Interactive Course – Developing a Case and Advocating on Behalf of a Client
Professor Philip M. Genty, Columbia Law School
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COURSE READINGS

Principles of Interviewing

Roni Rothler, Esq., Bar Ilan University, Israel

Introduction

Usually, the meeting with the client is also the **starting point** of the case for you as a lawyer, and therefore it is very important.

The quality of the interview, the information gathered and the nature of your relationship with the client will **determine the progression of the case.** The **skills** you need for the interview – such as listening, empathy, honesty and investigation, will continue to serve you throughout the case.

My idea of the right approach for the interview is that the **lawyer and client are partners,** working towards a mutual goal, and **the client is responsible for making the main decisions,** while the lawyer helps, counsels, and represents.

This is definitely our approach in the law school clinics, since we believe that our clients are the greatest experts about their problems and their surroundings.

In order to work on a common goal we need to **see the client as a person with a legal problem** and not as a legal problem accompanied by a person. We're talking about personal relationships. We need to see who is our client and not just what is the case, in order to decide about the best way to handle it, e.g. is the client so anxious that he will not do so well on the stand? If so, then we might try to resolve the case through negotiation. We might also ask how the client feels in general about taking risks.

We also need to know our **boundaries**, and to know when the client needs professional help that is not legal.

I. Goals of the Initial Interview

The **two important things** we have to achieve in the initial interview are:

1. Gathering the relevant information
2. Starting to establish our client-lawyer relationship

Gathering the relevant information

On the one hand, **let the client talk freely**, trying to get as much information as you can. Sometimes we come to the interview with a certain idea of what we want to hear, and if we direct the client too much we might miss relevant facts (all within the boundaries of reason...).

On the other hand, **make sure you're getting all the information** that is relevant to the case, and focus the client on those issues. There's nothing worse than being surprised by the other party during negotiation – or worse, in court.

In summary – try to know everything about the case that the client knows.

Use this time to gather **"outside" information** that can help you handle the case – how strong will he be on the stand, what is the damage that will be inflicted upon him from a long trial (publicity, etc.), what is his financial situation – will he prefer to get a certain sum now than a greater sum later? etc.

You should know that the client will not always be able to define the legal problem, and that legal problems might exist that he's not even aware of or able to explain. It is your role to **translate his reality into a legal reality.**

Don't forget also, that whatever clients tell you, they filter through their own thoughts and emotions. Always ask for documents or try to **verify the facts** with other sources in order to get the real picture.

Developing client-lawyer relationship

Your relationship with the client begins from the moment you first meet, and will go deeper throughout the case. The initial interview will be the basis of the relationship.

One of the most important things in this relationship is **mutual respect and honesty,** so that clients will know that you respect them as people and not just as legal problems. You definitely don't have to like the clients (ex. – representing criminals) but you do have to show them that you really care about them and their legal situation.

It is also very important to develop a relationship of **trust,** in order to encourage clients to be as candid with you as possible and not withhold any information from you.

It is also important that clients feel **comfortable** in order to make sure they give you all the relevant details regarding the case. So try to think about what will make the clients comfortable, and especially, try to be relaxed and not judgmental.

Since the clients came to you in order to get legal aid, in order for them to take your advice seriously it is important to give them the feeling that **you are a professional and know what you're talking about**. (Of course – don't make up things; it's totally ok to say that you're not sure and that you'll check!). The clients will be the ones to make the final decision but you have the responsibility to thoroughly check all the possibilities and advise them.

Another important thing during the first interview is to **decide for yourselves** – does this case suit you? How much work will it require and do you have the time for it? Do you have the legal expertise to handle this case? Is there anything in the case that conflicts with your moral standards and will affect the way you handle the case, or make you suffer?

Another important issue is the **payment** – should you take a fixed price? By the hour? Success rates? Whatever you decide, it is important to reach an agreement with the client, written if possible, during the first meeting, to avoid unpleasant surprises and misunderstandings later on.

II. Anatomy of a first interview

Since you don't know the client at this point, you are working under some sort of uncertainty. Nevertheless, you can still construct the interview as follows:

1. Preparation
2. Ice breaking
3. Identification of the problem
4. Presentation and overview of the problem – to be confirmed by the client
5. Ending

Preparation

Before the client arrives, check out which legal material you're dealing with, and devote some time (not too long – because you don't know the facts yet) to make yourself acquainted with the relevant legal material. Obviously, as you gain more experience you will need less time for preparation. But you should know that even experienced lawyers sometimes have to deal with different legal fields and need to update themselves. This preparation will help you focus the client and more effectively gather the relevant information.

Also, if from your phone conversation you already gathered some facts regarding the case or the client, you may inquire a little bit about that You might also like to **organize your office** in an attractive way – not too messy, and to make your appointments with **reasonable breaks** so that you will be able to give each client the time he or she needs.

Ice breaking

People usually don't feel comfortable before a meeting with a person who represents authority and power, like a lawyer. Add to that, that they came to talk about a problem that bothers them. Since they need legal aid, they might develop some sort of dependence.

The ice breaking part is important in order for the client to feel comfortable and give as much relevant information as possible. You can achieve this in several ways – meet the client and shake his or her hand at the lobby; escort him or her to your office; make some "small talk" – weather, parking; offer something to drink; and only then start with the practical interview.

Identifying the problem

In this phase you need to get the "pure" version from the client of his or her legal problem, while he or she explains what happened – emphasizing the elements that are important to him or her – without interpreting it through your own point of view. This is why it is recommended to start this phase of the interview with an **open question** that calls for a long "story-like" answer, such as – "How can I help you", or something more structured like "Tell me about the problem that brought you here, how it started and what do you want to do in regard to it". Even when you do have prior information (because you know the client

from a previous case, or you talked on the phone), it is important that you first let the client tell you about the problem. You should not describe it yourself, because this might make the client follow the picture and structure that you are suggesting and skip relevant facts that you have not mentioned. So, if you already know something about the problem it is best if you give a one sentence overview of your understanding of it, and ask the client to explain how it all began.

Clients usually prepare for their meeting. This is true of experienced businessmen and people who have never met a lawyer before. All generally know how they want to present their legal problem. Most of the time it represents the way they think it's best to represent the case. So pay attention to what they say and see what you can learn from it.

When the client talks it is recommended that you **use body language that supports and encourages the continuation of the story** – keep eye contact, lean forward, don't cross your hands, use "a-ha", "I see", please continue," etc.

Many times lawyers cut the client's story short and put on it their own interpretation. There are two main reasons for this– 1) they think (usually prematurely) that they have understood the problem, and 2) they're afraid to lose precious time. It is important to avoid this as much as you can and to interrupt the client only if you really feel that he or she can't tell you a clear and coherent story.

Overview of the problem

At this phase you tell the story back to the client the way you have understood it, and ask for explanations about things that are not clear enough. You need to identify the main legal subjects in the story and line them up in a logical (many times – chronological) manner. You need to identify information especially in 3 levels: the facts that have led to the case, the facts that surrounded the case, and the facts that occurred after the case.

As you go along, your questions will be more and more specific, in order to gather all the information you need. But don't start with "Yes/no" questions. Usually the client will not give you all the relevant information and you'll have to interrogate them (in a nice atmosphere of course). Pay attention especially to gaps in the information, incorrectness, failures of memory, a will to hide facts, or misunderstandings of the client. If you get the feeling that the client doesn't know why you're asking a specific question, explain.

At the end of this phase you might already have a good idea regarding possible solutions, but it is recommended in most cases not to go forward and analyze the possible results of

the case, before you go through further legal investigation. If you do want to get into results, try to be cautious and not let the client reach overly optimistic or pessimistic conclusions.

Ending

At this phase it is important to achieve at least 2 goals:

1. Division of tasks between you and the client – such as – you will investigate the legal material and the client will talk to a certain person or get a certain document in order to clarify some unclear facts.
2. Make another appointment or deadline, in order to show commitment and achieve more certainty about how things are going to proceed.

III. Miscellaneous Issues

Non-verbal communication

Although we as lawyers like verbal communication very much, we should not neglect the non-verbal communication and gather information on all the levels.

Space – think about how you sit with the client – sitting across from each other, on the 2 sides of a heavy desk sets out a difference of power and doesn't always encourage openness. At the clinics we sometimes therefore chose to sit in a small circle around a small table.

Body language – pay attention to facial gestures, eye contact, and tone – Is the client avoiding you? Not trusting you? Lying? Shy? You might use those as reference points to be checked later on as the relationship moves along.

Verbal communication

It is important not to insult or annoy the client – don't ask a person, "When did you abandon your wife and kids", but rather, "When did you and your wife separate".

When you choose your words, pay attention to the client's level of understanding, and don't say things that he or she cannot understand or that would be an insult to his or her intelligence. If you're using legal terms – explain them.

MEETING WITH CLIENTS/INTERVIEWING SKILLS
Prof. Philip M. Genty, Columbia Law School

Overview

- Think about the meeting with your client as an interview. Careful advance planning is very important to the success of an interview.
- The kind of things to think about
  a) setting – you are going into a space you may have never been; you may have some anxiety and preconceived ideas of what a prison is like; and some insecurity about being there
  b) be honest with yourself about those feelings above
  c) be careful about overcompensating for your insecurity instead of acknowledging your vulnerability
- Clients are happy to have someone to listen to them. They usually have not had that experience with lawyers before.

Beginning of Interview

- Most important part of ice-breaking in the interview is how do you connect. Think about it from the client's perspective. What are they wondering about you?
- Be honest about your experience. It's ok to say, "I haven't done this before." You can overcome your lack of knowledge by expressing your interest and taking the time to understand the client's situation and needs. But DON'T overpromise!
- Confidentiality – What are you going to do with the information that has been conveyed to you? Make the person feel comfortable, trusting to get the information you need.

Middle of Interview

- Potentially sensitive questions: Think about what you want to know and why. For example, information about the crime, information about the father(s). Is this a sensitive question? Is this something I need to know. You might say, "I'm sorry I need to ask this….." Explain, why you need to know, i.e. lay a foundation for the questions you ask. Timing is also important -- Try not to ask sensitive questions in the very beginning, before the client is comfortable speaking to you.
- Ask open-ended questions to get a narrative. Clients may even reveal sensitive information. This gives you an opener. Use an open-ended funnel technique of asking questions.
- It's a conversation not an interrogation.
- Boundary issue- Be careful of trying to empathize with information that isn't analogous and will make the client feel uncomfortable. (parenting examples)
- Self disclosure – Why are you doing this? It's not about you. Does a comparison to your own life make sense. Use this technique delicately.
- Judgmental issue – It isn't appropriate to express whether you approve of her childcare arrangement or not. It's not useful to say, "If you had done things differently, then……."
- You may have to deliver bad news like a client's rights have been terminated and her children adopted. Acknowledge that. But don't attempt to justify/rationalize the outcome.

End of Interview

a) make sure you understand what the client has told you.
b) Be clear with the client about what you are going to do between this meeting and the next one, and the likely timeframe for that next meeting
c) Don't overload the client. Focus on the immediate.
d) Think of this as a partnership – are there things the client needs to do between this meeting and the next one, e.g. contacting a relative, getting copies of documents together to show you, etc.?

Summary – Think of the interview in three parts-- beginning – how do you begin the conversation; middle – how you gather the information; end – how you wrap things up and prepare for next steps.

CHAPTER 18

Writing a Fact Statement

There is an adage among trial lawyers: If you have to choose between the law and the facts, take the facts. The adage reflects the experience of many lawyers that a judge or jury convinced of the justice of your cause will find a way around unfavorable law. Conversely, if the judge or jury perceives that justice is on the other side, favorable law might not be enough.

The Statement of Facts (sometimes called the "Statement of the Case") is the primary place where your reader's sense of justice about the case will be formed. As a general rule, narrative is more effective at creating attitudes than is intellectual analysis. *The Jungle* persuaded countless readers of the inhumanity of the meat-packing industry. *Cry, the Beloved Country* convinced people around the world of the injustice of apartheid.

Consider your own reactions. Imagine reading a well-reasoned analysis arguing that Hitler should not have imprisoned and killed European Jews. The analysis explains and applies certain abstract moral principles. Imagine your response. Now compare it to your response to *The Diary of Anne Frank* or *Schindler's List* or *Sophie's Choice*. Which would you find more powerful: the rational analysis or the stories of the people who lived the facts? Which would you remember longer? Which would persuade you more?

Stories grab us, persuade us, motivate us. Your client's story can persuade a judge, just as a movie or book can persuade you. But to be persuasive, your client's story must be told skillfully. Many lawyers believe that the brief that tells the most effective story is the most likely to prevail. But writing this key part of the brief is more challenging than writing a short story or novel. It is harder because you cannot make up desirable facts or imagine away undesirable facts, and because you must use the facts to persuade without *appearing* to do so. You must recite the facts objectively enough to be fair and yet persuasively enough to be compelling. As Professors Ray and Cox put it:

> If briefs to the court were gymnastics events, their statements of facts would be performed on the balance beam. Writing a persuasive statement is accomplished not by following one set of rules, but by balancing your use of various techniques to maintain credibility while achieving the stance needed to highlight favorable facts. It does not require the brute force of emphatic language so much as a subtle blend of strength and control of structure and detail. It involves much thought, consideration of alternatives, and monitoring the interactions of various techniques. Yet an excellent statement of facts

looks natural and effortless, just like a complex routine looks easy when performed by a skilled gymnast.[1]

I. FACT ETHICS, READERS, AND THE CONVENTIONS OF FACT STATEMENTS

A. Fact Ethics

Remember from Chapter 14 that a lawyer must not misrepresent facts.[2] Misrepresentation includes both stating facts untruthfully and omitting material facts when the result of the omission is to create a false inference. The rule further requires lawyers to disclose material facts when disclosure is necessary to avoid assisting the client in a criminal or fraudulent act.

In virtually every case, you will find some facts you wish were not there. The more material the facts are, the more you wish they would go away. But they exist nonetheless, and leaving them out of your Fact Statement will not make them disappear, for they will certainly appear in the opposing brief. Omitting them from your brief will only damage your credibility before the judge, causing the judge to wonder how much she can rely on the other facts you assert and on the legal analysis you propose. Few things make a judge angrier than feeling misled by a lawyer.

The omission of important facts also forces the judge to use the opposing party's Fact Statement, rather than yours, as the court's primary factual reference. These consequences are serious for both lawyer and client. Therefore, both good ethics and good strategy require inclusion of all material facts, favorable or not.[3]

B. The Conventions of a Statement of Facts

Certain formal requirements and generally accepted conventions apply to the Statement of Facts. Refer to the Statement of Facts of the briefs in Appendices B and C for examples of how a Statement of Facts employs the following conventions:

1. An appellate brief must refer only to facts that are a part of the court record. Facts cannot be added to the record.[4] Because the point of an appeal is to decide whether the lower court's decision on a certain point was supported by the facts and the law *before that court,* the appellate court may consider only

1. Mary Barnard Ray & Barbara J. Cox, *Beyond the Basics: A Text for Advanced Legal Writing* 167 (2d ed. West 2003).

2. A lawyer shall not knowingly make a false statement of fact or fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client. Model R. Prof. Conduct 3.3(a)(1) and (2) (2007).

3. Later sections in this chapter identify ways to neutralize or deemphasize unfavorable facts.

4. There are rare exceptions to this rule, but none that we need to worry about here.

the factual record that was before the lower court at the time of the decision from which the appeal has been taken.

The Statement of Facts must cite the location of the fact in the record.[5] The citation allows the judge to verify that the fact actually appears in the record and to check that the writer's descriptions of the fact and its context are not misleading. Judges *do* check the facts. For an appellate brief, the most common form for these citations to the record is "R. at [page number]."

2. A Statement of Facts is a part of a legal document and retains the formal style of the rest of the brief. Although a Statement of Facts tells the story of the legal dispute, its style is not like a short story. You do not want the style of the fact statement to cause the judge to wonder if she is reading fiction. Therefore, present the facts in an objective style, avoiding obvious appeals to emotion, grand description, dramatic literary devices, and other obvious attempts to manipulate the reader. The style should be dignified and courteous, never sarcastic or angry.

3. A Statement of Facts does not discuss law. It sets out all of the facts the rule makes important, but it does not explain the rule or the rule's relationship to the facts. Rule explanation and application come in the Argument section. The only exception to this convention is that the last paragraph of the fact statement may segue into the legal argument by stating the legal issue the Argument will address.[6]

4. A Statement of Facts does not contain overt argument, whether legal or factual. The facts are presented in an objective style, and the writer does not expressly assert factual conclusions. For instance, for a case involving medical malpractice, the Fact Statement might relate the patient's vital signs, the medical test results, the patient's medical history, and the nurse's observations, but the writer would not argue that the doctor breached the applicable standard of care.

Note that this restriction applies to conclusions drawn by the *writer*, but the writer *is* permitted to relate the conclusion of another. For instance, whereas the writer cannot assert that the doctor breached the applicable standard of care, the writer can report the testimony of an expert witness who asserted this conclusion. The testimony of the witness is a *fact* that occurred at a deposition or at trial. Reporting the conclusions of others is sometimes called "masked editorializing."[7] Quotations, used in moderation, are appropriate in a Statement of Facts, and often are effective, as section IV explains.

A Statement of Facts also can point out the *absence* of certain facts from the record. The absence of a fact from the record is itself a fact. Thus it is fair game to include in the Statement of Facts the following:

> At trial, three officers testified that they were stationed at the building's entrance between 5:00 and 6:00. However, no witness testified to seeing the janitor enter or leave the building.

Pointing out a fact's absence can allow the writer to make a point about the evidence while remaining within the legitimate bounds of fact-reporting.

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5. Fed. R. App. P. 28(a)(7).

6. *See* section IIIB.

7. *See* Louis J. Sirico & Nancy Schultz, *Persuasive Writing for Lawyers and the Legal Profession, Second Edition*, 81 (Lexis Nexis 2001).

One of the most common and most unfortunate errors lawyers make is neglecting to notice important *absent* facts.

II. DEVELOPING A THEORY OF THE CASE AND SELECTING FACTS

Although some facts must be included no matter what theory of the case or theme the lawyer selects, other fact-selection decisions are tied directly to the theme the lawyer will develop. This section explores these two interrelated lawyering tasks.

A. Developing a Theory of the Case

Lawyers use the term "theory of the case" to refer to the theme they will weave throughout the facts, the theme that will explain the facts from their client's perspective. The theme should be sympathetic to the client. It should help the judge understand who the client is, why the client acted in the way he did, feels the way he does, and needs the things he needs. At the least, a good theory of the case assures the judge that a ruling in favor of your client will not be unjust. At best, the theory convinces the judge that justice requires a ruling for your client.

Of course, a theory of the case must be consistent with the key facts. Creating a theory is easy when the facts are generally favorable and much more difficult when they are not. For troublesome facts, you must work even harder to see and *feel* the story from your client's perspective. Look at the sample Questions Presented for Carrolton and for Watson in Chapter 15, section I. Can you see what Carrolton's theory of the case will be? How about Watson's?

To find an effective theory of the case, try to look at the facts from your client's perspective and look for narrative themes. Professors Brian Foley and Ruth Anne Robbins have pointed out seven common kinds of narrative themes: (1) a person against another person, (2) a person against herself, (3) a person against nature, (4) a person against society, (5) a person against a machine, (6) a person against God, and (7) a person against everybody else.[8] Might one of these stock themes describe your client's struggle? If so, explore possible theories of the case that would communicate that narrative theme.

You might find that several of these themes could describe your client's story. People are complex, after all, and seldom are we motivated by only one need, feeling, or goal. For presentation of the facts in a legal proceeding, however, beware of trying to present several themes at once. The medium of a brief generally is better suited to handle one consistent theme rather than several themes intermixed. The effort to combine several themes might leave

8. Brian Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Fact Sections*, 32 Rutgers L.J. 459 (2001) (citing Josip Novakovich, *Fiction Writer's Workshop* 74-75 (1995)).

the reader with no coherent theory at all; so pick the theme that is most compelling and best supported by the facts.

The best way to find an effective theory of the case is by talking with your client. However, your client might not be good at communicating the heart of his position and might not even be consciously aware of it himself, so you will need also to use your imagination. Try to put yourself in his position. Imagine what it must have been like, what it must be like now. Try to understand who this person is and who the other key characters are. Mull it over in the shower, on your morning run, on your way to the grocery store. Try to fill in the blanks of the following statement: "This is a story about a (man) (woman) who (is)(was) . . . [describe client] . . . and who is struggling to . . . ." If you can do so without breaching client confidentiality, try telling the story orally. Go to lunch with another lawyer from your firm and tell her your client's story. Telling the story and then talking about it with another person often gives you a fresh perspective. After you have developed a clearer sense of your client and the situation, what helps you understand your client's behavior? What moves you about the story? What might move the judge?

Once you have an idea, try articulating it in a few sentences, like so:

> Carrolton bought Watson's company, the only provider of health care products in the area, and immediately began to take advantage of the company's customers by raising prices, limiting product lines, and allowing long delays for special-order items. Because the customers had nowhere else to go for their health care products, they had no choice but to pay the prices and put up with the limited service. Watson, who had continued to work at the business, had to sit by and watch as Carrolton took advantage of her neighbors and longtime customers. Many of them even thought that Watson was intentionally profiting at their expense, as she was still the customer contact person in the office—the only face her old customers saw. This situation was personally distressing to Watson. She also became increasingly convinced that it just wasn't right.

A good theory of the case should be consistent with the facts and with a common sense notion of fairness. It should explain as many of the unfavorable facts as possible, and it should cast your client in a sympathetic light.

B. Selecting and Citing to Facts

Once you have developed your theory of the case, select the facts you will include in the Statement of Facts. Include facts that fall into the following categories:

1. Facts that fit the theory of the case
2. All facts mentioned in the Argument section of the brief
3. All legally significant facts, whether favorable or unfavorable
4. Significant background facts
5. Emotionally significant facts

IV. TECHNIQUES FOR PERSUASION

A. General Principles

1. Clarity is more important than using sophisticated techniques for persuasion. Judges will not be persuaded by a fact statement they cannot understand. If a technique impedes clarity, do not use it.

2. Do not use a technique that the reader will notice. An effective technique must be invisible, or nearly so. Once a reader recognizes a technique, it has lost its power because the reader's attention is on the technique and not the fact. For instance, assume that you have used the technique of repetition to emphasize a favorable fact. You hoped that it would encourage the reader to realize the significance of the fact, to let it sink in. If, instead, your reader's Commentator[11] observes, "Ah, look, the writer is repeating this fact to try to get me to notice it," the reader will be thinking about the technique and the writer's goals rather than the fact. Your Fact Statement would have been more persuasive if you had not used the technique at all.

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10. *See, e.g.*, Fed. R. App. P. 28(a)(6).
11. *See* Chapter 6, section IID.

3. Do not overuse any technique. Overuse creates monotony, decreases the technique's power, and increases the chances that the reader will notice the technique rather than the facts.

4. Any technique for emphasizing one fact or group of facts deemphasizes the remaining facts. To the extent you try to use techniques of emphasis for nearly all of the facts, your strategy will fail. You have to pick the few facts you want most to emphasize and allow the others to serve as the background.

5. Some of the techniques described below are inconsistent with each other. The inconsistency does not mean that one is right and the other wrong, but only that each has its advantages and disadvantages. The writer's job is to select the technique that will work best for the needs of a particular fact statement.

B. Large-Scale Organization

The Beginning

6. Unless you know differently, assume that the judge is not already familiar with the case. The beginning of the Statement of Facts should establish the context for the facts that follow. Otherwise, the judge might find herself reading a chronological account of a series of events without knowing why these events are important. Context can be provided by a procedural history or by a short summary of what the case is about, written to be consistent with your theory of the case. Here is an example written on behalf of Carrolton:

> This is an action to enforce the terms of a covenant-not-to-compete. As part of the sale of her business to Carrolton Company, the defendant promised that for the three years immediately following the sale she would not compete with Carrolton in the three counties closest to Carrolton's headquarters. Eighteen months after the sale was completed, the defendant opened a competing business just one mile from Carrolton's office. She has been competing directly with Carrolton in the three prohibited counties ever since. This action seeks to enjoin her continued breach of the covenant-not-to-compete.

7. The reader's attention level is greatest in the first few paragraphs. When you can find a way to do so logically, capitalize on this increased attention level by selecting an organization that allows you to place there material you want to emphasize. This strategy can be consistent with a summary of the case drafted from your client's perspective, like the one above.

8. Aim for a beginning that will spark the reader's interest. Journalists call this "the lead." The conventions of a legal document do not allow for some of the more dramatic forms of grabbing attention, but you do want the reader to be drawn into the story and want to read on. For example, a prosecutor's brief might begin with the facts of the crime rather than with the procedural history of the appeal.

The Middle

9. Here is the place for the facts you want to deemphasize. Normally, a reader's attention level is at its lowest about three-fourths of the way through the section.[12]

The End

10. Readers might pay more attention to the material at the beginning, but they remember longest the material at the end. Readers tend to take a mental break to let the story sink in, and when they do, the last sentence lingers in their minds. Try to select an organization that allows you to place at the end material you most want the reader to remember.

11. The last paragraph should have the "feel" of a concluding paragraph. One way to accomplish this is to close with a transition into the legal argument to follow by identifying the legal positions staked out by the parties. Be careful not to include overt legal argument. Limit yourself to identifying the positions each side will take on the legal dispute. Avoid stating the opposing position any more favorably than you have to. Keeping in mind that the last sentence lingers in the reader's mind, end with your legal position rather than your opponent's. Here is an example of such a transition:

> The bank has admitted that it did not disclose the effective interest rate to the Turners. However, it claims that disclosure was not required, arguing that the transaction was not a "consumer loan" under the Consumer Protection Act. This brief will show that the transaction was, indeed, a "consumer loan" and that the bank's failure to disclose to the Turners the effective interest rate was a violation of the Act.

C. Paragraph Organization

12. A reader devotes more attention to the beginning and the end of a paragraph than to the middle. Put facts you want to emphasize in the first sentence or in the last clause or phrase of the last sentence. Deemphasize unfavorable facts by placing them in the middle.

13. Be conscious of paragraph length. In sections where you want to emphasize the facts, keep paragraphs relatively short. Where you want to deemphasize facts, let the paragraphs get longer, and put the facts you particularly want to deemphasize deep in the paragraph.

D. Techniques with Sentences

14. As a general rule, reduce clutter by using the techniques in Chapter 21 to eliminate surplus verbiage. Clutter reduces clarity, irritates the reader, and deemphasizes the important facts. Occasionally, you can allow just a bit of

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12. Mary Barnard Ray & Barbara J. Cox, *Beyond the Basics: A Text for Advanced Legal Writing, Second Edition* 171 (West 2003).

clutter to surround an unfavorable fact. The clutter will reduce emphasis by lengthening the sentence and by making it less striking. Use this technique sparingly.

15. Use active verbs for emphasis and passive verbs for deemphasis or to avoid focus on the identity of the person who took the action.

a. *To encourage focus on the person taking the action:*

> Shaffer kicked in the front door of the house and attacked his estranged wife, breaking her forearm.
>
> ***[Here the prosecutor wants all attention on Shaffer as he takes these violent actions.]***

b. *To avoid focus on the person taking the action:*

> Acme Health Equipment was formed and began operation on April 22, 1995.
>
> ***[Here the writer seeks to deflect attention away from the person who formed and ran Acme—Watson.]***

c. *To focus on a person other than the one taking the action:*

> In the early morning of January 1, 1995, after attending several New Year's Eve parties, the defendant was stopped for a routine sobriety test.
>
> ***[Here the writer is not so much trying to keep attention away from the police officer who stopped the defendant as to keep the focus on the defendant who was stopped.]***

16. Place favorable facts in main clauses and unfavorable facts in dependent clauses. Consider this sentence in a brief for Watson:

> Although Acme's business does compete with Carrolton [dependent clause], the competition only extends to three small product lines and could only impact, at the most, four percent of Carrolton's profits [main clause].

17. If an unfavorable fact *must* go in the first or last sentence of a paragraph, place the dependent clause carrying the unfavorable fact toward the interior of the paragraph. Thus, for the first sentence of the paragraph, a dependent clause carrying an unfavorable fact should go at the end of the sentence. Which party's brief would contain this sentence?

> Acme competes directly with Carrolton in the three prohibited counties [main clause], although the competition presently extends only to three product lines [dependent clause]... [paragraph continues by setting out the facts of the competition].

For the last sentence of the paragraph, try putting the dependent clause at the beginning:

> [The paragraph has set out the facts establishing the competition.] Thus, while the competition extends only to three product lines [dependent clause], Acme directly and openly competes presently with Carrolton in the three prohibited counties [main clause].

18. Occasionally, when you want the reader to slow down and take in the significance of the material in all parts of the sentence, place a phrase

or dependent clause in the middle of the sentence, interrupting the reader's usual path from the subject directly to the verb.

> Watson, who admits that she is intentionally violating the terms of her covenant, asks this Court to use its equitable powers to relieve her of the consequences of her own actions.

Use this technique sparingly because it makes sentences less readable.

19. Use shorter sentences for material you want to emphasize and longer sentences for material you want to deemphasize.

Longer Sentences for Less Emphasis

> On July 1, while Mr. and Mrs. Emilio and their daughter Ashley were driving south on Interstate 75 toward Valdosta, a car swerved across the median and hit the Emilio car. Mr. and Mrs. Emilio survived, although they were seriously injured. Their daughter, who had been riding in the back seat, died as a result of the injuries she sustained in the accident.

Shorter Sentences for Greater Emphasis

> On July 1, Mr. and Mrs. Emilio were driving south on Interstate 75 toward Valdosta. Their daughter Ashley was riding in the back seat. A car swerved across the median and hit the Emilio car. Mr. and Mrs. Emilio survived, though seriously injured. Ashley, however, died.

E. Other Small-Scale Techniques

20. Compress the space you devote to unfavorable facts, and expand the space you devote to favorable facts. The more material you provide about the favorable facts, the more emphasis they soak up.

21. Use detail to describe the material you want to emphasize. Conversely, limit the detail of your discussion of the unfavorable facts, although of course you cannot omit any significant facts.

22. Use *visual* facts and images to describe favorable facts; avoid them for unfavorable facts. Visual images carry particular power for placing the reader, mentally, at the scene.

> On July 1, Mr. and Mrs. Emilio were driving south on Interstate 75 toward Valdosta. Their daughter Ashley was riding in the back seat. A car swerved across the median and crashed into the Emilios. The front of the other car hit the Emilio car at the left rear door, precisely where Ashley was sitting, strapped in by her seat belt.
>
> The force of the impact carried the other car's engine well into the passenger cabin of the Emilio car. It ripped Ashley from her seat belt, pinned her against the opposite door, and crushed her thoracic cavity.
>
> Mr. and Mrs. Emilio survived, though seriously injured. Ashley, however, died at the scene.

23. Short quotations (a sentence or two) or snippet quotations (just a word or a phrase) can be powerful facts. If the words of the witness or document are particularly helpful, quote them.

> Shaffer left the bar, declaring "I'm going to go talk to my wife, and she'll need a doctor before I'm through."

Avoid overquoting, however. Overquoting will result in a disjointed story and will cause the most effective quotes to fade into the pack with the rest of the quotes.

24. When you can repeat key facts *unobtrusively,* the repetition serves to emphasize those facts or concepts. For instance, the first sentence of the paragraph might summarize the facts, and the remaining sentences could set out the facts in more detail. Or the beginning of a sentence might refer to the facts of the prior sentence as a transition.

> Marie Claxton, the expert witness who testified on behalf of Pyle, concluded that a reasonable and prudent lawyer would have checked the deed for easements. Claxton explained that deeds often contain restrictions that significantly affect the use of the property. She testified that any prudent lawyer would know that such restrictions are common. According to Claxton, Gavin's failure to check the deed fell below the standard of professional skill and diligence of a reasonable and prudent lawyer.

Do not just repeat particular facts, seemingly for no reason, however. It will bore and irritate your reader. Remember that the Argument section gives you a natural opportunity to repeat the key facts.

25. Place unfavorable facts in a favorable or mitigating context. You can juxtapose the unfavorable fact with favorable facts or you can place the unfavorable fact in a context that negates some of the unfavorable inferences the fact might otherwise invite.

Juxtaposing an Unfavorable Fact with Favorable Facts

> Although Acme's business does compete with Carrolton, the competition only extends to three small product lines and could only impact, at the most, four percent of Carrolton's profits.

Placing the Unfavorable Fact in a More Favorable Context

> While the demonstrations against the abortion clinic are disruptive to the other tenants, the landlords cannot prevent the demonstrations; nor can they force the clinic to move until the clinic's lease term expires.

26. Humanize your client. The most important way to do this is by telling the story from the client's perspective, as your theory of the case will already accomplish. Include, where possible, a description of the client's feelings, responses, and motivations. It is also helpful to refer to your client by name and use titles that communicate respect, like "Mr.," "Ms.," "Dr.," or "Officer."

It is especially important to humanize corporate clients. Remember that every story involving a corporation is really a story about people. Identify the people who took the actions, and humanize those people. Portray them in a sympathetic light by setting out the context for their actions.

27. Generally, do not humanize opposing parties. Where there is no need to use the names of opposing individuals, consider using generic descriptions instead ("the officer," "the insurance agent," "the electrician"). Generic descriptions can be especially helpful where the description has unsympathetic connotations, such as "the finance company," "the insurance company," or "the corporation." However, humanize when your theory of the case depends on showing the judge not only the sympathetic facts about your

client but also the outrageously bad behavior of one or more of the opposing parties. In such a case, you might need to humanize the opposing party so you can show the outrageousness of his or her behavior.

28. Use graphic words, especially verbs, for facts you want to emphasize.

> The van *crashed into* [instead of "hit"] the taxi, and the force of the impact *shattered* [instead of "broke"] the driver's spine.

29. Refrain from name-calling. Name-calling tells your reader that you do not have good facts, so you are compelled to resort to derogatory characterizations.

30. Where possible, delete adverbs in favor of additional facts and more vivid verbs. Vivid verbs, alone, are much more powerful than a ho-hum verb with an adverb. Avoid such artificial intensifiers as "very" or "extremely."

31. Pay careful attention to common connotations of words. Choose words with helpful connotations and avoid those with unhelpful connotations.

A Word with Potentially Troubling Connotations

> Mr. and Mrs. McMann were *anxiously* awaiting the birth of their first child.
>
> ["Anxiously" carries the connotation of worry. Use it if the connotation helps your theory, but avoid it if the connotation either impedes the theory or might distract the reader into wondering what they were worried about.]

An Option with a Better Connotation

> Mr. and Mrs. McMann were *anticipating* the birth of their first child.

Finally, put the draft down for a few hours and then read it afresh. Try not to look for the techniques you used, but rather read openly, as you hope your reader will. Notice your reactions and fix anything that troubles you.

III. SYNTHESIZING CASES

Case briefing will help you understand a single case, but a lawyer faced with multiple authorities must do more than analyze each authority separately. Such a discussion would be little more than reading a series of case briefs. Instead, she must explain how the cases fit together to create the law governing her client's issue. She must compare the authorities to find and reconcile any seeming inconsistencies and to combine the content of the authorities so she can present a unified statement of the governing rule of law. Therefore, after you have identified the cases that will be important to your analysis, you must consider how they fit together. This process is called "synthesizing" cases.

A. Using Consistent Cases

Sometimes the cases will use similar language to state the governing rule and will apply that rule consistently. Or perhaps some jurisdictions follow one rule and others follow a different rule. However, the cases within each jurisdiction are consistent with each other. In either of these situations, it will not be difficult to combine the language of the cases into one explanation of the law with a consistent explanation of how the courts have applied it. Simply identify the points you want to make about the law and its application, and select and discuss the cases that best illustrate each point. Usually those points will include each element or factor and may include other observations about how the rule is usually applied. For example, recall our rule on whether a person had effectively revoked her will:

To revoke a will, a testator must have the intention to revoke and must take some action that demonstrates that intent.

Your written analysis would discuss each element (intention and action) separately. For each element you would identify several cases that best explain that element and discuss them in your description of that element.

Similarly, if jurisdictions are split between two different approaches, your written analysis would discuss each approach separately. For each approach, you would identify several cases that best explain that approach and discuss them in your description of that element. For instance, assume you are writing an office memo on the question of whether parents can recover for the wrongful death of a fetus. You might find that some jurisdictions do not permit recovery at all, whereas others permit recovery if the fetus was medically viable at the time of the injury. You would explain to your reader that jurisdictions disagree and then discuss separately each of the two approaches. For each approach, you would select and discuss the several cases that best illustrate that approach.

B. Reconciling Seemingly Inconsistent Cases

Cases in the same jurisdiction are not always consistent, however. If you find seemingly inconsistent cases in the same jurisdiction, and if these cases will