



# **Legal Writing Handbook for Clinical Students**

**NAN L. HAYNES**



# Legal Writing Handbook for Clinical Students

Nan L. Haynes

Professor Emerita

University at Buffalo School of Law

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*This book is dedicated to my late husband, Richard Haynes,  
a newspaper editor who taught me much about writing and editing.*

*I will always love you.*

## Introduction

This handbook is for upper-level students enrolled in a clinic who are expected to draft legal memorandums, briefs, and pleadings with minimal supervision. It should also help law students enrolled in an externship since they, too, are expected to draft legal documents with little supervision. Each chapter focuses on a single writing skill. The exercises and examples consistently and cogently employ the techniques and devices advocated in the book.

Through my teaching experience, I developed a firm understanding of the most common legal writing challenges for first-year and upper-level students. I taught first-year legal writing for ten years, followed by five years teaching advanced legal writing. Every semester I taught 1Ls, I noted the skills that most students struggle with. I did the same at the end of every semester I taught advanced legal writing. After comparing the two sets of notes, I could see the common weaknesses in students' legal analysis and writing. And I identified the skills most 1Ls learn, but do not retain as upper-level students.

I retired in 2017 but returned to the classroom as a volunteer writing instructor and supervising attorney in my school's Civil Rights and Transparency Clinic in 2021. I also taught the clinic students writing and analysis review classes. I developed teaching materials in that role based on what I learned as a legal writing professor. My idea for this handbook grew from this experience.

A fundamental principle in clinical pedagogy is learning by doing. Clinics often structure case assignments, work responsibility, and supervision to allow student attorneys to serve as the "first chair" or primary attorney on the case. Translating this into teaching legal writing is challenging. On the one hand, students need specific, directive feedback on their legal writing—from where to start to how to organize a brief to whether they have adequately addressed the issue. On the other hand, clinicians seek learning materials, like legal writing textbooks, which empower students to do as much as possible on their own. In a form of inductive learning, clinicians seek to help students learn not simply to follow templates but to extrapolate principles from examples and then apply them to their legal writing. This handbook incorporates these pedagogical principles to maximize student learning in the clinical context.

I hope this simple and concise handbook fills an existing gap in the literature. It builds on existing legal writing textbooks by focusing on practical legal writing techniques for clinic students.

Chapters 1-3 are about how to organize written legal analysis and argument. They are relevant to students writing objective inter-office memos, client letters, and persuasive briefs. Chapters 4-6 are about how to turn objective analysis into a persuasive argument. Chapter 7 is about headings, and Chapter 8 is about issue statements (for objective writing) and questions presented (for persuasive writing). By identifying and effectively writing headings, and issue statements or questions presented, writers learn to succinctly state the law that governs an issue, the legally significant facts the law is applied to, the conclusions the writer wants the reader to adopt, and the reasons why the reader should adopt those conclusions.

Chapters 9 and 10 are about effectively identifying and writing a client's story. Chapter 9 will help you find a theme for that story, while Chapter 10 will help you write the story credibly and persuasively. Chapter 11 is about reducing your word count and making your text more interesting for your busy reader. The final chapter is a primer on writing complaints and answers.

Most of the examples and exercises are based on my work as an attorney representing plaintiffs in toxic exposure and civil rights claims. I hope you enjoy and learn from them.

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## Editor's Notes:

Citations to New York case law are in New York Law Reports Style Manual form.

Citations to federal case law are in Bluebook form.

Footnotes are highlighted in either blue or yellow. Footnotes with citations to authority are highlighted in blue. Footnotes explaining the purpose of sentences in examples are highlighted in yellow.

This book was originally authored as a web-based, interactive learning experience. Exercises in this print version include links to the website for this handbook. At the book's website you will find interactive exercises and answers to all the questions. No code is needed to work through the exercises online.

## About the Author

Nan Haynes is an emeritus State University at Buffalo Law School professor, who taught legal writing for 15 years. She is also a retired attorney who represented plaintiffs in civil rights and toxic torts claims. If you have questions about the content of this book, you are invited to send her an email to [nlhaynes@buffalo.edu](mailto:nlhaynes@buffalo.edu).

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## Introduction to Chapters 1-3 - Organization and Reasoning

Chapters 1-3 focus on THE effective organization of legal analysis and argument, which is essential to effective legal writing. As a 1L, you probably learned that the analysis or argument of a single issue follows an organizational form called CREAC, IRAC or something similar. Whatever acronym you learned, the structure is the same. The only difference might be the terms you used.

You probably also learned to include both rule-based reasoning (the application of a single rule to facts) and reasoning by analogy (since two situations are parallel, the first should yield the same outcome as the second) in your CREAC. As a result, you might have a hard time distinguishing legal analysis based on the application of a rule to a set of facts and those based on reasoning by analogy. The result is analysis or argument that is incomplete and poorly organized.

It is important to understand that analysis and argument based on rule application, and those based on analogy are separate and distinct, even though you may have learned about them together as components of CREAC, IRAC or something similar. So, Chapter 1 is solely about how to write an analysis or argument based rule-based reasoning, and Chapter 2 is solely about how to write analysis or argument reasoning by analogy.

As explained in Chapter 1, except for purely legal analysis or argument such as the meaning of a rule, every objective analysis and argument is rule-based, that is the application of a rule to facts. So, when analyzing a legal issue or making a legal argument, you must apply the rule that governs to the relevant facts.

In contrast, as explained in Chapter 2, legal analysis and argument based on reasoning by analogy is usually, but not always necessary. When legal writers forget this and rely solely on analogies rather than rule application the resulting product is an unfocused series of case illustrations, which are of little or no use.

Chapter 3 is about umbrella paragraphs, which organize single legal issues analysis and arguments that are divided into sub-parts. Add an umbrella paragraph or paragraphs to introduce your reader to any analysis or argument that is divided into sub-points.

Chapters 1-3 apply to both objective analysis and legal argument because the organization of a legal issue is essentially the same, whether it be objective analysis or argument.

## Chapter 1 - A Single Argument using Rule-based Reasoning

### Learning Outcomes

1. Understand that every legal analysis or argument is simply the application of a rule to facts.
2. Be able to
  - Explain a rule using key terms;
  - Ground a rule in binding authority; and
  - Apply the rule's key terms to the facts of your case.

**Citations to New York case law are in New York Law Reports Style Manual form.**

**Citations to federal case law are in Bluebook form.**

Except for purely legal arguments, such as the meaning of a rule, every objective analysis and persuasive argument is rule-based, that is the application of a rule to facts. So, when analyzing a legal issue or making a legal argument, you must apply the rule that governs an issue to the relevant facts raised by the issue. Legal writers apply rules to facts when they write objective memos, persuasive briefs, client letters, and draft pleadings. Often novice legal writers have a hard time distinguishing legal arguments based on the application of a rule to a set of facts and those based on reasoning by analogy. The result is arguments that are incomplete and poorly organized. It is important to understand that arguments based on rule application and those based on analogy are separate and distinct, even though you may have learned about them together as components of the organizational framework you learned about in your legal writing class.

While all legal analysis and argument relies on rule-based reasoning, as explained in Chapter 2, arguments based on reasoning by analogy are usually, but not always necessary. When legal writers forget this and rely solely on analogies rather than rule application, the resulting product is an unfocused series of case illustrations, which are of little or no use.

As a 1L you learned that when analyzing or arguing a single issue, you should follow an organizational form called CRAC, CREAC, or IRAC, or something similar. Whatever acronym you learned, the structure is essentially the same. Except that IRAC teaches to begin with "issue" while CREAC and CRAC teach to begin with "conclusion." In clinical writing, it is better to begin with your conclusion since legal readers want to know your conclusion before reading your analysis or argument. In contrast, when taking an exam, your professor may prefer you begin with "issue."

CREAC is small-scale organization or the organization of a single issue governed by a single rule. In contrast is large-scale organization, which is the structure of a broad argument that is governed by more than one rule. In this book, I write only about small-scale or single legal arguments

To ensure we begin on the same page, here is an illustration of where within large-scale organization the single legal arguments are placed. The single arguments are:

**I. THERE ARE QUESTIONS OF FACT ABOUT THE DEFENDANT DRIVER’S NEGLIGENCE BECAUSE HE BREACHED HIS DUTY OF REASONABLE CARE AND THE BREACH CAUSED THE PLAINTIFF PEDESTRIAN TO SUFFER SIGNIFICANT INJURY**

A. The Defendant Driver Breached His Duty of Care when he Drove at the Unreasonable Speed of Forty-Five MPH in a Thirty MPH Zone

**CREAC Here, and**

B. The Defendant Driver Caused the Plaintiff to Suffer a Serious Injury Because She Sustained Multiple Herniated Disks When the Defendant Driver Struck Her with His Vehicle

**CREAC Here**

The foundation of legal reasoning is simply the application of a rule to facts. A rule states “if a certain condition exists, then a certain legal condition results.”<sup>1</sup> Or if A, then B. In the example above, each of the two single arguments are about one element of negligence: sub-point A is about duty, and sub-point B is about injury. The rule that governs argument sub-point A is “if a plaintiff shows a defendant acted unreasonably, the plaintiff establishes the defendant breached their duty.” The rule that governs sub-point B is “if a plaintiff establishes a defendant caused the plaintiff to suffer serious injury, the plaintiff establishes the injury element of negligence.”

Keep in mind that a single legal argument is the application of a specific rule to a set of facts. Lawyers do this when they set out the law and apply them to the facts of the case. Thus, at its simplest, a single legal argument is the application of a rule to the relevant facts (a RAC). Here is a complete legal argument:

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<sup>1</sup> See, Mary Beth Beasley, *A Practical Guide to Appellate Advocacy*, p.65 (Aspen Publishing, 2d ed. 2006).

**Rule** - If a driver travels in excess of 30 mph on Delaware Avenue, he is in violation of N.Y. V&T Law sec. xx.

**Application** - Joe was driving his car at a rate of 45 mph on Delaware Avenue when he was stopped by a police officer.

**Conclusion** - Thus, Joe was in violation of N.Y. V&T Law sec. xx when he drove on Delaware Avenue.

You can use this type of simple rule application when you write a brief or memo. In addition, you might use it when you write a client letter. For example, if you write to a client explaining why you will or will not pursue a claim on their behalf, you will include the rule and then apply it to the facts of your client's case. Here is a sample client letter with a single legal argument:

---

Dear Joe:

I write to follow up on our July 8<sup>th</sup> meeting.

On March 11, 2022, you were issued a ticket for speeding on Delaware Avenue. More specifically, you are charged with driving at 45-mph in a 30-mph zone. You want to challenge the charge because you already have three speeding violations on your license, and your insurance company will not renew your policy should you get a fourth violation.

I strongly suggest we enter into a plea negotiation with the town prosecutor. She will probably agree to reduce the charge to a non-moving violation, since the town can keep in its coffers any money it collects from you as a result of a non-moving violation. In contrast, the state keeps money collected for a speeding conviction.

If we ask for a trial to contest the ticket, you will lose because the speed limit on Delaware Avenue is 30-mph, and police radar shows you were traveling at 45-mph. Thus, you were in violation of N.Y. V&T Law sec. xx.<sup>2</sup> Please let me know how you wish to proceed before our scheduled court appearance on August 22.

Signature

---

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<sup>2</sup> Paragraph 3 is simple rule application.

---

Most legal issues are based on rules that, unlike N.Y. V&T Law sec. xx, include vague or ambiguous terms. When writing a brief or memo, you will usually need to expand the simple rule, application, conclusion by (1) adding an explanation of the key terms that define the rule and (2) then applying the same key terms to the facts of your case. These steps let the reader know the meaning of your rule and why the facts do or do not satisfy it.

Generally, the rule must be explained or defined through its key terms before it is applied, so RAC becomes REAC. And since legal readers want to know the conclusion to an argument at the beginning, they begin with a conclusion (C). Put it all together, and you have CREAC. This is rule-based reasoning.

Here is a chart of the organization of a single legal argument based solely on rule-based reasoning:

---

**C** - initial conclusion

**R** - the element/rule at issue (“if a certain condition exists, then a certain legal condition results.”)<sup>3</sup>

**E** – rule explained through key terms

**A** - Apply the key phrases from the rule explanation in the same order that they appear in the rule explanation

**C** - final conclusion

---

Here is an annotated CREAC rule-based argument (key terms, which you will read about later in this chapter are highlighted for illustrative purposes only). It is an excerpt from a brief in opposition to summary judgment submitted by a prisoner plaintiff in a civil rights claim. In Chapter 2, you will find this same annotated CREAC, with reasoning by analogy (the subject of Chapter 2) added.

References to R indicate where the writer would cite to a page in the record to support a factual statement.

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<sup>3</sup> See, Mary Beth Beasley, *A Practical Guide to Appellate Advocacy*, p.65 (Aspen Publishing, 2d ed. 2006)

The evidence before this Court raises genuine issues of material fact as to whether the defendant guard knew that the plaintiff prisoner was at a substantial risk of serious harm.<sup>4</sup>

**Prison officials meet the knowledge prong of a deliberate indifference claim when they are subjectively aware of a substantial risk of serious harm to prisoners**<sup>5</sup> *Farmer v. Brennan*, 511 U.S. 825, at 837. Although an official “must be aware of facts from which **the inference** could be drawn that a substantial risk of serious harm exists, and he must also draw the inference,” a claimant can demonstrate that an official had knowledge if a risk is obvious. *Id.*, at 837, 844. **An obvious risk** can be shown by evidence that prison assaults were “**longstanding, pervasive, well-documented**, or expressly noted by prison officials” because these circumstances suggest an official must have known. *Id.*, at 842-43.<sup>6</sup>

Whether a prison official is subjectively aware of a substantial risk of serious harm “is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence.” *Id.*, at 842. Advance notice is not necessary to establish knowledge if a prisoner falls into a **victim prone category**. *Id.*, at 843; *Corbett v. Kelly*, No. 97-CV-0682 E, 2000 WL 1335749, at \*4 (W.D.N.Y. Sept. 13, 2000). Thus, a prison official may be put on notice that a prisoner faces a substantial risk of serious harm if there is a **similar history of violence** at the prison.<sup>7</sup> One circumstance that can give rise to knowledge of an obvious risk is if there are classes of **victim-prone** prisoners whom officials know are more susceptible to attack. See *Farmer*, 511 U.S. at 843.

Looking at the evidence in the light most favorable to Fox raises the **inference** that Rath knew that Fox was at a **substantial risk of serious harm** for two reasons. One, Rath knew that as a convicted sex offender Fox was **victim prone**. After all, Rath admitted he knew that the DOJ found sex offenders at the Holding Center were targeted, and he knew that Fox was a convicted sex offender. **(R.30)**.

Two, Rath knew about Ball’s **well-documented history of violent** behavior towards sex offenders and Rath knew Ball was a security risk ordered to stay away from other prisoners. Ball had a **well-documented history** of violent offenses on his intake sheet, including an assault on a convicted sex offender at the Holding Center. **(R.29)**. Because Ball had assaulted another prisoner earlier in the same day he assaulted Fox, he was classified as a security risk and ordered not to comingle with other prisoners **(R.53, 55)**. Rath heard Ball threaten that prisoner hours before he assaulted Fox. And Rath admitted he had read both Ball’s Intake Sheet and the order that classified Ball as a security risk. **(R.29, 53, 56)**.<sup>8</sup> Ball calling Fox a “pervert” as he beat him to death all serve as a factual basis from which a jury could rationally infer that Rath was on notice that Fox faced a substantial risk of harm.<sup>9</sup>

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<sup>4</sup> This is the initial conclusion.

<sup>5</sup> This is the rule.

<sup>6</sup> Rule explanation with key phrases highlighted for display only.

<sup>7</sup> More rule explanation.

<sup>8</sup> More rule application here.

<sup>9</sup> This is rule application. Key phrases from the rule are applied to the facts of the case before the court.



These facts would allow a jury to draw the reasonable inference that Rath knew Fox was at risk of harm. Thus, there are questions of fact about whether Rath knew Fox was at risk of harm.<sup>10</sup>

## Exercise 1-1 | Question 1

**Question 1:** What's wrong with the **rule** in this argument?

**Conclusion** - Joe exclaimed that “the light was red” immediately after the motor vehicle accident. His statement should be admitted as an exception to the hearsay rule.

**Rule** - A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused, is an excited utterance, which is not excluded as hearsay. Fed. R. Evid. 803(2)

**Application** - Joe’s statement that “the light was red” is an excited utterance.

**Conclusion** - Therefore, Joe’s statement is an exception to the hearsay rule.

*An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=24#h5p-1>*

## Exercise 1-1 | Question 2

**Question 2:** Here is the same argument with an explanation of the rule. This argument is better, but still incomplete because... (choose from the options that follow).

**Conclusion** - Joe exclaimed that “the light was red” immediately after the motor vehicle accident. His statement should be admitted as an exception to the hearsay rule.

**Rule** - A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused, is an excited utterance, which is not excluded as hearsay. Fed. R. Evid. 803(2).

**Rule explained through “key terms” (in bold)** - Hearsay evidence is generally excluded. Fed. R. Evid. 802. In contrast, an excited utterance is not excluded by the rule against hearsay. Fed. R. Evid. 803(2). The basis for this hearsay exception is the belief that a **statement made under stress is likely to be trustworthy** and unlikely to be premeditated falsehoods. Thus, to qualify, the statement must be **spontaneously made** by the person while still under the stress of excitement from the event or condition. CITE. The subject **matter and content of the statement must "relate to" the event or condition**. CITE. The statement could be a **description or explanation or an opinion or inference**. CITE.

<sup>10</sup> Final conclusion.

**Application** - Joe’s statement that “the light was red” is an excited utterance.

**Conclusion** - Since Joe’s statement that “the light was red” is an excited utterance, it should be admitted into evidence.

*An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=24#h5p-2>*

### Exercise 1-1 | Question 3 – Putting it all together

**Putting it all together:** Here is the same argument with application of its key terms, which is a complete legal argument.

Note that the writer applies the key terms in the same order as they appear in the rule explanation. This general writing concept is called "parallel structure" and helps the reader follow your argument.

*An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=24#h5p-3>*

### Exercise 1-2 | Question 1

**Question 1:** What’s wrong with the rule in this argument?

**Conclusion** - Immediately after the assault, the plaintiff prisoner shouted that “[Defendant] C.O. Smith had it out for me for years.” His statement should be admitted as an exception to the hearsay rule.

**Rule** - A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused, is not excluded as hearsay. Fed. R. Evid. 803(2).

**Application** - The prisoner’s statement that “[Defendant] C.O. Smith had it out for me for years” is an excited utterance.

**Conclusion** - Therefore, the prisoner’s statement is an exception to the hearsay rule.

*An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=24#h5p-4>*

## Exercise 1-2 | Question 2

**Question 2:** Here is the same argument with the rule explained. This argument is better, but still incomplete because the writer does not apply the rule to the facts using the rule's key terms. In the box provided below, rewrite the application applying the rule's key terms. [The box appears in the online version of the book's question, linked below.]

**Conclusion** - Immediately after the assault that resulted in the plaintiff prisoner's broken nose, the prisoner shouted that "[Defendant] C.O. Smith had it out for me for years." His statement should be admitted as an exception to the hearsay rule.

**Rule** - A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused, is an excited utterance, which is not excluded as hearsay. Fed. R. Evid. 803(2).

**Rule explained through "key terms" (in bold)** - Hearsay evidence is generally excluded. Fed. R. Evid. 802. In contrast, an excited utterance is not excluded by the rule against hearsay. Fed. R. Evid. 803(2). The basis for this hearsay exception is the belief that a **statement made under stress is likely to be trustworthy** and unlikely to be premeditated falsehoods. Thus, to qualify the statement must be **spontaneously made** by the person while still under the stress of excitement from the event or condition. CITE. The subject **matter and content of the statement must "relate to" the event or condition**. CITE. The statement could be a **description or explanation or an opinion or inference**. CITE.

**Application** - The prisoner's statement that "[Defendant] C.O. Smith had it out for me for years" is an excited utterance.

**Conclusion** - Since the prisoner's statement that "[Defendant] C.O. Smith had it out for me for years" is an excited utterance, it should be admitted into evidence.

*An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=24#h5p-5>*

## How to Explain a Rule

A rule explanation should consist of the rule’s “key terms,”<sup>11</sup> which are the words or phrases at the heart of the controversy regarding how the rule applies. You will find the key terms in case law, where courts explain rules.

The facts of your case determine the key terms of your rule explanation. Use your explanation to identify the key terms a court would likely consider when analyzing the particular issue you write about. Keep your rule explanation as brief as possible, including further discussion of key terms only to the extent it is necessary for the reader to understand the nature of the law as it relates to the facts of your case. Judges are busy and want to know about the law only to the extent they need to determine the outcome of your case.

### Exercise 1-3 | Question

**Question:** Assume your client Chaplin was injured when his vehicle was struck by a vehicle that had suddenly crossed over into his lane of traffic, and the police accident report concludes the cross-over was the sole cause of the collision. You determined the controlling case law is Caristo v. Sanzone, 96 N.Y.2d 172, 174 (2001), and Gouchie v. Gill, 198 A.D.2d 862, 862 (4th Dept. 1993), which follow. Find the key terms from the case law and write a rule explanation in the space provided that follows.

**Editor’s Note:** The “space provided” appears in the online version of the book’s question, linked below, and follows the two cases.]

*An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=24#h5p-6>*

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<sup>11</sup> See, Mary Beth Beasley, *A Practical Guide to Appellate Advocacy*, p.69 (Aspen Publishing, 2d ed. 2006).

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Antoinette Caristo et al., Appellants

v.

Augustine Sanzone et al., Respondents

96 N.Y.2d 172, 750 N.E.2d 36, 726 N.Y.S.2d 334, 2001 N.Y. Slip Op. 02891

Court of Appeals of New York

22

Argued February 6, 2001

Decided April 3, 2001

#### OPINION OF THE COURT

Graffeo, J.

The issue in this motor vehicle accident negligence case is whether the trial court erred in charging the jury on the emergency doctrine. Under the facts presented, we conclude that defendants were not entitled to this instruction.

At approximately 9:00 A.M. on the morning of the accident, defendant Augustine Sanzone was driving a vehicle owned by his wife, defendant Patricia Cinquemani, on Foster Road in Staten Island. At the same time, plaintiff Antoinette Caristo was operating her automobile on Woodrow Road. Foster Road terminated at a “T” intersection with Woodrow Road, and a stop sign controlled the flow of traffic from Foster Road onto Woodrow Road.

At trial, Sanzone testified that the weather conditions at 7:00 A.M. that day consisted of snow, rain and freezing rain. This mixed precipitation was unchanged when he and his family left their home at approximately 8:30 A.M. By the time he drove to Foster Road, the weather had worsened. He described the conditions as “more like frozen rain and hail at the time.” The temperature that morning was established, by stipulation of the parties, at 22 degrees Fahrenheit.

After cresting an incline on Foster Road, Sanzone proceeded downhill toward the Woodrow Road intersection, traveling at 20 to 25 miles per hour. At this juncture, his vehicle began to slide and he noticed there was “a sheet of ice” on the hill. Despite Sanzone's effort to pump the brakes, the vehicle slid 175 to 200 feet, past the stop sign and into Woodrow Road. As plaintiff approached the intersection at 15 to 20 miles per hour and saw defendants' vehicle, she attempted to swerve to avoid a collision, but was unsuccessful. Both Cinquemani and the police officer who responded to the scene of the accident confirmed the icy conditions on Foster Road.

Neither plaintiff nor Sanzone experienced difficulty controlling their vehicles prior to this incident.

Over plaintiff's objection, the trial court charged the jury on the emergency doctrine. The jury returned a verdict in favor of defendants and the trial court entered a judgment dismissing plaintiff's complaint. The Appellate Division affirmed the judgment, with two Justices dissenting (274 AD2d 406). Plaintiff now appeals as a matter of right.

More than a century ago, this Court first considered the reasonableness of an actor's conduct when confronted with a sudden emergency situation (see, Wynn v Central Park, N. & E. Riv. R. Co., 133 NY 575). Since then, we have articulated and applied the common-law emergency doctrine which "recognizes that when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context" (Rivera v New York City Tr. Auth., 77 NY2d 322, 327), provided the actor has not created the emergency.

The rationale for this doctrine--the need to instruct a jury that it may consider the reasonableness of a party's conduct in light of the unexpected emergency confronting that person--has been somewhat eroded by the evolution from contributory negligence to comparative negligence. With the advent of the ability of juries to allocate fault and apportion damages, the viability of the doctrine has been questioned by some jurisdictions, with a few states going so far as to abolish it (see generally, Annotation, Modern Status Of Sudden Emergency Doctrine, 10 ALR5th 680).

In New York, in addition to the elements of the charge, we have defined the role of the Trial Judge in assessing the propriety of an emergency charge request. We require the \*175 Judge to make the threshold determination that there is some reasonable view of the evidence supporting the occurrence of a "qualifying emergency" (Rivera v New York City Tr. Auth., supra, 77 NY2d, at 327). Only then is a jury instructed to consider whether a defendant was faced with a sudden and unforeseen emergency not of the actor's own making and, if so, whether defendant's response to the situation was that of a reasonably prudent person (see, PJI 2:14 [3d ed]). The emergency instruction is, therefore, properly charged where the evidence supports a finding that the party requesting the charge was confronted by "a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration" (Rivera v New York City Tr. Auth., supra, 77 NY2d, at 327; Kuci v Manhattan & Bronx Surface Tr. Operating Auth., 88 NY2d 923, 924; see also, Restatement [Second] of Torts § 296).

Here, even considering the evidence in a light most favorable to defendant (see, Kuci v Manhattan & Bronx Surface Tr. Operating Auth., supra, 88 NY2d, at 924), we hold as a matter of law that there was no qualifying event which justified issuance of the emergency instruction. Given Sanzone's admitted knowledge of the worsening weather conditions, the presence of ice on the hill cannot be deemed a sudden and unexpected emergency. Although Sanzone did not encounter patches of ice on the roadways before losing control of his vehicle, at the time of the

accident the temperature was well below freezing and it had been snowing, raining and hailing for at least two hours. As such, there was no reasonable view of the evidence that would lead to the conclusion that the ice and slippery road conditions on the Foster Road slope were sudden and unforeseen. Defendants were not, therefore, entitled to an emergency instruction and the charge to the jury constituted reversible error under these circumstances.

The dissent contrasts our holding here with Ferrer v. Harris (55 NY2d 285), where we concluded defendant was entitled to an emergency doctrine charge. Ferrer is clearly distinguishable in that defendant was confronted by an unanticipated event when a four-year old child ran in front of his vehicle from between two parked cars. The qualifying emergency--a child darting from a sidewalk into street traffic--is simply not analogous to the presence of ice and slippery conditions following at least two hours of inclement weather with temperatures well below freezing. \*176

Accordingly, the order of the Appellate Division should be reversed, with costs, and a new trial ordered.

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David A. Gouchie, Respondent

v.

Robert Gill et al., Respondents, and Robert F. Cook, Appellant

198 A.D.2d 862, 605 N.Y.S.2d 709 (1993)

Nov. 19, 1993 · New York Supreme Court, Appellate Division

**Opinion:**

Order unanimously reversed on the law with costs, motion granted and complaint dismissed.

**Memorandum:**

Supreme Court erred in denying defendant Robert F. Cook's (defendant) motion for summary judgment dismissing plaintiffs' complaints. A driver in his proper lane of travel is not required to anticipate that a car going in the opposite direction will cross over into that lane (see, Palmer v Palmer, 31 AD2d 876, 877, *affd* 27 NY2d 945; Gooch v Shapiro, 7 AD2d 307, *affd* 8 NY2d 1088). The failure of a driver, not otherwise negligent, who encounters such a car, "to avert the consequence[s] of such an emergency can seldom be considered negligent" (Breckir v Lewis, 21 AD2d 546, 549, *affd sub nom. Breckir v Pleibel*, 15 NY2d 1027, citing Meyer v Whisnant, 307 NY 369). A driver faced with a vehicle careening across the highway directly into his path "is not liable for [his] failure to exercise the best judgment or for any error[s] of judgment on [his] part" (Wolfson v Darnell, 15 AD2d 516, 517, *affd in part and dismissed in part* 12 NY2d 819).

Once a defendant establishes that a head-on collision was caused by plaintiff's crossing over into defendant's lane of travel, defendant has established "a complete defense to plaintiff's action" (Eisenbach v Rogers, 158 AD2d 792, 793, *lv denied* 79 NY2d 752; see also, Morowitz v Naughton, 150 AD2d 536, 537). It then becomes "incumbent upon plaintiff to submit evidence in admissible form to create an \*863 issue of fact as to [defendant's] negligence contributing to the happening of the accident" (Eisenbach v Rogers, *supra*, at 793).

Defendant's proof concerning the manner in which the accident occurred was sufficient to establish a complete defense to plaintiffs' actions. Plaintiffs, on the other hand, failed to raise a triable issue of fact concerning possible negligence of the defendant that might have contributed to the accident. Even considering two statements of defendant, which were not in admissible form (see, Zuckerman v City of New York, 49 NY2d 557, 563), we conclude that plaintiffs offered no evidence to suggest that defendant could have done something to avoid the collision (see, Eisenbach v Rogers, *supra*, at 793; Morowitz v Naughton, *supra*, at 537; see also, Viegas v Esposito, 135 AD2d 708, 709, *lv denied* 72 NY2d 801). (Appeal from Order of Supreme Court, Erie County, Wolfgang, J. — Summary Judgment.) Present — Callahan, J. P., Pine, Balio, Doerr and Boomer, JJ.

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Except for the key terms, avoid over reliance on the court's actual language, which can result in an awkward series of quotes. For concise rule explanations, use ellipses (Bluebook R. 5.3), and minimize the use of block quotations.

## Ground your Rule Explanation in Binding Authority

You should base any argument on binding authority. So when a key term is based on persuasive authority only, you should ground it by linking the term to binding authority. In the hierarchy of authority statutory text from the jurisdiction you write to is always binding. So, the first "key term" or proposition that explains the rule may come from statutory text, while those that follow may provide interpretations of this text offered by persuasive courts that have been called on to apply the statutory text.

In the following example, the writer wants to show that the moving party has the burden to show good cause for the issuance of a protective order. But the writer's authority, In re Terrorists Attacks on September 11, 2001, 454 F. Supp. 2d 220, 221-22 (S.D.N.Y.) is persuasive only because it is a trial level court. Thus, the writer grounds the rule in binding authority (Fed. R. Civ. P. 26(c)), and links that authority to the rule the writer applies.

A court may, only for good cause shown, grant a protective order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c). But it is the burden of the party seeking a protective order to "show that good cause exists of the issuance of that order." In re Terrorists Attacks on September 11, 2001, 454 F. Supp. 2d 220, 221-22 (S.D.N.Y.).



You may also ground a rule with a citation to a higher court in your jurisdiction. Thus, when writing to a federal trial level court, you can ground your rule in an opinion from the court of appeals that governs the trial court. In the following example, the writer wants to show that allegations of a painful foot do not meet the standard for a prisoner's claim of failure to provide medical care. But the writer's authority, Chatin v. Artuz, is persuasive only because it is a trial level court. Thus, the writer grounds it with a cite to the court of appeals that governs the trial court and links that authority to the rule the writer applies.

A medical condition is objectively considered “serious” if it is a “condition of urgency” that may result in “degeneration” or “extreme pain.” Hathaway v. Coughlin, 99 F.3d 550, 553 (2d Cir. 1996). In contrast, subjective complaints of pain are not sufficient to satisfy this standard. Chatin v. Artuz, No.95 Civ. 7994, 1999 WL 587885 at \*3 (S.D.N.Y. 1999). (“[The plaintiff’s] alleged problems in his right foot may indeed be very real. His pain is not, however, of the type contemplated for satisfaction of the objective standard”).

### Exercise 1-4 | Question 1

**Question 1:** Assume you are writing to a district court in the Third Circuit. Which of these rules is grounded?

*An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=24#h5p-7>*

### Exercise 1-4 | Question 2

**Question 2:** Assume you are writing to a district court in the Third Circuit, and want to ground this rule: “Ordinarily, good cause exists ‘when a party shows that disclosure will result in a clearly defined, specific and serious injury.’” In re Terrorist Attacks on September 11, 2001, 454 F. Supp. 2d 220, 221-22 (S.D.N.Y. 2006). Read the excerpt from the Terrorist Attacks opinion in the box below and find binding authority to ground the rule. Then, in the space provided, enter the binding authority to ground the rule.

The specificity required in a showing of good cause varies with the scope and complexity of a case. Ordinarily, good cause exists “when a party shows that disclosure will result in a clearly defined, specific and serious injury.” Shingara v. Skiles, 420 F.3d 301, 306 (3d Cir. 2005); see also Havens v. Metro. Life Ins. Co., No. 94 Civ. 1402 (CSH), 1995 WL 254710 at \*11 (S.D.N.Y. 1995) (“[D]efendant fails to specify the nature or extent of injury [that] it contemplates release of the sealed documents would bring about, and accordingly fails to establish good cause”). But see Topo v. Dhir, 210 F.R.D. 76, 77–78 (S.D.N.Y.2002) (holding that while the “specificity requirement” of the good cause standard applies to companies, it does not apply to private individuals). In cases of unusual scope and complexity, however, broad protection during the pretrial stages of litigation may be warranted without a highly particularized finding of good cause. See In re Agent Orange, 821 F.2d at 148. Instead, a court may impose an initial protective order based upon a general showing of good cause, and may

modify that order at a later time if more specific grounds for its continuance remain indiscernible. *Id.* (Explaining that although the district court made no finding of good cause, the court “properly entered the [protective] orders initially as temporary measures, and properly lifted them thereafter.”)

*An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=24#h5p-8>*

You can ground a rule when you don't have something directly on point through inductive reasoning, which is a method of drawing conclusions by going from the specific to the general. For example, assume you respond to a motion to dismiss a civil rights claim against a local police department based on the defendant's argument that your failure to name the individual officer involved is fatal to the federal civil rights claim. You want to explain that to prevail a plaintiff need not sue the individual government employee. You find authority that is directly on point, but you are writing to the Ninth Circuit Court of Appeals, and your only authority is from the Second Circuit Court of Appeals.

Through your research on the issue you find that the United States Supreme Court held that local governments can be liable only for constitutional harms that are directly attributable to the local entity itself, which includes liability when municipal organization's failure to train, or the policies or customs that it has sanctioned, led to an independent constitutional violation. Thus, local governments are not liable under a theory of respondeat superior for the unconstitutional acts of its employees. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). To ground your key term, you begin with *Monell*, and then cite to the Second Circuit opinion. Your rule explanation would then be:

Local governments can be liable only for constitutional harms that are directly attributable to the local entity itself, which includes liability when municipal organization's failure to train, or the policies or customs that it has sanctioned, led to an independent constitutional violation. Thus, local governments are not liable under a theory of respondeat superior for the unconstitutional acts of its employees. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). However, to prevail a plaintiff need not sue the individual government employees, but may proceed solely against the municipality. *Askins v. Doe No. 1*, 727 F.3d 248 (2d Cir. 2013).

## Applying the Rule

Legal writers apply the rule to the facts of their case after they have explained a rule through key terms. They do this by applying the key terms that explain the rule to the facts of the case. To help your reader follow the argument, apply the key terms in the same order they are introduced in the rule explanation.

## Exercise 1-5 | Question

**Question:** In the text below, first find the key terms in the rule explanation, then find where they are applied. In the space that follows, enter the key terms you found.

A property owner has a common-law duty to inspect, repair and maintain exterior and common areas of his leased space. Wynn v. T.R.I.P. Redevelopment Associates, 296 A.D.2d 1767 (3d Dept. 2002). So, questions regarding a defendant’s knowledge of the presence of chipping and peeling paint on the exterior of a leased space may not be resolved on summary judgment. Id. (noting that “[b]ecause defendants had a common-law obligation to inspect and maintain the non-leased portions of the building, a jury may find that they were aware or should have been aware of the ... paint condition in the common areas as described by plaintiff’s testimony – credited by Court for purposes of defendants’ summary judgment motion”). Therefore, when attempting to defeat a notice-based summary judgment motion, a plaintiff can satisfy the third Chapman factor by producing evidence that demonstrates the presence of chipping or peeling paint on the exterior or common areas of his leased space. Id.

The evidence before this Court raises a question of fact about whether the property owner was aware or should have been aware of presence of chipping paint on the exterior of 60 New Amsterdam. During her deposition, plaintiff’s mother testified that paint chips were present “everywhere” on the exterior first floor front porch. See, Joy Affidavit at *Exhibit D*, pp. 85. Plaintiff’s mother linked the paint chips’ origin to the exterior poles and columns. See id. at 86. Additionally, during his own deposition, Defendant explained that he “could not remember” whether peeling or chipping paint was present on the exterior but did admit to visiting the common areas at least twice per month during the course of plaintiff’s tenancy. See, Joy Affidavit at *Exhibit C*, pp. 30.

*An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=24#h5p-9>*

## Exercise 1-6 | Question

**Question:** What is wrong with this rule application?

The principle that a citizen may bring an Article 78 proceeding to enforce a public interest has been a fundamental tenet of New York common law since at least the middle of the nineteenth century. The New York Court of Appeals found that when a county treasurer refused to issue a warrant for tax collection, “a proceeding by mandamus is the proper remedy, and may be instituted by any citizen having a common interest in the collection of the tax.” People v. Halsey, 37 N.Y. 344 (1867).

The Court of Appeals reaffirmed the principle in the middle of the twentieth century, stating “the erroneous appointments ought to be open to attack by the petitioners, because as citizens and taxpayers they are entitled to an opportunity to insist upon the construction which this court placed upon the civil service article of the State Constitution.” Cash v. Bates, 301

N.Y. 258, 261 (1950). This Department has cited Cash for the proposition that, “Any citizen may maintain a mandamus proceeding to compel a public officer to do his duty.” Albert Elia Bldg. Co. v. N.Y.S. Urban Dev. Corp., 54 A.D.2d 337, 341 (4th Dept. 1976).

The Petitioners in the instant action are Erie County citizens, residents, and taxpayers. While not required to establish standing, as members of the now-disbanded Erie County Community Corrections Advisory Board, they have both a public interest and a particular interest in maintaining standards at the county jails. In that regard, they are like every person in Erie County; as Petitioners’ counsel stated in oral argument before the lower court, there is a public interest to ensure that the Sheriff perform his duty to report:

Every single one of us...at some point has a risk of some family member or possibly our self or someone else we care about ending up in [the Holding Center]. Every single one of us had an interest in that facility being run and organized in a way that provides everyone who’s in it with due process, with the protections that they are entitled to under the New York and Federal Constitution with a safe and secure place, including the people who work there. And part of the procedure that the State of New York had determined need to be in place to ensure that we all have a safe jail are the procedures that require reporting of incidents. (R. 17-18).

*An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=24#h5p-10>*

Now that you completed this chapter you should understand that nearly all legal analysis and argument is based on the application of a rule to facts. And you should know how to analyze or argue a single legal issue by finding the rule's key terms and applying them to facts.

In the next chapter, you will read about why and how you might add reasoning by analogy to your analysis or argument.

## Chapter 2 - Rule-based Reasoning, with Analogy-based Reasoning Added

### Learning Outcomes

1. Be able to explain when and how to add reasoning by analogy to your analysis.
2. Be able to
  - Write parenthetical rule illustrations;
  - Write in-text rule illustrations; and
  - Write analogies.

### When and Why to Add Rule Illustrations and Analogy-based Reasoning

While all legal analysis and argument relies on rule-based reasoning, you may want to add reasoning by analogy when you write a brief or objective memo in order to help your reader understand a key term. You may also include reasoning by analogy when you write a client letter if you think your client might not understand or accept your conclusion in its absence. Generally, pleadings do not include reasoning by analogy.

There are two reasons why you might add a rule illustration. The first is that rule-based reasoning has a shortcoming, because humans do not think effectively in terms of abstract principles, rather we are better able to understand principles when they are expressed in the form of stories.<sup>12</sup> So legal writers clarify rules by taking the key terms and through precedent showing how those terms have been applied to real life situations. These are the same key terms writers then apply to the facts of the case before the court in the application.

The other reason legal writers add rule illustrations is to set up reasoning by analogy. When writers make an analogy between the facts of precedent and the facts of their case, they argue that since the two situations are parallel the reasoning that decided the first should yield the same result applied to the second. This is reasoning by analogy.

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<sup>1212</sup> Michael R. Smith, *Advanced Legal Writing*, pp. 38-9 (Wolters Kluwer, 3rd ed. 2008).

Here is the organization of a legal argument with rule illustrations and reasoning by analogy added:

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C

**R** - The element or rule at issue (“if a certain condition exists, then a certain legal condition results.”<sup>13</sup>)

E

- Rule explanation through key terms
- Rule clarified with rule illustrations

A

- Apply the key terms from the rule cluster
- And add analogies to in text rule illustration cases to argue the court should find the result in your case is the same as the rule illustration case

C

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**Here is a rule-based legal argument with reasoning by analogy added. It is an excerpt from a brief in opposition to summary judgment filed by a prisoner plaintiff in a civil rights claim (references to R indicate that the writer would cite to a page in the record to support a factual statement):**

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The evidence before this Court raises genuine issues of material fact as to whether the defendant guard knew that the plaintiff prisoner was at a substantial risk of serious harm.<sup>14</sup>

**Prison officials meet the knowledge prong of a deliberate indifference claim when they are subjectively aware of a substantial risk of serious harm to prisoners.**<sup>15</sup> *Farmer*, 511 U.S. at 837. Although an official “must both be aware of facts from which **the inference** could be drawn that a substantial risk of serious harm exists, and he must also draw the inference,” a claimant can demonstrate that an official had knowledge if a risk is obvious. *Id.* at 837. **An obvious risk** can be shown by evidence that prison assaults were “**longstanding, pervasive, well-documented**, or

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<sup>13</sup> See, Mary Beth Beasley, *A Practical Guide to Appellate Advocacy*, p.65 (Aspen Publishing, 2d ed. 2006).

<sup>14</sup> This is the initial conclusion.

<sup>15</sup> This is the rule with the key terms highlighted for display purposes only.

expressly noted by prison officials” because these circumstances suggest an official must have known. *Id.* at 842-43.<sup>16</sup>

Whether a prison official is subjectively aware of a substantial risk of serious harm “is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence.” *Id.* at 842. Advance notice is not necessary to establish knowledge if a prisoner falls into a victim prone category. *Id.* at 843; *Corbett v. Kelly*, No. 97-CV-0682 E, 2000 WL 1335749, at \*4 (W.D.N.Y. Sept. 13, 2000). Thus, a prison official may be put on notice that a prisoner faces a substantial risk of serious harm if there is a **similar history of violence** at the prison.<sup>17</sup>

Plaintiffs that fit into a **unique class of prisoners** known to be **victim prone** raise the inference that prison officials must have known they were at a substantial risk of serious harm, even if advance notice was never given. See *Farmer*, 511 U.S. at 843. In *Farmer*, the petitioner prisoner, a transsexual who possessed feminine characteristics, was incarcerated, and allowed to be in the general population at a penitentiary with a history of violence. *Id.* at 829-30. Within weeks, the prisoner was beaten and raped by another inmate. *Id.* at 830. Finding questions of fact, the Supreme Court reversed the lower court’s dismissal on summary judgment despite the fact that the prisoner failed to notify prison officials of a risk of harm, holding that “the failure to make advance notice is not dispositive,” when an inmate’s victim prone status may have made the prison officials subjectively aware of a risk of harm. *Id.* at 849,<sup>18</sup> see also *Corbett*, 2000 WL 1335749, at \*4-5 (finding a genuine issue of fact about whether prison officials knew a prisoner identified in intake sheet as “victim prone” was at substantial risk of harm).<sup>19</sup>

Looking at the evidence in the light most favorable to Fox raises the **inference** Rath knew that Fox was at a **substantial risk of serious harm** for two reasons. First, Rath knew that Ball posed a risk to Fox. And two, Rath knew that as a convicted sex offender Fox was **victim prone**.

Rath knew about Ball’s **longstanding well-documented history of violent** behavior towards sex offenders and he knew that Fox was a convicted sex offender. Ball had a **well-documented history** of violent offenses on his intake sheet, including an assault on a convicted sex offender at the Holding Center. **(R.29)**. Rath admitted he had read the intake sheet. Moreover, Rath knew Ball was ordered to stay away from other prisoners. Ball had assaulted another prisoner earlier in the same day he assaulted Fox, and was therefore classified as a security risk. **(R.53, 55)**. Rath even heard Ball threaten that prisoner hours before he assaulted Fox. **(R.29, 53, 56)**.<sup>20</sup> Ball calling Fox a “pervert,” as he beat him to death, all serve as a factual basis from which a jury could rationally infer that Rath was on notice that Fox faced a substantial risk of harm.<sup>21</sup>

Like the plaintiff prisoner in *Farmer*, Fox’s **status placed him in a unique class of prisoners who are victim prone**. The *Farmer* plaintiff prisoner was a transsexual person, and Fox was a convicted

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<sup>16</sup> This paragraph is rule explanation with the key terms highlighted for display purposes only.

<sup>17</sup> This is more rule explanation.

<sup>18</sup> This is in-text rule illustration.

<sup>19</sup> This is a parenthetical rule illustration.

<sup>20</sup> More rule application here.

<sup>21</sup> This is rule application. Key phrases from the rule are applied to the facts of the case before the court.



sex offender. Both are classes of prisoners targeted by other prisoners for violence. And like the defendant prison officials in Farmer who knew the plaintiff was transsexual, Rath admitted that he knew Fox was a convicted sex offender (**R.43, 58**). He had also read the DOJ report alleging that prison officials condoned assaults on sex offenders at the Holding Center. (**R.49**). Since the evidence of the Farmer plaintiff prisoner's status was sufficient to raise questions of fact about the defendant prison official's notice that he was at risk of harm, so too should the evidence of Fox's status raise questions of fact about Rath's notice that Fox was at risk of substantial harm.<sup>22</sup>

These facts would allow a jury to draw the reasonable **inference** that Rath knew Fox was at risk for harm.<sup>23</sup>

## Rule Illustrations can be Written as Parentheticals or In-text

Use in-text illustrations when the key term controls the outcome of the issue before the court, and whenever you intend to make an analogy between the facts of precedent and your facts in order to support your rule application. If the key term does not control the outcome, you can use a parenthetical as long as the key term can be illustrated in a single sentence. The tension is between the need for brevity and the need to explain abstractions by showing how they have been applied to facts in real life.

Whether in-text or parenthetical the ingredients of a rule illustration are (1) disposition, (2) issue, (3) trigger facts (those material to the issue) and (4) reasoning. These four parts sometimes overlap.<sup>24</sup> A parenthetical will have three or four of the parts when it is combined with preceding text. Focus on the facts and reasoning of the precedent that are material to the issue and use language effectively. Provide only the information the reader needs.

### 1. Writing parenthetical illustrations

Parenthetical case illustrations follow the parenthetical identifying date of the opinion. When the opinion is cited using short form, they follow the end of the cite.<sup>25</sup> Parentheticals begin with a present participle beginning with a lower-case letter; that is, a verb ending in "ing," or they consist of a quote from the statute or opinion they illustrate. They are one sentence or a one sentence fragment. Include facts in general terms that will help a reader unfamiliar with the case understand it. For example, not plaintiff and defendant, rather prisoner and guard, or driver and pedestrian.

Here is example of a parenthetical illustrating the meaning of a key-term in a discovery dispute:

Concerns about confusing a jury are no bar to discovery of IQ tests. Juries routinely hear complicated cases where the opposing parties present competing theories of causation. *E.g.*, Blue Cross and Blue Shield of N.J., Inc. v. Philip Morris USA Inc., 344 F.3d 211,

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<sup>22</sup> The analogy in this paragraph supports the rule-based reasoning.

<sup>23</sup> Final conclusion.

<sup>24</sup> See, Mary Beth Beasley, *A Practical Guide to Appellate Advocacy*, pp.81-82 (Aspen Publishing, 2d ed. 2006).

<sup>25</sup> See Michael Smith, *Advanced Legal Writing*, p. 56 (Wolters Kluwer 3rd ed.)



226-27 (2d Cir. 2003) (holding the jury could consider statistics and models presented by plaintiff insurance company to show causation of cancer in a suit by insurance companies against tobacco companies).

Here are two parentheticals that show a key term that has been applied in several similar fact patterns:

A prison official disregards a substantial risk of serious harm by failing to take reasonable measures to abate it. Hayes, 84 F.3d at 620 (finding prison official failed to take reasonable measures because he did not transfer or escort a prisoner whose life was threatened and who was a security risk); Warren, 476 F. Supp. 2d at 411 (finding prison officials failed to take reasonable measures to protect prisoners because they failed to act despite knowing that assaults and stabbings regularly took place in the prison yard).

### Exercise 2-1 | Question 1

Which of these parentheticals begins correctly? Choose all that apply.

*An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=26#h5p-11>*

### Exercise 2-1 | Question 2

Which of these parenthetical rule illustrations has good content? Choose all that apply.

*An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=26#h5p-12>*

You can use parentheticals for purposes in addition to case illustrations. For example, here are parentheticals that show several courts in different jurisdictions have adopted the principle that perpetrators for sex-related crimes are vulnerable to attack in prison:

Courts have recognized that sex offenders are a particularly vulnerable group of inmates. See Neal v. Shimoda, 131 F.3d 818, 829 (9th Cir. 1997) (“We can hardly conceive of a state’s action bearing more stigmatizing consequences than the labeling of a prison inmate as a sex offender”); Arnold v. Cnty. of Nassau, 89 F. Supp. 2d 285, 289 (E.D.N.Y. 2000) (reasoning that inmates charged with sex-related crimes are more likely to be victims of violence by other inmates); Chandler v. Williams, No. 3:08–CV–00962–ST, 2013 WL 2489139, at \*17 (D. Or. June 7, 2013) (“The stigmatizing nature of being classified as a sex offender is undeniable”).

## 2. Writing in-text case illustrations

Unlike parentheticals, in-text rule illustrations should include a hook. The hook is the first sentence of the illustration, and should tell the reader why you chose to include the illustration by focusing in on the key term from the rule that the precedent illustrates. Concentrate on what the court held or reasoned, not what the case involved, or concerned. Include the key-term that the precedent illustrates, with a key fact or two, or the court's reasoning. A hook is never comprised solely of facts.

Writing hooks is difficult. But the hook often distinguishes excellent legal writing and analysis from merely serviceable legal writing and analysis. Try to write your hooks using concrete subjects rather than abstract subjects, even though it is tempting to use as a subject the key term you illustrate, and most key terms are abstractions. In contrast, concrete subjects are real people, things, or places that readers can visualize. For example "long-arm-jurisdiction" is an abstraction, and thus not a good subject for a hook. In contrast, out-of-state defendants is a concrete subject that is a good subject for a hook. So, when writing a hook to begin an illustration of "long arm jurisdiction":

Do this (concrete subject): Out-of-state defendants are subject to a state's long-arm-jurisdiction when they do business in that state.

Not this (abstract subject): Long-arm-jurisdiction exists over out-of-state defendants who do business in that state.

---

For help writing good hooks, read about choosing concrete subjects for your sentences in Chapter 11.

---

Here are strong hooks.

The Court of Appeals held that a defendant reasonably believed his liberty had been restrained when officers blocked his vehicle. C. v. D.

The use of excessive physical force against a prisoner may violate his constitutional rights even though the prisoner does not suffer serious injury. E. v. F.

Here are the strong hooks, rewritten as weak hooks because they do not include both the key term and facts or reasoning.

The C. v. D. defendant testified that officers blocked his vehicle.

In E. v. F., the court considered whether the plaintiff reasonably believed that his liberty had been restrained.

In E. v. F., the prisoner plaintiff did not sustain serious injuries.

### Exercise 2-2 | Question

Which of these is an effective hook? Choose all that apply.

*An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=26#h5p-13>*

In-text rule illustrations should include trigger facts, which are those that are key to the court's holding. Include them in your illustration, and add additional facts only to the extent the reader needs them to understand the trigger facts – these are the supporting facts. If you support your rule application with an analogy to the rule illustration precedent, include in the rule illustration all the facts needed to make that analogy.

Here are some examples of good in-text rule illustrations:

The Southern District of New York held that a lay principal of a Catholic school was a minister because principals have a duty to establish a climate that nurtures students in the Catholic faith, which is essential to fulfilling its mission.<sup>26</sup> See Fratello v. Roman Catholic Archdiocese of N.Y., No. 12-CV-7359, 2016 U.S. Dist. LEXIS 41483, at \*6-7 (S.D.N.Y. Mar. 29, 2016). The lay principal led prayers, attended mass with his students, and was obligated to follow an Administrative Manual requiring him to engage students in the pursuit of spiritual development.<sup>27</sup> See id. at 6-30. Although the principal performed mainly secular duties related solely to education, he actively conveyed the church's mission, and the court reasoned this carried more weight when comparing secular versus religious duties.<sup>28</sup> See id. at 30-38.

<sup>26</sup> The in-text rule illustration begins with a good hook, which includes key facts, the key term, and the disposition.

<sup>27</sup> The in-text rule illustration includes the facts key to the court's holding.

<sup>28</sup> The in-text rule illustration includes the court's reasoning.

The plaintiff in a claim for damages arising from exposure to lead-based paint raises a triable issue of fact as to a landlord's constructive notice of a dangerous condition when they provide evidence from which it may be inferred that the property owner knew paint was chipping or peeling on the premises.<sup>29</sup> Jackson v. Brown, 26 A.D.3d 804, 805 (4<sup>th</sup> Dept. 2006). In Brown, the Fourth Department reasoned that while the plaintiff failed to directly inform her landlord of the chipping and peeling paint, testimony that the peeling paint was in plain sight, coupled with the fact the landlord entered the apartment frequently while the condition existed, was sufficient to infer the landlord knew of the chipping and peeling lead paint condition.<sup>30</sup>

## Writing Analogies

Effective analogies have three parts:

1. A sentence that tells your reader the key phrase common to both the precedent and the case before the court;
2. A fact comparison establishing a similarity to a prior case; and
3. An explanation of why the comparison matters.

Here are two effective analogies:

#1. Hoffmann's acts, like Xi's, were active and had direct consequences for his victims.<sup>31</sup> Hoffmann called out the names of the prisoners who were to be executed, while Xi drove women to the hospital where they were forced to undergo abortions. In both cases, the acts had direct consequences for the victims because they ensured the victims were delivered to the final acts of persecution, namely the forced abortions in Xi's case and the beating and death of the prisoners in Hoffmann's case.<sup>32</sup> Since Xi's acts were held to be integral to the performance of persecution, so too should Hoffmann's.<sup>33</sup>

#2. Stark's role in conveying Holy Trinity's mission, like that of the principal in Fratello, weighs heavily in favor of the ministerial exception.<sup>34</sup> Like the principal in Fratello, Stark led prayers, participated in mass with her students, enhanced her students' appreciation of religious topics, and signed an agreement to promote the mission of the school.<sup>35</sup> Though Stark performed secular duties, including teaching her students PowerPoint, time spent on secular duties does not carry much weight. After all, the principal in Fratello performed mainly secular duties, but the

<sup>29</sup> The in-text rule illustration begins with a good hook that includes the key term, disposition, and key facts

<sup>30</sup> The in-text rule illustration includes more key facts and the court's reasoning.

<sup>31</sup> Sentence tells the reader that in both the precedent and the case before the court a key phrase is established.

<sup>32</sup> Facts of the prior case are compared to facts in present case to establish a similarity.

<sup>33</sup> Legal consequence of the analogy is explained

<sup>34</sup> Sentence tells the reader that in both the precedent and the case before the court a key phrase is established.

<sup>35</sup> Facts of the prior case are compared to facts in present case to establish a similarity.

court held in favor of the ministerial exception. Here, this Court too should hold Stark was a minister because she led prayers, enhanced her students' religious knowledge, and agreed to promote the mission of the Church.<sup>36</sup>

### Exercise 2-3 | Question

Reorganize these sentences into an effective analogy.

*Interactive H5P elements (including the answer) has been excluded from this version of the text. You can view them online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=26#h5p-14> and <https://hayneslegalwriting.lawbooks.cali.org/?p=26#h5p-15>*

Analogies must be based on facts relevant to the outcome of the precedent. Do not analogize a fact to an entire case.<sup>37</sup>

Weak - Like Jackson, the defendant property owner regularly read a periodical that included information about the hazards of lead paint exposure posed to young children.

This is ineffective because a person (the defendant property owner) cannot be compared to a published legal opinion (Jackson). Instead make your analogy or distinction fact specific. Compare people to people, and things to their specific counterparts, for example property owners to property owners.

Strong – Like the property owner in Jackson, the defendant property owner in the present action regularly read a periodical that included information about the hazards of lead paint exposure posed to young children.

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<sup>36</sup> Legal consequence of the analogy is explained.

<sup>37</sup> See, Mary Beth Beasley, *A Practical Guide to Appellate Advocacy*, p.94 (Aspen Publishing, 2d ed. 2006)

## Exercise 2-4 | Question

**Question:** Write an analogy of the facts below to Lucas v. Ross, then compare your answer with the sample answer provided.

**Issue:** Did Basset have a personal hold on Big Corporation's (BC) customers?

**Facts:** BC sued former employee, Tad Basset, to enforce a non-compete clause. Basset had managed all of BC's contracts with the DOD, its sole customer. As such he developed a close relationship with the Secretary of Defense, Chaplin Bing, who dealt solely with Basset.

**Lucas v. Ross:** The Arlington Supreme Court held that Lucas and O'Connor had a claim to enforce a non-compete clause against its former employee, Gordon Ross. Ross was a store manager whose main responsibility was to wait on the store's most elite customers—a bank president, the mayor, and the city's biggest developer. Each of them was loyal to Ross and would do business only with him. The court reasoned that because Ross was the only employee who could assist the elite customers, he had a hold on his employer's customers. Lucas v. Ross.

*An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=26#h5p-16>*

Cases are distinguished in rebuttal, since the point is “the facts of my case are unlike those of precedent, so this court should not reach the same conclusion.”

For more on writing rebuttals see Chapter 5 Writing Rebuttals Assertively.

Now that you completed this chapter you should know why, and be able to add reasoning by analogy to your rule-based analysis or argument. This includes writing in-text and parenthetical rule illustrations, and writing analogies.

In the next chapter, you will read about writing umbrella paragraphs, which introduce your reader to analysis or argument that is divided into sub-issues.

## Chapter 3 - Use Umbrella Paragraphs to Organize a Legal Point that is Divided into Sub-Points

### Learning Outcomes

1. Be able to explain the purpose of umbrella paragraphs.
2. Be able to write concise umbrella paragraphs.

**Citations to New York case law are in New York Law Reports Style Manual form.**

**Citations to federal case law are in Bluebook form.**

### Umbrella Paragraphs Defined

Umbrella paragraphs are simply introductory paragraphs that help to organize an objective memo or persuasive brief and inform readers about what is to come. They make the points that follow easier for a reader to understand. They are typically found under a point heading in an argument section of a brief that is further divided into sub-points, and sub-points that are further divided into sub-sub-points.

Give your readers an umbrella paragraph or paragraphs anytime you divide a point into sub-points.

For example:

**Point 1. This Court Should Grant the Defendant Driver's Motion for Summary Judgment Because He was Not Negligent as a Matter of Law**

#### **Umbrella paragraphs that introduce sub-points A and B**

- A. The Sole Cause of the Collision Was the Plaintiff's Sudden Cross Over to the Defendant's Lane of Traffic Which Constitutes an Emergency
- B. The Defendant Driver Drove Reasonably Given the Severe Weather Conditions.

Point 1-A. The Sole Cause of the Collision Was the Plaintiff's Sudden Cross Over to the Defendant's Lane of Traffic Which Constitutes an Emergency

**Umbrella paragraphs that introduce sub-sub-points 1, 2 and 3**

- 1.
- 2.
- 3.

Umbrella paragraphs give readers an overview of the law to be applied and a roadmap outlining the specific points to be addressed. They let the reader know about the conclusions the writer will reach in the sub-points that follow and the broad rule that governs the sub-points.

Umbrella paragraphs should be concise, you should generally have several at most. They are designed to orient the reader and prepare them for what is to come. They are not meant for advancing arguments or reciting facts. The umbrella paragraphs under the first point heading should include the broad rule of law applied, listing elements as necessary, and the conclusion briefly supported by facts or reasons in each sub-point that follows. Do not define elements at this point. Leave that for the body of the discussion. Let the reader know if only some of the elements are at issue. For example, you would include this sentence in the umbrella paragraphs that introduce a brief in opposition to summary judgement of a claim for intentional infliction of emotional harm where only two of four elements are at issue:

A plaintiff must establish four elements to prove a claim for intentional infliction of emotional harm: (1) extreme and outrageous conduct; (2) intent to cause severe emotional distress; (3) a causal connection between the conduct and injury; and (4) severe emotional distress. Only the first and third elements are at issue.

Umbrella paragraphs under a sub-heading that is divided in sub-sub-headings, introduce the sub-sub arguments that follow. They should include the broad rule, if any, that governs each of the sub-sub-points and the conclusion reached in each sub-sub-point.



## Annotated Umbrella Paragraphs as Examples

Here is an annotated umbrella paragraph that introduces two subpoints, and one that introduces sub-sub points:

AS A MATTER OF LAW, THE DEFENDANT DID NOT VIOLATE THE PLAINTIFF INMATE’S RIGHTS BECAUSE HE DID NOT KNOW THE INMATE WAS AT RISK OF HARM AND BECAUSE HE TOOK REASONABLE MEASURES TO PROTECT HIM

A prison official, such as the defendant, is not liable for failure to protect a prisoner unless he both knows the prisoner is at risk of harm and he does nothing to prevent it. Farmer v. Brennan, 511 U.S. 825 (1994). Officials are not charged with guaranteeing prisoners’ safety, all they need to do is make “reasonable efforts” to keep them safe, and this applies only when they actually know the prisoner is at risk. Id., at 833.<sup>38</sup> The evidence before this Court demonstrates that as matter of law the defendant did not know the plaintiff was at risk of harm because no one ever told him that other prisoners had threatened him. Moreover, the evidence before this Court demonstrates that as a matter of law even if he had known the plaintiff was at risk of harm, he took reasonable measures to protect him when he stood guard outside the cell block the night the plaintiff was assaulted.<sup>39</sup>

A. The Defendant Did Not Know the Inmate Was at Risk of Harm Because No One Told Him  
Other Inmates Had Threatened Him

B. The Defendant Took Reasonable Measure to Protect the Inmate When he Had a Guard Stand  
Outside of the Inmate’s Cell and When he Later moved Him to Another Pod

Prison officials who know an inmate is at risk of harm are not liable unless they are “deliberately indifferent” to that risk. The requisite state of mind lies “somewhere between the poles of negligence at one end and purpose or knowledge at the other.” Farmer, 511 U.S. at 833.<sup>40</sup> Here the Defendant was not even negligent since he took reasonable measures to protect the inmate the day he arrived in the prison and again the next day.<sup>41</sup>

1. Knowing the Inmate was a Convicted Child Murderer the Defendant Ordered a Guard to Stand  
Outside the His Cell for Three Hours When He Arrived

2. Concerned About His Safety as a Convicted Child Murderer the Defendant Moved the  
Inmate to Another Cell Block the Next Day

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<sup>38</sup> This is the broad rule that governs the claim.

<sup>39</sup> The conclusion reached on each sub-point.

<sup>40</sup> This is the rule that governs the sub-issue.

<sup>41</sup> The conclusion reached on each sub-issue.

### Exercise 3-1 | Question

**Question:** Read the following case excerpt and then write the umbrella paragraph(s).

Include that the broad rule that governs the sub-points is Chapman v. Silber, 97 N.Y.2d 9 (2001) (holding that landlords are on constructive notice of a hazardous lead paint condition when he or she (1) retained a right of entry to the premises and assumed a duty to make repairs, (2) knew that the apartment was constructed at a time before lead-based paint was banned, (3) was aware that paint was chipping or peeling on the premises, (4) knew that lead paint was hazardous to young children, and (5) knew that young children lived in the apartment). Id., at 15.

Assume and let your reader know that only the third and fourth elements are at issue.

[Umbrella paragraph(s) would be here]

**A. There is a question of fact whether the defendant property owner knew chipping and peeling lead paint existed within his rental property because...**

Plaintiffs raise a triable issue of fact about a landlord's notice that there is chipping paint in her rental property when they present evidence from which it may be inferred that the property owner knew that paint was chipping or peeling on the premises. Jackson v. Brown, 26 A.D.3d 804, 805 (4<sup>th</sup> Dept. 2006). While the Brown plaintiff failed to directly inform her property owner of the chipping and peeling paint, the court held the parties' testimony specifying the peeling paint was in plain sight, coupled with the fact the property owner entered the apartment frequently while the condition existed, was sufficient to infer the property owner knew of the chipping and peeling lead paint condition. Id.

The Brown holding establishes that oblivious property owners cannot hide from what is obvious. The Brown plaintiff successfully defeated the landlord's motion for summary judgment by showing the court it simply did not matter that the property owner was not explicitly informed of the chipping paint because the condition lay in plain sight, obvious and observable as opposed to latent.

The evidence before this Court raises a question of fact as to whether Simon knew of the presence of chipping and peeling lead paint inside 67 Pine Street. During Benjamin Curtis' deposition, he testified that while walking through the upper unit with Simon, he noticed chipping paint on the upstairs interior porch that was "hard to miss." R. 47. Additionally, during his own deposition, Simon testified he toured the property with Mr. Curtis during a scheduled viewing and entered the property to fix the bathroom sink later in the rental period. R. 61-62. Ultimately, the deposition transcripts of both parties place Simon on the porch, where Mr. Curtis testified the paint chips were "hard to miss" and later, in the bathroom, where paint chips existed on every window well and track. R. 47, 52-62.

Much like the plaintiff's mother in Brown, Mr. Curtis did not inform Simon of the chipping paint directly, but this omission does not matter. Rather, just as the chipping paint lay in plain sight in Brown, Mr. Curtis' testimony indicates the paint chips on the porch were "hard to miss." R. 47. Furthermore, just as the testimony in Brown acknowledged the property owner entered the apartment more than once, the record before this Court reflects that Simon entered the apartment and walked about locations where paint chips were clearly visible on two separate occasions.

That fact Simon denies ever seeing the paint chips is irrelevant. Tellingly, when Mr. Simon entered the apartment for the second time, he testified that it was "a bit messy; there were toys everywhere." R. 61. Mr. Simon was aware of his surroundings enough to comment on the cleanliness of the Curtis' lifestyle, yet somehow, he did not notice the chipping paint throughout the apartment, and specifically, the bathroom window wells and tracks where he performed repairs later on. Regardless, what Mr. Simon claims he did or did not see should be left to a jury.

Accordingly, just as the Fourth Department held there was sufficient evidence in Brown to infer the landlord knew chipping paint existed in his apartment, this Court must examine the record before it and find that because Mr. Simon twice presided over paint chips in plain sight within his property, his knowledge of the chipping paint can be inferred and a triable issue of fact exists. Since there are questions of fact about Mr. Simon's knowledge of the chipping and peeling paint, and if, as demonstrated in the next section, there is a question of fact regarding Mr. Simon's knowledge that lead paint is hazardous to children, this Court must reverse the lower court's order granting the motion for summary judgment.

**B. There is a question of fact whether the defendant knew lead paint was dangerous to children because...**

Plaintiffs need only raise the inference a defendant knew of the hazards of lead-based paint to children in order to defeat summary judgment. Jackson v. Vatter, 121 A.D.3d 1588 (4<sup>th</sup> Dept. 2014). The Vatter plaintiff raised an issue of fact based on evidence that the defendant subscribed to a local newspaper that carried a number of articles about the hazards. Id., at 1589.

Similarly, in Brown, despite the defendant's contentions otherwise, the Fourth Department found a triable issue of fact based on evidence the defendants subscribed to the Buffalo News and read it regularly. The Buffalo News published numerous articles discussing the hazards lead-based paint posed to children. Brief for Respondent at 6, Jackson v. Brown, 26 A.D.3d 804 (4th Dept. 2006) (No. CA 05-01826).

Importantly, other courts have held that what a defendant knows or doesn't know regarding the hazards of lead-based paint to children is a question for a jury, regardless of what the defendant says. See Abreu v. Huang, 298 A.D.2d 471, 751 NYS2d 410 (2d. Dept. 2002) (finding a jury is allowed to infer a defendant knew of the danger of lead paint to children and is a question of fact that cannot be found as a matter of law). Moreover, the

Fourth Department has held that equivocal and poor testimony can be evidence of a question of fact alone. See Watson v. Priore, 104 A.D.3d 1304, 1305 (4<sup>th</sup> Dept. 2013) (holding that the defendant’s vague and equivocal denials during testimony created a question of fact as to his knowledge and precluded his summary judgment request). In Watson, the defendant-landlord testified that “he could not recall whether there was peeling or chipping paint, and that he had ‘no problem’ with chipping or peeling paint.” Id. at 1306. Revealingly, the court in Watson viewed these statements by the property owner, coupled with his testimony conceding to the other Chapman elements, as evidence that triable issues of fact existed based off testimony alone. Id.

The evidence before this Court raises a question of fact whether Mr. Simon knew lead-based paint was dangerous to children. During his deposition, Mr. Simon testified that he could not recall whether he read the lease agreement he used, which contained a “known lead-based paint hazards” warning and disclosure provision. R. 59-60.

Like the property owner in Watson, who provided suspect denials and inconsistencies regarding critical facts, and the defendants in Williams, whose testimony was littered with vague observations and denials, Mr. Simon has provided vague denials regarding whether he read his own lease agreement used with multiple properties. Just as the court in Williams considered a defendant’s equivocal testimony and vague denials sufficient to raise a triable issue of fact, Mr. Simon’s equivocal testimony regarding the contents of the lease agreement he used and his vague denials regarding his knowledge of chipping paint, raise triable issues of fact as well.

Mr. Simon also testified that he had no idea of the dangers of lead paint to children because he did not have children and never learned of the dangers during his time spent in the military. R. 59-64. However, in addition to reading multiple newspapers, Mr. Simon testified he read his local Amvets Newsletter for the past ten years. R. 64. The Amvets Newsletter contained a paragraph inviting veterans and their relatives to attend a workshop about “the effects of exposure to lead on children...[c]ome learn how to make sure your kids are safe!” Just as the newspaper articles discussing the dangers of lead paint were sufficient to infer the defendant knew of the dangers of lead paint in Vatter, the fact that Mr. Simon admitted to reading even just one publication discussing the hazards of lead paint to children, is enough to infer Mr. Simon knew of the hazards lead-based paint posed to children.

(continued on next page)

The fact that Mr. Simon was never directly informed of the dangers of lead paint does not matter. The facts before this Court show Mr. Simon had multiple documents discussing the dangers of lead-based paint to children in his physical possession. He has the lease agreement he used to rent 67 Pine Street to the Curtis family, highlighting the dangers of lead paint generally, and the Amvets Newsletter, highlighting the dangers of lead paint to children. Indisputably, both documents were firmly in his possession. Therefore, these facts alone, infer Mr. Simon knew of the hazards lead paint posed to children and raise a triable issue of fact.

*An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=28#h5p-17>*

Now that you completed this chapter, you should be able to add umbrella paragraphs to introduce your reader to the points you raise in your analysis or argument.

## Introduction to Chapters 4-6 - Persuasive Writing

Chapters 4-6 are about writing arguments. Again, you will use the organizational framework you read about in Chapters 1-3, since objective legal analysis and persuasive legal arguments both employ rule-based reasoning and reasoning by analogy. But when you write an inter-office memo or a client letter analyzing an issue, you explain your rules objectively since you are merely predicting how a court would decide an issue. In contrast, when you write a legal argument or brief to a court, you explain your rules persuasively, since you are arguing to a court in support of a particular outcome. Thus, Chapter 4 is about how to state your rules persuasively.

Chapter 5 is about how to write counter-arguments effectively since a thorough legal argument counters the argument you anticipate your opponent makes.

You should also have in your arsenal the ability to argue based on equity (what's best for the parties involved in a dispute) or policy (what's best for the public good). Thus, in Chapter 6, you will read about how to make equity and policy arguments.

## Chapter 4 - Writing Rules Persuasively

### Learning Outcome

1. Be able to rephrase an objective rule to make it persuasive.

**Citations to New York case law are in New York Law Reports Style Manual form.**

**Citations to federal case law are in Bluebook form.**

When you write a brief to a court you should write and explain your rules persuasively. That means portraying both procedural and substantive legal rules in ways that are helpful to your client's position. The goal is to foreshadow the client's argument in the way legal rules are phrased.

The rules should not sound like they do in an objective analysis. Instead, when explaining a rule through key terms, legal writers keep the focus on what *does satisfy* the rule when arguing that the facts of the case satisfy the rule, and they keep the focus on what *does not satisfy* the rule when arguing that the facts do not satisfy it. That way, legal writers keep the reader's focus leaning the same way the rule application will lean.

Similarly, when illustrating a key term, writers focus on precedent, where the rule is satisfied when they argue that the facts of the case satisfy the rule; and they keep the focus on precedent, where the rule is not satisfied when they argue that the facts do not satisfy it. As explained in Chapter 5 (writing rebuttals), you will save case law that favors your adversary for rebuttals, where you will distinguish it.

Assume you represent someone injured when a driver went through a red light, and you have the statement of a witness that "the light was red." You want the statement admitted, but the lawyer for the driver moves to have it excluded as hearsay. The case is in federal court based on diversity, and you find that the Federal Rules of Evidence provide an exception to the rule against hearsay when the statement is an excited utterance. The rule stated objectively is "A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused" is not excluded as hearsay. Fed. R. Evid. 803(2). You want the statement admitted, so you would focus on when a statement is admissible as an excited utterance.

Thus, you might state the rule as (Note: references to CITE indicate that the writer would add a citation to authority):

An excited utterance is not excluded by the rule against hearsay. Fed. R. Evid. 803(2). While hearsay is excluded due to its inherent unreliability, the rule against hearsay does not apply to excited utterances because they are made under stress, and thus are likely to be trustworthy. CITE. Thus, statements spontaneously made by a person while still under the stress of excitement from the event or condition are admissible if they "relate to" event or condition. CITE. The statement could be a description, explanation, opinion or inference. CITE.

The lawyer representing the driver would want the statement excluded and would focus on when hearsay statements are not admissible as excited utterances.

So, the rule might be (CITE indicates that the writer would add a citation to authority to that space):

Hearsay evidence is generally excluded as unreliable because the declarant is not subject to cross-examination. CITE. While "excited utterances" are not excluded by the rule, the exception applies only when the declarant is under stress and has no time to think about its content, and the statement "relates to" the event or condition at issue. CITE. Absent those conditions even "excited utterances" are considered untrustworthy, and thus excluded as hearsay. Fed. R. Evid. 803(2).

#### Exercise 4-1 | Question

**Instructions:** Try your hand at writing a rule persuasively. Advance through the pages below (available only at the link below) and complete each exercise.

*An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=31#h5p-18>*



## Exercise 4-2 | Question

**Question:** Does the writer of the following rule want the court to find that the privilege applies or does not apply?

The clergy-communicant privilege may not be invoked to include conversations that are exclusively secular in nature. Cox v. Miller, 296 F.3d 89, 113 (2d. Cir. 2000); People v. Carmona, 82 N.Y.2d 603, 609 (1993). Thus, only communications made with the purpose of seeking “religious counsel, advice, solace, absolution or ministration” are protected. People v. Drelich, 123 A.D.2d 441, 442 (2d Dept. 1986). The Second Circuit Court of Appeals held that even when communications take place in a location where religion plays an important role, communications are not privileged when they are not for the purpose of obtaining spiritual guidance. Cox v. Miller, 296 F.3d at 107.

*An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=31#h5p-19>*

## Exercise 4-3 | Question

**Instructions:** Let's try restating an objective rule again, persuasively, from both sides. Advance through the pages below (available only at the link below) and complete each exercise.

*An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=31#h5p-20>*

Now that you completed this chapter, you should be able to phrase rules in ways that are helpful to your client’s position. In the next chapter you will read about how to rebut your opponent’s arguments.

## Chapter 5 - Writing Rebuttals Assertively

### Learning Outcomes

1. Be able to explain where to rebut your opponent's argument.
2. Be able to assertively rebut
  - Negative facts; and
  - Negative law.

### Show the Reader you are Right Before you Show Them Why the Other Party is Wrong

A thorough legal argument includes counters to your adversary's arguments. While it is tempting to take on your opponent's argument before you make yours, doing so gives readers the impression that you are so overwhelmed by your opponent's arguments you can't make your own arguments. So, rebut your opponent's arguments **after** you have proved your point by applying a rule to the facts, and perhaps arguing by analogy. Show the reader that you are right before you show them why the other party is wrong.

Here is the organization of a legal argument with rebuttal added:

**C**

**R**

**E**

- Rule explanation through key terms
- Rule illustrations

**A**

- Apply the key phrases from the rule explanation
- And add analogies to in-text rule illustration cases

**Rebuttal**

**C**

Here is the annotated CREAC using rule-based reasoning and reasoning by analogy from Chapter 2, with rebuttal added. It is from a brief in opposition to summary judgment filed by a prisoner plaintiff in a civil rights claim. Key terms, which are covered in Chapter 1, are highlighted for illustrative purposes only. (R indicates the writer would insert a cite to the record):

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The evidence before this Court raises genuine issues of material fact as to whether the defendant guard knew that the plaintiff prisoner was at a substantial risk of serious harm.<sup>42</sup>

**Prison officials meet the knowledge prong of a deliberate indifference claim when they are subjectively aware of a substantial risk of serious harm to prisoners.**<sup>43</sup> Farmer, 511 U.S. at 837. Although an official “must be both aware of facts from which **the inference** could be drawn that a substantial risk of serious harm exists, and he must also draw the inference,” a claimant can demonstrate that an official had knowledge if a risk is obvious. Id. at 837, 844. **An obvious risk** can be shown by evidence that prison assaults were “**longstanding, pervasive, well-documented**, or expressly noted by prison officials” because these circumstances suggest an official must have known. Id. at 842-43.<sup>44</sup>

Whether a prison official is subjectively aware of a substantial risk of serious harm “is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence.” Id. at 842. Advance notice is not necessary to establish knowledge if a prisoner falls into a victim prone category. Id. at 843; Corbett v. Kelly, No. 97-CV-0682 E, 2000 WL 1335749, at \*4 (W.D.N.Y. Sept. 13, 2000).<sup>45</sup> Thus, a prison official may be put on notice that a prisoner faces a substantial risk of serious harm if there is a **similar history of violence** at the prison.<sup>46</sup>

Plaintiffs that fit into a **unique class of prisoners** known to be **victim prone** raise the inference that prison officials must have known they were at a substantial risk of serious harm, even if advance notice was never given. See Farmer, 511 U.S. at 843. In Farmer, the petitioner prisoner, a transsexual who possessed feminine characteristics, was incarcerated, and allowed to be in the general population at a penitentiary with a history of violence. Id. at 829-30. Within weeks, the prisoner was beaten and raped by another inmate. Id. at 830. Finding questions of fact, the Supreme Court reversed the lower court’s dismissal on summary judgment despite the fact that the prisoner failed to notify prison officials of a risk of harm, holding that “the failure to make advance notice is not dispositive,” when an inmate’s victim prone status may have made the prison officials subjectively aware of a risk of harm. Id. at 849,<sup>47</sup> see also Corbett, 2000 WL 1335749, at \*4-5

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<sup>42</sup> This is the initial conclusion.

<sup>43</sup> This is the rule.

<sup>44</sup> This paragraph is rule explanation with the key terms highlighted for display purposes only.

<sup>45</sup> The first two sentences in this paragraph are more rule explanation.

<sup>46</sup> This is more rule explanation with the key terms highlighted for display purposes only.

<sup>47</sup> This is in-text rule illustration.

(finding a genuine issue of fact about whether prison officials knew a prisoner identified in intake sheet as “victim prone” was at substantial risk of harm).<sup>48</sup>

Looking at the evidence in the light most favorable to Fox raises the **inference** Rath knew that Fox was at a **substantial risk of serious harm** for two reasons. First, Rath knew that Ball posed a risk to Fox. And two, Rath knew that as a convicted sex offender Fox was **victim prone**.

Rath knew about Ball’s **longstanding well-documented history of violent** behavior towards sex offenders and he knew that Fox was a convicted sex offender. Ball had a **well-documented history** of violent offenses on his intake sheet, including an assault on a convicted sex offender at the Holding Center. **(R.29)**. Rath admitted he had read the intake sheet. Moreover, Rath knew Ball was ordered to stay away from other prisoners. Ball had assaulted another prisoner earlier in the same day he assaulted Fox, and was therefore classified as a security risk. **(R.53, 55)**. Rath even heard Ball threaten that prisoner hours before he assaulted Fox.<sup>49</sup> **(R.29, 53, 56)**. Fox a “pervert” as he beat him to death all serve as a factual basis from which a jury could rationally infer that Rath was on notice that Fox faced a substantial risk of harm.<sup>50</sup>

Like the plaintiff prisoner in Farmer, Fox’s **status placed him in a unique class of prisoners who are victim prone**. The Farmer plaintiff prisoner was a transsexual person, and Fox was a convicted sex offender. Both are classes of prisoners targeted by other prisoners for violence. And like the defendant prison officials in Farmer who knew the plaintiff was transsexual, Rath admitted that he knew Fox was a convicted sex offender **(R.43, 58)**. He had also read the DOJ report alleging that prison officials condoned assaults on sex offenders at the Holding Center. **(R.49)**. Since the evidence of the Farmer plaintiff prisoner’s status was sufficient to raise questions of fact about the defendant prison official’s notice that he was at risk of harm, so too should the evidence of Fox’s status raise questions of fact about Rath’s notice that Fox was at risk of substantial harm.<sup>51</sup>

Fox’s assault could not have come as a surprise to Rath. But cf., Coronado v. Goord, No. 99 CIV. 1674(RWS), 2000 WL 1372834, at \*4-6 (S.D.N.Y. 2000). In Coronado, a prisoner was stabbed in the back by several inmates in the prison yard. Id. at \*1. The prisoner claimed he was prone to attack because he had been stabbed ten years prior. Id. The district court dismissed plaintiff’s complaint because he failed to allege the nature of other attacks in the prison yard, arguing that evidence of similar prior attacks would be necessary to establish knowledge. Id. Unlike in Coronado, the nature of the attack in this case demonstrates a similar pattern of violence. Ball had a history of violence against sex offenders, establishing prior, similar incidences of violence that put Fox at risk. Additionally, unlike the defendants in Coronado, Rath and other deputies at the Holding Center were aware of Fox’s victim prone status because they had been telling other inmates about his past sex offense. Furthermore, Rath was aware of a DOJ report that alleged this very behavior at the Holding Center.<sup>52</sup>

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<sup>48</sup> This is a parenthetical rule illustration.

<sup>49</sup> More rule application here.

<sup>50</sup> This is rule application. Key phrases from the rule are applied to the facts of the case before the court.

<sup>51</sup> The analogy in this paragraph supports the rule-based reasoning.

<sup>52</sup> This is rebuttal.

These facts show a specific threat to sex offenders at the Holding Center and would allow a jury to draw the reasonable inference that Rath knew Fox was at risk for harm. Thus, there are questions of fact about whether Rath knew Fox was at risk of harm.<sup>53</sup>

## Be Assertive, not Defensive with Rebuttals

Be assertive, not defensive with rebuttals. Be conscious of how you present your argument, so you don't unwittingly put yourself on the defensive. A frequent problem is to begin a rebuttal with a statement of your opponent's argument. This defensive style makes your opponent's arguments the focus of your argument. While it is tempting to introduce a counterargument with a phrase like "the defendant will argue..." don't do it!<sup>54</sup> Instead, as explained below be assertive.

There are two types of rebuttals. The first are those based on facts that support your opponent but hurt you, where you raise and rebut negative facts. The second are those based on law that supports your opponent but hurts you, where you raise and distinguish negative law.

### A. Rebutting negative facts

Here is a rebuttal of negative facts that is defensive because it begins with the opponent's argument that an attack on a prisoner was sudden, and highlights a "bad fact" (the prisoner's attacker yelled "I bet you didn't expect this")

The defendant will argue that the attack was sudden because the prisoner's attacker yelled "I bet you didn't expect this" the second before he stabbed him. However, the facts before this Court raise the inference that the attacks were planned and thus not sudden.

To write it assertively acknowledge the bad fact but begin with your point, not your adversary's. For example:

While the prisoner's attacker yelled "I bet you didn't expect this" the second before he stabbed him, the attack was not sudden. To the contrary, the facts before this Court raise the inference that the attacks were planned...

As restated this rebuttal is assertive because it begins with the advocate's argument (the attack was not sudden), not the adversary's argument. It also neutralizes the "bad fact" (attacker yelled "I bet you didn't expect this") by juxtaposing it with a "good fact" (attack was planned).

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<sup>53</sup> Final conclusion.

<sup>54</sup> See Robbins, Johansen and Chestek, *Your Client's Story: Persuasive Legal Writing*, pp. 257-258 (Wolters Kluwer 1st edition).

## Exercise 5-1 | Question

**Instructions:** Try your hand at rebutting negative facts assertively. Advance through the pages below (available only at the link below) and complete each exercise.

*An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=33#h5p-21>*

### B. Rebutting negative law

After you argue that the law supports your position, rebut law that arguably supports your adversary. As with rebuttals of “bad facts,” resist the temptation to begin with your adversary’s position. Here is an example of a rebuttal of negative law, which is defensive because it begins with the opponent’s argument (when a parent knows his child is at risk of injury from exposure to lead-based paint, but does nothing to prevent it, his conduct is actionable); thus highlighting “negative law”:

The Supreme Court in Albany County held that when a parent knows his child is at risk of injury from exposure to lead-based paint, but does nothing to prevent it, his conduct is actionable. Cooper v. Basset. But the present case is distinguishable to the Cooper case. In Cooper (facts). In contrast here (facts).

To write it assertively acknowledge the bad law but begin with your point.

Here is the rebuttal stated assertively, which begins with the advocate’s argument (this is not a case of parents who knew their child was at risk) and cites “negative law” only to immediately distinguish it. Note the negative law is introduced with a signal that it stands for a position contrary to the main proposition:

This is not a case of parents who know their child is at risk of injury from exposure to lead-based paint but do nothing to prevent it.<sup>55</sup> But cf, Cooper v. Basset (holding claim against parents actionable). The facts of the present case are distinguishable from those of the Cooper case. In Cooper (facts). In contrast here (facts).

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<sup>55</sup> This signal indicates contradiction. More specifically it signals that the cited authority supports a position contrary to the main proposition.

## Exercise 5-2 | Question

**Instructions:** Try your hand at rebutting negative law assertively. Advance through the pages below (available only at the link below) and complete each exercise.

*An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=33#h5p-22>*

### C. Your final conclusion follows your rebuttal

Your final conclusion follows the rebuttal. You need not begin a new paragraph if the rebuttal is brief, and the conclusion is straight forward. Final conclusions let a reader know you are finished with a single legal argument and show how it fits into the argument as a whole. If it is the conclusion to one of multiple single legal arguments, it signals to the reader that you are about to move onto another legal argument.

For example:

Since there are questions of fact about x, the defendant's motion must be denied. Even if this Court finds there are no questions of fact about x, as argued in the next section, there are questions of facts about y that preclude summary judgment.

Here's another example:

As a matter of law x. And as argued in the next section as a matter of law y, the motion for summary judgment must be granted.

Now that you finished this chapter, you should be able to effectively rebut your opponent's factual and legal arguments.

In the next chapter you will learn about how to add policy and equity arguments to a brief.

## Chapter 6 - Add Arguments Based on Policy and Equity

### Learning Outcomes

1. Be able to explain the purpose of equity and policy arguments.
2. Be able to
  - Write equity arguments; and
  - Write policy arguments.

### Policy and Equity Arguments

The author's approach for teaching policy and equity arguments is based on Michael R. Smith, *Advanced Legal Writing*, pp. 92-97 (Wolters Kluwer, 3rd ed. 2008).

Equity and policy arguments are appeals to the audience's emotions, or values. Equity arguments are focused on a person and why they are or are not sympathetic. Policy arguments appeal to the public good rather than the parties in the litigation. Both bolster but do not take the place of rule-based reasoning. Instead, like reasoning by analogy, they support your application of rules to facts.

### Equity Arguments

Equity arguments are fact based, and designed to appeal to values that will evoke sympathy towards your client or another player in the story (a positive equity argument) or hostility toward the opposing party or another player in the story (a negative equity argument). They are essentially a plea for fairness that probably won't affect liability but could affect settlement negotiations or evaluations of jury appeal.

Equity arguments can be implied or express. Express equity arguments are in the argument section and are intended to bolster your rule application. For example, assume you represent the defendant driver of a car who is the daughter of her passenger killed in a motor vehicle accident. The mother's estate sues the driver-daughter. The daughter moves for summary judgment, arguing that she faced an emergency and is thus not liable as a matter of law. While arguing that your client was faced with an emergency you could add "in a split second, a vehicle crossed over from another lane, leaving the driver with no time to maneuver around it. And just minutes after the collision, the driver was left racked with guilt when she realized her mother was dead."

Implied equity arguments can be more effective. They are in the statement of facts, rather than the argument section. You make equity arguments in a statement of facts through strategic placement of facts, organization, and choice of words to emphasize good facts and minimize bad facts. For more on writing statements of fact see Chapter 10. You can make implied equity arguments through a compelling story in the statement of facts. The facts you emphasize to evoke favorable



emotions need not be material to the legal issue. That the daughter-driver suffers tremendous guilt over her mother's death is not relevant to her negligence, still, this fact could very well show up in her statement of facts.

In a criminal case, as the attorney for the defendant charged with embezzlement, you might point out that she used the money she allegedly embezzled to pay for her mother's medical bills. This fact would not affect her culpability, but could affect her sentence by evoking the sentencing judge's sympathy and would be well placed in a statement of facts. This approach is more subtle and more effective than are express arguments intended to evoke sympathy.

## Policy Arguments

Policy arguments appeal to the public good rather than the parties in the litigation. They argue that an outcome would either benefit (positive policy argument) or harm the public (negative policy argument). Policy arguments can be based on pre-existing statements of policy by the judiciary in a published opinion or by the legislature in a statute. They can also be based solely on the precedential impact of your case.

### 1. Policy analysis/argument based on pre-existing statements

Some statutes begin with express statements about the underlying policy goals. And judges often include express statements about policy to support a rule or the outcome of a particular case.

For example, the New York State Legislature states at the beginning of the state's Freedom of Information Law that its purpose is to shed light on government decision-making, which in turn both permits the electorate to make informed choices regarding governmental activities and facilitates exposure of waste, negligence, and abuse. See N.Y. Public Officers Law § 84.

If you represented the plaintiff in a lawsuit seeking the government to release a document under the statute you would include the legislative purpose in your rule explanation. Then you would apply the purpose to the facts of your case to argue that the outcome you advocate for would further the policy underlying law because it would expose government abuse. You would begin the application with a sentence that the outcome you advocate will further the policy underlying the statute or rule. You would then apply the policy using key terms that support the outcome you advocate.

Here's an example:

Include in rule explanation: The purpose of NYS's Freedom of Information Law is to shed light on government decision-making, which in turn both permits the electorate to make informed choices regarding governmental activities and facilitates exposure of waste, negligence, and abuse. See N.Y. Public Officers Law § 84.

Include in rule application: An order requiring the Sheriff to release a video depicting five guards pushing a handcuffed prisoner into a wall will serve the purpose of New York's Freedom of

Information Law because it will expose government abuse. The Sheriff denied a FOIL request to disclose the video, asserting it fell into the public safety exception. The Sheriff should release the video to the public because it would facilitate exposure of abuse by the Erie County Sheriff's Office.

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**The organization of a legal argument with policy argument based on a pre-existing statement of policy:**

**C**

**R**

- The element or rule at issue (“if a certain condition exists, then a certain legal condition results.”).<sup>56</sup>

**E**

- Explain rule through its key terms.
- Explain policy underlying the rule as expressed by a legislature or a court.
- Rule illustrations (either parenthetically or in text).

**A**

- Apply the key phrases from the rule cluster.
- Apply policy or its key terms to argue your application is consistent with it.
- And add analogies to in text rule illustration cases (perhaps).

**C**

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Sometimes policy statements made by judges or legislatures are lengthy. When that's the case choose key terms from the statement that apply to your case, just as you choose key terms to explain a rule. See Chapter 1, how to explain a rule. Then apply those key terms to the facts of your case, just as you do when you apply key terms from a rule to the facts of your case.

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<sup>56</sup> See, Mary Beth Beasley, *A Practical Guide to Appellate Advocacy* (Aspen Publishing, 3rd ed. 2008)

## Exercise 6-1 | Question

**Instructions:** Read the legislature's policy underlying N.Y. Mental Hygiene Law sec. 81.01 and Carol's narrative about Sally. Choose from the policy key terms relevant to Carol's narrative. Then apply the key terms from the policy to the facts in Carol's narrative to write:

1. a policy-based argument in support of Sally; and
2. a policy-based argument in support of Carol.

**The legislature's policy statement underlying Mental Hygiene Law sec. 81.01:** "The legislature finds that it is best for persons with incapacities to make available to them the least restrictive form of intervention which assists them in meeting their needs but, at the same time, permits them to exercise the independence and self-determination of which they are capable. It is the purpose of this act to promote the public welfare by establishing a guardianship system which is appropriate to satisfy either personal or property management needs of an incapacitated person in a manner tailored to the individual needs of that person, which takes in account the personal wishes, preferences and desires of the person, and which affords the person the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life." N.Y. Mental Hyg. Law sec. 81.01.

### **Carol's narrative:**

At age seventy-nine, Sally was living alone for the first time. She had lived for decades with her late husband, who sadly passed away after a long illness. I checked in on her daily. I have known Sally since I was three years of age as she and her late husband lived next door to my parents for thirty years. I think of her as my third grandmother.

Sally had always been meticulous about taking care of herself and her belongings. But within weeks of her husband's death, she stopped bathing and paying her bills. Her house was filthy, she lived on marshmallow cookies she bought at the convenience store located next to her house, and she stopped taking her blood pressure medicine. I was pleased when she readily accepted my offer to take over paying her bills.

I started thinking that Sally was incapable of managing her personal and financial affairs. I tried to convince her to move into a senior citizen's apartment complex, but she would not consider leaving the home she had shared with her husband. She explained away her strange behavior. She said that she thought life was too short to worry about cooking and cleaning and that she didn't want to take her medicine because of the way it made her feel. That sounded reasonable enough, so I started to think that maybe I wanted Sally to move so that I would be relieved of the responsibility of looking after her.

I pleaded with her to take a shower and wash her hair, but she insisted that she wasn't dirty. I was worried. But she was in no immediate danger.

About a week later, Sally slipped and fell when she was out walking, and by the next day, her arm was swollen to twice its size. When I insisted that she go with me to see a doctor she became

angry. Eventually, I located a doctor who offered to go to Sally's house. Once he arrived, Sally did not resist his care. While he was examining Sally, he discovered a tumor on her breast that had broken through her skin. "It must have been there at least a year," he said. "She'll die without surgery."

Sally didn't know what all the fuss was about, but she enjoyed the attention. She went to the hospital without protest. The doctor explained to her that she needed a mastectomy. He drew a picture for her and held her hand. He asked her if she wanted to go ahead with the operations and she nodded her head affirmatively.

The operation was successful and over the next week, as I sat by her side in the hospital, Sally began to slowly regain her strength. Nonetheless, at times, she seemed disoriented. When she wandered around the hospital corridors, she couldn't find her way back to her room, and occasionally she couldn't remember my name. I began to wonder what would happen if Sally returned to her house and continued to live alone.

When it was time for Sally to be discharged, the doctor explained that based on his observations, he didn't think Sally was able to properly care for herself. He recommended that she be placed in a nursing home. In the midst of this discussion, Sally began yelling angrily at the doctor and me. "I can take care of myself! I have been doing things for myself all of these years and I will keep doing things for myself! You can't tell me what to do."

Sally wants to live with her younger brother Carl. He offered Sally a room in his two-bedroom home where he lives alone. Carl is a relatively healthy 70-year-old who still works part-time and drives a car. As stated in his affidavit, while he is arthritic, he believes he is both physically and mentally capable of supervising his older sister. He offered to "look after her."

Carol initiated an article 81 petition to become Sally's guardian. If she is successful and granted the authority to decide where Sally will live, she will arrange for Sally to live in the best nursing home she can find and will visit every other day to monitor her care. Sally and Carl oppose the petition. If they prevail, Sally will move into Carl's apartment.

In the space provided below, apply the policy to the facts in Carol's narrative and write a policy-based argument in support of Sally and one in support of Carol, then compare your answers against the sample answers provided.

*An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=35#h5p-23>*

## 2. Policy analysis/argument based solely on the precedential impact of your case

If there is no policy statement made by legal authority, you can make a policy argument based on the precedential impact of your case. Focus on the precedential impact of the case being decided and the values implicated by a decision. If you want to make this type of argument, make it clear and convincing. Lay out the potential precedential rule that a decision could establish; the consequences of the rule; the value implicated by the consequences, and an explanation of how

the decision would lead to those consequences. You can strengthen your policy argument by citing to non-legal sources such as scientific articles.

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### **The organization of a legal argument with policy argument with no pre-existing statement of policy**

**C**

**R**

- The element or rule at issue.

**E**

- Explain rule through its key terms.
- Rule illustrations (either parenthetically or in text).

**A**

- Apply the key phrases from the rule cluster.
- And add analogies to in-text rule illustration cases.
- Apply policy to argue your application is consistent with it. You can cite non-legal sources such as scientific articles or statistics to support your argument.

### **Rebuttal**

**C**

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Here are two annotated policy arguments based on the precedential impact concerning the use of force by prison guards on prisoners:

1. A decision denying the defendant corrections officers' summary judgment would establish a rule that officers may not use force even when faced with a noncompliant inmate.<sup>57</sup> Under such a rule the workplace for corrections officers would become more dangerous because inmates would feel at liberty to disregard orders.<sup>58</sup> Even under the current rule that permits officers to use

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<sup>57</sup> Consequences of the rule.

<sup>58</sup> Explanation of how the decision would lead to those consequences.

reasonable force, officers put themselves at risk every day. In 2013, the most recent year the statistic is available x inmates inflicted serious injuries on xx officers.<sup>59</sup>

2. A decision granting the defendant guards' summary judgment would establish a rule that officers may use force against defenseless prisoners.<sup>60</sup> Under such a rule prisoners could be subject to the malicious use of force by guards simply because the guards do not like them.<sup>61</sup> Even under the current rule that prohibits the malicious use of force prisoners are subject to the arbitrary use of force. In 2013, the most recent year the statistic is available x prisoners were seriously injured because of beatings inflicted by guards.<sup>62</sup>

### Exercise 6-2 | Question

**Question:** Rearrange these sentences (available only from the link below) to make a policy argument based on the precedential impact concerning a case of childhood lead poisoning.

*An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=35#h5p-24>*

Now that you completed this chapter you should know how to add equity and policy-based reasoning to your argument.

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<sup>59</sup> Citation to the source of this statistic and inclusion of actual numbers.

<sup>60</sup> Consequences of the rule.

<sup>61</sup> Explanation of how the decision would lead to those consequences.

<sup>62</sup> Citation to the source of the statistic and inclusion of actual numbers.

## Introduction to Chapters 7-8 - Headings and Issue Statements/Questions Presented

Chapter 7 is about headings that guide your reader through the issues you objectively analyze or persuasively argue. Chapter 8 is about issues statements (for objective analysis) and questions presented (for persuasive argument), which frame the issues you write about. Both help your reader understand your analysis or argument. Both help writers, too, because when they identify and write headings, and issue statements or questions presented effectively, they learn to write succinctly about their issue, the law that governs the issue, the legally significant facts that the law is applied to, the conclusions they want their reader to adopt, and the reasons why their reader should adopt those conclusions.

## Chapter 7 – Headings

### Learning Outcomes

1. Be able to explain the purpose of headings and when to use them.
2. Be able to explain the difference between headings and point headings.
3. Be able to write point headings for both major contentions and for sub-issues.

### Headings Explained

You might use headings to divide topics and help your reader easily navigate a document. Or you might use headings when writing a statement of facts, particularly when the facts are complex and raise separate issues. Headings in a statement of facts simply describe the facts that follow. For example, in a claim for injuries arising from a collision, the statement of facts could be divided by headings “the collision” and “the plaintiff’s injuries” to help the reader easily follow the story.

Similarly, you might choose to use headings to break up a client letter or objective memo covering more than one issue. The headings would identify the issue and your conclusion about it. For example, a memo discussing whether to accept a client with a claim of medical malpractice could be divided by headings “Evidence that the physician departed from the standard of care is weak” and “As a result of the alleged malpractice, the plaintiff lost the use of her left leg.”

In contrast, are headings in briefs that provide readers with a persuasive outline of an argument. They appear in two different places in a brief, in the table of contents, and within the argument. They direct the reader to draw the conclusions that favor the writer’s client, illustrate the relationship between and among the various sections of the argument, and signal to the reader they just finished a point and will now move on to another. These persuasive headings are referred to as point headings.

A point heading in a brief that sets forth a major contention is labeled with a Roman numeral. A major contention stands on its own. Its relevance is not dependent on a broader contention. For example, "The defendant contractor is not negligent as a matter of law because he did not owe the plaintiff a duty." This contention stands on its own because the court would grant summary judgment if proven.

In contrast is a sub-heading that sets forth a contention dependent on another contention. For example, sub-headings A and B are in the annotated headings below. Even if proven, neither alone would settle an issue before a court.



Generally, when writing a persuasive heading, include either a conclusion, or an action you want the court to take; plus, a reason the court should take the action or agree with your conclusion.<sup>63</sup>

Headings are full, single sentences, not phrases or multiple sentences.

When you have multiple reasons why a court should accept your major contention those reasons are set forth in sub-headings. However, you should have no sub-headings if you have just one reason. A solitary sub-heading is inappropriate because you cannot divide something into just one sub-section. If you find yourself with an A, but no B, or with a 1, but no 2, either create a B or a 2, or incorporate the substance of A or 1 into the point heading itself.

Beyond this, the format for point headings varies. Check court rules for any required format.

**This:**  
Major Contention

A.

B.

**Not this:**  
I. Major Contention

A.

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<sup>63</sup> See, Mary Beth Beasley, *A Practical Guide to Appellate Advocacy*, p. 158 (Aspen Publishing, 2d ed. 2006).

When you have major contention, but no sub-headings, include facts in support of your conclusion or request in the heading.

**This:**

THERE ARE QUESTIONS OF FACT ABOUT WHETHER THE DEFENDANT DRIVER WAS NEGLIGENT BECAUSE SHE SAW THE PLAINTIFF LOSE CONTROL OF HER VEHICLE THIRTY SECONDS BEFORE SHE CROSSED INTO THE DEFENDANT'S LANE OF TRAFFIC

**Not this:**

I. THERE ARE QUESTIONS OF FACT ABOUT WHETHER THE DEFENDANT DRIVER WAS NEGLIGENT

A. The Defendant Driver Saw the Plaintiff Begin to Lose Control of Her Vehicle Thirty Seconds Before She Crossed into the Defendant's Lane of Traffic

## Annotated Examples

Here are two annotated examples of a major contention heading supported by sub-headings:

I. THE DISTRICT COURT'S ORDER REQUIRING DISCLOSURE OF THE FAMILY MEMBERS' IQ TESTS SHOULD BE AFFIRMED<sup>64</sup> BECAUSE THE TESTS ARE NONPRIVILEGED ACADEMIC RECORDS AND ARE RELEVANT TO DETERMINING THE CAUSE OF PLAINTIFF'S DEVELOPMENTAL PROBLEMS<sup>65</sup>

A. The IQ tests are nonprivileged<sup>66</sup> evidence because they were administered for academic placement and Plaintiff's family members had no relationship with the school psychologist.<sup>67</sup>

B. The IQ tests are relevant<sup>68</sup> because their value in determining whether heredity caused Plaintiff's developmental problems is greater than the minimal burden imposed on Plaintiff's family members by the discovery.<sup>69</sup>

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I. THIS COURT SHOULD DENY THE DEFENDANT'S MOTION FOR A PROTECTIVE ORDER<sup>70</sup> BECAUSE THE COC DOCUMENTS ARE ALREADY ACCESSIBLE AND THE DEFENDANT HAS NO PRIVACY INTEREST IN THEM.<sup>71</sup>

A. The COC Documents are Presumed to be Accessible to the Plaintiff<sup>72</sup> Because They are "Judicial Documents"<sup>73</sup>

B. The Defendants Have No Privacy Interest in the COC Documents<sup>74</sup> Because they Should Expect Public Scrutiny of Conditions in the Erie County Holding Center.<sup>75</sup>

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<sup>64</sup> This is the action you want the court to take.

<sup>65</sup> These are the reasons the court should take the action.

<sup>66</sup> This is a conclusion in support of a major contention.

<sup>67</sup> This is the factual reason the court should agree with the conclusion.

<sup>68</sup> This is the conclusion.

<sup>69</sup> This is the factual reason the court should adopt your conclusion.

<sup>70</sup> This is the action the writer wants the court to take.

<sup>71</sup> This is the reason the court should take the action.

<sup>72</sup> Conclusion in support of major contention.

<sup>73</sup> Reason the court should agree with the conclusion.

<sup>74</sup> Conclusion in support of major contention.

<sup>75</sup> Reason the court should accept the conclusion.

## Exercise 7-1 | Question

**Question:** Label the parts of this example (available only at the link below) by dragging the labels into the correct boxes. (Label comes after the sentence to which it belongs.)

*An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=38#h5p-25>*

Headings should be about the case before the court, not abstract pronouncements about the law.

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Here is a heading that is weak because it is an abstract pronouncement of the law:

Landlord's Notice of Chipping Paint May be Proved by Circumstantial Evidence.

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This heading is strong because it is about the case before the court:

This Court Should Deny the Defendant Landlord's Motion for Summary Judgment<sup>76</sup>  
Because the Circumstantial Evidence That the Defendant Knew of the Chipping at the  
Rental Property Creates Questions of Fact<sup>77</sup>

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<sup>76</sup> This is the action the writer wants the court to take.

<sup>77</sup> This is the reason the court should take the action.

As you plan your argument think about whether you have more than one reason a court should do what you ask it to do or why it should adopt the conclusion you ask it to adopt. These will be your sub-points. Then ask, whether your sub-points are supported by more than one reason. If so, they will be your sub-sub points.

### Exercise 7-2 | Question

**Question:** Write a point heading and sub-headings, if needed, for this brief opposition to summary judgment, then compare your answer with the sample answer provided.

Prison officials meet the knowledge prong of a deliberate indifference claim when they are subjectively aware of a substantial risk of serious harm to prisoners. Farmer, 511 U.S. at 837. Although an official “must be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference,” a claimant can demonstrate that an official had knowledge if a risk is obvious. Id. at 837, 844. An obvious risk can be shown by evidence that prison assaults were “longstanding, pervasive, well-documented, or expressly noted by prison officials” because these circumstances suggest an official must have known. Id. at 842-43.

Whether a prison official is subjectively aware of a substantial risk of serious harm “is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence.” Id. at 842. Advance notice is not necessary to establish knowledge if a prisoner falls into a victim prone category. Id. at 843; Corbett v. Kelly, No. 97-CV-0682 E, 2000 WL 1335749, at \*4 (W.D.N.Y. Sept. 13, 2000). Thus, a prison official may be put on notice that a prisoner faces a substantial risk of serious harm if there is a similar history of violence at the prison.

Plaintiffs that fit into a unique class of prisoners known to be victim prone raise the inference that prison officials must have known they were at a substantial risk of serious harm, even if advance notice was never given. See Farmer, 511 U.S. at 843. In Farmer, the petitioner prisoner, a transsexual who possessed feminine characteristics, was incarcerated and allowed to be in the general population at a penitentiary with a history of violence. Id. at 829-30. Within weeks, the prisoner was beaten and raped by another inmate. Id. at 830. Finding questions of fact, the Supreme Court reversed the lower court’s dismissal on summary judgment despite the fact that the prisoner failed to notify prison officials of a risk of harm, holding that “the failure to make advance notice is not dispositive,” when an inmate’s victim prone status may have made the prison officials subjectively aware of a risk of harm. Id. at 831; see also Corbett, 2000 WL 1335749, at \*4-5 (finding a genuine issue of fact about whether prison officials knew a prisoner identified in the intake sheet as “victim prone” was at substantial risk of harm).

Looking at the evidence in the light most favorable to Fox raises the inference Rath knew that Fox was at a substantial risk of serious harm for two reasons. One, Rath knew that as a convicted sex offender, Fox was victim prone. After all, Rath admitted he knew that the DOJ

found sex offenders at the Holding Center were targeted, and he knew that Fox was a convicted sex offender. (R.30).

Two, Rath knew about Ball's longstanding well-documented history of violent behavior towards sex offenders, and he knew Ball was a security risk, ordered to stay away from other prisoners. Ball had a well-documented history of violent offenses on his intake sheet, including an assault on a convicted sex offender at the Holding Center. (R.29). Because Ball had assaulted another prisoner earlier the same day he assaulted Fox, he was classified as a security risk and ordered not to come in contact with other prisoners (R.53, 55). Rath heard Ball threaten that prisoner hours before he assaulted Fox. And Rath admitted he had read both Ball's intake sheet and the order that classified Ball as a security risk. (R.29, 53). Ball called Fox a "pervert" as he beat him to death. All serve as a factual basis from which a jury could rationally infer that Rath was on notice that Fox faced a substantial risk of harm.

Like the plaintiff prisoner in Farmer, Fox's status placed him in a unique class of prisoners at substantial risk of serious harm because they are victim prone. The Farmer plaintiff prisoner was a transsexual person, and Fox was a convicted sex offender. Both classes of prisoners are targeted by other prisoners for violence. And like the defendant prison officials in Farmer who knew the plaintiff was transsexual, Rath knew that Fox was a convicted sex offender. Rath admitted that he knew Fox was a convicted sex offender (Rath EBT at x). He had also read the DOJ report alleging that prison officials condoned assaults on sex offenders at the Holding Center. (Rath EBT at x) Since the evidence of the Farmer plaintiff prisoner's status was sufficient to raise questions of fact about the defendant prison official's notice that he was at risk of harm, so too should the evidence of Fox's status raise questions of fact about Rath's notice that Fox was at risk of substantial harm.

Fox's assault could not have come as a surprise to Rath. But cf., Coronado v. Goord, No. 99 CIV. 1674 (RWS), 2000 WL 1372834, at \*4-6 (S.D.N.Y. 2000). In Coronado, a prisoner was stabbed in the back by several inmates in the prison yard. Id. at \*1. The prisoner claimed he was prone to attack because he had been stabbed ten years prior. Id. The district court dismissed plaintiff's complaint because he failed to allege the nature of the earlier attack in the prison yard, reasoning that evidence of similar prior attacks would be necessary to establish knowledge. Id. Unlike in Coronado, the nature of the attack in this case demonstrates a similar pattern of violence. Ball had a history of violence against sex offenders, establishing prior, similar incidences of violence that put Fox at risk.

Additionally, unlike the defendants in Coronado where there was no evidence of the reason for the attack, Rath and other deputies at the Holding Center were aware of Fox's victim prone status because they had been telling other inmates about his past sex offense. Furthermore, Rath was aware of a DOJ report that alleged this very behavior at the Holding Center. These facts show a specific threat to sex offenders at the Holding Center and would allow a jury to draw the reasonable inference that Rath knew Fox was at risk.

*An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=38#h5p-26>*

Now that you completed this chapter, you should know the purpose of and be able to write headings for statements of fact and client letters. You should also be able to state the purpose of and write point headings for issues and sub-issues. In the next chapter, you will read about how to write issue statements and questions presented.

## Chapter 8 - Issue Statements and Questions Presented

### Learning Outcomes

1. Be able to explain the difference between an issue statement and a question presented.
2. Be able to write
  - Issue statements; and
  - Questions presented

### Issue Statements/Questions Presented

Issue statements objectively identify the issue addressed in an objective memo, while questions presented persuasively frame the issue before the court.

The elements of both sub-headings are 1. the law, 2. the question itself (the issue), and 3. legally significant facts.<sup>78</sup> The difference lies in the way you state each part. Each part is stated objectively in an issue statement, since the purpose is merely to give readers the information needed to resolve an issue. In contrast, each part is stated persuasively in a question presented, since the purpose is to suggest to readers the conclusion advocated.

There are two formulas. One is “Under (law with brief explanation) does (question itself aka issue) when (legally significant facts)?”<sup>79</sup> For example, here is an objective issue statement stated in the formula:

Under the New York State's Freedom of Information Law, which provides government agencies shall make available for public inspection and copying all records, except those they may deny access to (law with brief objective explanation) must the government release the video (issue stated objectively) of an interaction between a prisoner and some guards ( facts stated objectively)?

Restated as a persuasive question presented, the law, the issue, and the facts are stated in a manner designed to invoke an answer that favors one party. Here is the issue statement restated as a question presented:

Under New York State's Freedom of Information Law, whose purpose is to provide government transparency (law with brief explanation), may the State or any of its subdivisions or agencies

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<sup>78</sup> See, Mary Beth Beazley, *A Practical Guide to Appellate Advocacy*, p. 136 (Aspen Publishers, 2d ed. 2006).

<sup>79</sup> Id.



suppress a videotape recording (this is the issue) containing scenes of jail guards beating a handcuffed detainee (these are the legally significant facts)?

The other format is “Whether (the question itself/issue) under (law & simple explanation) when (key facts)?”<sup>80</sup>

Here is the question presented above in the under, when, does formula, restated in the whether, under, when formula:

Whether the State or any of its subdivisions or agencies may suppress a videotape recording (issue) under the New York State's Freedom of Information Law, whose purpose is to provide government transparency (law with brief explanation), when the recording contains scenes of jail guards beating a handcuffed detainee (legally significant facts)?

### Exercise 8-1 | Question

**Instructions:** The last two questions presented are written from the position of the party who wants disclosure. Here is the question presented from the position of the party who does not want disclosure.

Under New York’s Freedom of Information Law, which excludes from disclosure government records that if public could jeopardize public safety (this is the law with brief explanation), did the County sustain its burden to articulate a specific justification for denying a prisoner’s request for the release of a video (issue) that shows how sheriff’s deputies respond when a prisoner refuses to follow orders during transport from court to a holding cell (legally significant facts)?

Advance through the pages (available only at the link below) to complete the exercise.

*An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=40#h5p-27>*

### Exercise 8-2 | Question 1

**Question 1:** Identify the elements in the following question presented by dragging the labels into the correct boxes. (Label comes after the phrase to which it belongs.)

*An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=40#h5p-28>*

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<sup>80</sup> See, Mary Beth Beazley, *A Practical Guide to Appellate Advocacy*, p. 137 (Aspen Publishers, 2d ed. 2006).

## Exercise 8-2 | Question 2

**Question 2:** Now rewrite the question presented using the "Under (law w/brief explanation) does (question itself aka issue) when (legally significant facts)" format.

*An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=40#h5p-29>*

## Exercise 8-3 | Question 3

**Instructions:** There are a few frequent problems to avoid when writing your question presented. Advance through the pages below (available only at the link below) to learn how to identify and address them.

*An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=40#h5p-30>*

## Exercise 8-4 | Question 4

**Question:** Write a question presented for the following brief opposition to summary judgment first introduced in Chapter 7, then compare your answer with the sample answer provided.

Prison officials meet the knowledge prong of a deliberate indifference claim when they are subjectively aware of a substantial risk of serious harm to prisoners. Farmer, 511 U.S. at 837. Although an official “must be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference,” a claimant can demonstrate that an official had knowledge if a risk is obvious. Id. at 837, 844. An obvious risk can be shown by evidence that prison assaults were “longstanding, pervasive, well-documented, or expressly noted by prison officials” because these circumstances suggest an official must have known. Id. at 842-43.

Whether a prison official is subjectively aware of a substantial risk of serious harm “is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence.” Id. at 842. Advance notice is not necessary to establish knowledge if a prisoner falls into a victim prone category. Id. at 843; Corbett v. Kelly, No. 97-CV-0682 E, 2000 WL 1335749, at \*4 (W.D.N.Y. Sept. 13, 2000). Thus, a prison official may be put on notice that a prisoner faces a substantial risk of serious harm if there is a similar history of violence at the prison.

Plaintiffs that fit into a unique class of prisoners known to be victim prone raise the inference that prison officials must have known they were at a substantial risk of serious harm, even if advance notice was never given. See Farmer, 511 U.S. at 843. In Farmer, the petitioner prisoner, a transsexual who possessed feminine characteristics, was incarcerated and allowed

to be in the general population at a penitentiary with a history of violence. Id. at 829-30. Within weeks, the prisoner was beaten and raped by another inmate. Id. at 830. Finding questions of fact, the Supreme Court reversed the lower court's dismissal on summary judgment despite the fact that the prisoner failed to notify prison officials of a risk of harm, holding that "the failure to make advance notice is not dispositive," when an inmate's victim prone status may have made the prison officials subjectively aware of a risk of harm. Id. at 831; see also Corbett, 2000 WL 1335749, at \*4-5 (finding a genuine issue of fact about whether prison officials knew a prisoner identified in the intake sheet as "victim prone" was at substantial risk of harm).

Looking at the evidence in the light most favorable to Fox raises the inference Rath knew that Fox was at a substantial risk of serious harm for two reasons. One, Rath knew that as a convicted sex offender, Fox was victim prone. After all, Rath admitted he knew that the DOJ found sex offenders at the Holding Center were targeted, and he knew that Fox was a convicted sex offender. (R.30).

Two, Rath knew about Ball's longstanding well-documented history of violent behavior towards sex offenders, and he knew Ball was a security risk, ordered to stay away from other prisoners. Ball had a well-documented history of violent offenses on his intake sheet, including an assault on a convicted sex offender at the Holding Center. (R.29). Because Ball had assaulted another prisoner earlier the same day he assaulted Fox, he was classified as a security risk and ordered not to comingle with other prisoners (R.53, 55). Rath heard Ball threaten that prisoner hours before he assaulted Fox. And Rath admitted he had read both Ball's intake sheet and the order that classified Ball as a security risk. (R.29, 53). Ball called Fox a "pervert" as he beat him to death. All serve as a factual basis from which a jury could rationally infer that Rath was on notice that Fox faced a substantial risk of harm.

Like the plaintiff prisoner in Farmer, Fox's status placed him in a unique class of prisoners at substantial risk of serious harm because they are victim prone. The Farmer plaintiff prisoner was a transsexual person, and Fox was a convicted sex offender. Both classes of prisoners are targeted by other prisoners for violence. And like the defendant prison officials in Farmer who knew the plaintiff was transsexual, Rath knew that Fox was a convicted sex offender. Rath admitted that he knew Fox was a convicted sex offender (Rath EBT at x). He had also read the DOJ report alleging that prison officials condoned assaults on sex offenders at the Holding Center. (Rath EBT at x) Since the evidence of the Farmer plaintiff prisoner's status was sufficient to raise questions of fact about the defendant prison official's notice that he was at risk of harm, so too should the evidence of Fox's status raise questions of fact about Rath's notice that Fox was at risk of substantial harm.

Fox's assault could not have come as a surprise to Rath. But cf., Coronado v. Goord, No. 99 CIV. 1674 (RWS), 2000 WL 1372834, at \*4-6 (S.D.N.Y. 2000). In Coronado, a prisoner was stabbed in the back by several inmates in the prison yard. Id. at \*1. The prisoner claimed he was prone to attack because he had been stabbed ten years prior. Id. The district court dismissed plaintiff's complaint because he failed to allege the nature of the earlier attack in the prison yard, reasoning that evidence of similar prior attacks would be necessary to establish

knowledge. *Id.* Unlike in Coronado, the nature of the attack in this case demonstrates a similar pattern of violence. Ball had a history of violence against sex offenders, establishing prior, similar incidences of violence that put Fox at risk.

Additionally, unlike the defendants in Coronado where there was no evidence of the reason for the attack, Rath and other deputies at the Holding Center were aware of Fox's victim prone status because they had been telling other inmates about his past sex offense. Furthermore, Rath was aware of a DOJ report that alleged this very behavior at the Holding Center. These facts show a specific threat to sex offenders at the Holding Center and would allow a jury to draw the reasonable inference that Rath knew Fox was at risk.

*An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=40#h5p-31>*

Having completed this chapter you should be able to write objective issue statements and persuasive questions presented.

## Introduction to Chapters 9-10 - Your Client's Story

Chapters 9 and 10 are about how to find and write your client's story. Chapter 9 will help you find a theme for that story, while Chapter 10 will help you incorporate the theme into a credible and persuasive statement of facts.

## Chapter 9 - A Theme for your Client's Story

### Learning Outcomes

1. Be able to explain the purpose and nature of a shadow story.
2. Be able to articulate a shadow story.

It is important to incorporate a theme in your client's story. A brief will stand out from others with equally good legal arguments if you incorporate a theme that demonstrates your client suffered an injustice. The theme should be implied in your client's story as told in the statement of facts, and when possible, reflected in your choice of rule illustrations, analogies, and policy arguments. However, attorneys often struggle with incorporating a theme because they get caught up in intricacies of their legal arguments. One way to find your theme is through the "shadow story."<sup>81</sup>

Your shadow story does not appear in your brief. It is a tool to help you find your theme and draft your statement of facts. It *tells* your client's view of the facts on paper without a filter, so it is complete with explicit emotional reasons, opinions, and judgments. A shadow story is what you would like to say, and what your client wishes you could say, but what you cannot say because it would undermine your credibility. Imagine you tell the story of what happened to a close friend. Use adjectives and adverbs freely. Think about if you were unfiltered how you would make the reader care about your client, how you would describe your client, and how you describe the other party.

For example, describing a landlord who knew the furnace in a rental did not function properly but did nothing to fix it, you might want to *tell* the reader that "the property owner is an SOB." However, you would later revise that sentence for a statement of facts to *show* rather than tell the reader the landlord was an SOB. So that phrase is deleted and replaced with facts that show the property owner was an SOB. For example, "the defendant property owner never returned the plaintiff tenant's calls. Even in the dead of winter when the furnace stopped working, the temperature inside the rental hovered at 42 degrees."

Use the "tell" words in the shadow story to find your theme. Recognize the reason(s) readers would care about what happens to your client that your shadow story gives them.

Let's look at an example. Take the case of a child who was lead poisoned by exposure to deteriorating lead-based paint in the apartment her family rented. Here is an excerpt from her shadow story (reference to R. are citations to the record):

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<sup>81</sup> See Robbins, Johansen and Chestek, *Your Client's Story: Persuasive Legal Writing*, pp. 141-147 (Wolters Kluwer, 2d ed. 2019).

Defendant Lloyd Simon is Mariner City’s worst slumlord. His cruel disregard for his tenants is unmatched. Moreover, he is among the city’s most wealthy landlords. He owns approximately 525 dilapidated units in the city; all are infested with rodents and insects. His neglect is criminal. R.28 Among his absolute most uninhabitable properties is 67 Pine Street. R. 56-58. It’s there that Simon poisoned the plaintiff when she was an innocent child of only three years of age.

The theme that arises in the shadow story is a search for justice for an innocent child victimized by a greedy property owner. Now, here is an excerpt from the child’s statement of facts, which filters out the bias and emotion present in the shadow story:

Defendant Lloyd Simon owns 525 rental units in Mariner City. In 2020, he earned nine hundred thousand dollars from the rents he collected. R. 97. He faces criminal charges related to lead paint violations in forty-four units. R. 110. The County Health Department has cited him for unsanitary conditions fifty times in the last five years. R. 112. More specifically, in 2020 alone the Health Department found one hundred and fifty of his units were rat and insect infested. R. 113. That same year, the Health Department cited him for dangerous lead paint conditions at twenty-five of his units. R. 114 Among them was 67 Pine Street in Buffalo, New York, where the plaintiff was diagnosed with lead poisoning when she was three years of age. R. 25.

### Exercise 9-1 | Question

**Instructions:** Watch the first six seconds of [this video](#) two times. (Warning: the video contains graphic violence.) It depicts an interaction between a protester and several police officers. The protester was denouncing police violence in the aftermath of the George Floyd murder. The protest took place outside during a city-wide curfew. Assume that, as a result of the event, the protestor was injured and sued the officers for violation of his civil rights. The legal issue is whether the police used unnecessary force or whether their use of force was legitimate.

Watch it once from viewpoint of the lawyer who represents the protestor and then watch from the viewpoint of the lawyer who represents the officers. Then complete the exercise that follows.

*Interactive H5P elements (including the answers) have been excluded from this version of the text. You can view them online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=43#h5p-32> and <https://hayneslegalwriting.lawbooks.cali.org/?p=43#h5p-33>*

Now that you finished this chapter you should understand the nature and purpose of a shadow story, and be able to write a shadow story to find a theme for your brief. In the next chapter you will read about how to transform a shadow story into a persuasive statement of facts.

## Chapter 10 - Writing a Statement of Facts to Show Your Client's Story

### Learning Outcomes

1. Be able to explain the difference between
  - a shadow story and a statement of facts;
  - a fact and an inference; and
  - fact and opinion.
2. Be able to
  - transform a shadow story into a statement of facts;
  - write a persuasive statement of facts.

### Introduction

I suggest you read about shadow stories in Chapter 9, before you begin to write your statement of facts. Shadow stories do not appear in a brief. Rather, they are tools that help you find a theme. They tell your client's view of the facts on paper without a filter, and the process of writing a shadow story helps you find your theme.

In this chapter you will read about how to transform your shadow story into a credible and persuasive statement of facts (SOF) for a brief. You *tell* your reader the story in the shadow story. In contrast, you *show* your reader the story in your SOF. You can tell your client's story complete with anger, bias, and emotion in your shadow story. When you tell a story, you make your reader feel or think in a particular way about the story based on explicit judgments and opinions. For example, your shadow story would state "the Sheriff refuses to take responsibility for the widespread neglect and abuse at the jail."

Then when you write your statement of facts, you replace the tell words with facts that show anger, emotion, and bias. Use citable facts- things that can be seen, heard, smelled, tasted, or touched. A fact should be supported directly by a citation to the record. Thus, rather than telling readers that the sheriff refuses to take responsibility for the widespread abuse at the jail, you show it through facts. For example, your statement of facts would state, "When asked about the Department of Justice's report of widespread unconstitutional conditions at the jail, he testified that "the county jail is not a hotel." "

### Use Facts to Tell your Client's Story

Use facts, not opinions and emotions to tell your client's story. Facts are about the physical world. They can be seen or heard and can be verified through objective evidence. In contrast are conclusions and opinions that tell the reader what to think. For example, here the writer tells the reader to think the defendant driver was reckless through use of conclusions (in bold):



“The defendant driver **barreled down** the road at **breakneck speed without any thought** to the blizzard like conditions.”

In contrast, here the writer shows the reader the driver was reckless through facts (reference to Cite indicate the writer would cite to evidence in support of a fact):

“The Defendant was driving south on Route 16 during the early morning hours of December 26. Streetlights were 50 yards apart. Cite. The wind was blowing from the south at 45 mph, with gusts up to 65 mph, and it was snowing at a rate of 2 inches an hour. Cite. The posted speed limit was 45 mph, yet the Defendant drove his truck at a rate of about 50 mph. Cite.”

### Exercise 10-1 | Question 1

**Question 1:** Which of these is a fact?

*Interactive H5P elements (including the answers) have been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=45#h5p-34>*

Similarly, leave inferences from facts out of your statement of facts. An inference is a conclusion reached from facts. For example, from the fact that Sam threw a drink at Joe, you could infer he was angry with Joe.

### Exercise 10-1 | Question 2

**Question 2:** Which of these is a fact?

*Interactive H5P elements (including the answers) have been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=45#h5p-35>*

### Exercise 10-1 | Question 3

**Question 3:** Which of these is a fact?

*Interactive H5P elements (including the answers) have been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=45#h5p-36>*

## Make it Persuasive

Before you write the statement of facts, develop a theme by exploring the shadow story. See Chapter 9. Then tell your client's story in a manner consistent with your theme. The statement must be factual, accurate, and without argument, yet persuasive. Accomplish these goals with a creative choice of words and organization to emphasize good facts and diminish the effect of bad facts.

You can also point to the absence of evidence when it helps show a weakness in your adversary's case. For example: "there is no testimony about [fill in blank with facts the P/D wishes were in the record but are not]."

### 1. Organize your client's story into three parts

Most persuasive stories have three parts. They begin in a state of equilibrium, where life for your client might not be wonderful, but it's okay. Then something bad happens, and the equilibrium is disrupted. Then the protagonist (your client) tries to restore the equilibrium.

#### Exercise 10-2 | Question 1

Let's look at a story together and break it down into its three parts.

A successful lawyer sells her house when her marriage ends. The buyer is unhappy when she moves in and discovers both the washing machine and dishwasher don't work, so she writes on Facebook that the lawyer is a liar. The lawyer loses clients and sues the buyer for defamation.

**Instructions 1:** First, assume you **represent the seller**. Think about each of these before revealing the answer.

*Interactive H5P elements (including the answers) have been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=45#h5p-37>*

#### Exercise 10-2 | Question 2

**Instructions 2:** Now do the same, this time from the perspective of **representing the buyer**.

*Interactive H5P elements (including the answers) have been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=45#h5p-38>*

## 2. Define both your client’s character and the other party’s character

Define characters by reciting what they have or haven't. So, as the attorney for the seller in a statement of facts, you would not describe the buyer as vindictive since that is not a fact. But you could write about what she did do and did not do. For example, she never contacted the seller to ask that she pay to repair the appliances; instead she went to Facebook and called her a liar.

### Exercise 10-3 | Question

**Instructions:** Assume you represent the buyer. What fact that the seller failed to do might you recite to define her? Think about the answer before revealing it below.

*Interactive H5P elements (including the answers) have been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=45#h5p-39>*

## 3. Use imagery to tell the story

This is where you decide whether to describe events generally or with *detail*. Keep your theme in mind as you decide which details to use. Employ oneness, which is the idea in storytelling that the event you are describing can only happen once and has only ever happened once. It is accomplished through the use of detail to ensure that the audience remembers the story.

### Compare

The car drove down the street, and

The plaintiff drove her blue 2006 Honda Civic at 10 mph down Main Street block at 6 a.m.

## 4. Selectively use the present tense when you write the story

The present tense creates a feeling of immediacy that lets your audience identify with the story.

### Compare

1. At 3:00 p.m. the rioters ascended the stairs to a locked City Hall. When they reached the building, they broke a window and went inside.

2. It’s 3:00 p.m. and the rioters are ascending the stairs to a locked City Hall. They reach the building and break a window and go inside.

## Exercise 10-4 | Question

**Instructions:** Let's try some together. Advance through the pages below (available only at the link below) and complete each exercise.

*Interactive H5P elements (including the answers) have been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=45#h5p-40>*

### 5. Begin with a punch

After you have finished your statement of facts, go back to the start and write a short passage that summarizes your best facts, not with neutral or unimportant facts. Perhaps you'll describe generally the state of equilibrium and its sudden loss in a few sentences. Then in the rest of the statement tell the story by describing those facts with the right amount of detail.

Here's an example:

The Phillips family moved into an apartment owned by defendant Hayes in July of 2020. The two Phillips children went to school just a couple of blocks away. Mr. Phillips stayed home and took care of them, while Ms. Phillips worked as an accountant. In May of 2021, their daughter Katherine, then nearly four years old, was diagnosed with severe lead poisoning as a result of her contact with lead-based paint while living in their rental unit. R. 51-52.

### Selecting Facts

First, find the facts that show how the rules have or have not been satisfied. It helps to organize an abstract around the elements. Both the good and the bad. Think of the determinative facts for each issue, those material to each element.

Second, include every fact you rely on in your argument. Go through the application parts of your argument and find every fact you write about. Then check your statement of facts to make sure that it includes every fact that you find in your application and your counter-arguments to "bad facts."

Third, identify additional facts that help tell your client's story persuasively. Facts that reveal the character of your client and of the other people involved in the story. Facts that you need to hold the story together. Use the active voice.

Fourth, include bad facts, those that hurt your case. These are the facts that your adversary will rely on. If you do not include them, you will lose credibility. You can minimize the effect of bad

facts through placement. Try to neutralize bad facts by juxtaposing them with good ones, either in a paragraph or sentence. Consider using the passive voice to deemphasize bad facts.

Fifth, identify what is not in evidence.

Sixth, eliminate factual clutter.

Now that you have finished this chapter, you should be able to write an effective and credible statement of facts.

## Chapter 11 - Keep it Interesting with Concrete Subjects and Active Verbs

### Learning Outcomes

1. Be able to explain
  - The importance of concrete subjects and active verbs; and
  - When to use the passive voice.
2. Be able to write sentences with concrete subjects and active verbs.

As a lawyer writing an inter-office memo to colleagues or a brief to a court, your audience is busy. They appreciate brevity and do not have time to wade through long-winded text. One way to accomplish this is by writing in the active voice. It will reduce your word count and make your text more interesting.

You have probably read about the active voice. Typically, a sentence written in the active voice is a sentence where the person or thing represented by the grammatical subject performs the action represented by the verb. In contrast, the passive voice is a sentence where the verb is the subject of the sentence, and the subject acts on the person or thing it affects. You can read these abstract definitions multiple times but still need to learn how to write in the active voice. It helps to think instead about choosing concrete subjects and active verbs. My approach for teaching the active voice is based on Richard C. Wydick, *Plain English for Lawyers*, Teacher's Manual, Lesson 2 (Carolina Academic Press, 5th ed. 2005).

First, a word about flexibility: while you should usually use the active voice, there is a place for the passive voice. So, be flexible. Use the passive voice when you do not want your reader to focus on the actor or when you want the reader to focus on the action. For example, assume you represent a defendant driver who allegedly hit a pedestrian. In writing about the incident, you would choose the passive voice to keep the focus off your client; for example, the plaintiff was allegedly struck by a vehicle on April 2, 2022.

### Choose Concrete Subjects

An effective way to learn how to write in the active voice is to think about who or what you chose as the subject of your sentence. The first principle to remember is that the clearest sentences should follow the normal English word order, which is S-V-O. First, the **subject**. Next are the **verb** and the **object** (if there is one).

Example: The dog (subject) chased (verb) the ball (object).

Here is the same sentence written in the passive voice:

The ball (subject) was chased (verb) by the dog (object).

Notice that when written in the active voice, the sentence contains only five words. In contrast, when written in the passive voice, the sentence contains an extra two words for a total of seven words. That's an increase of 20%. Assume a twelve-page brief has 3500 words when written primarily in the active voice. If written in the passive voice, the word count can increase by 20%, which balloons it to 4200.

You will likely write in the active voice if you choose concrete rather than abstract subjects for your sentences. Concrete subjects are real people, things, or places that readers can visualize. But as lawyers, we often write about abstract subjects such as tests and rules and make these abstractions the subject of our sentences. To find the most effective concrete subject of a sentence, ask yourself “who or what is doing something in this sentence?” Then place that thing or person in the subject position of the sentence.

The grammatical subject of the next sentence is “documents,” which is an abstraction.

The documents were subpoenaed by the January 6 committee.

---

But it is the January 6 committee that acts, so it is a better subject.

Here is the sentence rewritten with the committee as its subject:

The January 6 committee subpoenaed the documents.

### Exercise 11-1 | Question 1

**Question 1:** What is the grammatical subject of the next sentence?

Jurisdiction is established when out-of-state actors have minimum contacts with the subject state.

*Interactive H5P elements (including the answers) have been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=47#h5p-41>*

## Exercise 11-1 | Question 2

**Question 2:** But who actually acts?

*Interactive H5P elements (including the answers) have been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=47#h5p-42>*

## Exercise 11-1 | Question 3

**Question 3:** Fill in the missing words to complete the sentence with the actual actor as the grammatical subject.

*Interactive H5P elements (including the answers) have been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=47#h5p-43>*

The grammatical subject of the next sentence is “these problems,” which is an abstraction.

These problems were addressed by the members of the Common Council.

But it is the members of the Common Council who act, so they are the actual subject. To rewrite it in the active voice make "members of the Common Council" the subject. Thus, the sentence becomes: The members of the Common Council addressed these problems.

## Exercise 11-2 | Question 1a

**Question 1a:** Identify the grammatical subject and the actual subjects in the following sentence by dragging the labels into the correct boxes.

*Interactive H5P elements (including the answers) have been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=47#h5p-44>*



### Exercise 11-2 | Question 1b

**Question 1b:** Rewrite the sentence from Question 1a with the actual actor as the grammatical subject, then compare your answer with the sample answer provided.

*Interactive H5P elements (including the answers) have been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=47#h5p-45>*

### Exercise 11-2 | Question 2a

**Question 2a:** Identify the grammatical subject and the actual subjects in the following sentence by dragging the labels into the correct boxes.

*Interactive H5P elements (including the answers) have been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=47#h5p-46>*

### Exercise 11-2 | Question 2b

**Question 2b:** Rewrite the sentence from Question 2a with the actual actor as the grammatical subject, then compare your answer with the sample answer provided.

*Interactive H5P elements (including the answers) have been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=47#h5p-47>*

## Exercise 11-3 | Question

**Question:** Rewrite the following paragraph replacing the abstract subjects with concrete subjects. Remember to ask yourself “who or what did or is doing something in each sentence?” Then make that the grammatical subject of your sentence.

Citations to New York case law are in New York Law Reports Style Manual form.

A triable issue of fact is raised about a landlord’s notice that there is chipping paint in her rental property when there is evidence presented by plaintiffs from which it may be inferred that the property owner knew that paint was chipping or peeling on the premises. Jackson v. Brown, 26 A.D.3d 804, 805 (4<sup>th</sup> Dept. 2006). The Brown landlord defendant was not informed by the plaintiff of the chipping and peeling paint. Nevertheless, the parties’ testimony specifying the peeling paint was in plain sight, coupled with the fact the property owner entered the apartment frequently while the condition existed, was held by the court to be sufficient to infer the property owner knew of the chipping and peeling lead paint condition. Id.

*Interactive H5P elements (including the answers) have been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=47#h5p-48>*

### Couple Your Concrete Subjects with Active Verbs

When you find a concrete subject, couple it with a verb that describes what the subject actually does. Choose such action verbs, rather than vague verbs; for example, avoid “concerns,” “involves,” and “deals with” since they tell the reader little about the real action in the sentence.

Example – The Fourth Department (subject) dealt (verb) with a vehicle that suddenly crossed over into an oncoming vehicle’s lane of traffic. Gouchie v. Gill, 198 A.D.2d 862 (4th Dep’t 1993).

Revised with an active verb – The Fourth Department (subject) held (verb) that the non-offending driver in a cross-over accident was not negligent as a matter of law. Gouchie v. Gill, 198 A.D.2d 862 (4th Dep’t 1993).

Replace the vague verb in this sentence with an active verb:

My neighbor is involved in gardening

Suggested answer: My neighbor gardens.

One final note, effective legal writers make their subjects act with base verbs, not nominalizations. A nominalization is a base verb that has been turned into a noun. Thus, argue becomes argument; deliberate becomes deliberation; and consider becomes consideration. Like relying on the passive voice, when you rely on nominalizations your word count balloons, but the meaning of your text remains the same.

In the following sentence the concrete subject (The landlord) is coupled with a base verb (knew):

The property owner knew about the hazardous condition.

Here is the sentence written with the base verb expressed as a nominalization (knowledge):

The property owner had knowledge of the hazardous condition.

Both iterations convey the same message. But by replacing the base verb (knew) with a nominalization “knowledge” you need to add a supporting verb (had).

#### Exercise 11-4 | Question 1

**Question 1:** In each sentence, identify the word that is a nominalization. (Choose one word only for each sentence.)

*Interactive H5P elements (including the answers) have been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=47#h5p-49>*

#### Exercise 11-4 | Question 2

**Question 2:** Using those same sentences, replace the nominalization with the appropriate base verb.

*Interactive H5P elements (including the answers) have been excluded from this version of the text. You can view it online here: <https://hayneslegalwriting.lawbooks.cali.org/?p=47#h5p-50>*

With practice you will choose concrete subjects and active verbs naturally. But it does take practice. So, I suggest that you read a brief or memo you wrote in your legal writing class with the lessons in this chapter in mind. Then, edit the sentences in that work by removing abstract subjects and replacing them with concrete subjects, and replacing nominalizations with active verbs.

## Chapter 12 - Writing Complaints and Answers

### Learning Outcomes

1. Be able to explain the preliminary questions you need to answer before you draft a complaint or answer.
2. Be able to explain where to find the answers to those questions in both state and federal court.
3. Be able to write complaints and answers for federal actions.

Complaints and answers get a lawsuit started.

Complaints stop the running of the statute of limitations, initiate the litigation, provide notice of disputed facts and issues, provide notice of the relief sought, and define the scope of discovery. Answers join the issue, prevent default, and provide notice of affirmative defenses.

Good drafting is essential; if technically precise, it will avoid attacks by motion, which, if lost, require you to file amended pleadings to cure defects. You will find federal pleading rules in the Federal Rules of Civil Procedure. State pleading rules differ from state to state, so if you plan to file a lawsuit in state court or answer a complaint filed in state court, you must consult your state's pleading rules.

### Drafting Complaints

Before you begin drafting a complaint, you need to answer three preliminary questions. They are:

#### 1. Whom do you plan to sue?

The answer is relevant to both personal jurisdiction and venue. Jurisdiction establishes whether a court, for example, federal court, has the power to make a decision affecting the party sued. And the answer is relevant to venue, which establishes whether a court in a particular location is the proper place to file suit. Consult the Federal Rules of Civil Procedure for rules governing venue in claims filed in federal court. If you plan to file in state court, consult the statute or rules that govern venue in that state.

A court can have jurisdiction over a defendant but be improper venue. For example, you could determine that the Western District of New York has jurisdiction over a party. Still the district courts within the Western District are located in five separate geographic locations. So, while any of the five courts within the district would have jurisdiction over a party, it may be that only one is proper venue.

A detailed discussion of jurisdiction and venue is beyond this handbook's scope. But relevant factors include where the occurrences underlying an action occurred and where potential defendants reside.

## **2. Where do you plan to sue?**

Once you decide, consult either the Federal Rules of Civil Procedure or the rules that govern the state where you intend to file.

## **3. What are the elements of your cause(s) of action?**

Remember that in federal court, the standard is fact pleading, which requires you to allege specific facts that establish each element of each claim. For example:

For a first cause of action (negligence)

1. On March 11, 2020, at approximately 1:00 p.m., plaintiff Chaplin was ascending the exterior stairs to 99 Chateau Terrace in Amherst, New York.
2. When Chaplin reached the fourth stair, she fell when it broke under her.
3. Defendant Walters should have known the stair was unsafe because the Town has issued him a summons citing the deteriorating condition of the stair but took no action to repair it.
4. As a result of her fall, Chaplin suffered a comminuted fracture of her left leg.

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In contrast to factual pleading is notice pleading, which permits plaintiffs to state a claim generally, without requiring detailed facts to support each element of each claim. If you plan to sue in state court, read the rules to determine whether the state allows for notice pleading. For example:

For a first cause of action (negligence)

1. As the owner of 99 Chateau Terrace in Amherst, New York, the defendant owed the plaintiff a duty to keep the property in a safe condition.
2. The defendant breached his duty.
3. As a result of the defendant's breach, the plaintiff suffered an injury.

The form and content of complaints filed in federal court are governed by the Federal Rules of Civil Procedure, which you must check before drafting a complaint. If you plan to file in state court, you must consult the relevant state court statutes or rules. The state requirements are outside the scope of this book, and only federal requirements are addressed.

Even if you think your state permits notice pleading, I suggest you plead facts to be on the safe side. You have nothing to lose and will be required to disclose the facts in discovery.

While researching, you will find forms that you can follow. You may be given a form to file by a supervising attorney. While forms can help you draft a complaint, I discourage blindly following

them because while it may result in an acceptable product, you will not have learned how to draft a complaint. Rather, you will have learned only how to fill in a form.

Generally, the content of a complaint in federal court consists of:

1. The caption – A caption appears at the top of legal pleadings. It lists the plaintiff's name, the defendant's name, the document's name, the court where the matter was filed, and the docket number.
2. Introductory sentences – give your reader a sense of what the lawsuit is about. Just a few sentences will suffice. They will put the complaint in context, which makes it easier for the reader to understand the pleading as they read it.
3. The Body of the complaint, which includes:
  - a. Jurisdiction and venue – A statement stating the basis for both jurisdiction and venue is only required in federal court pleadings.
  - b. Parties – name all parties.
  - c. Demand or conditions precedent satisfied if required (for example, that administrative remedies are exhausted). Attach relevant documents as exhibits.
  - d. Factual allegations - Allege facts to support each element of the claim.
  - e. Legal allegations - Allege the elements of each claim separately.
4. Request for Relief – list the remedies sought.
5. Jury demand – to preserve your right to a trial by jury in federal court, include a demand for a trial by jury in your complaint.
6. Date, Attorney Signature – Attorney signature is required in federal court.
7. Plaintiff verification, if required.

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Annotated complaint

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK**

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JOHN SMITH,

Plaintiff,

PLAINTIFF'S ,  
COMPLAINT AND  
JURY TRIAL

vs.

SERGEANT  
JOHN DOE,

Defendant.

DEMAND Civil  
Action  
  
No.22-CV-888

---

**I. INTRODUCTION**

1. This claim is for damages pursuant to 42 U.S.C. § 1983, and is based on a beating inflicted on the Plaintiff by the Defendant Erie County Deputy Sergeant when Plaintiff was a pre-trial detainee in the custody of the Sheriff of Erie County on or about May 14, 2021.

2. The Plaintiff claims that MAY 14, 2021, SERGEANT JOHN DOE violated his rights under the United States Constitution to be free from the excessive use of force.

**II. JURISDICTION<sup>82</sup>**

3. This Court has subject matter jurisdiction over the Plaintiff's civil rights claims, pursuant to 28 U.S.C. §§ 1331, 1341(a)(3) (4).

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<sup>82</sup> The two primary sources of the subject-matter jurisdiction of the federal courts are federal questions and diversity.

### III. VENUE<sup>83</sup>

4. All alleged acts occurred in the County of Erie. Therefore, venue is proper in the Western District of New York under 28 U.S.C. § 1391(b).

### IV. PARTIES<sup>84</sup>

5. At all times relevant to this action, the Plaintiff was incarcerated and awaiting trial in the custody of the Office of the Sheriff of Erie County.

6. At all times relevant to this action, Defendant JOHN DOE (“DOE”) was a deputy sheriff who assaulted the Plaintiff and was acting under color of state law. DOE is sued in his individual capacity.

### V. CONDITIONS PRECEDENT<sup>85</sup>

7. Within the intent of the Prison Litigation Reform Act, the Plaintiff pursued all administrative procedures available to him at the Erie County Holding Center. A copy of his grievance based on the beating inflicted on the Plaintiff on or about January 29, 1010, and the County’s response are attached to this Complaint as **Exhibit A**.

8. The Plaintiff also filed a grievance based on the beating inflicted on him on or about April 28, 2010. A copy of this grievance is attached to this Complaint as **Exhibit B**.

### VI. STATEMENT OF FACTS<sup>86</sup>

9. That on or about May 14, 2021, the Plaintiff was in the physical custody of the Erie County Sheriff.

10. That on or about May 14, 2021, the Plaintiff was a detainee in the Erie County Holding Center.

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<sup>83</sup> Venue is generally determined based on either where the defendant resides or where a substantial part of the events giving rise to the action occurred, or where a substantial part of the property that is the subject of the action is located.

<sup>84</sup> Here the parties are identified based on their relevancy to the claim.

<sup>85</sup> This complaint includes pleading conditions precedent because they are required when a prisoner sues over conditions of their confinement.

<sup>86</sup> Example of fact pleading. Alleges facts sufficient to establish each element of the claim.



11. That on or about the afternoon of May 14, 2021, the Plaintiff was being escorted back to the Erie County Holding Center from a court hold area in County Court, when DOE pushed him and shoved him into a court hold cell.

12. That the Plaintiff's hands were cuffed.

13. That while the Plaintiff was in the court hold cell with his hands cuffed, DOE, seriously and violently assaulted him.

14. That the beating inflicted on the Plaintiff included kicking, punching, slamming his head into a wall, and spitting on him.

15. That as a result of the beating, the Plaintiff suffered multiple injuries to his head, ears, and body.

16. That as a result of his injuries, the Plaintiff sustained severe pain and discomfort in his head, ears, and body. He also suffered serious psychological trauma, leaving him anxious, depressed, and fearful.

## **VII. PLAINTIFF'S CAUSE OF ACTION UNDER 42 U.S.C. SEC. 1983 AGAINST DOE<sup>87</sup>**

17. Plaintiff repeats and re-alleges each and every allegation contained in paragraphs "1" through "16" of the Complaint herein with the same force and effect as if fully set forth herein.

18. That the Plaintiff had an absolute and constitutional right to be free from the unreasonable and excessive use of force, assault, and battery on his person, even during a period of lawful detention and even if in the custody of Sheriff of the County of Erie.

19. That the severe beating and assault upon a passive and non-confrontational person is totally without legal justification and, upon information and belief, is contrary to the rules and procedures of the Sheriff of the County of Erie.

20. That the laws of New York against assault, menacing and reckless endangerment prohibit actions such as those undertaken by JOHN DOE

21. That the punching, kicking, and injuring of the Plaintiff by DOE, on May 14, 2021, was excessive, unreasonable, and unjustifiable under the circumstances and subjected the Plaintiff to a deprivation of rights and privileges secured to him by the Constitution and laws of the United States, including the Fourteenth Amendment of the United States Constitution, within the meaning of 42 U.S.C. § 1983.

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<sup>87</sup> These are the legal elements of the claim.

22. That as a direct and proximate result of the unconstitutional acts of DOE the Plaintiff suffered extreme emotional distress, physical injury, psychological distress, and humiliation.

### **VIII. REQUEST FOR RELIEF**

The Plaintiff requests that the Court grant the following relief:

- a. judgment against the defendant for compensatory and special damages in a sum in excess of two hundred fifty thousand dollars (\$250,000.00).
- b. punitive damages against the defendant.
- c. attorneys' fees, for his costs expended herein, for interest, and
- d. for such other and further relief both at law and in equity, to which the Plaintiff may show himself to be justly entitled.

### **IX. JURY DEMAND**

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, the Plaintiff demands that all issues of fact in this cause be tried to a properly impaneled jury.

Dated: August 31, 2022

Buffalo, New York

/s/Sally Attorney

17 Chathlin BLVD.  
Basset City, NY  
(716) 555-8888

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When you finish drafting a complaint, the next step in commencing an action is to file it. Filing commences the action and thus stops the statute of limitations, but the complaint must be served within a certain number of days. Check your local rules for filing.

### **Form and content of answer**

The form and content of answers filed in federal court are governed by the Federal Rules of Civil Procedure, which you must check before drafting an answer. If you answer a complaint in state court, you must consult the relevant state court statutes or rules. However, the state requirements are outside the scope of this book, and only federal requirements are addressed.

While researching, you will find forms that you can follow. You may be given a form to file by a supervising attorney. While forms can help you draft answers, as with complaint forms, I discourage blindly following them.

Generally, the content of an answer in federal court consists of:

Caption – identical to complaint

Introductory Sentence – for example, “The defendant through his or her attorney states as follows.”

Body – admit or deny each allegation in the complaint. Alternatively, if the defendant lacks knowledge sufficient to form a belief about the truth of an allegation, they can plead LKI, which stands for lack knowledge and information.

Affirmative Defenses – allege potential defenses

Counterclaims – state as a counterclaim any claim the answering party has against an opposing party.

No Demand for Relief (unless asserting counterclaims)

Wherefore Clause – a summary of the defendant’s demands

Date, Attorney name, Signature if federal court

Sample Answer to Annotated Complaint

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK**

JOHN SMITH,  
Plaintiff,

vs.

SERGEANT JOHN DOE  
Defendant.

The Defendant JOHN DOE for his answer and through his attorneys, states:

1. Denies the allegations in paragraphs 6, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22.
2. Lacks information and knowledge sufficient to form a belief about the truth of the allegations in paragraphs 1, 2, 3, 4, 5, 8, 9, 10, 23, 24.
3. Admits the allegations in paragraphs 7 and 12.

**First Affirmative Defense**

4. Plaintiff's complaint fails to state a claim against defendant on which relief can be granted.

**Second Affirmative Defense**

5. Defendant further pleads the application of the defense of absolute and/or qualified immunity; defendant asserts that he is entitled to absolute and/or qualified immunity for acts done or actions taken by him, since all acts done or taken by defendant were done or taken in good faith, and that the acts done or taken were not in violation of any clearly established statutory or constitutional rights of which defendant knew or should have known.

WHEREFORE, defendant respectfully requests that the Court:

- A. Enter judgment in defendant's favor.
- B. Award defendant its reasonable costs and fees[, including attorneys' fees].

C. Grant defendant such other and further relief as the Court deems just and proper.

/s/Steve Attorney

44 Marpina Ave.  
Basset City, NY  
(716) 555-9999

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Now that you finished this chapter, you should be able to write simple federal court complaints and answers and know how to find the rules to write simple state court complaints and answers.

## Update this Book

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