

Currency. Legal practice evolves constantly. Recent examples typically reflect current standards and address contemporary legal developments. Examine whether changes in law or practice since the document's creation affect its continued utility as a model.

Context. Consider whether the example's purpose aligns with your objectives. A motion for summary judgment in a complex commercial dispute may provide limited guidance for drafting a similar motion in a straightforward contract case. Similarly, merger documentation for a public-company acquisition may require significant modification for use in a small-business transaction.

Annotations. Explanatory notes can illuminate the drafter's reasoning and strategic choices. Such commentary helps readers understand why particular approaches were selected and how they advance the document's objectives.

Adaptability. Assess what modifications would be necessary to adapt the example to your specific circumstances. Consider whether such adaptations would preserve the document's effectiveness while meeting your client's needs.

A note on AI in legal writing

While artificial intelligence tools can help identify common patterns and generate preliminary content, they should not serve as primary models for legal writing. AI-generated content requires careful verification against authoritative sources and may not reflect current best practices or recent legal developments.

Framework for studying examples

Apply the following methodology when examining legal document examples:

- Review multiple examples of the target document type to identify essential elements and permissible variations.
- Compare examples from different sources to understand the range of acceptable approaches.
- Analyze both successful and unsuccessful examples to understand critical features.
- Examine both structural organization and specific language choices.
- Evaluate how each component advances the document's objectives.

Through systematic analysis of well-chosen examples, legal writers develop the judgment necessary to produce effective documents that meet professional standards and achieve their intended purposes.

40.4 Applying genre conventions

The structure of a legal document often follows a particular blueprint that lawyers and judges have come to expect. For example, a memorandum will typically consist of an introduction, a statement of facts, legal analysis, and conclusion. When you first compare examples within a genre, look for these structural cues. Write down any headings you see. Take notes of what goes into each subsection.

Many genres have fairly strict organizational patterns. These patterns exist, not necessarily because it is the best or right choice, but because readers expect the writing to flow in a particular way. The longer a genre has been around, the more accustomed a reader will be to one set organizational pattern. Failure to recognize and adhere to this organizational format can confuse your readers and may reduce the effectiveness of your argument. Therefore, it's crucial to familiarize yourself with the expected

structural elements of each genre you are working on. Once you understand the blueprint, endeavor to organize your information and arguments accordingly.

Each legal genre has a particular tone[7] or voice[8] that lawyers are expected to adopt. For example, an appellate brief demands a formal and authoritative tone, while a client email may require a more approachable and explanatory style. Understanding the stylistic norms of a genre involves recognizing the tone, voice, and even the level of complexity that is expected. Keep in mind that deviating too far from the established style could lead to misunderstandings or could negatively impact how your work is received. Of course, we must use inclusive language and remove older sexist, racist, or limiting terms, but we should do so in the style our reader expects.

Tone and voice are key elements in legal writing that often go beyond the explicit rules outlined in style manuals. They form part of the stylistic norms for each genre of legal communication, subtly influencing the reader's perception and interpretation of your message. You can cultivate a nuanced understanding of tone and voice by analyzing multiple examples from within a single type of legal document.

Reading one sample of a legal genre, be it an appellate brief or a contract, can give you an initial idea of its stylistic norms. However, reading multiple examples allows you to discern the common stylistic threads as well as the range of acceptable variations within that genre. The repetitive patterns you notice—whether it's the use of passive voice, specific transition phrases, or particular rhetorical devices—serve as clues to understanding the genre's standard tone and voice.

While it's crucial to understand and adopt the stylistic norms of a given genre, there may be occasions when a slight deviation is warranted for a specific purpose. However, any deviation should be deliberate and well-considered, as straying too far from established norms can confuse the reader or detract from your credibility. Through the act of comparative reading, you will begin to understand the boundaries within which you have the flexibility to make stylistic choices.

7: Tone refers to the emotional tenor or attitude conveyed in the document. To identify tone, pay close attention to word choice, sentence structure, and the level of formality. For example, words like "heretofore" and "pursuant" often signal a formal (perhaps stuffy) tone, while phrases like "we believe" or "it appears" might suggest a more cautious or qualified stance. Through a comparative reading of multiple examples, you can gauge the emotional range that is acceptable within a particular legal genre. Note the instances where the tone may shift slightly—perhaps becoming more urgent in the conclusion of an appellate brief—to serve a specific rhetorical purpose.

8: Voice refers to the implicit speaker or the narrative style of the document. Unlike tone, which is emotional, voice is more about the personality that comes through in the writing. Are you hearing from a detached, objective legal analyst, or does the document have a more conversational style that seeks to engage the reader? Again, reading multiple examples will help you recognize the commonly adopted voices within a specific genre.

Appendices

41 Appendix: Plagiarism

Brian N. Larson

This chapter discusses plagiarism, collaboration, and copying, issues that have important consequences in law school and in legal practice.[1] Section 41.1 first provides a series of definitions to make our discussion easier. Section 41.2 considers how much you can copy before it becomes subject to requirements to quote or raises plagiarism concerns. Section 41.3 highlights differences between the policies in undergraduate classes and in law school classes. Section 41.4 provides a set of policies for plagiarism, collaboration, and copying typical for a legal writing class in law school. Section 41.5 considers the more flexible stance toward plagiarism and copying in legal practice and other professional contexts.

Note that you should not rely on the statements of policy in this chapter or even the definitions in it unless your professor tells you to; instead, consult with your own professor and remember that different professors may have different definitions and policies.

41.1 Definitions

plagiarism n. "Taking the literary [work] of another, passing it off as one's own without appropriate attribution, and reaping from its use any benefit from an academic institution."[2]

collaboration n. Consulting with any person regarding an assignment or exercise one will submit in a class.

copying n. Selecting text from one document (or from a recording of oral comments) and reproducing it exactly in another document that one will submit in a class or in practice; or 'patch-writing' it by writing words in the second document while looking at the words of the first, tactically making minor changes to avoid the texts being identical.[3]

generative artificial intelligence or *generative AI* n. Any tool that creates text that could be copied into the work product of a student, including any tool that generates a paraphrase of another text. Generative AI does not include tools that identify errors or issues in a text, such as Word's Editor (spelling and grammar checker), nor does it include legal research tools that employ artificial intelligence to identify potentially useful authorities or passages in them.[4]

1: Some content in this chapter is adapted from Legal Writing Institute, *Law School Plagiarism v. Proper Attribution* (2003), Legal Writing Institute, 900 Broadway, Seattle, Washington 98122-4340. That document resulted from committee work documented more thoroughly in Terri LeClercq, *Failure to Teach: Due Process and Law School Plagiarism*, 49 J. Legal Educ. 236 (1999). Concepts regarding generative AI are adapted from Dr. Kirsten Davis, Professor of Law, Stetson University.

2: *Law School Plagiarism v. Proper Attribution* at 2.

3: The boundaries of patch-writing and reasonable paraphrase are subject to dispute. *See* Sandra Jamieson, *Is it Plagiarism or Patchwriting? Toward a Nuanced Definition*, in *Handbook of Academic Integrity* 503 (Tracey Bretag ed. 2016).

4: Whether software applications like Grammarly or the AI tools in Westlaw, Lexis, etc., count as generative AI is a difficult question, as these products continue to develop and look for ways to use AI to improve their performance. Consult with your professor.

41.2 How much is too much?

One challenge students and faculty alike face is deciding how many words one may copy from a text before the words must appear in quotation marks with a citation. There is no single definition. Some professors will say even two consecutive words taken from a text must be in quotation marks. Other professors have a more liberal standard or no definite standard at all.

Some professors will give you more leeway in a legal writing class, because you will likely have more leeway in your practice, and legal writing class is meant to prepare you for practice. In other classes, though, your professors might be much more strict.

Given these issues, I cannot actually provide you examples of things that are or are not plagiarism or unacceptable copying. The issue is just too context-sensitive. Your best bet is to keep it top of mind while you are working with sources and to ask your professor or teaching assistant.

41.3 How the law school context differs from undergraduate classes

"Writers must be aware of the customs, conventions, and expectations of their audiences."[5] There are differences between law school and undergraduate education in terms of what students must cite and also in terms of the ways that they may collaborate with others. Copying from texts works very similarly in both contexts.

5: *Law School Plagiarism v. Proper Attribution* at 3.

"Undergraduate professors [often] accept [assertions about] 'common knowledge' without citation."[6] Common knowledge consists of "facts most readers would already know, and facts available from a wide variety of sources, for instance, the date of D-Day or the name of the previous U.S. President."[7] Undergraduate standards about the need to provide page numbers within cited works are also different than law school standards. The citation guides common in undergraduate classes, including APA and MLA style, generally require a specific page number only when quoting, with the page number indicating the page on which the quoted language appears in the original. They do not require page numbers for assertions that the student writer merely claims that the cited work supports.

6: *Id.*

7: *Id.*

Finally, in undergraduate writing, it's often permissible to put one footnote or citation in a paragraph to support a whole series of claims in the paragraph from the same source.

Note that these are not just undergraduate standards: The research that professors in the social sciences and humanities write also use these standards.

Undergraduate professors also often permit students to seek help from writing labs, peers, tutors, and other faculty to proofread, copy-edit, and substantively edit their work.

In law school, the "expectation is that writers will rely, almost exclusively," in their arguments on assertions that they back up with textual authorities.[8] "Thus, citing existing authority adds credibility to the writer's discussion. Common knowledge generally derives from case law or statute and must be cited."[9] Students should expect to provide a citation for nearly every assertion they make in a legal document in this class. (Your professors will note exceptions.)

8: *Id.*

9: *Id.*

Further, if students make assertions based on a text, regardless whether they quote, they must indicate the page (or sometimes paragraph or section) number in which the assertion appears in the original. This also means that each sentence that has some kind of assertion in it usually needs the support of a citation or footnote—there's no getting by using one citation to support a whole paragraph of claims.

These rules are relaxed in certain law school contexts: For example, when you are writing a final exam in law school, your professor usually won't expect formal citations. But you should ask what they *do* expect.

41.4 Collaboration & copying in law school

Plagiarism in law school is always inappropriate. There may be specific times, however, when your professor will allow you to copy something written by someone else, revise it, and submit it as your own work. The professor might permit this, for example, in a contract drafting class, where the professor gives you a draft prepared by someone else and directs you to revise and resubmit it. Your revision is not plagiarism in the senses that (a) the professor knows the source of the original and is instructing you to engage in this conduct and (b) because of that, you cannot really be accused of trying to pass another's work off as your own. If you use such work as a writing sample when seeking employment, however, it is important to acknowledge in a cover letter that the resulting document is your *revision* of a document *originally drafted* by someone else.

Generally, law students are expected *never* to collaborate with *anyone* (including other students, family, friends) on their assignments, unless they receive express permission from the professor. And they are expected *never* to copy from other students' work. There are many circumstances in which these generalizations may be suspended, but you should assume these limits exist in each of your classes unless the professor advises you otherwise. ***Always ask your professors what their expectations are.***

Generally, students may *never* copy text from any generative AI unless they receive express permission from the professor. Generative AI tools, like ChatGPT, can interfere with students' learning of legal thinking, reading, reasoning, and writing skills if students use these tools before they have the fundamental legal skills in place. Generative AI may be critically useful to students and lawyers later, and one goal of your legal writing and analysis class is to make sure students have the lawyer intelligence they need to effectively use the artificial intelligence. Students with any questions about what tools are permitted or prohibited on any assignment

in a class must ask their professor in advance of using that tool. Professors and teaching assistants in law school may use generative-AI detection tools when reviewing and grading students' assignments.

It is permissible for law students to copy from legal authorities, provided they correctly indicate quoted language and always cite to the authorities to indicate the source of their words and assertions (whether about the law or the broader world).

According to the Legal Writing Institute:

> Avoiding allegations of plagiarism requires knowing when to cite. Here are important rules and suggestions to follow when working with authority:
>
> 1. Acknowledge direct use of someone else's words.
> 2. Acknowledge any paraphrase of someone else's words.
> 3. Acknowledge direct use of someone else's idea.
>
> Careful scholarship, which is especially important in other classes at the law school, requires adhering to two additional rules:
>
> 4. Acknowledge a source when your own analysis or conclusion builds on that source.
> 5. Acknowledge a source when your idea about a legal opinion came from a source other than the opinion itself.[10]

10: *Id.* at 4.

These rules are applicable to most law school classes, but because the work you do in in a legal writing class is usually modeled on the genres you will write in legal practice, you may not need to worry in your legal writing class about complying with items 4 and 5. Rules that are in some ways more relaxed and some ways more strict may apply in other classes. ***Always ask your professors what their expectations are.***

You can acknowledge a source in your law school writing according to the rules in the *Indigo Book*, *ALWD Guide* or *Bluebook*. Early in your first year of law school, some professors may relax these rules in terms of the form of citations, and the effect of missing a citation or incorrectly formatting one might be quite small on your grade. (You learn to cite in your first year, so you won't get in trouble for not doing it correctly later.) Other professors take a hard line on citations from day one. Make sure you know what your professors expect. The requirement to cite applies to any source, "including material obtained from electronic databases such as LexisNexis®; Westlaw®; and the internet."[11]

11: *Id.*

Your legal-writing professor may require you to review the work of peers in some classes on some on assignments, after which you will continue working on and revising your own submissions for the same assignments. Unless the professor offers some other standard for your conduct, you should adopt the following standard:

> ***In the peer-review context, you may not work on writing your own assignments while directly referencing the work of other students.*** That means you may not (1) copy and paste anything from another student's work; or (2) view another student's work while you are writing or editing your own work. You may make notes of the things that other students do in their writing, and after closing their files, you may refer to your own notes while you are writing and revising your own work. Making notes about what other students do in their writing is not the same as copying down their words, though. If you have doubts about what you are doing, ask your professor.

Collaboration or copying without instructor permission and plagiarism are serious violations of the code of academic conduct in every American law school. If a violation is proven, the committee or other body that oversees student conduct may impose severe sanctions—ones that could affect a grade or credit for the course or even require suspension or expulsion from school. In addition, the school may require the administration to report the incident to the bar of any jurisdiction to which the sanctioned student applies.[12]

12: *Id.* at 2.

41.5 How the law school context differs from legal practice

Things change in legal practice:

> The frame of reference and expectations shift outside the academic environment. In practice, legal writers liberally borrow language from other sources; frequently, they collaborate on a project. Some lawyers write under the name of their supervising partner, judge, or government official. Occasionally, lawyers may write law review articles or publish CLE materials; then they adjust to outside expectations, which may require careful source attribution. Nevertheless, like law school writers, lawyers continue to depend on legal citations to provide authority.[13]

13: *Law School Plagiarism v. Proper Attribution* at 3–4.

Despite what sounds like a lot more flexibility, you still must exercise caution in copying work from someone else. Lawyers often copy certain types of phrases, sentences, and even paragraphs (like standards of review) almost verbatim from judicial opinions or other lawyers' briefs, but they can face judicial sanctions for copying too much language from someone else.[14] Lawyers crib contract language from form books, other lawyers' contracts, and published contract forms, but again, they can face copyright infringement lawsuits and other sanctions for taking too much, and they can face ethical problems for failing to ensure that the forms were appropriate for the jurisdictions in which they are working.[15]

14: For example and discussion, see Thomas G. Wilkinson, Jr., *Plagiarism Draws Sanctions in First Amendment Case*, Lawyers Representing Lawyers (May 16, 2023), available at https://perma.cc/2Z4W-XY5A.

15: *Id.*

Lawyers are increasingly turning to generative AI to produce language for a variety of purposes. As a result, some judges are demanding that

lawyers take responsibility for ensuring that computer-generated text is accurate.[16]

16: *See, e.g.*, Rolando Olvera, Civil Procedure/Local Rules R. 8(C)(1) (S.D. Tex. Feb. 8, 2024), available at https://perma.cc/L36N-E947.

It's also critical to consider the needs of your client. On the one hand, in a small transaction involving a relatively narrow risk profile, the client will not wish for you to spend tens of hours drafting an iron-clad contract from scratch after consulting dozens of authoritative sources. The lawyer fees there might exceed both the value of the contract and even the cost of the risks under it.

On the other hand, if you are drafting even a minor, ancillary document relating to a multi-billion-dollar transaction, it might justify time, effort, and legal fees that would seem shocking to you now. As usual, we suggest that you consult with others at your organization to determine the best strategic stance to the project before you get involved in the tactical execution.

42 Appendix: Words, sentences & paragraphs

Link to book table of contents (PDF only)

Brian N. Larson

It's not quite fair to say that the law has its own language. It certainly has its own professional vocabulary. To use that vocabulary correctly, you need to understand how to structure legal and other English words into sentences, and the sentences into paragraphs. Your goals are to keep your word count low and make sure you are using only the correct words. You must also avoid common problems that everyone regards as errors, along with certain choices that may set off the pet peeves of your more pedantic readers. Of course, this short appendix chapter cannot cover all the ground necessary to write good paragraphs and sentences, but it touches on points that often trip up law students. It also provides useful vocabulary for talking *about* your writing and that of others.

42.1 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).[1] 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 lawyer noises come at the cost of obfuscating and annoying readers. Neumann and Simon offer this example:

1: 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.[2]

2: *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;[3]

3: *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 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 suggest 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.[4]

4: You might also choose to break this into two sentences. What would be a natural way to do that?

Let's consider another example, this time without the brackets:

> 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:[5]

5: As an exercise, perhaps you can offer an alternative better than any of these three.

1. 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. 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. 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 the reader cannot tell what they modify. These phrases are often called 'dangling modifiers' and sometimes 'dangling participles.' 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,[6] and the *-ing* form of the verb, which is also called a 'gerund,' which is used to make the progressive verb tenses,[7] 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*.

6: As explained in Table 43.3 beginning on page 373.

7: As shown in the table on page 371.

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.

If you find that you have a a dependent clause with a verb in it at the beginning of a sentence, ask yourself the following questions:

1. Is the subject or agent of the verb stated in the dependent clause? If so, you are probably fine. Consider:
   - After I read the underlying data, the article still did not convince me.
   - If we examine this issue more clearly, the factors are separable into three broad categories.
2. If the subject or agent of the verb is *not* stated in the dependent clause, you should figure out who or what the implied subject or agent is, and then ask is this implied subject or agent the first noun phrase in the main clause? If so, you are probably fine. Consider:
   - To examine the issue more clearly, we must separate the factors into three broad categories.
   - After reading the underlying data, I remained unconvinced by the article.

42.2 Paragraph structure

Paragraphs exist in writing for a reason. They group sentences that share a common theme or purpose. This section offers four pieces of advice about paragraphs: Each paragraph should have a topic sentence and should stick to its topic. Authors should vary paragraph lengths and consider using the final sentence of a paragraph to transition to the next paragraph.

First, every paragraph should have a topic sentence that lets your reader know what the paragraph's point is. 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 46.3, starting at page 420, 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. *Ronnigen* 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 to the next paragraph. If you've provided a good roadmap before a series of paragraphs, this is less necessary, but sometimes 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.

It's wise when you are revising your writing to create a checklist or worksheet to check your paragraph organization. For each paragraph, you should be able to identify the topic—the point it is trying to make. Then make sure that the point is clear from the context (like a header before the paragraph) or the paragraph's first sentence. Then check that every sentence in the paragraph supports that main point.

Here's a helpful exercise after you have a first draft of a discussion or argument:

- Either . . .
  - . . . highlight the first sentence of every paragraph or,
  - . . . copy and paste the first sentence of every paragraph into a separate document.
- Now, read through these topic sentences and imagine how your reader might react to them.
- From these sentences alone, the reader should be able to identify all the claims in your argument.
- Understand, though, that none of these first sentences will provide enough evidence to accept its point without the rest of the paragraph's supporting sentences.

42.3 Concision

Writing concisely means using only the number of words necessary. That sounds easy. Unfortunately, there is no simple recipe to achieve this. Here are some tips.

First, follow the advice in Section 43.5 about passive voice and Section 43.7 about nominalizing verbs. Avoiding passive voice and nominalized 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.'
- *In the event that* becomes 'If.' (This substitution does not always work, so use it cautiously.)

Garner provides a list of dozens more of them, and you should familiarize yourself with them, though probably not all at once.[8] Knowing them and fixing them will add polish to your writing and keep your word-counts down. The grammar checkers on most commercial word processing programs can be set to point out these problems to you while you are writing.

8: Bryan A. Garner, *The Redbook* § 12.2(c) (5th ed. 2023).

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 was previously general counsel but is now president of SDS.
  - Daniel Snyder is president of SDS now, but the board may remove him at its next meeting.

42.4 Precision

Using only the right words is more important in legal writing than almost anywhere 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 'don't,' 'couldn't,' and 'we've.' A sort of odd exception is 'cannot,' a single word that is contracted to 'can't.' (When not contracting, you cannot write 'can not.')

Many legal readers and writers prefer to avoid contractions in formal writing. In fact, one reviewer of this chapter recommended that I tell you that "most courts do not countenance contractions."[9] Others (including me) don't mind contractions at all. Whether they are appropriate in a given situation depends on contextual factors, including the kind of place where you work, the kind of document you are drafting, and the audience(s) for the writing. For example, if you work in a very informal environment and need to write an email with legal guidance to the boss, spelling out 'do not' and 'cannot' can sound pretty stilted. Even in that environment, though, you might avoid contractions when drafting a contract, a document that typically uses more formal language. On the other hand, I have seen contractions in the terms-of-use agreements of some online services; the service provider seemed to me to be trying to make the terms sound more friendly. You may always use contractions when quoting evidence or an authority that did.

9: In fact, my empirical research in trial briefs and opinions filed in federal district courts found widespread use of contractions by the lawyers and some by the judges themselves. You might decide how a particular judge feels about contractions by seeing whether she uses them in her opinions.

Consider these examples:

- Always 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!'
- Good if the context supports it
  - 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 43.1 on page 369. 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 use pronouns of the feminine gender. Or a person who does not identify with either gender—who is *non-binary*—might 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 47, 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, 'Student 5's example in Appendix Chapter 46 has a clear purpose' or 'In the example in Appendix Chapter 47, 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.'[10] Say 'SDS, Inc., makes widgets,' not 'SDS, Inc., make widgets.'

10: 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.

One place where first-person pronouns can be tricky is when you are referring to the intentions or positions of a client. Generally, I avoid in those circumstances referring to 'we,' 'us,' or 'ours.' Instead, I refer to the client in the third person. For example:

- Compare 'SDS's management believes that plaintiffs have overstated their damages.'
- with 'We believe that plaintiffs have overstated their damages.'
- Compare 'All SDS wants here is a fair chance to respond to the complaint against it.'
- with 'All we want here is a fair chance to respond to the complaint against us.'

Many lawyers ignore this advice routinely, but I think it is important to distinguish the desires, views, demands, etc., of the client from those of the advocate.

The right words

When you are writing or talking about what happened in a court's opinion, you should think about which verbs are appropriate. Courts reach certain operational conclusions that have impacts on the parties before them. Their opinions justify those outcomes. When lawyers write about the opinions, we generally do not discuss them as if the court is making assertions, but instead we use verbs of evaluation.

Operationally, 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, depending in part on whether the court is a trial or appellate court.

When we discuss court opinions, though, we generally do not use the words 'assert,' 'say,' 'state,' or 'argue.' These are verbs of assertion. 'Argue' may be appropriate for a dissenting or concurring opinion that presents an argument about the majority opinion's line of reasoning or conclusions.

Instead, we often talk about opinions engaging in forms of evaluation. So an opinion may *discuss* an issue, *evaluate* arguments, *consider* alternatives, etc. It may *resolve* an issue or *conclude* that one outcome is more appropriate than another.

Exceptions to these rules of thumb exist, of course. There are, for example, situations where an advocate might want to refer to a court's statement of some fact as an assertion. Can you imagine any?

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.[11] Substitute them wherever you can.

11: Bryan A. Garner, *The Redbook* § 12.2 (5th ed. 2023).

Garner also provides a glossary of nearly seventy pages of "problematic expressions," words and phrases that many folks get wrong.[12] You should (gradually) familiarize yourself with them too.

12: *Id.* § 13.3.

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 so common in the law that they need not be in italics.[13]

13: *See* Alwd *Guide* Chart 1.2 or *Bluebook* rule 7(b). *Indigo Book* rule 2.2 addresses this issue, but does not include the list of unitalicized words available from the other citation guides.

My advice is generally to leave out the stuffy Latin and French. There are many instances, though, where the law Latin or French is the most succinct way of saying something to a legally trained audience. For example:

- 'A *pro se* defendant' is more concise than 'a self-represented defendant.'
- 'Voir dire' is more concise than 'the questioning of potential jurors.'

42.5 Common pet peeves

You should try to avoid triggering the negative responses fired up in some readers because of their pet peeves. Here are some common pet peeves:

- Do not say 'utilize' when you can say 'use' (or 'utilization' when you can say 'use').
- Do not say 'based off' or 'build off' when you mean 'based on' or 'build on.' This arguable 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.'

Here are some others that perhaps have a smaller number of peevers, but you might wish to avoid them just for safety's sake:

- Do not end sentences with prepositions.

- Avoid using first- and second-person pronouns in formal writing.[14] For example, instead of 'I recommend that you avoid the plaintiff,' you might write 'The plaintiff should be avoided.' This sounds quite stilted, though, and the passive voice might make the audience's role as subject or agent of the action less clear.[15]
- Do not say 'Since' when you mean 'Because.'
- Do not begin sentences with the word 'However.'

14: To learn the difference, see Section 43.1.

15: See Section 43.5 for a discussion of passive voice.

43 Appendix: Using verbs

Brian N. Larson

Your sentence acts or moves through its verbs. This appendix chapter explains some terminology important for discussing verbs, permitting you to understand feedback from your instructor and to give 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. When you change the base form to account for person, number, and tense, you are *conjugating* the verb.

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*.

43.1 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 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 43.1 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*.

Table 43.1: Common pronouns in English

	Singular *nom.*	*acc./dat.*	*poss.*	Plural *nom.*	*acc./dat.*	*poss.*
First person	I	me	my, mine	We	us	our, ours
Second person	You	you	your, yours	You, y'all	you, y'all	your, yours, y'alls
Third person	It She He	it her him	its her, hers his	They	them	their, theirs

- William sent the book to *her*.

- The genitive or possessive form, not surprisingly, indicates possession or ownership: This is *their* book.[1]

Note that the third-person plural pronouns—*they, them, their, theirs*—are commonly used to refer to individual persons. This has been true regarding individuals of uncertain gender in English since before Shakespeare.[2] For example, I might say 'Each student should bring their computer to class.' But increasingly, people who express their gender in non-traditional ways and those who support them use these pronouns for known persons. For example, I might say, 'Octavia brought their computer to class,' referring to Octavia's computer.[3]

1: Test yourself: What is the first-person plural accusative pronoun in English?

2: *See* Brian N. Larson & Olivia J. Countryman, *What's Your Pronoun? Contemporary Gender Issues in Legal Communication*, Rhetoricted.com (Jan. 16, 2020), https://perma.cc/EAT2-QA2E.

3: For a discussion of using appropriate personal pronouns for such folks, see Section 16.3.

"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://perma.cc/W46R-872R.

43.2 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 possible combination of the subject's number and person. For example, in Castilian Spanish, the present indicative[4] form of the verb *tomar*, 'to take,' has six forms, as shown in Table 43.2. My point here is not to teach you

4: More on what 'present' tense and 'indicative' mood mean in a moment.

Table 43.2: Agreement for the verb *tomar* in Spanish

	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*)

Spanish, but only to show you that different languages have a larger variety of forms for their verbs. Spanish then has a set of six forms for the past tense,[5] another six for future tense, etc.

5: Actually, Spanish has *two* past tenses.

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:*

- 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****.*[6]

6: 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.[7] 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.

7: Bryan A. Garner, *The Redbook* §§ 11.23–11.26 (5th ed. 2023).

Table 43.3: Verb tenses in English

Tense	Examples	What it communicates
Present	She *sings* for a living. I *walk* the dog at noon.	Action that is 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 is not completed.

43.3 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 43.3 provides a comprehensive review of the common tenses in modern English.

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 the tense you choose represents the event exactly as it happened, happens, or will happen. Table 43.3 provides examples and explanations.

You should also avoid the 'historical' or 'narrative' present tense in your writing. Since ancient times, authors have recognized that narrating past events in present tense 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 yelling and knocking over displays because she doesn't think they should

sell Bud Light. 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. Do so cautiously, if at all.

43.4 Transitivity & 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 another pronoun, noun, or phrase that complements the verb, either as the direct target of the verb's action and therefore called a 'direct object'; or indicating the direction or purpose for the verb's action and then called an 'indirect object.' Table 43.4 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, 'ate' can take an object as in (b), 'I ate a burrito.' Or it can go without an object as in (a), 'I ate.' Some verbs can have *two* objects, as in (c) and (d). Note that the indirect objects in sentences like these can almost always be transformed into a prepositional phrase, like 'I give the book *to her*' or 'I wrote the letter *to her*.' Some verbs can have a different sense depending on whether they appear with or without an object, as in (f) and (g).[8] 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.

8: They are called *labile,* if you really want to geek out on this stuff.

Some scholars and writing experts have emphasized the value of transitive over intransitive verbs for giving a text a sense of energy and urgency. Professor Doug Coulson even writes that "[b]ecause [transitivity] is the property of language through which we attribute responsibility to agents for the transfer of action essential to any legal complaint, it is especially important for lawyers to understand."[9] Coulson's article provides a nuanced discussion of degrees of transitivity as they have been identified in the linguistics literature. Its treatment is rich, but it is accessible to the novice reader willing to invest a little effort.

9: Doug Coulson, *More than Verbs: An Introduction to Transitivity in Legal Argument*, 19 The Scribes J. of Legal Writing 81 (2020).

Table 43.4: (In)Transitive verbs and objects

	Subject	Verb	Object (indirect)	Object (direct)
a.	I	ate.		
b.	I	ate		a burrito.
c.	I	give	her	the book.
d.	I	wrote	her	a letter.
e.	He	gives		gifts.
f.	I	ring		the bell.
g.	The bell	rings.		

43.5 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 43.4: 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 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 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.[10] 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 also 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 from a hypothetical news story:

> *A woman is accused* of knocking down the product displays of Bud Light 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 explained 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."

10: 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://perma.cc/4KH5-K9AT (for word nerds only).

There are three instances of passive voice here, highlighted in italics. In the first, the author could have written 'The state accused a woman . . .' or 'The prosecution accused a woman . . .,' but perhaps the author did not want to introduce another actor into the story. The author 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.[11]

11: 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.

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.[12]

12: Note the prosecutor's choice of very different verbs to describe the action, too.

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.
- Avoid the passive voice in your writing *in all other circumstances*. In particular, 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.

If you use a commercial word-processing program, you can have its grammar checker highlight things it identifies as passive voice for you. Such tools are not perfect, however, and you must use your judgment to decide whether to accept their recommendations.

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*, https://perma.cc/9JLZ-QQ3B.

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.[13] All the 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.

13: 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.

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.

43.6 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 subjunctive mood 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 . . . .' This is subjunctive and indicates that the speaker is *not* a sculptor.
b. 'If the truck had been eighteen feet high, it would not clear the bridge ahead.' This is subjunctive and indicates that the truck was *not* eighteen feet high.
c. 'If the truck is eighteen feet high, it will not clear the bridge ahead.' This is indicative and does not communicate a belief about whether the truck is that high.
d. 'If she had assisted the defendant, she would have been his accomplice.' This is subjunctive, suggesting the assistance is counter-factual.
e. 'If she assisted the defendant, she was his accomplice.' This one is indicative, because it's not clear whether the writer believes she assisted the defendant.

In examples (a), (b), and (d), the antecedent *If*-clause refers to an event that is not true (at least not yet)—that is, it is counter-factual. 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. The second sentence expresses uncertainty about whether the author's 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'?

43.7 Nominalizing verbs

The final section in this chapter 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.[14] Consider these examples.

14: Bryan Garner calls these "nominalizations," itself a nominalization, or "zombie nouns," which seems a little harsh to me. Bryan A. Garner, *The Redbook* § 14.3(c) (5th ed. 2023).

a. The *action* and *motion* of your sentence is in its verbs.
b. Your sentence acts and moves through its 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 each pair the first sentence is unnecessarily wordy and less vivid.

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.[15]

15: *Id.*

44 Appendix: Writing mechanics

Brian N. Larson

Beginning legal writers often underestimate the importance of correct punctuation and citation. 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 relentlessly 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, the judge 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 *Indigo Book*, *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*!"

The moral of the story is this: 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* (5th ed. 2023) and in the *Indigo Book*, 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 some mechanics issues and points to answers to the most common errors that 1Ls make. 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 will also

1: *See ALWD Guide* rule 11.3(b) and *Bluebook* rule B4.2. The *Indigo Book*'s rule 2.1 does not make this as clear. Note that underlining has become an anachronism. It originated with old typewriters that could not make italic characters, and it is harder to read than italics. 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 (5th ed. 2023).

note if you persist in making the same mistake after they have corrected it; your instructor (and most legal employers) will find that annoying.

44.1 Typography

Bluebook-style citations for practice documents require only two typefaces: normal (sometimes called 'roman') and italic.[2] You should avoid use of boldface except in headings.

2: For *scholarly writing*, citations also require the use of SMALL CAPITALS. You do not need to worry about that during your first year in law school.

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.'

You should not use all-capital text, except in very short headings and titles.[3] Some lawyers use it frequently, and if you work for them, you will, too. But it is hard to read and quite ugly.

3: *See* Bryan A. Garner, *The Redbook* § 2.19 (5th ed. 2023).

You should use at most two fonts in most practice documents.[4] A common reason for a second font is for headings.

4: *See id.* § 4.4.

Unless local rules or your supervising attorney requires it, don't fully justify text—like this book with a smooth right and left margin. Instead, allow for a 'ragged' right margin.[5] The ragged margin results in text that has more consistent spacing between words; the justified text can sometimes be more difficult to read, especially where the word processor introduces large spaces between words in some lines.

5: *Id.* § 4.10.

44.2 Dates

In the text of your writing (including the memo header lines—addressee, date, etc.), indicate a full date by spelling out the month followed by the cardinal numeral of the day, a comma, and the year. Contrast cardinal numerals with ordinal ones:[6]

6: The cardinal numerals are the ones you count with: 'One, two, three, four . . . .' The ordinal numerals express ordering: 'First, second, third, fourth . . . .'

- "November 12th, 2008, represented the beginning of defendant's . . . ." ***Incorrect*** because the numeral "12th" is an ordinal numeral.
- "November 12, 2008, represented the beginning of defendant's . . . ." ***Correct*** because "12" is the cardinal numeral.
- "12 November 2008 represented the beginning of defendant's . . . ." ***Incorrect*** because it's in military/international form.[7]

7: 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 *Indigo Book*, *Bluebook*, and *ALWD Guide* that address exact dates prefer the month, day, year ordering described here.

Set a full date off from succeeding text with a comma as indicated in the correct example above. You do not need a comma between a month and year when there is no day indicated.

- "On October 21, 2008 the defendant resigned." ***Incorrect*** because there should be a comma after the year.
- "In October 2008, the defendant resigned." ***Correct***, though some folks feel the comma is unnecessary given that the dependent clause is so short.[8]

8: See Section 42.1 for an explanation of what a dependent clause is.

- "In October, 2008, the defendant resigned." ***Incorrect*** because there should be no comma before the year.

You should abbreviate month names according to the citation guide rules only in citation sentences/clauses and not in textual sentences.

- "On Oct. 21, 2008, the defendant resigned." ***Incorrect*** because month names in textual sentences should be spelled out. Compare with the correct example above.
- "The court granted defendants' motion for summary judgment. *Designworks Homes, Inc. v. Columbia House of Brokers Realty, Inc.*, No. 2:18-CV-04090-BCW, 2023 WL 7278744, at *1 (W.D. Mo. September 29, 2023)." ***Incorrect*** because the month should be abbreviated in the citation.
- "The court granted defendants' motion for summary judgment. *Designworks Homes, Inc. v. Columbia House of Brokers Realty, Inc.*, No. 2:18-CV-04090-BCW, 2023 WL 7278744, at *1 (W.D. Mo. Sept. 29, 2023)." ***Corrected*** version of previous example.

Where you have choices or options, or can vary punctuation based on personal preferences, be sure you do it consistently.

44.3 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.')

- "Steven Snyder is 65 years old." ***Incorrect*** because the number is under 100 and must be spelled out.
- "Steven Snyder is sixty-five years old." ***Corrected*** version of previous example.
- "104 is the maximum age in the sample." ***Incorrect*** because the number begins a sentence and must be spelled out.
- "One hundred four is the maximum age in the sample." ***Corrected*** version of previous example, but . . . .
- "The maximum age in the sample is 104." This is ***better*** because it's hard to read larger numerals written out.

You must spell out 'percent' where you have to spell out a number; if you can write numerals, you can use the % sign. But these rules are pierced with exceptions: For example, you can spell out 'round' numbers like 'hundred' and 'thousand,' and you can use numerals and percent signs even if the numbers would normally have to be spelled out where you are providing a lot of numbers.

- "Steven Snyder owned 65 percent of SDS's stock." ***Incorrect*** because the number should be spelled out.
- "Steven Snyder owned sixty-five percent of SDS's stock." ***Corrected*** **version of the last example.**

- "Steven Snyder owned 65% of SDS's stock; Bill owned 5%; and Mary owned 3%." ***Correct*** becaues the series of numbers justifies the use of numerals.
- "Snyder Corp. invested $3,300,000 in SDS." ***Correct***, but the following would also probably work: "Snyder Corp. invested $3.3 million in SDS."
- "SDS still owes Snyder Corp. $200,000." ***Correct***. Though the rules might permit "two hundred thousand dollars," it is much easier to read $200,000.

Finally, use commas to break up numerals of four digits or more. But do not do so for years, page numbers, volume numbers, statutory references, database locators, or docket numbers if the original source did not include them.

- "SDS owns 1456 trucks and ships 14,567 crates of product per month." ***Incorrect*** because the first numeral needs a comma.
- "SDS owns 1,456 trucks and ships 14,567 crates of product per month." ***Corrected*** version of last example.
- *Designworks Homes, Inc. v. Columbia House of Brokers Realty, Inc.*, No. 2:18-CV-04,090-BCW, 2023 WL 7,278,744, at *1 (W.D. Mo. Sept. 29, 2023)." This citation sentence is ***incorrect*** because the author introduced commas into the case number (04090) and the Westlaw database file number (7278744). See the correct citation in an example above.

Again, if you have options, just be consistent.

44.4 Using quotations

You often *must* quote authorities when you are writing legal texts, but you should use quotations 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."[9]

9: *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.[10] This section provides some additional thoughts.

10: *The Indigo Book: A Manual of Legal Citation* rule 8.1. (Christopher Sprigman, Jennifer Romig, et al. eds., Public.Resource.Org 2d ed., 2023 rev.), https://indigobook.github.io/versions/indigobook-2.0-rev2023-2.html.

44.5 Block quotations

How you format quotations depends on how long they are: A block quotation is fifty words or more.[11] An in-line or 'short' quotation is forty-nine words or fewer.[12] 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.

For details on formatting block quotations, see the *Indigo Book*, *Alwd Guide*, *Bluebook*, and Garner's *Redbook*.[13] 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.[14] 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.

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.

11: *Indigo Book* rule 8.1.1, 9; *Alwd Guide* rule 38.5; *Bluebook* rule 5.1(a); *Redbook* §§ 1.29–1.34.

12: *Indigo Book* rule 8.1.1; *Alwd Guide* rule 38.4; *Bluebook* rule 5.1(b); Bryan A. Garner, *The Redbook* §§ 1.29–1.34 (5th ed. 2023). General rules for all quotations are in *Indigo Book* rule 8.

13: *Indigo Book* rule 9; *Alwd Guide* rule 38.5; *Bluebook* rule 5.1(a); *Redbook* §§ 1.29–1.34. General rules for all quotations are in *Indigo Book* rule 8.

14: The advice appears below.

44.6 In-line quotations

The *Indigo Book*, *Alwd Guide*, *Bluebook*, and Garner's *Redbook* also provide details for in-line quotations.[15] 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.

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. & Human. 345, 360 (1998) (citation omitted).[16]

15: *Indigo Book* rule 8; *AWLD Guide* rule 38.4; *Bluebook* rule 5.1(b); *Redbook* §§ 1.29–1.34.

16: 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.

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.[17]

17: 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 on how to avoid it 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 *Example 2*, 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. & Human. 345, 360 **(1998),**[18] **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.).

18: 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 . . ."

44.7 Punctuation around quotations

The rules for punctuation near quotation marks are fairly simple:

- Commas and periods *always* go inside the quotation marks. (See *Example 1* and *Example 2* above.)
- 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.

44.8 Altering quotations

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].[19] 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*.

19: For general guidance, see the *Indigo Book* rule 8.2, 8.3; *Alwd Guide* rule 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 it exactly as it is to simplify the reader's life.

44.9 Omissions from quotations

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.[20] This is called an 'ellipsis,' deriving from the same root as 'elliptical,' which means omitting something.[21]

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

20: For general guidance, see the *Indigo Book* rule 8.2, 8.3, *Alwd Guide* rule 40; *Bluebook* rule 5.3.

21: 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.

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 end of the previous text .
. . and then the beginning of
the subsequent text.

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.[22] 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).[23]

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.[24]

The end of the previous
text. . . and then the
beginning of the
subsequent text.

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.[25]

22: At this writing, there is no easy way to insert non-breaking spaces in Google Docs.

23: Again, there is no way to do this in Google Docs unless you install an Add-on called *Show*.

24: 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.

25: 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.

44.10 Quotations & *sic*

The *Indigo Book* rule 8.2.2, *ALWD Guide* rule 39.6, *Bluebook* rule 5.2(c), and the *Redbook* § 1.42(b) offer guidance about using [sic] to mark errors in an original. Authors use [sic] to bring attention to something in a quotation that the author quoting it thinks is wrong or suprising. It is a way of demonstrating that the quoting author did not introduce the error. Consider this example from a hypothetical defendant's brief:

> According to the plaintiff's brief, "The defendant appropriated more of the funds then [sic] it was entitled to." But this is not the case. . . .

Here, the defendant is indicating that the plaintiff used the wrong word—"then" instead of "than"—at this point and that the defendant has not made that error. This is a somewhat passive aggressive approach, however, as it highlights the original author's error. If the author you are quoting is your own client, you might choose instead to modify the text in one of the ways noted above. It might then look like this:

> According to the plaintiff's brief, "The defendant appropriated more of the funds [than] it was entitled to." And that is exactly what happened. . . .

44.11 Explaining modifications

Explaining modifications with parentheticals can be very helpful. *Indigo Book* rule 8.2.4–8.2.6; *ALWD Guide* rule 37.2, 39.4; and *Bluebook* rule 5.2(d) explain how to use parentheticals in citations to indicate other kinds of modification. 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)
- (internal quotation marks omitted)
- (footnote omitted)

One explanatory parenthetical you should avoid in your first year of law school is "cleaned up." Authors use this approach when they make several amendments to a quotation that do not affect its meaning, but they do not disclose the revisions using the brackets, ellipses, and internal quotation marks described above. Consider *Example 3.A* from Section 44.8 above, renumbered here as *Example 6.A* with a citation added.

Example 6.A, Original text with citation

> The state's activities are a taking when the encroachment on private property causes damages. *Smith v. Jones*, 345 U.S. 345, 348 (2001).

Example 6.B, Original text quoted with alterations

> The court must determine whether the activities "encroach[] on private property [and] cause[] damages." *Smith v. Jones*, 345 U.S. 345, 348 (2001).

Example 6.C, Original text quoted and "cleaned up"

> The court must determine whether the activities "encroach on private property and cause damages." *Smith v. Jones*, 345 U.S. 345, 348 (2001) (cleaned up).

Example 6.A and *Example 6.B* are the same as *Example 3.A* and *Example 3.B* in Section 44.8 above, with the exception of the added citation. In *Example 6.C*, though, the author has made the alterations to the quoted language without showing the reader exactly where they are. The author cues the reader about this by using the "cleaned up" parenthetical.

The advantage of the cleaned up quote is that it is easier to read *Example 6.C* than *Example 6.B*. The disadvantages are two-fold: First, the reader might not notice the parenthetical explanation and may take *Example 6.C* as what the court in *Smith* said word for word. Second, even if the reader notes the parenthetical explanation, they will not know where the author made the changes or whether they alter the sense of the original, as is arguably true here, at least to small degree.

You may find occasion to use "cleaned up" later in your law school or professional career, but for now, avoid it unless your teacher encourages you to use it.

44.12 Capitalization

Lawyers have a profound tendency to overcapitalize in texts. You should avoid excessive capitalization. Legal citation handbooks provide good guidelines for when to capitalize.[26] Generally, you should not capitalize any word unless a rule says that you must. Here are a couple of specific points.

26: *See Indigo Book* rule 3.3, 4.5, 5.2.2, 6.2.2, 8.2.3, 10.1, 15.3.3, 27; *ALWD Guide* rule 3.2–3.4; *Bluebook* rule 8.

Do not capitlize the word 'court,' unless you are doing 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.

- "Daniel Snyder is Chief Executive Officer and President of SDS." ***Incorrect*** because the titles do not immediately precede the person's name.
- "Daniel Snyder is chief executive officer and president of SDS." ***Corrected*** version of last example.
- "Chief Executive Officer Daniel Snyder chaired the meeting." ***Correct*** because the title immediately precedes the name.
- "Tanya Morales is a Judge in the Eastern District of New York." ***Incorrect*** because the title does not immediately precede the person's name.
- "Judge Tanya Morales sits in the Eastern District of New York." ***Correct*** because the title immediately precedes the person's name.

44.13 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. Consider *Example 7*.

> **Example 7.A**
>
> 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.
>
> **Example 7.B**
>
> 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.

All the parenthetical clarifications in *Example 7.A*, with the exception of "SDS," are entirely unnecessary and merely clutter the text for the reader. *Example 7.B* is much easier to read and perfectly clear. By they way, whether the author puts quotation marks around the initialism in *Example 7.B* is a matter of preference. It could just as easily be '(SDS)' as '("SDS").'

Note, however, that when you are drafting a contract, you may want to consistently identify and spell out all abbreviations, acronyms, and initialisms to avoid any uncertainty.

44.14 Spaces between sentences and other items

This section and the ones that follow address common punctuation problems. We will start with spaces.

Use consistent spacing between sentences. How many spaces between sentences? One or two? I prefer one with proportionally spaced fonts,[27]

27: *See* Bryan A. Garner, *The Redbook* § 4.12 (5th ed. 2023).

but two is fine, too. But whatever you choose, be consistent!

44.15 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."[28] 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.[29]

28: *Id.* § 162(a).

29: 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.

44.16 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 42.1 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 with or without a conjunction. 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.

- "Defendant is a subsidiary of Snyder Corp. and Mr. Snyder owns sixty-five percent of the shares of Snyder Corp." ***Incorrect*** because there should be a comma before the 'and' and the second independent clause. This is a run-on sentence.
- "Defendant is a subsidiary of Snyder Corp., Mr. Snyder owns sixty-five percent of the shares of Snyder Corp." ***Incorrect*** because the conjunction 'and' should appear at the beginning of the second independent clause. This is a comma splice.
- "Defendant is a subsidiary of Snyder Corp., and Mr. Snyder owns sixty-five percent of the shares of Snyder Corp." ***Correct.***

You *may also* join two closely related sentences with a semi-colon without any conjunction.

- "Defendant is a subsidiary of Snyder Corp.; Mr. Snyder owns sixty-five percent of the shares of Snyder Corp." Also ***correct*** because the semi-colon does not require the conjunction 'and,' though the author could have used it here.

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 Section 44.17.

- "Mr. Snyder is president of Snyder Corp., and owns sixty-five percent of its shares." ***Incorrect*** because no comma is required to join the second, dependent clause to the first, independent clause.
- "Mr. Snyder is president of Snyder Corp. and owns sixty-five percent of its shares." ***Corrected*** version of the previous example.

44.17 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.[30]

30: Not all legal writers agree that we should use the serial comma. If you work for an attorney or judge who dislikes them, you should conform to your supervisor's preference.

- "I read the complaint, the answer and the motion." ***Incorrect*** because there should be a comma before the conjunction 'and.'
- "I read the complaint, the answer, and the motion." ***Corrected*** version of the previous example.

Following this rule can be tricky when two items together form one item in a series.

- "I brought the rope, block and tackle." ***Incorrect*** because 'block and tackle' is a single item.
- "I brought the rope and block and tackle." ***Corrected*** version of the previous example.

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.

- "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." Though ***technically correct***, this list is ***confusing*** because there are items in it that have commas in them.
- "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." This version is ***better*** because the items in the list are separated by semi-colons, so the comma-separated clauses within them are not so confusing.

44.18 Colons

Generally, use a colon only to end a complete sentence that describes the clause that follows it or that introduces a list.

- "The plaintiff wants only one thing. She wants the defendant to apologize." These sentences are ***fine***, but . . . .
- "The plaintiff wants only one thing: She wants the defendant to apologize." This version is ***a little better***, and . . . .
- "The plaintiff wants only one thing: an apology from the defendant." This version is just ***more concise***.

Note that there are some differences of opinion about whether the clause after the colon in these examples should always be capitalized, always be uncapitalized, or (as I have done here) be capitalized only when it's a complete sentence. Just be consistent.

Do not use a colon to introduce a list that is necessary for the completion of the sentence. Some folks do use it if the items in the list are enumerated.

- "To invoke this equitable claim, a plaintiff must show that: the sole or dominant shareholder had control . . ., and the dominant shareholder . . ." ***Incorrect*** because the colon is unneeded here.
- "To invoke this equitable claim, a plaintiff must show that the sole or dominant shareholder had control . . ., and the dominant shareholder . . ." ***Corrected*** version of the previous example.
- "To invoke this equitable claim, a plaintiff must show that: (1) the sole or dominant shareholder had control . . ., and (2) the dominant shareholder . . ." ***Correct*** because the colon sets an enumerated list off from the beginning of the sentence. Note that some writers will still not use a colon here, and failing to do so would not be an error, as long as the author is consistent about it.

45 Appendix: Example of a statute in context

Link to book table of contents (PDF only)

This appendix provides an example of a statutory provision—the Age Discrimination in Employment Act (ADEA) of 1967—in (some of) its statutory context. The statutory language is copied from the pages of the print compilation of the United States Code. There are excerpts from two volumes of the 2018 code compilation (which is the most recent published by the Government Accounting Office). This appendix is meant for you to use with the problem example and explanations in Chapter 22.

- The first six pages are excerpts from Volume 1 of the Code, which contains Titles 1 through 5 of the statutes:
  - The first two pages are the cover and publication page of the volume.
  - The excerpt omits the rest of the volume's front matter.
  - Following the first two pages are the first four pages of the actual text of that volume, which include Chapter 1 of Title 1, and its eight sections.
- The balance of the excerpt comes from Volume 22 of the Code, which contains Titles 28 and 29:
  - The first page is the cover page of the volume.
  - The excerpt omits the rest of the volume's front matter and all of Title 28.
  - Following it is the first page of Title 29, which includes a table of all the chapters in the title.
  - The excerpt omits the first 13 chapters of Title 29.
  - Next are the first several pages of Chapter 14 of Title 29. They begin with a table of the sections in the chapter and include sections 612–623 in their entirety.
  - The excerpt omits sections 624–627, before picking back up at section 628 and concluding with section 631.

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THE CODE OF LAWS OF THE UNITED STATES OF AMERICA

TITLE 1—GENERAL PROVISIONS

This title was enacted by act July 30, 1947, ch. 388, § 1, 61 Stat. 633

POSITIVE LAW; CITATION

This title has been made positive law by section 1 of act July 30, 1947, ch. 388, 61 Stat. 633, which provided in part that: "Title 1 of the United States Code entitled 'General Provisions', is codified and enacted into positive law and may be cited as '1 U. S. C., §——.'"

REPEALS

Act July 30, 1947, ch. 388, § 2, 61 Stat. 640, provided that the sections or parts thereof of the Statutes at Large or the Revised Statutes covering provisions codified in this Act are repealed insofar as the provisions appeared in former Title 1, and provided that any rights or liabilities now existing under the repealed sections or parts thereof shall not be affected by the repeal.

WRITS OF ERROR

Act June 25, 1948, ch. 646, § 23, 62 Stat. 990, provided that: "All Acts of Congress referring to writs of error shall be construed as amended to the extent necessary to substitute appeal for writ of error."

TABLE SHOWING DISPOSITION OF ALL SECTIONS OF FORMER TITLE 1

Title 1 Former Sections	*Revised Statutes Statutes at Large*	*Title 1 New Sections*
1	R.S., § 1	1
2	R.S., § 2	2
3	R.S., § 3	3
4	R.S., § 4	4
5	R.S., § 5	5
6	June 11, 1940, ch. 325, § 1, 54 Stat. 305	6
21	R.S., § 7	101
22	R.S., § 8	102
23	R.S., § 9	103
24	R.S., § 10	104
25	R.S., § 11	105
26	Nov. 1, 1893, 28 Stat. App. 5 Mar. 2, 1895, ch. 177, § 1, 28 Stat. 769.	106
27	Mar. 6, 1920, ch. 94, § 1, 41 Stat. 520	107
28	R.S., § 12	108
29	R.S., § 13 Mar. 22, 1944, ch. 123, 58 Stat. 118.	109
29a	R.S., § 5599	110
29b	Mar. 3, 1933, ch. 202, § 3, 47 Stat. 1431	111
30	Jan. 12, 1895, ch. 23, § 73, 28 Stat. 615 June 20, 1936, ch. 630, § 9, 49 Stat. 1551. June 16, 1938, ch. 477, § 1, 52 Stat. 760.	112
30a	R.S., § 908	113
31	R.S., § 6	114

TABLE SHOWING DISPOSITION OF ALL SECTIONS OF FORMER TITLE 1—Continued

Title 1 Former Sections	*Revised Statutes Statutes at Large*	*Title 1 New Sections*
51a	Mar. 2, 1929, ch. 586, § 1, 45 Stat. 1540	201
52	May 29, 1928, ch. 910, § 2, 45 Stat. 1007 Mar. 2, 1929, ch. 586, § 2, 45 Stat. 1541.	202
53	May 29, 1928, ch. 910, § 3, 45 Stat. 1007	203
54	May 29, 1928, ch. 910, § 4, 45 Stat. 1007 Mar. 2, 1929, ch. 586, § 3, 45 Stat. 1541.	204
54a	Mar. 2, 1929, ch. 586, § 4, 45 Stat. 1542 Mar. 4, 1933, ch. 282, § 1, 47 Stat. 1603. June 13, 1934, ch. 483, §§ 1, 2, 48 Stat. 948.	205
54b	Mar. 2, 1929, ch. 586, § 5, 45 Stat. 1542 Mar. 4, 1933, ch. 282, § 1, 47 Stat. 1603. June 13, 1934, ch. 483, §§ 1, 2, 48 Stat. 948.	206
54c	Mar. 2, 1929, ch. 586, § 6, 45 Stat. 1542	207
54d	Mar. 2, 1929, ch. 586, § 7, 45 Stat. 1542	208
55	May 29, 1928, ch. 910, § 5, 45 Stat. 1007	209
56	May 29, 1928, ch. 910, § 6, 45 Stat. 1007	210
57	May 29, 1928, ch. 910, § 7, 45 Stat. 1008	211
58	May 29, 1928, ch. 910, § 8, 45 Stat. 1008	212
59	May 29, 1928, ch. 910, § 10, 45 Stat. 1008	213
60	Mar. 3, 1933, ch. 202, § 2, 47 Stat. 1431	Rep.

CHAPTER 1—RULES OF CONSTRUCTION

AMENDMENTS

2002—Pub. L. 107–207, § 2(b), Aug. 5, 2002, 116 Stat. 926, added item 8.

1996—Pub. L. 104–199, § 3(b), Sept. 21, 1996, 110 Stat. 2420, added item 7.

§ 1. Words denoting number, gender, and so forth

In determining the meaning of any Act of Congress, unless the context indicates otherwise—

words importing the singular include and apply to several persons, parties, or things;

words importing the plural include the singular;

[1] So in original. Does not conform to section catchline.

words importing the masculine gender include the feminine as well;

words used in the present tense include the future as well as the present;

the words "insane" and "insane person" shall include every idiot, insane person, and person non compos mentis;

the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals;

"officer" includes any person authorized by law to perform the duties of the office;

"signature" or "subscription" includes a mark when the person making the same intended it as such;

"oath" includes affirmation, and "sworn" includes affirmed;

"writing" includes printing and typewriting and reproductions of visual symbols by photographing, multigraphing, mimeographing, manifolding, or otherwise.

(July 30, 1947, ch. 388, 61 Stat. 633; June 25, 1948, ch. 645, § 6, 62 Stat. 859; Oct. 31, 1951, ch. 655, § 1, 65 Stat. 710; Pub. L. 112–231, § 2(a), Dec. 28, 2012, 126 Stat. 1619.)

AMENDMENTS

2012—Pub. L. 112–231, in fifth clause after opening clause, struck out "and 'lunatic'" before "shall include every" and "lunatic," before "insane person,".

1951—Act Oct. 31, 1951, substituted, in fourth clause after opening clause, "used" for "use".

1948—Act June 25, 1948, included "tense", "whoever", "signature", "subscription", "writing" and a broader definition of "person".

SHORT TITLE OF 2012 AMENDMENT

Pub. L. 112–231, § 1, Dec. 28, 2012, 126 Stat. 1619, provided that: "This Act [amending this section and sections 92a, 215, and 215a of Title 12, Banks and Banking] may be cited as the '21st Century Language Act of 2012'."

SHORT TITLE OF 2002 AMENDMENT

Pub. L. 107–207, § 1, Aug. 5, 2002, 116 Stat. 926, provided that: "This Act [enacting section 8 of this title] may be cited as the 'Born-Alive Infants Protection Act of 2002'."

SHORT TITLE OF 1996 AMENDMENT

Pub. L. 104–199, § 1, Sept. 21, 1996, 110 Stat. 2419, provided that: "This Act [enacting section 7 of this title and section 1738C of Title 28, Judiciary and Judicial Procedure] may be cited as the 'Defense of Marriage Act'."

REFERENCES IN PUB. L. 115–245

Pub. L. 115–245, § 3, Sept. 28, 2018, 132 Stat. 2981, provided that: "Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this Act [Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, see Tables for classification] shall be treated as referring only to the provisions of that division."

REFERENCES IN PUB. L. 115–244

Pub. L. 115–244, § 3, Sept. 21, 2018, 132 Stat. 2897, provided that: "Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this Act [Energy and Water, Legislative Branch, and Military Construction and Veterans Affairs Appropriations Act, 2019, see Tables for classification] shall be treated as referring only to the provisions of that division."

REFERENCES IN PUB. L. 115–141

Pub. L. 115–141, § 3, Mar. 23, 2018, 132 Stat. 350, provided that: "Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this Act [Consolidated Appropriations Act, 2018, see Tables for classification] shall be treated as referring only to the provisions of that division."

REFERENCES IN PUB. L. 115–56

Pub. L. 115–56, § 3, Sept. 8, 2017, 131 Stat. 1129, provided that: "Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this Act [Continuing Appropriations Act, 2018 and Supplemental Appropriations for Disaster Relief Requirements Act, 2017, see Tables for classification] shall be treated as referring only to the provisions of that division."

REFERENCES IN PUB. L. 115–31

Pub. L. 115–31, § 3, May 5, 2017, 131 Stat. 137, provided that: "Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this Act [Consolidated Appropriations Act, 2017, see Tables for classification] shall be treated as referring only to the provisions of that division."

REFERENCES IN PUB. L. 114–113

Pub. L. 114–113, § 3, Dec. 18, 2015, 129 Stat. 2244, provided that: "Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this Act [Consolidated Appropriations Act, 2016, see Tables for classification] shall be treated as referring only to the provisions of that division."

REFERENCES IN PUB. L. 114–94

Pub. L. 114–94, div. A, § 1004, Dec. 4, 2015, 129 Stat. 1322, provided that: "Except as expressly provided otherwise, any reference to 'this Act' contained in this division [see Tables for classification] shall be treated as referring only to the provisions of this division."

REFERENCES IN PUB. L. 113–235

Pub. L. 113–235, § 3, Dec. 16, 2014, 128 Stat. 2132, provided that: "Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this Act [Consolidated and Further Continuing Appropriations Act, 2015, see Tables for classification] shall be treated as referring only to the provisions of that division."

REFERENCES IN PUB. L. 113–76

Pub. L. 113–76, § 3, Jan. 17, 2014, 128 Stat. 7, provided that: "Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this Act [Consolidated Appropriations Act, 2014, see Tables for classification] shall be treated as referring only to the provisions of that division."

REFERENCES IN PUB. L. 113–67

Pub. L. 113–67, div. A, § 1(c), Dec. 26, 2013, 127 Stat. 1166, provided that: "Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this Act [Bipartisan Budget Act of 2013, see Tables for classification] shall be treated as referring only to the provisions of that division."

REFERENCES IN PUB. L. 113–6

Pub. L. 113–6, § 3, Mar. 26, 2013, 127 Stat. 199, provided that: "Except as expressly provided otherwise, any reference to 'this Act' contained in division A, B, C, D, or E of this Act [Consolidated and Further Continuing Appropriations Act, 2013, see Tables for classification] shall be treated as referring only to the provisions of that division."

REFERENCES IN PUB. L. 112–74

Pub. L. 112–74, § 3, Dec. 23, 2011, 125 Stat. 787, provided that: "Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this Act [Consolidated Appropriations Act, 2012, see Tables for classification] shall be treated as referring only to the provisions of that division."

REFERENCES IN PUB. L. 112–55

Pub. L. 112–55, § 3, Nov. 18, 2011, 125 Stat. 552, provided that: "Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this Act [Consolidated and Further Continuing Appropriations Act, 2012, see Tables for classification] shall be treated as referring only to the provisions of that division."

REFERENCES IN PUB. L. 112–10

Pub. L. 112–10, div. A, title IX, § 9015, Apr. 15, 2011, 125 Stat. 102, provided that: "Any reference to 'this Act' in this division [Department of Defense Appropriations Act, 2011, see Tables for classification] shall apply solely to this division."

REFERENCES IN PUB. L. 111–118

Pub. L. 111–118, § 3, Dec. 19, 2009, 123 Stat. 3409, provided that: "Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this Act [Department of Defense Appropriations Act, 2010, see Tables for classification] shall be treated as referring only to the provisions of that division."

REFERENCES IN PUB. L. 111–117

Pub. L. 111–117, § 3, Dec. 16, 2009, 123 Stat. 3035, provided that: "Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this Act [Consolidated Appropriations Act, 2010, see Tables for classification] shall be treated as referring only to the provisions of that division."

REFERENCES IN PUB. L. 111–8

Pub. L. 111–8, § 3, Mar. 11, 2009, 123 Stat. 525, provided that: "Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this Act [Omnibus Appropriations Act, 2009, see Tables for classification] shall be treated as referring only to the provisions of that division."

REFERENCES IN PUB. L. 111–5

Pub. L. 111–5, § 4, Feb. 17, 2009, 123 Stat. 116, provided that: "Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this Act [American Recovery and Reinvestment Act of 2009, see Tables for classification] shall be treated as referring only to the provisions of that division."

REFERENCES IN PUB. L. 110–329

Pub. L. 110–329, § 3, Sept. 30, 2008, 122 Stat. 3574, provided that: "Except as expressly provided otherwise, any reference to 'this Act' or 'this joint resolution' contained in any division of this Act [Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, see Tables for classification] shall be treated as referring only to the provisions of that division."

REFERENCES IN PUB. L. 110–161

Pub. L. 110–161, § 3, Dec. 26, 2007, 121 Stat. 1845, provided that: "Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this Act [Consolidated Appropriations Act, 2008, see Tables for classification] shall be treated as referring only to the provisions of that division."

REFERENCES IN PUB. L. 110–116

Pub. L. 110–116, § 2, Nov. 13, 2007, 121 Stat. 1295, provided that: "Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this Act [see Tables for classification] shall be treated as referencing only to the provisions of that division."

REFERENCES IN PUB. L. 109–289

Pub. L. 109–289, div. A, title VIII, § 8112, Sept. 29, 2006, 120 Stat. 1299, provided that: "Except as expressly provided otherwise, any reference to 'this Act' contained in this division [Department of Defense Appropriations Act, 2007, see Tables for classification] shall be referring only to the provisions of this division."

REFERENCES IN PUB. L. 109–148

Pub. L. 109–148, div. B, title V, § 5002, Dec. 30, 2005, 119 Stat. 2813, provided that: "Except as expressly provided otherwise, any reference to 'this Act' contained in either division A [Department of Defense Appropriations Act, 2006, see Tables for classification] or division B [Emergency Supplemental Appropriations Act to Address Hurricanes in the Gulf of Mexico and Pandemic Influenza, 2006, see Tables for classification] shall be treated as referring only to the provisions of that division."

REFERENCES IN PUB. L. 109–115

Pub. L. 109–115, div. A, title VIII, § 847, Nov. 30, 2005, 119 Stat. 2507, provided that: "Except as expressly provided otherwise, any reference to 'this Act' contained in this division [Transportation, Treasury, Housing and Urban Development, the Judiciary, and Independent Agencies Appropriations Act, 2006, see Tables for classification] shall be treated as referring only to the provisions of this division."

REFERENCES IN PUB. L. 108–447

Pub. L. 108–447, § 3, Dec. 8, 2004, 118 Stat. 2810, provided that: "Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this Act [Consolidated Appropriations Act, 2005, see Tables for classification] shall be treated as referring only to the provisions of that division."

REFERENCES IN PUB. L. 108–199

Pub. L. 108–199, § 3, Jan. 23, 2004, 118 Stat. 4, provided that: "Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this Act [Consolidated Appropriations Act, 2004, see Tables for classification] shall be treated as referring only to the provisions of that division."

REFERENCES IN PUB. L. 108–7

Pub. L. 108–7, § 3, Feb. 20, 2003, 117 Stat. 12, provided that: "Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this joint resolution [Consolidated Appropriations Resolution, 2003, see Tables for classification] shall be treated as referring only to the provisions of that division."

CONTINENTAL UNITED STATES

Pub. L. 86–70, § 48, June 25, 1959, 73 Stat. 154, provided that: "Whenever the phrase 'continental United States' is used in any law of the United States enacted after the date of enactment of this Act [June 25, 1959], it shall mean the 49 States on the North American Continent and the District of Columbia, unless otherwise expressly provided."

§ 2. "County" as including "parish", and so forth

The word "county" includes a parish, or any other equivalent subdivision of a State or Territory of the United States.

(July 30, 1947, ch. 388, 61 Stat. 633.)

§ 3. "Vessel" as including all means of water transportation

The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

(July 30, 1947, ch. 388, 61 Stat. 633.)

§ 4. "Vehicle" as including all means of land transportation

The word "vehicle" includes every description of carriage or other artificial contrivance used, or

capable of being used, as a means of transportation on land.

(July 30, 1947, ch. 388, 61 Stat. 633.)

§ 5. "Company" or "association" as including successors and assigns

The word ''company'' or ''association'', when used in reference to a corporation, shall be deemed to embrace the words ''successors and assigns of such company or association'', in like manner as if these last-named words, or words of similar import, were expressed.

(July 30, 1947, ch. 388, 61 Stat. 633.)

§ 6. Limitation of term "products of American fisheries"

Wherever, in the statutes of the United States or in the rulings, regulations, or interpretations of various administrative bureaus and agencies of the United States there appears or may appear the term ''products of American fisheries'' said term shall not include fresh or frozen fish fillets, fresh or frozen fish steaks, or fresh or frozen slices of fish substantially free of bone (including any of the foregoing divided into sections), produced in a foreign country or its territorial waters, in whole or in part with the use of the labor of persons who are not residents of the United States.

(July 30, 1947, ch. 388, 61 Stat. 634.)

§ 7. Definition of "marriage" and "spouse"

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ''marriage'' means only a legal union between one man and one woman as husband and wife, and the word ''spouse'' refers only to a person of the opposite sex who is a husband or a wife.

(Added Pub. L. 104–199, § 3(a), Sept. 21, 1996, 110 Stat. 2419.)

CONSTITUTIONALITY

For information regarding constitutionality of this section, as added by section 3(a) of Pub. L. 104-199, see Congressional Research Service, The Constitution of the United States of America: Analysis and Interpretation, Appendix 1, Acts of Congress Held Unconstitutional in Whole or in Part by the Supreme Court of the United States.

§ 8. "Person", "human being", "child", and "individual" as including born-alive infant

(a) In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the words ''person'', ''human being'', ''child'', and ''individual'', shall include every infant member of the species homo sapiens who is born alive at any stage of development.

(b) As used in this section, the term ''born alive'', with respect to a member of the species homo sapiens, means the complete expulsion or extraction from his or her mother of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion.

(c) Nothing in this section shall be construed to affirm, deny, expand, or contract any legal status or legal right applicable to any member of the species homo sapiens at any point prior to being ''born alive'' as defined in this section.

(Added Pub. L. 107–207, § 2(a), Aug. 5, 2002, 116 Stat. 926.)

CHAPTER 2—ACTS AND RESOLUTIONS; FORMALITIES OF ENACTMENT; REPEALS; SEALING OF INSTRUMENTS

AMENDMENTS

1972—Pub. L. 92–403, § 2, Aug. 22, 1972, 86 Stat. 619, added item 112b.

1966—Pub. L. 89–497, § 2, July 8, 1966, 80 Stat. 271, inserted ''slip laws; Treaties and Other International Acts Series;'' in item 113.

1951—Act Oct. 31, 1951, ch. 655, § 2(a), 65 Stat. 710, added items 106a and 106b.

1950—Act Sept. 23, 1950, ch. 1001, § 3, 64 Stat. 980, added item 112a.

§ 101. Enacting clause

The enacting clause of all Acts of Congress shall be in the following form: ''Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.''

(July 30, 1947, ch. 388, 61 Stat. 634.)

§ 102. Resolving clause

The resolving clause of all joint resolutions shall be in the following form: ''Resolved by the Senate and House of Representatives of the United States of America in Congress assembled.''

(July 30, 1947, ch. 388, 61 Stat. 634.)

§ 103. Enacting or resolving words after first section

No enacting or resolving words shall be used in any section of an Act or resolution of Congress except in the first.

[1] So in original. Does not conform to section catchline.

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APPENDIX
TO
TITLE 29—LABOR

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TITLE 29—LABOR

CHAPTER 1—LABOR STATISTICS

SUBCHAPTER I—BUREAU OF LABOR STATISTICS

SUBCHAPTER II—SPECIAL STATISTICS

SUBCHAPTER I—BUREAU OF LABOR STATISTICS

§ 1. Design and duties of bureau generally

The general design and duties of the Bureau of Labor Statistics shall be to acquire and diffuse among the people of the United States useful information on subjects connected with labor, in the most general and comprehensive sense of that word, and especially upon its relation to capital, the hours of labor, the earnings of laboring men and women, and the means of promoting their material, social, intellectual, and moral prosperity.

(June 13, 1888, ch. 389, § 1, 25 Stat. 182; Feb. 14, 1903, ch. 552, § 4, 32 Stat. 826; Mar. 18, 1904, ch. 716, 33 Stat. 136; Mar. 4, 1913, ch. 141, § 3, 37 Stat. 737.)

CODIFICATION

Act June 27, 1884, created Bureau of Labor in Department of the Interior.

Section 1 of act June 13, 1888, created Department of Labor and outlined its general design and duties, and section 9 of that act transferred Bureau of Labor to Department of Labor.

Act Feb. 14, 1903, placed Department of Labor under jurisdiction and made it a part of Department of Commerce and Labor.

Pub. L. 100–202, § 101(h) [title I, § 101], Dec. 22, 1987, 101 Stat. 1329–256, 1329–263.
Pub. L. 99–500, § 101(i) [H.R. 5233, title I, § 101], Oct. 18, 1986, 100 Stat. 1783–287, and Pub. L. 99–591, § 101(i) [H.R. 5233, title I, § 101], Oct. 30, 1986, 100 Stat. 3341–287.
Pub. L. 99–178, title I, § 101, Dec. 12, 1985, 99 Stat. 1108.
Pub. L. 98–619, title I, § 101, Nov. 8, 1984, 98 Stat. 3311.
Pub. L. 98–139, title I, § 101, Oct. 31, 1983, 97 Stat. 877.
Pub. L. 97–377, title I, § 101(e)(1) [title I, § 101], Dec. 21, 1982, 96 Stat. 1878, 1884.

§ 568. Acceptance of donations by Secretary

The Secretary of Labor is authorized to accept, in the name of the Department of Labor, and employ or dispose of in furtherance of authorized activities of the Department of Labor, during the fiscal year ending September 30, 1995, and each fiscal year thereafter, any money or property, real, personal, or mixed, tangible or intangible, received by gift, devise, bequest, or otherwise.

(Pub. L. 103–333, title I, § 105, Sept. 30, 1994, 108 Stat. 2548.)

PRIOR PROVISIONS

Provisions similar to those in this section were contained in the following prior appropriation acts:
Pub. L. 103–112, title I, § 101, Oct. 21, 1993, 107 Stat. 1089.
Pub. L. 102–394, title I, § 105, Oct. 6, 1992, 106 Stat. 1799.

CHAPTER 13—EXEMPLARY REHABILITATION CERTIFICATES

§§ 601 to 605. Repealed. Pub. L. 97–306, title III, § 311, Oct. 14, 1982, 96 Stat. 1442

Section 601, Pub. L. 90–83, § 6(a), Sept. 11, 1967, 81 Stat. 221, provided that Secretary of Labor act on any application for an Exemplary Rehabilitation Certificate received under this chapter from any person discharged or dismissed under conditions other than honorable, or who received a general discharge, at least three years before date of receipt of such application.

Section 602, Pub. L. 90–83, § 6(b), Sept. 11, 1967, 81 Stat. 221, provided criteria for issuance of an Exemplary Rehabilitation Certificate and required notification of issuance of such certificate to Secretary of Defense and placement of certificate in military personnel file of person to whom it is issued.

Section 603, Pub. L. 90–83, § 6(c), Sept. 11, 1967, 81 Stat. 221, specified certain types of notarized statements that might be used in support of an application for an Exemplary Rehabilitation Certificate, and provided for independent investigations by Secretary of Labor and personal appearances by applicant or appearance by counsel before Secretary.

Section 604, Pub. L. 90–83, § 6(d), Sept. 11, 1967, 81 Stat. 221, provided that no benefits under any laws of United States (including but not limited to those relating to pensions, compensation, hospitalization, military pay and allowances, education, loan guarantees, retired pay, or other benefits based on military service) accrue to any person to whom an Exemplary Rehabilitation Certificate was issued under section 602 of this title unless he would have been entitled to those benefits under his original discharge or dismissal.

Section 605, Pub. L. 90–83, § 6(e), Sept. 11, 1967, 81 Stat. 221, provided that Secretary of Labor require national system of public employment offices established under chapter 4B of this title to accord special counseling and job development assistance to any person who had been discharged or dismissed under conditions other than honorable but who had been issued an Exemplary Rehabilitation Certificate.

§ 606. Repealed. Pub. L. 97–306, title III, § 311, Oct. 14, 1982, 96 Stat. 1442; Pub. L. 97–375, title I, § 110(a), Dec. 21, 1982, 96 Stat. 1820

Section, Pub. L. 90–83, § 6(f), Sept. 11, 1967, 81 Stat. 221, directed Secretary of Labor to report to Congress not later than Jan. 15 of each year the number of cases reviewed under this chapter and the number of certificates issued.

§ 607. Repealed. Pub. L. 97–306, title III, § 311, Oct. 14, 1982, 96 Stat. 1442

Section, Pub. L. 90–83, § 6(g), Sept. 11, 1967, 81 Stat. 221, provided that in carrying out provisions of this chapter Secretary of Labor was authorized to issued regulations, delegate authority, and utilize services of the Civil Service Commission for making such investigations as might have been mutually agreeable.

CHAPTER 14—AGE DISCRIMINATION IN EMPLOYMENT

6

§ 621. Congressional statement of findings and purpose

7

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

(Pub. L. 90–202, § 2, Dec. 15, 1967, 81 Stat. 602.)

EFFECTIVE DATE; RULES AND REGULATIONS

Section 16, formerly § 15, of Pub. L. 90–202, renumbered by Pub. L. 93–259, § 28(b)(1), Apr. 8, 1974, 88 Stat. 74, provided that: "This Act [enacting this chapter] shall be-

come effective one hundred and eighty days after enactment [Dec. 15, 1967], except (a) that the Secretary of Labor may extend the delay in effective date of any provision of this Act up to and additional ninety days thereafter if he finds that such time is necessary in permitting adjustments to the provisions hereof, and (b) that on or after the date of enactment [Dec. 15, 1967] the Secretary of Labor is authorized to issue such rules and regulations as may be necessary to carry out its provisions."

SHORT TITLE OF 1996 AMENDMENT

Pub. L. 104–208, div. A, title I, § 101(a) [title I, § 119], Sept. 30, 1996, 110 Stat. 3009, 3009–23, provided in part that: "This section [amending section 623 of this title, enacting provisions set out as notes under section 623 of this title, and repealing provisions set out as a note under section 623 of this title] may be cited as the 'Age Discrimination in Employment Amendments of 1996'."

SHORT TITLE OF 1990 AMENDMENT

Pub. L. 101–433, § 1, Oct. 16, 1990, 104 Stat. 978, provided that: "This Act [amending sections 623, 626, and 630 of this title and enacting provisions set out as notes under this section and sections 623 and 626 of this title] may be cited as the 'Older Workers Benefit Protection Act'."

SHORT TITLE OF 1986 AMENDMENT

Pub. L. 99–592, § 1, Oct. 31, 1986, 100 Stat. 3342, provided that: "This Act [amending sections 623, 630, and 631 of this title and enacting provisions set out as notes under sections 622 to 624 and 631 of this title] may be cited as the 'Age Discrimination in Employment Amendments of 1986'."

SHORT TITLE OF 1978 AMENDMENT

Pub. L. 95–256, § 1, Apr. 6, 1978, 92 Stat. 189, provided that: "This Act [amending sections 623, 624, 626, 631, 633a, and 634 of this title and sections 8335 and 8339 of Title 5, Government Organization and Employees, repealing section 3322 of Title 5, and enacting provisions set out as notes under sections 623, 626, 631, and 633a of this title] may be cited as the 'Age Discrimination in Employment Act Amendments of 1978'."

SHORT TITLE

Pub. L. 90–202, § 1, Dec. 15, 1967, 81 Stat. 602, provided: "That this Act [enacting this chapter] may be cited as the 'Age Discrimination in Employment Act of 1967'."

TRANSFER OF FUNCTIONS

Functions vested by this section in Secretary of Labor or Civil Service Commission transferred to Equal Employment Opportunity Commission by Reorg. Plan No. 1 of 1978, § 2, 43 F.R. 19807, 92 Stat. 3781, set out in the Appendix to Title 5, Government Organization and Employees, effective Jan. 1, 1979, as provided by section 1–101 of Ex. Ord. No. 12106, Dec. 28, 1978, 44 F.R. 1053.

SEVERABILITY

Pub. L. 101–433, title III, § 301, Oct. 16, 1990, 104 Stat. 984, provided that: "If any provision of this Act [see Short Title of 1990 Amendment note above], or an amendment made by this Act, or the application of such provision to any person or circumstances is held to be invalid, the remainder of this Act and the amendments made by this Act, and the application of such provision to other persons and circumstances, shall not be affected thereby."

CONGRESSIONAL FINDING

Pub. L. 101–433, title I, § 101, Oct. 16, 1990, 104 Stat. 978, provided that: "The Congress finds that, as a result of the decision of the Supreme Court in Public Employees Retirement System of Ohio v. Betts, 109 S.Ct. 256 (1989), legislative action is necessary to restore the original congressional intent in passing and amending the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.), which was to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations."

§ 622. Education and research program; recommendation to Congress

(a) The Secretary of Labor shall undertake studies and provide information to labor unions, management, and the general public concerning the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy. In order to achieve the purposes of this chapter, the Secretary of Labor shall carry on a continuing program of education and information, under which he may, among other measures—

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills;

(2) publish and otherwise make available to employers, professional societies, the various media of communication, and other interested persons the findings of studies and other materials for the promotion of employment;

(3) foster through the public employment service system and through cooperative effort the development of facilities of public and private agencies for expanding the opportunities and potentials of older persons;

(4) sponsor and assist State and community informational and educational programs.

(b) Not later than six months after the effective date of this chapter, the Secretary shall recommend to the Congress any measures he may deem desirable to change the lower or upper age limits set forth in section 631 of this title.

(Pub. L. 90–202, § 3, Dec. 15, 1967, 81 Stat. 602.)

REFERENCES IN TEXT

The effective date of this chapter, referred to in subsec. (b), means the effective date of Pub. L. 90–202, which is one hundred and eighty days after the enactment of this chapter, except that the Secretary of Labor may extend the delay in effective date an additional ninety days thereafter for any provision to permit adjustments to such provisions. See section 16 of Pub. L. 90–202, set out as a note under section 621 of this title.

STUDY AND PROPOSED GUIDELINES RELATING TO POLICE OFFICERS AND FIREFIGHTERS

Pub. L. 99–592, § 5, Oct. 31, 1986, 100 Stat. 3343, provided that:

"(a) STUDY.—Not later than 4 years after the date of enactment of this Act [Oct. 31, 1986], the Secretary of Labor and the Equal Employment Opportunity Commission, jointly, shall—

"(1) conduct a study—

"(A) to determine whether physical and mental fitness tests are valid measurements of the ability and competency of police officers and firefighters to perform the requirements of their jobs,

"(B) if such tests are found to be valid measurements of such ability and competency, to determine which particular types of tests most effectively measure such ability and competency, and

"(C) to develop recommendations with respect to specific standards that such tests, and the administration of such tests should satisfy, and

"(2) submit a report to the Speaker of the House of Representatives and the President pro tempore of the Senate that includes—

"(A) a description of the results of such study, and

"(B) a statement of the recommendations developed under paragraph (1)(C).

"(b) CONSULTATION REQUIREMENT.—The Secretary of Labor and the Equal Employment Opportunity Commission shall, during the conduct of the study required under subsection (a) and prior to the development of recommendations under paragraph (1)(C), consult with the United States Fire Administration, the Federal Emergency Management Agency, organizations representing law enforcement officers, firefighters, and their employers, and organizations representing older Americans.

"(c) PROPOSED GUIDELINES.—Not later than 5 years after the date of the enactment of this Act [Oct. 31, 1986], the Equal Employment Opportunity Commission shall propose, in accordance with subchapter II of chapter 5 of title 5 of the United States Code, guidelines for the administration and use of physical and mental fitness tests to measure the ability and competency of police officers and firefighters to perform the requirements of their jobs."

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§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) 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;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause 10

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section—

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan—

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i)

or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) Repealed. Pub. L. 101–239, title VI, § 6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233

(h) Practices of foreign corporations controlled by American employers; foreign employers not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the—

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control,

of the employer and the corporation.

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits—

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan—

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title and section 401(a)(14)(C) of title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title or section 411(a)(3)(B) of title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of title 26.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals or it is a plan permitted by subsection (m)..[1]

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of title 26 and subparagraphs (C) and (D)[2] of section 411(b)(2) of title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2).

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002(24)(B) of this title and section 411(a)(8)(B) of title 26.

(9) For purposes of this subsection—

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

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[1] So in original.

[2] See References in Text note below.

(B) The term "compensation" has the meaning provided by section 414(s) of title 26.

(10) SPECIAL RULES RELATING TO AGE.—

(A) COMPARISON TO SIMILARLY SITUATED YOUNGER INDIVIDUAL.—

(i) IN GENERAL.—A plan shall not be treated as failing to meet the requirements of paragraph (1) if a participant's accrued benefit, as determined as of any date under the terms of the plan, would be equal to or greater than that of any similarly situated, younger individual who is or could be a participant.

(ii) SIMILARLY SITUATED.—For purposes of this subparagraph, a participant is similarly situated to any other individual if such participant is identical to such other individual in every respect (including period of service, compensation, position, date of hire, work history, and any other respect) except for age.

(iii) DISREGARD OF SUBSIDIZED EARLY RETIREMENT BENEFITS.—In determining the accrued benefit as of any date for purposes of this clause, the subsidized portion of any early retirement benefit or retirement-type subsidy shall be disregarded.

(iv) ACCRUED BENEFIT.—For purposes of this subparagraph, the accrued benefit may, under the terms of the plan, be expressed as an annuity payable at normal retirement age, the balance of a hypothetical account, or the current value of the accumulated percentage of the employee's final average compensation.

(B) APPLICABLE DEFINED BENEFIT PLANS.—

(i) INTEREST CREDITS.—

(I) IN GENERAL.—An applicable defined benefit plan shall be treated as failing to meet the requirements of paragraph (1) unless the terms of the plan provide that any interest credit (or an equivalent amount) for any plan year shall be at a rate which is not greater than a market rate of return. A plan shall not be treated as failing to meet the requirements of this subclause merely because the plan provides for a reasonable minimum guaranteed rate of return or for a rate of return that is equal to the greater of a fixed or variable rate of return.

(II) PRESERVATION OF CAPITAL.—An interest credit (or an equivalent amount) of less than zero shall in no event result in the account balance or similar amount being less than the aggregate amount of contributions credited to the account.

(III) MARKET RATE OF RETURN.—The Secretary of the Treasury may provide by regulation for rules governing the calculation of a market rate of return for purposes of subclause (I) and for permissible methods of crediting interest to the account (including fixed or variable interest rates) resulting in effective rates of return meeting the requirements of subclause (I). In the case of a governmental plan (as defined in the first sentence of section 414(d) of title 26), a rate of return or a method of crediting interest established pursuant to any provision of Federal, State, or local law (including any administrative rule or policy adopted in accordance with any such law) shall be treated as a market rate of return for purposes of subclause (I) and a permissible method of crediting interest for purposes of meeting the requirements of subclause (I), except that this sentence shall only apply to a rate of return or method of crediting interest if such rate or method does not violate any other requirement of this chapter.

(ii) SPECIAL RULE FOR PLAN CONVERSIONS.—If, after June 29, 2005, an applicable plan amendment is adopted, the plan shall be treated as failing to meet the requirements of paragraph (1)(H) unless the requirements of clause (iii) are met with respect to each individual who was a participant in the plan immediately before the adoption of the amendment.

(iii) RATE OF BENEFIT ACCRUAL.—Subject to clause (iv), the requirements of this clause are met with respect to any participant if the accrued benefit of the participant under the terms of the plan as in effect after the amendment is not less than the sum of—

(I) the participant's accrued benefit for years of service before the effective date of the amendment, determined under the terms of the plan as in effect before the amendment, plus

(II) the participant's accrued benefit for years of service after the effective date of the amendment, determined under the terms of the plan as in effect after the amendment.

(iv) SPECIAL RULES FOR EARLY RETIREMENT SUBSIDIES.—For purposes of clause (iii)(I), the plan shall credit the accumulation account or similar amount [3] with the amount of any early retirement benefit or retirement-type subsidy for the plan year in which the participant retires if, as of such time, the participant has met the age, years of service, and other requirements under the plan for entitlement to such benefit or subsidy.

(v) APPLICABLE PLAN AMENDMENT.—For purposes of this subparagraph—

(I) IN GENERAL.—The term "applicable plan amendment" means an amendment to a defined benefit plan which has the effect of converting the plan to an applicable defined benefit plan.

(II) SPECIAL RULE FOR COORDINATED BENEFITS.—If the benefits of 2 or more defined benefit plans established or maintained by an employer are coordinated in such a manner as to have the effect of the adoption of an amendment described in subclause (I), the sponsor of the defined benefit plan or plans providing for such coordination shall be treated as having adopted such a plan amendment as of the date such coordination begins.

(III) MULTIPLE AMENDMENTS.—The Secretary of the Treasury shall issue regulations to prevent the avoidance of the purposes of this subparagraph through the use of 2 or more plan amendments rather than a single amendment.

(IV) APPLICABLE DEFINED BENEFIT PLAN.—For purposes of this subparagraph, the term "applicable defined benefit plan" has the mean-

[3] So in original. Probably should be "similar account".

ing given such term by section 1053(f)(3) of this title.

(vi) TERMINATION REQUIREMENTS.—An applicable defined benefit plan shall not be treated as meeting the requirements of clause (i) unless the plan provides that, upon the termination of the plan—

(I) if the interest credit rate (or an equivalent amount) under the plan is a variable rate, the rate of interest used to determine accrued benefits under the plan shall be equal to the average of the rates of interest used under the plan during the 5-year period ending on the termination date, and

(II) the interest rate and mortality table used to determine the amount of any benefit under the plan payable in the form of an annuity payable at normal retirement age shall be the rate and table specified under the plan for such purpose as of the termination date, except that if such interest rate is a variable rate, the interest rate shall be determined under the rules of subclause (I).

(C) CERTAIN OFFSETS PERMITTED.—A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the plan provides offsets against benefits under the plan to the extent such offsets are allowable in applying the requirements of section 401(a) of title 26.

(D) PERMITTED DISPARITIES IN PLAN CONTRIBUTIONS OR BENEFITS.—A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the plan provides a disparity in contributions or benefits with respect to which the requirements of section 401(*l*) of title 26 are met.

(E) INDEXING PERMITTED.—

(i) IN GENERAL.—A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the plan provides for indexing of accrued benefits under the plan.

(ii) PROTECTION AGAINST LOSS.—Except in the case of any benefit provided in the form of a variable annuity, clause (i) shall not apply with respect to any indexing which results in an accrued benefit less than the accrued benefit determined without regard to such indexing.

(iii) INDEXING.—For purposes of this subparagraph, the term "indexing" means, in connection with an accrued benefit, the periodic adjustment of the accrued benefit by means of the application of a recognized investment index or methodology.

(F) EARLY RETIREMENT BENEFIT OR RETIREMENT-TYPE SUBSIDY.—For purposes of this paragraph, the terms "early retirement benefit" and "retirement-type subsidy" have the meaning given such terms in section 1054(g)(2)(A) of this title.[4]

(G) BENEFIT ACCRUED TO DATE.—For purposes of this paragraph, any reference to the accrued benefit shall be a reference to such benefit accrued to date.

(j) Employment as firefighter or law enforcement officer

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken—

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996[4] if the individual was discharged after the date described in such section, and the individual has attained—

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

(B)(i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or

(ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged, the higher of—

(I) the age of retirement in effect on the date of such discharge under such law; and

(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

(k) Seniority system or employee benefit plan; compliance

A seniority system or employee benefit plan shall comply with this chapter regardless of the date of adoption of such system or plan.

(*l*) Lawful practices; minimum age as condition of eligibility for retirement benefits; deductions from severance pay; reduction of long-term disability benefits

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B)—

(1)(A) It shall not be a violation of subsection (a), (b), (c), or (e) solely because—

(i) an employee pension benefit plan (as defined in section 1002(2) of this title) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(ii) a defined benefit plan (as defined in section 1002(35) of this title) provides for—

(I) payments that constitute the subsidized portion of an early retirement benefit; or

(II) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

(B) A voluntary early retirement incentive plan that—

(i) is maintained by—

(I) a local educational agency (as defined in section 7801 of title 20), or

(II) an education association which principally represents employees of 1 or more

[4] See References in Text note below.

agencies described in subclause (I) and which is described in section 501(c)(5) or (6) of title 26 and exempt from taxation under section 501(a) of title 26, and

(ii) makes payments or supplements described in subclauses (I) and (II) of subparagraph (A)(ii) in coordination with a defined benefit plan (as so defined) maintained by an eligible employer described in section 457(e)(1)(A) of title 26 or by an education association described in clause (i)(II),

shall be treated solely for purposes of subparagraph (A)(ii) as if it were a part of the defined benefit plan with respect to such payments or supplements. Payments or supplements under such a voluntary early retirement incentive plan shall not constitute severance pay for purposes of paragraph (2).

(2)(A) It shall not be a violation of subsection (a), (b), (c), or (e) solely because following a contingent event unrelated to age—

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii);

are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in section 501(c)(17) of title 26) that—

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age)—

(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.);

(ii) the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act; or

(iii) the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E)(i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of $3,000 per year for benefit years before age 65, and $750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $48,000 for individuals below age 65, and $24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on October 16, 1990, and shall be adjusted on an annual basis, with respect to a contingent event that occurs subsequent to the first year after October 16, 1990, based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.

(iv) If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.

(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions)—

(A) paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.

(m) Voluntary retirement incentive plans

Notwithstanding subsection (f)(2)(B), it shall not be a violation of subsection (a), (b), (c), or (e) solely because a plan of an institution of higher education (as defined in section 1001 of title 20) offers employees who are serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) supplemental benefits upon voluntary retirement that are reduced or eliminated on the basis of age, if—

(1) such institution does not implement with respect to such employees any age-based reduction or cessation of benefits that are not such supplemental benefits, except as permitted by other provisions of this chapter;

(2) such supplemental benefits are in addition to any retirement or severance benefits which have been offered generally to employees serving under a contract of unlimited tenure (or

similar arrangement providing for unlimited tenure), independent of any early retirement or exit-incentive plan, within the preceding 365 days; and

(3) any employee who attains the minimum age and satisfies all non-age-based conditions for receiving a benefit under the plan has an opportunity lasting not less than 180 days to elect to retire and to receive the maximum benefit that could then be elected by a younger but otherwise similarly situated employee, and the plan does not require retirement to occur sooner than 180 days after such election.

(Pub. L. 90–202, § 4, Dec. 15, 1967, 81 Stat. 603; Pub. L. 95–256, § 2(a), Apr. 6, 1978, 92 Stat. 189; Pub. L. 97–248, title I, § 116(a), Sept. 3, 1982, 96 Stat. 353; Pub. L. 98–369, div. B, title III, § 2301(b), July 18, 1984, 98 Stat. 1063; Pub. L. 98–459, title VIII, § 802(b), Oct. 9, 1984, 98 Stat. 1792; Pub. L. 99–272, title IX, § 9201(b)(1), (3), Apr. 7, 1986, 100 Stat. 171; Pub. L. 99–509, title IX, § 9201, Oct. 21, 1986, 100 Stat. 1973; Pub. L. 99–514, § 2, Oct. 22, 1986, 100 Stat. 2095; Pub. L. 99–592, §§ 2(a), (b), 3(a), Oct. 31, 1986, 100 Stat. 3342; Pub. L. 101–239, title VI, § 6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233; Pub. L. 101–433, title I, § 103, Oct. 16, 1990, 104 Stat. 978; Pub. L. 101–521, Nov. 5, 1990, 104 Stat. 2287; Pub. L. 104–208, div. A, title I, § 101(a) [title I, § 119[1(b)]], Sept. 30, 1996, 110 Stat. 3009, 3009–23; Pub. L. 105–244, title IX, § 941(a), (b), Oct. 7, 1998, 112 Stat. 1834, 1835; Pub. L. 109–280, title VII, § 701(c), title XI, § 1104(a)(2), Aug. 17, 2006, 120 Stat. 988, 1058; Pub. L. 110–458, title I, § 123(a), Dec. 23, 2008, 122 Stat. 5114; Pub. L. 114–95, title IX, § 9215(e), Dec. 10, 2015, 129 Stat. 2166.)

REFERENCES IN TEXT

Subparagraphs (C) and (D) of section 411(b)(2) of title 26, referred to in subsec. (i)(7), were redesignated subpars. (B) and (C) of section 411(b)(2) of Title 26, Internal Revenue Code, by Pub. L. 101–239, title VII, § 7871(a)(1), Dec. 19, 1989, 103 Stat. 2435.

Section 1054(g)(2)(A) of this title, referred to in subsec. (i)(10)(F), was in the original "section 203(g)(2)(A) of the Employee Retirement Income Security Act of 1974", and was translated as reading section 204(g)(2)(A) of that Act to reflect the probable intent of Congress, because section 203 does not contain a subsec. (g).

Section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996, referred to in subsec. (j)(1), probably means Pub. L. 104–208, div. A, title I, § 101(a) [title I, § 119[2(d)(2)]], Sept. 30, 1996, 110 Stat. 3009, 3009–23, 3009–25, which is set out as a note under this section.

The Social Security Act, referred to in subsec. (*l*)(1)(A)(ii)(II), (2)(D)(i), (ii), is act Aug. 14, 1935, ch. 531, 49 Stat. 620, as amended. Titles II and XVIII of the Act are classified generally to subchapters II (§ 401 et seq.) and XVIII (§ 1395 et seq.), respectively, of chapter 7 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see section 1305 of Title 42 and Tables.

AMENDMENTS

2015—Subsec. (*l*)(1)(B)(i)(I). Pub. L. 114–95 substituted "section 7801 of title 20)" for "section 7801 of title 20".

2008—Subsec. (i)(10)(B)(i)(III). Pub. L. 110–458 inserted at end "In the case of a governmental plan (as defined in the first sentence of section 414(d) of title 26), a rate of return or a method of crediting interest established pursuant to any provision of Federal, State, or local law (including any administrative rule or policy adopted in accordance with any such law) shall be treated as a market rate of return for purposes of subclause (I) and a permissible method of crediting interest for purposes of meeting the requirements of subclause (I), except that this sentence shall only apply to a rate of return or method of crediting interest if such rate or method does not violate any other requirement of this chapter."

2006—Subsec. (i)(10). Pub. L. 109–280, § 701(c), added par. (10).

Subsec. (*l*)(1). Pub. L. 109–280, § 1104(a)(2), designated existing provisions as subpar. (A), redesignated former subpars. (A) and (B) as cls. (i) and (ii), respectively, and former cls. (i) and (ii) of former subpar. (B) as subcls. (I) and (II) of cl. (ii), respectively, and added subpar. (B).

1998—Subsec. (i)(6). Pub. L. 105–244, § 941(b), inserted "or it is a plan permitted by subsection (m)." after "accruals".

Subsec. (m). Pub. L. 105–244, § 941(a), added subsec. (m).

1996—Subsec. (j). Pub. L. 104–208, § 101(a) [title I, § 119[1(b)(1)]], reenacted subsec. (j) of this section, as in effect immediately before Dec. 31, 1993.

Subsec. (j)(1). Pub. L. 104–208, § 101(a) [title I, § 119[1(b)(2)]], substituted ", the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such section, and the individual has attained—

"(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

"(B)(i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or

"(ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged, the higher of—

"(I) the age of retirement in effect on the date of such discharge under such law; and

"(II) age 55; and" for "and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and".

1990—Subsec. (f)(2). Pub. L. 101–433, § 103(1), added par. (2) and struck out former par. (2) which read as follows: "to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or".

Subsecs. (i), (j). Pub. L. 101–433, § 103(2), redesignated subsec. (i), relating to employment as firefighter or law enforcement officer, as (j).

Subsec. (k). Pub. L. 101–433, § 103(3), added subsec. (k).

Subsec. (*l*). Pub. L. 101–521 added cl. (iii) in par. (2)(A), and in par. (2)(D) inserted "and solely in order to make the deduction authorized under this paragraph" after "For purposes of this paragraph" and added cl. (iii).

Pub. L. 101–433, § 103(3), added subsec. (*l*).

1989—Subsec. (g). Pub. L. 101–239 struck out subsec. (g) which read as follows:

"(1) For purposes of this section, any employer must provide that any employee aged 65 or older, and any employee's spouse aged 65 or older, shall be entitled to coverage under any group health plan offered to such employees under the same conditions as any employee, and the spouse of such employee, under age 65.

"(2) For purposes of paragraph (1), the term 'group health plan' has the meaning given to such term in section 162(i)(2) of title 26."

1986—Subsec. (g)(1). Pub. L. 99–272, § 9201(b)(1), and Pub. L. 99–592, § 2(a), made identical amendments, substituting "or older" for "through 69" in two places.

Subsec. (g)(2). Pub. L. 99–514 substituted "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954", which for purposes of codification was translated as "title 26" thus requiring no change in text.

Subsec. (h). Pub. L. 99–272, § 9201(b)(3), and Pub. L. 99–592, § 2(b), made identical amendments, redesignating subsec. (g), relating to practices of foreign corporations controlled by American employers, as (h).

Subsec. (i). Pub. L. 99–592, § 3, temporarily added subsec. (i) which read as follows: "It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken—

"(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and

"(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter."

See Effective and Termination Dates of 1986 Amendments note below.

Pub. L. 99–509 added subsec. (i) relating to employee pension benefit plans.

1984—Subsec. (f)(1). Pub. L. 98–459, § 802(b)(1), inserted ", or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located".

Subsec. (g). Pub. L. 98–459, § 802(b)(2), added subsec. (g) relating to practices of foreign corporations controlled by American employers.

Subsec. (g)(1). Pub. L. 98–369 inserted ", and any employee's spouse aged 65 through 69," after "aged 65 through 69" and ", and the spouse of such employee," after "as any employee", in subsec. (g) relating to entitlement to coverage under group health plan.

1982—Subsec. (g). Pub. L. 97–248 added subsec. (g) relating to entitlement to coverage under group health plans.

1978—Subsec. (f)(2). Pub. L. 95–256 provided that no seniority system or employee benefit plan require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of the individual.

EFFECTIVE DATE OF 2015 AMENDMENT

Amendment by Pub. L. 114–95 effective Dec. 10, 2015, except with respect to certain noncompetitive programs and competitive programs, see section 5 of Pub. L. 114–95, set out as a note under section 6301 of Title 20, Education.

EFFECTIVE DATE OF 2008 AMENDMENT

Pub. L. 110–458, title I, § 123(b), Dec. 23, 2008, 122 Stat. 5114, provided that: "The amendment made by this section [amending this section] shall take effect as if included in the provisions of the Pension Protection Act of 2006 [Pub. L. 109–280] to which such amendment relates."

EFFECTIVE DATE OF 2006 AMENDMENT

Amendment by section 701(c) of Pub. L. 109–280 applicable to periods beginning on or after June 29, 2005, with provisions relating to vesting and interest credit requirements for plans in existence on June 29, 2005, special rule for collectively bargained plans, and provisions relating to conversions of plan amendments adopted after, and taking effect after, June 29, 2005, see section 701(e) of Pub. L. 109–280, set out as a note under section 411 of Title 26, Internal Revenue Code.

EFFECTIVE DATE OF 1998 AMENDMENT

Pub. L. 105–244, title IX, § 941(d), Oct. 7, 1998, 112 Stat. 1835, provided that:

"(1) IN GENERAL.—This section [amending this section and enacting provisions set out as a note below] shall take effect on the date of enactment of this Act [Oct. 7, 1998].

"(2) EFFECT ON CAUSES OF ACTION EXISTING BEFORE DATE OF ENACTMENT.—The amendment made by subsection (a) [amending this section] shall not apply with respect to any cause of action arising under the Age Discrimination in Employment Act of 1967 [29 U.S.C. 621 et seq.] prior to the date of enactment of this Act."

EFFECTIVE DATE OF 1996 AMENDMENT

Section 101(a) [title I, § 119[3]] of Pub. L. 104–208 provided that:

"(a) GENERAL EFFECTIVE DATE.—Except as provided in subsection (b), this title [probably means section 101(a) [title I, § 119] of Pub. L. 104–208, amending this section and enacting and repealing provisions set out as notes under this section] and the amendments made by this title shall take effect on the date of enactment of this Act [Sept. 30, 1996].

"(b) SPECIAL EFFECTIVE DATE.—The repeal made by section 2(a) and the reenactment made by section 2(b)(1) [probably means section 101(a) [title I, § 119[1(a), (b)(1)]] of Pub. L. 104–208, amending this section and repealing provisions set out as a note under this section] shall take effect on December 31, 1993."

EFFECTIVE DATE OF 1990 AMENDMENT

Pub. L. 101–433, title I, § 105, Oct. 16, 1990, 104 Stat. 981, as amended by Pub. L. 102–236, § 9, Dec. 12, 1991, 105 Stat. 1816, provided that:

"(a) IN GENERAL.—Except as otherwise provided in this section, this title [amending this section and section 630 of this title and enacting provisions set out as notes under this section and section 621 of this title] and the amendments made by this title shall apply only to—

"(1) any employee benefit established or modified on or after the date of enactment of this Act [Oct. 16, 1990]; and

"(2) other conduct occurring more than 180 days after the date of enactment of this Act.

"(b) COLLECTIVELY BARGAINED AGREEMENTS.—With respect to any employee benefits provided in accordance with a collective bargaining agreement—

"(1) that is in effect as of the date of enactment of this Act [Oct. 16, 1990]; or that is a result of pattern collective bargaining in an industry where the agreement setting the pattern was ratified after September 20, 1990, but prior to the date of enactment, and the final agreement in the industry adhering to the pattern was ratified after the date of enactment, but not later than November 20, 1990;

"(2) that terminates after such date of enactment;

"(3) any provision of which was entered into by a labor organization (as defined by section 6(d)(4) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)(4))); and

"(4) that contains any provision that would be superseded (in whole or part) by this title [amending this section and section 630 of this title and enacting provisions set out as notes under this section and section 621 of this title] and the amendments made by this title, but for the operation of this section,

this title and the amendments made by this title shall not apply until the termination of such collective bargaining agreement or June 1, 1992, whichever occurs first.

"(c) STATES AND POLITICAL SUBDIVISIONS.—

"(1) IN GENERAL.—With respect to any employee benefits provided by an employer—

"(A) that is a State or political subdivision of a State or any agency or instrumentality of a State or political subdivision of a State; and

"(B) that maintained an employee benefit plan at any time between June 23, 1989, and the date of enactment of this Act [Oct. 16, 1990] that would be superseded (in whole or part) by this title [amending this section and section 630 of this title and enacting provisions set out as notes under this section and section 621 of this title] and the amendments made by this title but for the operation of this subsection, and which plan may be modified only through a change in applicable State or local law,

this title and the amendments made by this title shall not apply until the date that is 2 years after the date of enactment of this Act.

"(2) ELECTION OF DISABILITY COVERAGE FOR EMPLOYEES HIRED PRIOR TO EFFECTIVE DATE.—

"(A) IN GENERAL.—An employer that maintains a plan described in paragraph (1)(B) may, with regard to disability benefits provided pursuant to such a plan—

"(i) following reasonable notice to all employees, implement new disability benefits that satisfy the requirements of the Age Discrimination in Employment Act of 1967 [29 U.S.C. 621 et seq.] (as amended by this title); and

"(ii) then offer to each employee covered by a plan described in paragraph (1)(B) the option to elect such new disability benefits in lieu of the existing disability benefits, if—

"(I) the offer is made and reasonable notice provided no later than the date that is 2 years after the date of enactment of this Act [Oct. 16, 1990]; and

"(II) the employee is given up to 180 days after the offer in which to make the election.

"(B) PREVIOUS DISABILITY BENEFITS.—If the employee does not elect to be covered by the new disability benefits, the employer may continue to cover the employee under the previous disability benefits even though such previous benefits do not otherwise satisfy the requirements of the Age Discrimination in Employment Act of 1967 (as amended by this title).

"(C) ABROGATION OF RIGHT TO RECEIVE BENEFITS.—An election of coverage under the new disability benefits shall abrogate any right the electing employee may have had to receive existing disability benefits. The employee shall maintain any years of service accumulated for purposes of determining eligibility for the new benefits.

"(3) STATE ASSISTANCE.—The Equal Employment Opportunity Commission, the Secretary of Labor, and the Secretary of the Treasury shall, on request, provide to States assistance in identifying and securing independent technical advice to assist in complying with this subsection.

"(4) DEFINITIONS.—For purposes of this subsection:

"(A) EMPLOYER AND STATE.—The terms 'employer' and 'State' shall have the respective meanings provided such terms under subsections (b) and (i) of section 11 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 630).

"(B) DISABILITY BENEFITS.—The term 'disability benefits' means any program for employees of a State or political subdivision of a State that provides long-term disability benefits, whether on an insured basis in a separate employee benefit plan or as part of an employee pension benefit plan.

"(C) REASONABLE NOTICE.—The term 'reasonable notice' means, with respect to notice of new disability benefits described in paragraph (2)(A) that is given to each employee, notice that—

"(i) is sufficiently accurate and comprehensive to appraise the employee of the terms and conditions of the disability benefits, including whether the employee is immediately eligible for such benefits; and

"(ii) is written in a manner calculated to be understood by the average employee eligible to participate.

"(d) DISCRIMINATION IN EMPLOYEE PENSION BENEFIT PLANS.—Nothing in this title [amending this section and section 630 of this title and enacting provisions set out as notes under this section and section 621 of this title], or the amendments made by this title, shall be construed as limiting the prohibitions against discrimination that are set forth in section 4(j) of the Age Discrimination in Employment Act of 1967 [29 U.S.C. 623(j)] (as redesignated by section 103(2) of this Act).

"(e) CONTINUED BENEFIT PAYMENTS.—Notwithstanding any other provision of this section, on and after the effective date of this title and the amendments made by this title (as determined in accordance with subsections (a), (b), and (c)), this title and the amendments made by this title shall not apply to a series of benefit payments made to an individual or the individual's representative that began prior to the effective date and that continue after the effective date pursuant to an arrangement that was in effect on the effective date, except that no substantial modification to such arrangement may be made after the date of enactment of this Act [Oct. 16, 1990] if the intent of the modification is to evade the purposes of this Act."

EFFECTIVE DATE OF 1989 AMENDMENT

Amendment by Pub. L. 101–239 applicable to items and services furnished after Dec. 19, 1989, see section 6202(b)(5) of Pub. L. 101–239, set out as a note under section 162 of Title 26, Internal Revenue Code.

EFFECTIVE AND TERMINATION DATES OF 1986 AMENDMENTS

Pub. L. 99–592, § 7, Oct. 31, 1986, 100 Stat. 3344, provided that:

"(a) IN GENERAL.—Except as provided in subsection (b), this Act and the amendments made by this Act [amending this section and sections 630 and 631 of this title and enacting provisions set out as notes under this section and sections 621, 622, 624, and 631 of this title] shall take effect on January 1, 1987, except that with respect to any employee who is subject to a collective-bargaining agreement—

"(1) which is in effect on June 30, 1986,

"(2) which terminates after January 1, 1987,

"(3) any provision of which was entered into by a labor organization (as defined by section 6(d)(4) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)(4)), and

"(4) which contains any provision that would be superseded by such amendments, but for the operation of this section,

such amendments shall not apply until the termination of such collective bargaining agreement or January 1, 1990, whichever occurs first.

"(b) EFFECT ON EXISTING CAUSES OF ACTION.—The amendments made by sections 3 and 4 of this Act [amending this section and section 630 of this title and enacting provisions set out as a note below] shall not apply with respect to any cause of action arising under the Age Discrimination in Employment Act of 1967 [29 U.S.C. 621 et seq.] as in effect before January 1, 1987."

Pub. L. 99–592, § 3(b), Oct. 31, 1986, 100 Stat. 3342, which provided that the amendment made by section 3(a) of Pub. L. 99–592, which amended this section, was repealed Dec. 31, 1993, was itself repealed, effective Dec. 31, 1993, by Pub. L. 104–208, div. A, title I, § 101(a) [title I, § 119[1(a)]], Sept. 30, 1996, 110 Stat. 3009, 3009–23.

Pub. L. 99–509, title IX, § 9204, Oct. 21, 1986, 100 Stat. 1979, provided that:

"(a) APPLICABILITY TO EMPLOYEES WITH SERVICE AFTER 1988.—

"(1) IN GENERAL.—The amendments made by sections 9201 and 9202 [amending this section, section 1054 of this title, and section 411 of Title 26, Internal Revenue Code] shall apply only with respect to plan years beginning on or after January 1, 1988, and only to employees who have 1 hour of service in any plan year to which such amendments apply.

"(2) SPECIAL RULE FOR COLLECTIVELY BARGAINED PLANS.—In the case of a plan maintained pursuant to 1 or more collective bargaining agreements between employee representatives and 1 or more employers ratified before March 1, 1986, paragraph (1) shall be applied to benefits pursuant to, and individuals covered by, any such agreement by substituting for 'January 1, 1988' the date of the commencement of the first plan year beginning on or after the earlier of—

"(A) the later of—

"(i) January 1, 1988, or

"(ii) the date on which the last of such collective bargaining agreements terminate (determined without regard to any extension thereof after February 28, 1986), or

"(B) January 1, 1990.

"(b) APPLICABILITY OF AMENDMENTS RELATING TO NORMAL RETIREMENT AGE.—The amendments made by section 9203 [amending sections 1002 and 1052 of this title and sections 410 and 411 of Title 26] shall apply only with respect to plan years beginning on or after January 1, 1988, and only with respect to service performed on or after such date.

"(c) PLAN AMENDMENTS.—If any amendment made by this subtitle [subtitle C (§§9201–9204) of title IX of Pub. L. 99–509, amending this section, sections 1002, 1052, and 1054 of this title, and sections 410 and 411 of Title 26] requires an amendment to any plan, such plan amendment shall not be required to be made before the first plan year beginning on or after January 1, 1989, if—

"(1) during the period after such amendment takes effect and before such first plan year, the plan is operated in accordance with the requirements of such amendment, and

"(2) such plan amendment applies retroactively to the period after such amendment takes effect and such first plan year.

A pension plan shall not be treated as failing to provide definitely determinable benefits or contributions, or to be operated in accordance with the provisions of the plan, merely because it operates in accordance with this subsection.

"(d) INTERAGENCY COORDINATION.—The regulations and rulings issued by the Secretary of Labor, the regulations and rulings issued by the Secretary of the Treasury, and the regulations and rulings issued by the Equal Employment Opportunity Commission pursuant to the amendments made by this subtitle shall each be consistent with the others. The Secretary of Labor, the Secretary of the Treasury, and the Equal Employment Opportunity Commission shall each consult with the others to the extent necessary to meet the requirements of the preceding sentence.

"(e) FINAL REGULATIONS.—The Secretary of Labor, the Secretary of the Treasury, and the Equal Employment Opportunity Commission shall each issue before February 1, 1988, such final regulations as may be necessary to carry out the amendments made by this subtitle."

Amendment by Pub. L. 99–272 effective May 1, 1986, see section 9201(d)(2) of Pub. L. 99–272, set out as an Effective Date of 1986 Amendment note under section 1395p of Title 42, The Public Health and Welfare.

EFFECTIVE DATE OF 1984 AMENDMENTS

Pub. L. 98–369, div. B, title III, § 2301(c)(2), July 18, 1984, 98 Stat. 1063, provided that: "The amendment made by subsection (b) [amending this section] shall become effective on January 1, 1985."

Amendment by Pub. L. 98–459 effective Oct. 9, 1984, see section 803(a) of Pub. L. 98–459, set out as a note under section 3001 of Title 42, The Public Health and Welfare.

EFFECTIVE DATE OF 1982 AMENDMENT

Pub. L. 97–248, title I, § 116(c), Sept. 3, 1982, 96 Stat. 354, provided that: "The amendment made by subsection (a) [amending this section] shall become effective on January 1, 1983, and the amendment made by subsection (b) [enacting section 1395y(b)(3) of Title 42, The Public Health and Welfare] shall apply with respect to items and services furnished on or after such date."

EFFECTIVE DATE OF 1978 AMENDMENT

Pub. L. 95–256, § 2(b), Apr. 6, 1978, 92 Stat. 189, provided that: "The amendment made by subsection (a) of this section [amending this section] shall take effect on the date of enactment of this Act [Apr. 6, 1978], except that, in the case of employees covered by a collective bargaining agreement which is in effect on September 1, 1977, which was entered into by a labor organization (as defined by section 6(d)(4) of the Fair Labor Standards Act of 1938 [section 206(d)(4) of this title]), and which would otherwise be prohibited by the amendment made by section 3(a) of this Act [amending section 631 of this title], the amendment made by subsection (a) of this section [amending this section] shall take effect upon the termination of such agreement or on January 1, 1980, whichever occurs first."

REGULATIONS

Pub. L. 101–433, title I, § 104, Oct. 16, 1990, 104 Stat. 981, provided that: "Notwithstanding section 9 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 628), the Equal Employment Opportunity Commission may issue such rules and regulations as the Commission may consider necessary or appropriate for carrying out this title [amending this section and section 630 of this title and enacting provisions set out as notes under this section and section 621 of this title], and the amendments made by this title, only after consultation with the Secretary of the Treasury and the Secretary of Labor."

CONSTRUCTION OF 1998 AMENDMENT

Pub. L. 105–244, title IX, § 941(c), Oct. 7, 1998, 112 Stat. 1835, provided that: "Nothing in the amendment made by subsection (a) [amending this section] shall affect the application of section 4 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623) with respect to—

"(1) any plan described in subsection (m) of section 4 of such Act (as added by subsection (a)), for any period prior to enactment of such Act [Dec. 15, 1967];

"(2) any plan not described in subsection (m) of section 4 of such Act (as added by subsection (a)); or

"(3) any employer other than an institution of higher education (as defined in section 101 of the Higher Education Act of 1965 [20 U.S.C. 1001])."

CONSTRUCTION OF 1996 AMENDMENT

Pub. L. 104–208, div. A, title I, § 101(a) [title I, § 119[1(c)]], Sept. 30, 1996, 110 Stat. 3009–24, provided that: "Nothing in the repeal, reenactment, and amendment made by subsections (a) and (b) [section 101(a) [title I, § 119[1(a), (b)]] of Pub. L. 104–208, amending this section and repealing provisions set out as a note under this section] shall be construed to make lawful the failure or refusal to hire, or the discharge of, an individual pursuant to a law that—

"(1) was enacted after March 3, 1983 and before the date of enactment of the Age Discrimination in Employment Amendments of 1996 [Sept. 30, 1996]; and

"(2) lowered the age of hiring or retirement, respectively, for firefighters or law enforcement officers that was in effect under applicable State or local law on March 3, 1983."

TRANSFER OF FUNCTIONS

Functions vested by this section in Secretary of Labor or Civil Service Commission transferred to Equal Employment Opportunity Commission by Reorg. Plan No. 1 of 1978, § 2, 43 F.R. 19807, 92 Stat. 3781, set out in the Appendix to Title 5, Government Organization and Employees, effective Jan. 1, 1979, as provided by section 1–101 of Ex. Ord. No. 12106, Dec. 28, 1978, 44 F.R. 1053.

STUDY AND GUIDELINES FOR PERFORMANCE TESTS

Pub. L. 104–208, div. A, title I, § 101(a) [title I, § 119[2]], Sept. 30, 1996, 110 Stat. 3009, 3009–24, required the Secretary of Health and Human Services to conduct a study on tests assessing the abilities important for the completion of public safety tasks performed by law enforcement officers and firefighters no later than 3 years after Sept. 30, 1996, and to develop and issue advisory guidelines based on the results of the study no later than 4 years after Sept. 30, 1996, and authorized appropriations.

§ 624. Study by Secretary of Labor; reports to President and Congress; scope of study; implementation of study; transmittal date of reports

(a)(1) The Secretary of Labor is directed to undertake an appropriate study of institutional and

(Pub. L. 90–202, § 8, Dec. 15, 1967, 81 Stat. 605; 1978 Reorg. Plan No. 1, § 2, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781.)

TRANSFER OF FUNCTIONS

"Equal Employment Opportunity Commission" and "Commission" substituted in text for "Secretary", meaning Secretary of Labor, pursuant to Reorg. Plan No. 1 of 1978, § 2, 43 F.R. 19807, 92 Stat. 3781, set out in the Appendix to Title 5, Government Organization and Employees, which transferred all functions vested by this section in Secretary of Labor to Equal Employment Opportunity Commission, effective Jan. 1, 1979, as provided by section 1–101 of Ex. Ord. No. 12106, Dec. 28, 1978, 44 F.R. 1053.

11 **§ 628. Rules and regulations; exemptions**

In accordance with the provisions of subchapter II of chapter 5 of title 5, the Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.

(Pub. L. 90–202, § 9, Dec. 15, 1967, 81 Stat. 605; 1978 Reorg. Plan No. 1, § 2, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781.)

TRANSFER OF FUNCTIONS

"Equal Employment Opportunity Commission" and "it" substituted in text for "Secretary of Labor" and "he", respectively, pursuant to Reorg. Plan No. 1 of 1978, § 2, 43 F.R. 19807, 92 Stat. 3781, set out in the Appendix to Title 5, Government Organization and Employees, which transferred all functions vested by this section in Secretary of Labor to Equal Employment Opportunity Commission, effective Jan. 1, 1979, as provided by section 1–101 of Ex. Ord. No. 12106, Dec. 28, 1978, 44 F.R. 1053.

§ 629. Criminal penalties

Whoever shall forcibly resist, oppose, impede, intimidate or interfere with a duly authorized representative of the Equal Employment Opportunity Commission while it is engaged in the performance of duties under this chapter shall be punished by a fine of not more than $500 or by imprisonment for not more than one year, or by both: *Provided, however*, That no person shall be imprisoned under this section except when there has been a prior conviction hereunder.

(Pub. L. 90–202, § 10, Dec. 15, 1967, 81 Stat. 605; 1978 Reorg. Plan No. 1, § 2, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781.)

TRANSFER OF FUNCTIONS

"Equal Employment Opportunity Commission" and "it" substituted in text for "Secretary", meaning Secretary of Labor, and "he", respectively, pursuant to Reorg. Plan No. 1 of 1978, § 2, 43 F.R. 19807, 92 Stat. 3781, set out in the Appendix to Title 5, Government Organization and Employees, which transferred all functions vested by this section in Secretary of Labor to Equal Employment Opportunity Commission, effective Jan. 1, 1979, as provided by section 1–101 of Ex. Ord. No. 12106, Dec. 28, 1978, 44 F.R. 1053.

12 **§ 630. Definitions**

For the purposes of this chapter—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C. 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C. 151 et seq.]; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in

an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term ''employee'' means an individual employed by any employer except that the term ''employee'' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term ''employee'' includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

(g) The term ''commerce'' means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term ''industry affecting commerce'' means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry ''affecting commerce'' within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. 401 et seq.].

(i) The term ''State'' includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C. 1331 et seq.].

(j) The term ''firefighter'' means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(k) The term ''law enforcement officer'' means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purpose of this subsection, ''detention'' includes the duties of employees assigned to guard individuals incarcerated in any penal institution.

(*l*) The term ''compensation, terms, conditions, or privileges of employment'' encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.

(Pub. L. 90–202, § 11, Dec. 15, 1967, 81 Stat. 605; Pub. L. 93–259, § 28(a)(1)–(4), Apr. 8, 1974, 88 Stat. 74; Pub. L. 98–459, title VIII, § 802(a), Oct. 9, 1984, 98 Stat. 1792; Pub. L. 99–592, § 4, Oct. 31, 1986, 100 Stat. 3343; Pub. L. 101–433, title I, § 102, Oct. 16, 1990, 104 Stat. 978.)

REFERENCES IN TEXT

The National Labor Relations Act, referred to in subsec. (e)(1), is act July 5, 1935, ch. 372, 49 Stat. 452, as amended, which is classified generally to subchapter II (§ 151 et seq.) of chapter 7 of this title. For complete classification of this Act to the Code, see section 167 of this title and Tables.

The Railway Labor Act, referred to in subsec. (e)(1), is act May 20, 1926, ch. 347, 44 Stat. 577, as amended, which is classified principally to chapter 8 (§ 151 et seq.) of Title 45, Railroads. For complete classification of this Act to the Code, see section 151 of Title 45 and Tables.

The Labor-Management Reporting and Disclosure Act of 1959, referred to in subsec. (h), is Pub. L. 86–257, Sept. 14, 1959, 73 Stat. 519, as amended, which is classified principally to chapter 11 (§ 401 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 401 of this title, and Tables.

For definition of Canal Zone, referred to in subsec. (i), see section 3602(b) of Title 22, Foreign Relations and Intercourse.

The Outer Continental Shelf Lands Act, referred to in subsec. (i), is act Aug. 7, 1953, ch. 345, 67 Stat. 462, as amended, which is classified generally to subchapter III (§ 1331 et seq.) of chapter 29 of Title 43, Public Lands. For complete classification of this Act to the Code, see Short Title note set out under section 1301 of Title 43 and Tables.

AMENDMENTS

1990—Subsec. (*l*). Pub. L. 101–433 added subsec. (*l*).

1986—Subsecs. (j), (k). Pub. L. 99–592 added subsecs. (j) and (k).

1984—Subsec. (f). Pub. L. 98–459 inserted provision defining ''employee'' as including any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

1974—Subsec. (b). Pub. L. 93–259, § 28(a)(1), (2), substituted in first sentence ''twenty'' for ''twenty-five'' and, in second sentence, defined term ''employer'' to include a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, and deleted text excluding from such term a State or political subdivision thereof.

Subsec. (c). Pub. L. 93–259, § 28(a)(3), struck out text excluding from term ''employment agency'' an agency of a State or political subdivision of a State, but including the United States Employment Service and the system of State and local employment services receiving Federal assistance.

Subsec. (f). Pub. L. 93–259, § 28(a)(4), excepted from the term ''employee'' elected public officials, persons chosen by such officials for such officials' personal staff, appointees on policymaking level, and immediate advisers with respect to exercise of constitutional or legal powers of the public office but excluded from such exemption employees subject to civil laws of a State government, governmental agency, or political subdivision.

EFFECTIVE DATE OF 1990 AMENDMENT

Amendment by Pub. L. 101–433 applicable only to any employee benefit established or modified on or after Oct. 16, 1990, and other conduct occurring more than 180 days after Oct. 16, 1990, except as otherwise provided, see section 105 of Pub. L. 101–433, set out as a note under section 623 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–592 effective Jan. 1, 1987, with certain exceptions, but not applicable with respect to any cause of action arising under this chapter as in effect before Jan. 1, 1987, see section 7 of Pub. L. 99–592, set out as an Effective and Termination Dates of 1986 Amendment note under section 623 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–459 effective Oct. 9, 1984, see section 803(a) of Pub. L. 98–459, set out as a note under section 3001 of Title 42, The Public Health and Welfare.

EFFECTIVE DATE OF 1974 AMENDMENT

Amendment by Pub. L. 93–259 effective May 1, 1974, see section 29(a) of Pub. L. 93–259, set out as a note under section 202 of this title.

TRANSFER OF FUNCTIONS

Functions vested by this section in Secretary of Labor or Civil Service Commission transferred to Equal Employment Opportunity Commission by Reorg. Plan No. 1 of 1978, § 2, 43 F.R. 19807, 92 Stat. 3781, set out in the Appendix to Title 5, Government Organization and Employees, effective Jan. 1, 1979, as provided by section 1–101 of Ex. Ord. No. 12106, Dec. 28, 1978, 44 F.R. 1053.

13

§ 631. Age limits

(a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

(b) Employees or applicants for employment in Federal Government

In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

(c) Bona fide executives or high policymakers

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

(Pub. L. 90–202, § 12, Dec. 15, 1967, 81 Stat. 607; Pub. L. 95–256, § 3(a), (b)(3), Apr. 6, 1978, 92 Stat. 189, 190; 1978 Reorg. Plan No. 1, § 2, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781; Pub. L. 98–459, title VIII, § 802(c)(1), Oct. 9, 1984, 98 Stat. 1792; Pub. L. 99–272, title IX, § 9201(b)(2), Apr. 7, 1986, 100 Stat. 171; Pub. L. 99–592, §§ 2(c), 6(a), Oct. 31, 1986, 100 Stat. 3342, 3344; Pub. L. 101–239, title VI, § 6202(b)(3)(C)(ii), Dec. 19, 1989, 103 Stat. 2233.)

AMENDMENTS

1989—Subsec. (a). Pub. L. 101–239 struck out "(except the provisions of section 623(g) of this title)" after "in this chapter".

1986—Subsec. (a). Pub. L. 99-592, § 2(c)(1), which directed that "but less than seventy years of age" be struck out was executed by striking out "but less than 70 years of age" after "40 years of age" as the probable intent of Congress.

Pub. L. 99-272 inserted "(except the provisions of section 623(g) of this title)" after "this chapter".

Subsec. (c)(1). Pub. L. 99–592, § 2(c)(2), which directed that "but not seventy years of age," be struck out was executed by striking out "but not 70 years of age," after "65 years of age" as the probable intent of Congress.

Subsec. (d). Pub. L. 99–592, § 6(a), (b), temporarily added subsec. (d) which read as follows: "Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 70 years of age, and who is serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at an institution of higher education (as defined by section 1141(a) of title 20)." See Effective and Termination Dates of 1986 Amendments note below.

1984—Subsec. (c)(1). Pub. L. 98–459 substituted "$44,000" for "$27,000".

1978—Pub. L. 95–256, § 3(a), designated existing provisions as subsec. (a), substituted "40 years of age but less than 70 years of age" for "forty years of age but less than sixty-five years of age", added subsecs. (b) and (c), and temporarily added subsec. (d). See Effective and Termination Dates of 1978 Amendment note below.

EFFECTIVE DATE OF 1989 AMENDMENT

Amendment by Pub. L. 101–239 applicable to items and services furnished after Dec. 19, 1989, see section 6202(b)(5) of Pub. L. 101–239, set out as a note under section 162 of Title 26, Internal Revenue Code.

EFFECTIVE AND TERMINATION DATES OF 1986 AMENDMENTS

Amendment by Pub. L. 99–592 effective Jan. 1, 1987, with certain exceptions, see section 7(a) of Pub. L. 99–592 set out as a note under section 623 of this title.

Pub. L. 99–592, § 6(b), Oct. 31, 1986, 100 Stat. 3344, provided that: "The amendment made by subsection (a) of this section [amending this section] is repealed December 31, 1993."

Amendment by Pub. L. 99–272 effective May 1, 1986, see section 9201(d)(2) of Pub. L. 99–272, set out as an Effective Date of 1986 Amendment note under section 1395p of Title 42, The Public Health and Welfare.

EFFECTIVE DATE OF 1984 AMENDMENT

Pub. L. 98–459, title VIII, § 802(c)(2), Oct. 9, 1984, 98 Stat. 1792, provided that: "The amendment made by paragraph (1) of this subsection [amending this section] shall not apply with respect to any individual who retires, or is compelled to retire, before the date of the enactment of this Act [Oct. 9, 1984]."

EFFECTIVE AND TERMINATION DATES OF 1978 AMENDMENT

Pub. L. 95–256, § 3(b), Apr. 6, 1978, 92 Stat. 190, provided that:

"(1) Sections 12(a), 12(c), and 12(d) of the Age Discrimination in Employment Act of 1967, as amended by subsection (a) of this section [subsecs. (a), (c), and (d) of this section] shall take effect on January 1, 1979.

"(2) Section 12(b) of such Act, as amended by subsection (a) of this section [subsec. (b) of this section], shall take effect on September 30, 1978.

"(3) Section 12(d) of such Act, as amended by subsection (a) of this section [enacting subsec. (d) of this section], is repealed on July 1, 1982."

TRANSFER OF FUNCTIONS

"Equal Employment Opportunity Commission" substituted for "Secretary", meaning Secretary of Labor, in subsec. (c)(2) pursuant to Reorg. Plan No. 1 of 1978, § 2, 43 F.R. 19807, 92 Stat. 3781, set out in the Appendix to Title 5, Government Organization and Employees, which transferred all functions vested by this section in Secretary of Labor to Equal Employment Opportunity Commis-

Appendix: Leung scenario & responses

46

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 credited in the acknowledgments. The editors have used the students' 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 an express license to use their work in this fashion. These student responses represent 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.

Link to book table of contents (PDF only)

46.1 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.[1]

1: For guidance about conventions of the email genre, see Chapter 28.

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 whether 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 4. 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.

46.2 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 4 (stating legal questions) and Chapter 28 (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.

46.3 Simple analyses

Here are two students' efforts to answer the question. You may wish to evaluate their responses according to the standards in Chapter 11 (on analysis generally), Chapter 14 (on writing simple analyses), and Chapter 28 (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

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 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. *Ronnigen* 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 *Ronnigen 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. *Ronnigen* 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 *Ronnigen*, 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. *Ronnigen* 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 *Ronnigen,* 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
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Appendix: Fair-use problem & student responses

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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.[1] 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 5.3 and in Section 20.1, starting at page 180.

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 47.1. 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 47.2.[2]

Link to book table of contents (PDF only)

1: These examples are keyed to concepts in other parts of this textbook. Chapter 14 regarding simple analysis, Chapter 15 regarding complex analysis, and Chapter 29 regarding the structure of office memos all refer to the examples in this appendix chapter using marginal markers like this one:

2: The students whose work appears here are among those credited in the acknowledgments. We 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 an express license to use their work in this fashion. These student responses represent good work for this stage of the students' careers, but none of them is perfect.

47.1 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.[3] 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.

3: You can get an introduction to the rule for fair use and how it works in Section 5.3 and in Section 20.1, starting at page 180.

Student 5's memo

Student 5's response to Phase I of the Sarah Connor problem begins on the next page. We 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.

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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.

QUESTION PRESENTED

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

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.

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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.

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.

[This section of the student's analysis removed to save space.]

* * *

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.]

* * *

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.

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.

47.2 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

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.

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.

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. 9

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. 10

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.

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.

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.

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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

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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.

QUESTION PRESENTED

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

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

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

5

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.

8

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.

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.

9

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: Extract from an example trial brief

48

Stephanie Rae Williams

48.1 Introduction to example

This imperfect sample contains work from many of Prof. Williams' students, who collaborated in class and through online peer review. Their assignment was to create one subsection of a CREAC trial brief argument analyzing many factors in a Fourth Amendment test.

This subsection is just one of several in the brief, and thus the roadmap explaining foundational rules on suppression and curtilage is not included. Additionally, the students used terms about *balancing* and *weighing* factors in the subsection because the roadmap outlined how courts use a multi-factor balancing test to decide suppression motions.

As you read this strong—but not completely polished—sample, think about what you like as well as what you would change to increase the reader's understanding.

48.2 Extract of sample trial brief

A. **THIS COURT SHOULD DENY SUPPRESSION BASED ON USE AND PRIVACY PROTECTION, BECAUSE MILLS OPENED HER LAND TO TRAVELERS AND DELIVERIES AND USED THE AREA FOR BUSINESS.**

This court should deny Mills' suppression motion. Curtilage only extends to areas residents actively protect from prying eyes, by eliminating deliveries and erecting barriers which ensure privacy, and where residents use the land for intimate, domestic activities, like marital relations or laundry. *See Dunn*, 480 U.S. at 301; *United States v. Diehl*, 276 F.3d 32, 37 (1st Cir. 2002); *United States v. Brown*, 510 F.3d 57, 66 (1st Cir. 2007). In *Brown*, police arrested a resident on the driveway of his family compound, adjacent to his garage motor-repair business. The resident invited shop patrons to drop off and pick up motors at the garage, although the family had some "foliage" hiding the garage from the street. *Brown*, 510 F.3d at 62, 66. In *Dunn*, agents crossed several post-and-wire fences to enter a ranch, heard a motor, smelled chemicals, and "peered into" a barn serving as "phenylacetone laboratory." 480 U.S. at 297, 302, 304. Contrastingly, in *Diehl*, agents stood near a remote forest clearing used as a "crude camp" by residents who went outside to play games, hang laundry, urinate, and "repair to a bench for marital intimate times." 276 F.3d at 35, 37. The *Diehl* residents constructed a long, dirt driveway with a "dogleg turn" and "No Trespassing" signs at

Detailed rule phrased in the client's favor.

Facts from the cases, with points best for the client first, as part of the rule explanation.

both ends, had mail and parcels delivered elsewhere, and asked neighbors to "respect their privacy." *Id.* at 34, 35, 37.

Brown stressed that the residents "clearly failed to protect privacy" by "inviting" the public onto the property, and also reasoned the family's failure to "erect[] barriers beyond" some foliage, or "post[] signs" balanced the protection factor against curtilage, noting that "public viewing" of the area must be "very infrequent." 510 F.3d at 65-66. *Dunn* found the odor and noise "significant" evidence that the barn use was not "associated with" the "privacies of domestic life" needed for curtilage, and reasoned the ranch fences only "corral[led] livestock" and did not "prevent persons from observing what lay inside." 480 U.S. at 302-03. Given what the court called the "ample evidence of domestic" and even "intimate" use, the *Diehl* court balanced the use factor for curtilage, and similarly found the protection factor favored curtilage as residents created a "locus as free from observation as one could conceive" through the remote location, driveway "far from public view," signs, and acts to stop deliveries and visitors. 276 F.3d at 39, 40-41. Thus, courts do not balance the factors of privacy protection or use for curtilage when facing open, unprotected areas residents use for business, especially if the residents fail to protect their privacy by either allowing public access and deliveries or by failing to erect "no trespassing" signs or opaque barriers.

Multiple sentences explaining the courts' reasoning and holdings, putting the most important points for the client first. Note that some writers combine the facts, holding, and reasoning of each case in the same sentence or connected sentences for their CREAC rule explanations. Others avoid this approach. Follow your house style and focus on most effectively explaining how the court(s) used the facts and the law. Elsewhere in this text, we discuss using local rules and the *house style* of your office—the format requirements your supervisors require or prefer—to format your documents, including trial briefs. See, e.g., Section 15.6, Section 15.7, and Section 34.6.

Summary sentence for the CRE/CE of CREAC, including the synthesized rule.

Under the *Brown*, *Dunn*, and *Diehl* reasoning stressing the lack of curtilage in unprotected areas used for business, this Court should balance use and privacy protection against curtilage and deny suppression. Just like the resident in *Brown*, who invited patrons onto the driveway for a motor-repair garage business and used only limited foliage for cover, with no signs or other barriers, and like the *Dunn* ranchers whose fences only "corral[led] livestock," Mills left her root cellar and path open to public view from visitors to the home asking for directions or to Amazon drivers. In fact, in contrast to the *Diehl* residents' acts to hide their crude camp behind its remote, forest cover and down the long, turning drive that had "No trespassing" signs, Mills placed only a "PRIVATE PROPERTY: DO NOT PICK THE APPLES" sign at her straight drive, and installed no foliage or barriers at the path or root cellar. Moreover, Mills kept a business desk, shredder, and boxes in the root cellar, like the *Dunn* ranchers who had drug-making business equipment in their barn, and in contrast to *Diehl*, where inhabitants used the clearing for games, laundry, toileting, and sexual relations.

Topic sentence to start the A/AC of CREAC, mentioning the result for the client.

Side-by-side comparisons with specific facts, in the order best for the client, applying the factors from the point headings.

Under the *Brown* reasoning that the residents failed to protect privacy by "inviting" the public and not erecting barriers beyond limited foliage, and the *Dunn* Court's stress on the way privacy barriers must truly hide an area, the protection factor balances for the Government because Mills allowed visitors and deliveries, left her root-cellar door open to passersby, and used foliage only in the tree ring, and not to protect the driveway or view of the cellar from the path or home. In the language of *Dunn*, Mills did little to "prevent persons observing what lay inside." Additionally, under the language and reasoning of *Diehl* and *Brown* that residents must limit public view and access, here, Mills did not create a "locus free from observation by passersby" when she allowed deliveries and "people [to] occasionally

Many sentences applying the courts' reasoning (as quoted/explained in the E part of this CREAC) to the client's facts (as highlighted in the side-by-side comparisons), using quotes and details from the cases to show precise application of the law to the facts.

drop by" for directions, in easy view of the cellar. Mills also allowed what these courts called "public viewing" more often than "very infrequent[ly]." Under the reasoning of *Diehl* and *Brown* on the need for residents to erect clear "no trespassing" signs, Mills' one sign prohibiting apple pickers did not "discourage public entry." Applying the *Dunn* and *Diehl* reasoning and holdings on only protecting domestic use, this Court should find Mills' acts allowing public access show she used the root cellar for business, and did not "so associate[]" the cellar with any "privacies of domestic life" to make it part of her home. While the fact that the Mills' children play in the cellar area shows some domestic activity, this court should use the reasoning of *Dunn*, where the Court balanced against curtilage where the barn had both domestic use, like livestock fences, and also business use as a drug lab.

Note how the author has capitalized the word 'court' in some places and not in others. Consult Section 44.12 to determine what the correct capitalization should be.

Mills argues the limited visibility of the home from the road shows privacy protection should balance for curtilage. However, using the ideas from *Brown*, where the fact that foliage hid the garage from the street did not overcome the resident's act of allowing patrons onto the land to shop, Mills' failure to hide the drive or the area in question from visitors who were able to enter from the street makes the protection factor balance for the Government. Consequently, this Court should balance the factors of protection and use against curtilage and deny Mills' motion, because Mills did not protect the path or cellar from prying eyes, and instead allowed deliveries and visitors while using the root cellar for business.

CREAC counter, addressing a strong point for the other side but not the opponent's strongest points, which are already addressed directly and from our client's view as part of the application above.

Final conclusion sentence with specifics.

49 Appendix: Example of a simple contract

49.1 Introduction to example

This example of a simple contract is adapted from an actual consulting agreement template used by Summit County, Colorado. Some provisions have been modified or omitted for pedagogical purposes. Pelican Point Consulting is not a real company, and Sheila Broflovski and Remy Delacroix are not real people. There are frequent notes here that refer to Chapter 24, which discusses the applicable kinds of contract provisions in more detail. Information in blue boxes in the example contract are annotations from the editors.

49.2 Example contract

Agreement title. See Chapter 24 at page 207 for discussion.

CONSULTING SERVICES AGREEMENT

Exordium. See Chapter 24 at page 207 for discussion.

THIS CONSULTING SERVICES AGREEMENT (The "Agreement") is entered into on June 28, 2024, by and between the Board of County Commissioners of Summit County, Colorado, having its principal place of business at 208 Lincoln Avenue, Breckenridge, Colorado, 80424 ("County") and Pelican Point Consulting Services, Inc., having its principal place of business at 1546 Professional Way, Belle Glade, Florida, 33430 ("Consultant"). County and Consultant are each a "Party" and collectively the "Parties."

Recitals. See Chapter 24 at page 207 for discussion.

WHEREAS, the County desires to contract with Consultant to perform in accordance with terms of this Agreement; and

WHEREAS, Consultant desires to perform certain services for Summit County Government, on an independent contractor basis as set forth in this Agreement;

Words of agreement. See Chapter 24 at page 207 for discussion.

NOW THEREFORE, in consideration of the mutual promises made herein, the receipt and sufficiency of which are hereby acknowledged, the County and Consultant further agree as follows:

These words of agreement are written in an archaic style. A more modern contract might replace this paragraph with 'The Parties hereby agree as follows.'

This section has the *central obligations*. See Chapter 24 at page 207 for discussion. "Services" is an example of a definition of a term on its first use. See Chapter 24 at page 207 for discussion. For a discussion of the reference to Schedule "A" here, see Chapter 24 at page 208.

1. Services. Consultant shall perform the following services (the "Services") in a timely, expeditious and professional manner: Consulting Services in accordance with all applicable provisions of the Consultant's Proposal dated May 15, 2024, which is attached as Schedule "A" and incorporated

herein by this reference. In the event of any conflicts between the Agreement and any of the terms of the attached Schedule, the terms of this Agreement shall prevail.

Consultant represents and warrants that it possesses sufficient equipment and material to satisfactorily perform the Services. Consultant shall perform all Services under this Agreement using Consultant's own equipment at Consultant's own place of business, and at hours and times as determined by Consultant. Consultant is engaged in providing these types of services for persons or entities other than the County, and County will not require Consultant to provide services exclusively to the County during the term of this Agreement.

Representations and warranties. See Chapter 24 at page 210 for discussion.

2. Compensation. For satisfactory performance of the Services, County shall pay Consultant $208,500. County shall not make any payments until such time as County accepts Consultant's performance as satisfactory. All payments under this contract shall be to the trade or business name of the Consultant. County shall not make payment to an individual under this contract.

A *covenant* and *payment term*. See Chapter 24 at page 209 for discussion.

The body of the agreement starts with the core obligations: the Consultant will perform Services, and the County will pay the Consultant.

A. Invoices. The Consultant shall submit invoices on or before the fifth day of each month, describing the Services performed and expenses incurred pursuant to this Agreement. County's Procurement Manager shall review invoices and submit them to the Summit County Finance Department for payment upon Procurement Manager's approval. Invoices shall provide detail of Consultant's performance of Services sufficient to the County's requirements. Upon request, Consultant shall provide documentation of its expenses. County shall pay such expenses within twenty-five (25) days following the receipt thereof.

This is an example of an ambiguous term. Is the County obligated to pay the expenses within 25 days of receipt of the invoice, or within 25 days of receipt of the documentation? And what if payment is made exactly on the twenty-fifth day? Is that "within" twenty-five days? A careful reader of the contract will flag this term for revision to eliminate these ambiguities.

B. Fund Availability/Annual Appropriation. Payment pursuant to this Agreement, whether in whole or in part, is subject to and contingent upon the continuing availability of County funds for purposes hereof. In the event that said funds, or any part thereof, become unavailable as determined by the County, the County may immediately terminate this Agreement or amend it accordingly.

A *condition* giving rise to a right to terminate. See Chapter 24 at page 212 for discussion.

C. Multi-Year Contracts. The obligations of the County hereunder shall not constitute a general obligation indebtedness

or multiple-year direct or indirect debt or other financial obligation whatsoever within the meaning of the Constitution or laws of the State of Colorado.

3. Term. The term of this Agreement shall be from July 1, 2024 to December 31, 2024. The Agreement may be terminated earlier by final completion of the Services by the Consultant and acceptance of and payment for the Services by the County or through the termination provisions provided herein.

4. Termination. Consultant may terminate this Agreement at any time by giving the County written notice of not less than sixty (60) days. County may terminate this Agreement at any time in the event that Consultant violates the terms of this Agreement or fails to produce a result that meets the specifications of this Agreement. In the event of termination, County will pay Consultant for all work performed up to the date of termination.

This paragraph provides a *right* belonging to Consultant. See Chapter 24 at page 209 and page 209 for discussion.

Another *condition*. See Chapter 24 at page 211 for discussion.

This term gives both parties the *right* to terminate the agreement (under certain conditions), but only specifies a *method* of termination for one party (the Consultant). A careful reader would flag this term for revision to ensure that the County's method of termination is also specified.

5. Relationship. Consultant is an independent Consultant and is not an employee, agent or servant of the County, nor is Consultant entitled to County employment benefits. CONSULTANT UNDERSTANDS AND AGREES THAT CONSULTANT IS NOT ENTITLED TO WORKERS' COMPENSATION BENEFITS AND THAT CONSULTANT IS OBLIGATED TO PAY FEDERAL AND STATE INCOME TAX ON ANY MONEYS EARNED PURSUANT TO THIS CONTRACT. As an independent Consultant, Consultant agrees that:

A *declaration*. See Chapter 24 at page 210 for discussion.

This disclosure is required by Colorado Revised Statute section 8-40-202. Subsection (IV) requires that this language be included "in type which is larger than the other provisions in the document or in bold-faced or underlined type," which is why the drafter chose to use all caps for this sentence. If the drafter did not carefully read the statute and follow its instructions, the County could be liable for paying workers' compensation benefits to the Contractor or its employees.

A. Consultant does not have the authority to act for the County, or to bind the County in any respect whatsoever, or to incur any debts or liabilities in the name of or on behalf of the County; and

Another *declaration*. See Chapter 24 at page 210 for discussion.

B. Consultant has and hereby retains control of and supervision over the performance of Consultant's obligations hereunder and control over any persons employed or contracted by Consultant for performing the Services hereunder; and

C. County shall not provide training or instruction to Consultant or any of its employees regarding the performance of Services hereunder; and

A *prohibition*. See Chapter 24 at page 210 for discussion.

D. Neither Consultant, nor its employees or Consultants, shall receive benefits of any kind from the County. Consultant represents and warrants that it is engaged in providing similar services to the general public and acknowledges it is not required to work exclusively for the County; and

E. All Services are to be performed solely at the risk of the Consultant and Consultant shall take all precautions necessary for the proper performance thereof; and

F. Consultant shall not combine its business operations in any way with the County's business operations and each Party shall maintain their operations as separate and distinct.

Another *prohibition*. See Chapter 24 at page 210 for discussion.

6. Change in the Work. County may order changes in the work and services detailed in this Agreement, consisting of additions, deletions, or modifications. All changes shall be authorized by a written Change Order designating the work to be added, changed, or deleted, the increase or decrease in costs, and any change in time for completion of the project. Consultant and County, or their duly authorized agents, shall sign the Change Order. Unless otherwise agreed, the cost of changes to the County for a change in work shall be determined by mutual agreement and paid according to the terms of the Change Order.

A *right* belonging to the County. See Chapter 24 at page 209 for discussion.

7. Consultant Responsibilities. In addition to all other obligations contained herein, Consultant shall:

A. Furnish all tools, labor and supplies in such quantities and of the proper quality to professionally and timely perform the Services; and

B. Proceed with diligence and promptness and hereby warrants that such Services shall be performed in accordance with the highest professional workmanship and service standards in the field to the satisfaction of the County; and

C. Comply, at its own expense, with the provisions of all state, local and federal laws, regulations, ordinances, requirements and codes which are applicable to the performance of the Services hereunder or to Consultant as employer.

D. Require its sub-consultants or sub-contractors to comply, at their own expense, with the provisions of all state, local and federal laws, regulations, ordinances, requirements and codes which are applicable to the performance of the Services hereunder or to sub-consultant as an employer, including maintenance of standard Workers' Compensation as required by law in the State of Colorado.

A *warranty of good quality*. Contrast it with representations and warranties generally, above at page 457. See Chapter 24 at page 212 and page 210 for discussion.

8. Work Quality. The Consultant warrants to the County that all services provided will be of good quality, in conformance with the highest standards of the profession and in conformance with this Agreement.

9. Work Product. Any data, reports, drawings, documents or other things or information provided by the County to the Consultant during the performance of services under this Agreement and any reports, drawings or other writings required under the services of this Agreement shall be and remain the sole property of the County at all times. The Consultant shall return or provide to the County such documents, etc., by the completion date and before full payment of the compensation herein.

Each time this provision talks about what's protected, it uses a different list of items. This could cause confusion and result in some items not being protected under this section. The drafter could have avoided this potential ambiguity by using a defined term.

An *insurance and indemnification clause*. See Chapter 24 at page 212 for discussion.

10. Indemnification and Insurance. Consultant shall indemnify and hold harmless the County from and against all claims, damages, losses, and expenses arising out of or resulting from acts or omissions of the Consultant, Consultant's sub-Consultants or otherwise arising out of the performance of services by Consultant. On or before the seventh day after execution of this Agreement, Consultant shall provide the County with certificates of insurance evidencing the types and amounts of insurance specified below:

> **A.** Standard Workers' Compensation as required by law in the State of Colorado; and
>
> **B.** Comprehensive General Liability Insurance for operations and contractual liability adequate to cover the liability assumed hereunder with limits of not less than $350,000 on account of any one person and $990,000 for each occurrence of property damage and personal injury; and
>
> **C.** Automobile Liability insurance in those instances where Consultant uses an automobile, regardless of ownership, for the performance of the Services. Consultant shall carry insurance, written on the comprehensive automobile form insuring all owned and non- owned automobiles with limits of not less than $100,000 (bodily injury per person), $300,000 (each accident) and $50,000 (property damage).

A *condition providing for immediate termination*. See Chapter 24 at page 212 for discussion.

Contractor shall not reduce insurance coverage below the limits described above or cancel insurance coverage without County's written approval of such reduction or cancellation. Reduction, cancellation or termination of insurance coverage, or failure to obtain insurance coverage, without the County's written approval constitutes a material breach of the Agreement and shall automatically terminate the Agreement. Consultant shall require that any of its agents or sub-consultants who enter upon the County's premises shall maintain like insurance. Consultant shall provide certificates

of such insurance of agents and sub-consultants to the County upon request. With regard to all insurance, such insurance shall:

A. Be primary insurance to the full limits of liability herein before stated and, should County have other valid insurance, County insurance shall be excess insurance only; and

B. Not cancelled without thirty (30) days prior written notice to the County.

11. Notice. Any notice to be given hereunder by either party to the other shall be in writing and shall be deemed given when sent by certified mail.

A. Notices to the County shall be addressed to:

Sheila Broflovski, County Manager

Summit County Government

P.O. Box 68 Breckenridge, CO 80424

B. Notices to the Consultant shall be addressed to:

Remy Delacroix, Chief Operating Officer

Pelican Point Consulting Services, Inc.

1546 Professional Way, Belle Glade, FL 33430

If either party changes its address during the term herein, it shall so advise the other party in writing and any notice thereafter shall be sent by certified mail to such new address.

Another *covenant*. See Chapter 24 at page 209 for discussion.

12. Third Parties. This Agreement does not and shall not be deemed to confer upon any third party any right to claim damages to bring suit, or other proceeding against either the County or Consultant because of any term contained in this Agreement.

An example of *boilerplate* or an *administrative term*. See Chapter 24 at page 208 for discussion.

13. Assignment. This Agreement is for services predicated upon Consultant's special abilities or knowledge, and Consultant shall not assign this Agreement in whole or in part without prior written consent of the County.

14. Entire Agreement. This Agreement constitutes the entire agreement and understanding between the Parties and supersedes any prior agreement or understanding relating to the subject matter of this Agreement.

15. Modification. This Agreement may be modified or amended only by a duly authorized written instrument executed by the Parties.

16. Severability. If any of the provisions of this Agreement shall be invalid or unenforceable, such invalidity or unenforceability shall not invalidate or render unenforceable the entire Agreement, but rather the entire Agreement shall be construed as if not containing the invalid or unenforceable provision or provisions, and the rights and obligations of the party shall be construed and enforced accordingly, to effectuate the essential intent and purposes of this Agreement.

17. Enforcement and Waiver. The failure of either Party in any one or more instances to insist upon strict performance of any of the terms and provisions of this Agreement, shall not be construed as a waiver of the right to assert any such terms and provisions on any future occasion or damages caused thereby.

18. Nonexclusive Nature. This Agreement does not grant Consultant an exclusive privilege or right to supply services to the County. County makes no representations or warranties as to a minimum or maximum procurement of Services hereunder.

This section determines *choice of law* and *venue*. See Chapter 24 at page 212 for discussion.

19. Interpretation. The validity, interpretation and effect of this Agreement shall be determined under Colorado law. All actions arising directly or indirectly as a result or in consequence of this Agreement shall be instituted and litigated only in courts having situs in Summit County, Colorado.

20. Governmental Immunity. The County does not intend to waive by any provision of this Agreement the monetary limits or any other rights, immunities and protections provided by the Colorado Governmental Immunity Act, Section 24-10-101, et seq., C.R.S., or any other provision of law.

Testimonium. See Chapter 24 at page 208 for discussion.

IN WITNESS WHEREOF, the parties have caused their duly authorized representatives to sign this CONSULTING SERVICES AGREEMENT as of the date first written above.

Sheila Broflovski
County Manager
Summit County,
Colorado

Remy Delacroix
Chief Operating
Officer
Pelican Point
Consulting Services,
Inc.

Typically, the named parties' signatures would appear on blank lines just above their names here. In the contemporary context, this contract might well be signed electronically, with one party preparing a final PDF file and sending it to the other through a third-party service such as DocuSign or Adobe Sign. The third party circulates this reference copy of the agreement and records a signing event by each party on it. It then circulates the fully signed version to all parties, showing the date and time that each signed it and certifying that none of them altered the document.

On the next page is Schedule "A," an *ancillary document*. See Chapter 24 at page 208 for discussion.

SCHEDULE A

Summit County 2040 Comprehensive Plan Scope of Services

Approved by Summit County Board of Commissioners on May 15, 2023

Pelican Point Consulting Services, Inc. will provide the following services related to the Summit County 2040 Comprehensive Plan. All documents will meet the minimum standards for comprehensive plans as required by the State of Colorado.

Task 1: Vision, Goals and Objectives

Process	Deliverables
Kick-off meetings with staff and commissions	Approved public engagement plan
Public Engagement Plan	Updated Community Context chapter
Public kick-off and visioning session	Draft vision statement and goals
Data collection and analysis	
Analysis of growth projections	
Baseline mapping	
Review and summary of existing plans and studies	
Develop and deploy online public engagement site	

Task 2: Public Engagement

Process	Deliverables
Implementation of approved Public Engagement Plan	Meeting materials and agendas
Meetings, outreach and surveys scheduled throughout the planning process	Report of public engagement results
Work with County staff, Planning Commission, Community Engagement Commission and other community resources to engage residents	Monthly debriefings on Community Engagement with staff and Planning Commissioners

Task 3: Land Use and Resilience

Process	Deliverables
Evaluation of MetCouncil forecasts	Land Use Chapter
Identification of vacant and underutilized sites	Future Land Use Map
Assessment of planning districts	Resilience Chapter
Development of future land use scenarios	
Land Use goals and policies	
Future land use plan	

Task 4: Housing and Neighborhoods

Process	Deliverables
Land Use districts and tools to meet MetCouncil affordable housing allocation	Strategic Housing Plan
Assessment of housing and demographic data to identify “gaps” in housing stock	
Strategies to provide for life-cycle housing	

Task 5: Implementation

Process	Deliverables
Development of an implementation matrix	Implementation chapter with implementation matrix and analysis of potential funding opportunities
Funding opportunities associated with implementation action	

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 table of contents (PDF only)

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

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).

trustee of Paul's trust. The plaintiffs appeal 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

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).

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 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

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."

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 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).

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- 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 asserts that she made these sacrifices in reliance on Paul's promise that he would give her the restaurant.

8: During her final year at Ballards, her income was increased to $500 per week.

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

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."

her position. We need not reach this issue because plaintiffs failed to prove their claim by clear and convincing evidence.

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* 51

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 table of contents (PDF only)

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 opinion begins 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 matter and released this opinion 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.

The previous 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 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]

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).

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]

*234*234* As society changes over time, the common law must also evolve:

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).

> 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]

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).

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:

10: Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L.Rev. 193 (1890).

> 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]

11: *Id.* at 193.

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]

12: *Id.* at 203-10.

13: *Id.* at 213, n.1.

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]

14: 122 Ga. 190, 50 S.E. 68 (1905).

15: *Id.* 50 S.E. at 69-70.

16: *Id.* at 70.

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.

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 *Defamation*, LII—Legal Information Institute, https://perma.cc/7FU7-8C43, last visited May 26, 2025. 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 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*

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.

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).

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]

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).

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.

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.

52 Appendix: Opinion in *Ronnigen v. Hertogs*

Link to book table of contents (PDF only)

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 46. The other two are *Togstad v. Vesely, Otto, Miller & Keefe*, which appears as Appendix Chapter 53, and *In re Paul W. Abbott Co., Inc.*, 767 N.W.2d 14 (Minn. 2009), which is available on Google Scholar, Westlaw, etc.

Ronnigen v. Hertogs

This court opinion is copied from Google Scholar, https://perma.cc/6PXD-B72Z. We 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. Our 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.

Marshall B. Ronnigen, Appellant,

v.

Samuel H. Hertogs, Respondent.

199 N.W.2d 420 (1972)

Supreme Court of Minnesota.

June 30, 1972.

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 issued this decision 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.

Here begins page 421 in the print reporter.

*421 Heard before KNUTSON, C. J., and ROGOSHESKE, KELLY, and MASON, JJ.

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 18.2 on page 159 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 attorney-client 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 488 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 textbook. 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 53, 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*

53

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 46. The first was *Ronnigen v. Hertogs*, which appears as Appendix Chapter 52 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 table of contents (PDF only)

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.

*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 clamp to the left

1: An aneurism is a weakness or softening in an artery wall which expands and bulges out over a period of years. [Ed. note: The court spelled 'aneurism' this way, though the more common contemporary spelling is 'aneurysm.']

2: The left internal carotid artery is one of the major vessels which supplies blood to the brain.

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]

3: Bucholz, who knew Miller through a local luncheon club, died prior to the trial of the instant action.

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 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 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.

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).

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 52, 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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