Interactive Course – Developing a Case and Advocating on Behalf of a Client
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COURSE READINGS

Principles of Interviewing

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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
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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

be important for your analysis, you must try to reconcile them. Reread carefully all of the language in both opinions, and also look for later cases that might resolve the inconsistency. Even if the later cases do not mention the inconsistency, these later cases will probably articulate and apply a rule. As you study the way these later cases articulate and apply the law, you will probably find clues about how to reconcile the cases.

One possibility is that the later case implicitly overruled the earlier case. As we saw in Chapter 2, a court can overrule an earlier opinion implicitly, however, by ignoring the earlier opinion and reaching a result inconsistent with the earlier opinion. Another possibility is that the seemingly inconsistent legal rules are meant to apply to different situations. Perhaps one rule is meant to be an exception to the other. In either case, the rule in one of the cases will apply to your client's situation and the other will not. This explanation handily resolves the inconsistency. Analysis that leads to a conclusion that the two opinions apply to different situations is called "distinguishing" cases.

Finally, you might be able to study the language of each opinion and find meanings in the text that will allow you to read the two cases consistently. Identify the seemingly inconsistent aspects of the opinions. Then reread the opinions carefully, exploring whether you can imagine a possible explanation that would reconcile the statements.

Inconsistencies in Rule Statements. Cases can seem inconsistent because they appear to state two different legal rules. For instance, assume that a lawyer is representing Sharon Watson, a sales employee of Carrolton Company, headquartered in Atlanta, Georgia. Watson had sold Carrolton to its present owners. She remained employed by Carrolton and signed a covenant not to compete, an agreement promising not to compete with Carrolton in certain ways for a certain period of time after the termination of her employment. Watson is considering leaving Carrolton to form a new business that would compete with Carrolton. She needs to know whether Carrolton would be able to enforce the covenant against her.

The lawyer researches the issue and finds *Coffee System of Atlanta v. Fox*[4] and *Clein v. Kapiloff*[5], two Georgia cases dealing with enforcement of covenants not to compete. In *Fox*, the court uses the following language to articulate the rule governing when a covenant is enforceable:

> A covenant not to compete is enforceable if all of the following elements are reasonable: the kind of activity restrained; the geographical area in which it is restrained; and the time period of the restraint.

If *Fox* were the only authority, the lawyer would use this rule to analyze Watson's question. He would analyze the reasonableness of each of the identified characteristics of the Watson covenant. But *Fox* is not the only authority. The lawyer also found *Clein*, and there the court seems to articulate the

4. 176 S.E.2d 71 (Ga. 1970).
5. 98 S.E.2d 897 (Ga. 1957).

governing rule differently. In *Clein*, the court stated:

> A covenant not to compete is enforceable if it is reasonable. The test for determining reasonableness is whether the covenant is reasonably necessary to protect the interests of the party who benefits by it; whether it unduly prejudices the interests of the public; and whether it imposes greater restrictions than are necessary.

Fox and *Clein* seem to lay out different rules. There seem to be two different legal standards governing the enforceability of covenants not to compete. Novice legal writers might be tempted to analyze the Watson issue by describing and applying, one at a time, the "rules" set out in *Fox* and in *Clein*. The discussion would first give a sort of "case brief" of *Fox*, describing the facts, the "rule" language that court used, and the result. The discussion would then apply the "rule" from *Fox* to the Watson facts. Then the discussion would do the same thing with *Clein*, setting out the "rule" language from that case and applying that "rule" to the Watson facts. The organizational structure would look something like this:

> Is the Watson covenant not to compete enforceable?
> 1. The rule in the *Fox* case: The covenant is enforceable if
>   a. the kind of activity restrained is reasonable;
>   b. the geographical area of restraint is reasonable;
>   c. the duration of the restraint is reasonable.
> 2. The rule in the *Clein* case: The covenant is enforceable if
>   a. it is reasonably necessary to protect the employer's interests;
>   b. it does not unduly prejudice the interests of the public; and
>   c. it does not impose greater restrictions than are necessary.

This approach is problematic, however. The lawyer needs to know *Georgia's* rule of law on enforcing covenants not to compete. Determining Georgia's rule is the most important analytical task. Organizing by the separate cases here would give the client two possible rules and two possible outcomes. Yet our legal system contemplates that a jurisdiction ordinarily will have only one rule of law on a particular issue so people can know what the law is and how it will apply to their conduct.

The lawyer must try to reconcile these seemingly inconsistent statements in *Fox* and *Clein*. After rereading the cases several times and carefully considering the court's possible meanings, the lawyer might conclude that the language in *Fox* identifies the particular terms that must be reasonable while the language in *Clein* identifies the criteria the court will use to judge whether those terms are reasonable. In other words, each contract term (kind of restraint, area of restraint, and duration of restraint) must meet the three criteria identified in *Clein*. This reconciliation salvages precedential value for each case and combines them into one unified statement of

the jurisdiction's legal rule. Here is a rule statement that reconciles *Fox* and *Clein*:

A covenant not to compete is enforceable if the kind of activity restrained, the geographical area of the restraint, and the duration of the restraint are reasonable. Reasonableness is judged according to whether the restraint is necessary to protect the employer's interests, does not unduly prejudice the interests of the public, and does not impose greater restrictions than are necessary.

This reconciled rule statement might produce an analysis organized like this:

Is the Watson covenant not to compete enforceable?

The covenant is enforceable if its terms are reasonable according to the following criteria:

A. Are its terms necessary to protect the employer's interests?
   1. The kind of activity;
   2. the geographical area;
   3. the duration.

B. Do its terms unduly prejudice the interests of the public?
   1. The kind of activity;
   2. the geographical area;
   3. the duration.

C. Do its terms impose greater restrictions than necessary?
   1. The kind of activity;
   2. the geographical area;
   3. the duration.

Inconsistencies in Results. You might find cases that seem to apply the same governing rule to seemingly similar sets of facts but reach puzzlingly different results. To reconcile them, search for differences in the facts that might adequately explain these results.

Consider this example: To establish adverse possession of land, a claimant must prove several things, one of which is "possession." The kind of possession that will ripen into title is gauged by the kind and degree of the claimant's use of the land. Here are summaries of two hypothetical cases dealing with the issue of whether the kind and degree of use was sufficient. Do they seem inconsistent? If so, can you reconcile them?

Allen v. Baxter: Fifteen years ago, Anne Allen bought Lot A in a suburban neighborhood. Lot B, the vacant and overgrown lot next door, was owned by Jacob Baxter. Allen built a house on lot A and moved in. In 1981, Allen began gardening on Lot B. During the eight-month growing season, she worked in the garden nearly every day, growing vegetables for herself and her neighbors. During the four remaining months, she seldom went on the lot. The court held that this use did not establish a sufficient degree of "possession" for the purposes of adverse possession.

> *Clay v. Davidson:* Fifteen years ago, Charles Clay bought a lakeside lot in a resort area. The lot already contained a cabin, and Clay built a dock. Every year since then, he has spent about six weekends a year and two weeks during the summer at the cabin. He has now discovered that the legal description of the lot was incorrect in that it actually describes the lot next door. Darlene Davidson is the actual record title-holder of the lot Clay thought to be his. The court held that Clay's facts established a sufficient degree of "possession" for the purposes of adverse possession.

The results in these two cases seem inconsistent. The degree of possession in *Allen* seems much greater than the degree of possession in *Clay*. Allen was physically present on the land for many more days of the year than was Clay, and Allen did more to the land than did Clay. Yet the court held that Clay possessed the land to a sufficient degree, and Allen did not. Reconciling these cases requires you to search for differences that could explain this seeming inconsistency. Perhaps the court will be satisfied with a lesser degree of possession in the case of vacation property, where an owner would not be expected to be in possession year round. Perhaps the court counted the continuous presence of Clay's improvements as part of Clay's possession. Or perhaps the court will require a greater degree of possession in the case of a possessor who knows she does not have record title. Any of these explanations could reconcile *Allen* and *Clay*.[5]

CHAPTER 8

Small-Scale Organization: Explaining the Law

After you have a large-scale structure for your discussion, the next step is to write out the analysis, putting flesh on the bones of this structure. Chapters 8 and 9 will explain how to discuss a single legal issue. Chapter 10 will explain how to put the discussions of multiple issues together into one cohesive analysis.

What do we mean by a "single issue"? You will find that phrase used differently in many contexts, but for our purposes, we mean the analysis of a single element of a rule. For instance in the burglary example, each of the elements of the crime of burglary would raise a separate issue.

I. AN OVERVIEW OF THE PARADIGM FOR LEGAL ANALYSIS

A legal issue is analyzed by first identifying and understanding the governing rule and then applying that rule to a particular set of facts. First you must *explain* the rule; then you must *apply* that rule to the facts. Here is an overview of the basic paradigm:

PARADIGM FOR A WORKING DRAFT

Rule Explanation

1. Conclusion: State your conclusion about the issue.
2. Rule: State the applicable rule of law.
3. Rule Explanation: Explain the rule.

Rule Application

4. Rule Application: Apply the rule to your client's facts.
5. Conclusion: Restate your conclusion.

This chapter describes the rule explanation half of this paradigm. Many new legal writers are not sure what rule explanation covers. They also might think they have explained the rule more thoroughly than they actually have. These difficulties can be eased if, after the introductory paragraph (described

below), you do not allow discussion of your client's facts (the second half of the paradigm) to slip into the first half of the paradigm—your explanation of the rule itself. Mixing explanation and application leads to confusion in identifying rule explanation. If you keep application out of the spot reserved for explanation, you will learn what rule explanation is *not*, which is vital to learning what rule explanation *is*.

Separating the halves of the paradigm also will help you accurately evaluate your own writing. Often a writer states the rule and then proceeds to write several pages about the rule and how it applies to the facts. The discussion seems thorough, but how can the writer tell? An accurate self-evaluation requires checking the depth and breadth of both halves of the reasoning process, and that is difficult to do when the two halves are intermixed. As a discipline, you might want to draw a line on your working draft between the rule explanation and the rule application. The line will remind you to keep your discussion of your client's facts below the line.

Keeping the halves distinct does not mean that while you are engaged in the process of writing the paradigm you must complete rule explanation before you attempt to write any rule application. For early versions of the working draft, you can write more freely. Many writers find this unstructured prewriting helpful. Using the paradigm means simply that at the conclusion of your writing process, the document should reflect distinct sections for rule explanation and rule application.

* * *

II. STATING THE CONCLUSION

Law-trained readers want to learn your answer, so the first thing your reader will want to see is your conclusion. If you already know what your conclusion will be, put it in a sentence and use that sentence as the section heading. Then write an introductory paragraph (sometimes called a "thesis paragraph") in which you state your conclusion again in two to three sentences. Place this paragraph immediately after the heading. In these sentences, your reader should learn (1) the issue to be decided, (2) your conclusion on that issue, and (3) your basic reason for that conclusion, if you can state it succinctly. Often the governing rule will be implicit in this statement, but you need not state it directly here because you likely will be stating it as the first sentence in the next paragraph.

For example, assume that your firm represents Linda Pyle, who recently bought a tract of land to use as a commercial horse stable. A lawyer from another firm, Howard Gavin, represented Pyle in the land purchase transaction. After

buying the land, Pyle discovered that a neighboring quarry owned an easement across her property, and the use of the easement is interfering with the stable's operation. Pyle has come to a partner in your firm, and the partner has asked you to research whether Gavin's failure to check the title for possible easements constituted legal malpractice. Here is an example of the beginning of the written discussion of this issue:

I. Linda Pyle has a strong claim for legal malpractice against Howard Gavin.

Howard Gavin committed legal malpractice in his representation of Linda Pyle because he did not meet the required standard of professional skill and diligence. The representation called for a basic task common to general practitioners, and the problem could have been prevented simply by doing thorough research.

If you are writing a brief to the court, probably you will already know what your conclusion will be. If you are writing an office memo, however, and if the issue is a close one, you might not be sure what your conclusion will be until you have progressed further in the writing process. If you are not yet sure, you can state the issue here rather than the conclusion, and proceed with writing your analysis. Once you have a solid draft, rewrite the heading and the first paragraph to provide your reader with the information above.

III. STATING THE GOVERNING RULE

Next, state the governing rule. Follow it with citations to the primary source(s) for the rule. Here is a rule statement added to our example:

I. Linda Pyle has a strong claim for legal malpractice against Howard Gavin.

Howard Gavin committed legal malpractice in his representation of Linda Pyle because he did not meet the required standard of professional skill and diligence. The representation called for a basic task common to general practitioners, and the problem could have been prevented simply by doing thorough research.

A lawyer has a duty to provide a client with representation that meets or exceeds the standard of *professional skill and diligence commonly possessed and exercised by a reasonably prudent lawyer* in this jurisdiction. *Jacobson v. Kamerinsky* [citation].

Usually the rule statement should be the first sentence in the first paragraph after the introductory (thesis) paragraph. Occasionally, however, an issue is complex enough to require a little context or clarification before stating the rule. If so, *briefly* set out the necessary context or clarification, but get to the rule statement as quickly as you can. Not only will your reader be

looking for the rule, but the discipline of concisely stating the rule immediately after the conclusion is an important part of your analytical process. It forces you to articulate the focal point of the first half of the analysis, and it focuses your attention on the rule you are about to explain.

After you have typed your statement of the rule, look for the key term or legal standard. The primary task of your rule explanation is to define that term or standard. Just for the working draft, you might want to use italics for these key words so you can easily refocus your attention on them.

IV. EXPLAINING THE RULE: FIVE COMPONENTS

The third step is explaining where the rule comes from and what it means. Rule explanation usually includes five components. Generally, these components are so closely interrelated that you will not be able to break them out and perform them sequentially. While you are explaining one, you will also be explaining another, so do not use this list as an organizing tool. Instead, use it to evaluate your rule explanation for its completeness:

1. *Show how the authorities demonstrate that the rule is what you say it is.* Often you can do this by setting out the relevant content of the authorities (facts and holdings of cases or key provisions of statutes). Sometimes, if you have had to formulate the rule by synthesizing or reconciling authorities, as Chapter 3 described, you might have to explain your synthesis or reconciliation.

2. *Explain the rule's purpose or the policies it serves.* The way the rule will apply to your client's facts will be influenced by the rule's purpose and the policies it serves, so your reader will need to understand these underlying rationales. Chapter 11 explains this part of rule explanation in greater detail.

3. *Explain how the rule has been applied in the past.* Interpreting the language of a rule requires attention to how courts have applied it and how they have not applied it. What are some examples of cases in which the rule's requirements have been met? Have not been met?

4. *Explain any additional characteristics that will affect how the rule may be applied.* Is this rule to be liberally or strictly construed? Are there burdens of proof or presumptions that might affect how the rule will apply to future cases? Does the rule require an elevated level of proof, like clear and convincing evidence? Will expert testimony be required?

5. *To the extent necessary, explain any other possible understanding of the rule.* If another reasonable interpretation of the rule exists, your reader will want to know it. In persuasive writing you need address only those competing theories that your adversary has or will raise or that you think the judge might wonder about. In predictive writing, you should address any

competing interpretation that is reasonably likely to arise. The explanation of another possible interpretation is sometimes called "counter-analysis" or "counter-explanation."

Match the depth of your discussion to your assessment of the strength of this second interpretation. If it is possible but unlikely that a court would adopt it, cover it briefly. However, if the choice between the interpretations is a closer call, discuss the counter-analysis in more detail, and explain why it is not the best or most likely interpretation.

V. GUIDELINES FOR RULE EXPLANATION

Here are some guidelines to keep in mind as you write the rule explanation section:

Use all relevant tools of statutory and case law analysis. Review the tools for case law and statutory analysis described in Chapters 2-5. Remember that the value of the information they yield is not simply in reporting (restating) it for your reader, but rather in *using it to make a point about the rule.* The form of reasoning most relevant to rule explanation is rule-based, with some help from policy or principle-based reasoning.

Limit your explanation to those topics that will be relevant to the way the rule will apply to your client's facts. When you explain what the rule means, do not include everything one might ever want to know about the rule. Include only the information that might pertain to your client's situation. This focus will save your reader's patience, and it will save you writing and editing time. Because you have not yet written the section *applying* the rule to your client's facts, you will have to anticipate the application you have not yet written. After you write the application section, you might need to return to the rule explanation section to add or delete topics of rule explanation. Your goal is to match the coverage of the explanation section to the coverage of the application section.

Use only very short quotes of key language. If you force yourself to use your own words for the information you find in the sources, you will understand that information better, and you might be able to state it more clearly than the original writer did. Remember that your analysis must do more than simply retype material from the sources. Analysis begins only when you draw theses from the material in the sources and explain the reasoning that supports your theses.

Order your discussion of the authorities according to their importance, placing the most important authorities early in the discussion. Case authorities are important to an analysis primarily by virtue of their precedential value generally or by the similarity of their particular facts to your client's facts.

Articulate factors or guidelines. When you discuss the cases that are similar factually, try to discern and articulate any factors or guidelines that seem to be operating when the courts apply the rule to these kinds of situations. Sometimes such information will be described explicitly by the courts; sometimes you will have to infer it from other comments the courts have made or from the way the courts have applied the rule.

Do not use authorities just to fill up space or to prove that you have read them. Rather, demonstrate that you have the lawyerly skill of identifying the *key* authorities and analyzing them thoroughly.

Include a description of the rule's historical development if (1) the development is important for understanding the rule's current form; or (2) the rule's current form does not decisively answer your question, but the rule's history establishes a trend that can help you predict or persuade. If you choose to describe the rule's development, tell your reader why. Otherwise, a law-trained reader will become impatient with what might seem like an unnecessary history lesson.

CHAPTER 9

Small-Scale Organization: Applying the Law

Now that you have explained the rule, you are ready to apply it to your client's facts. Remember that this half of the paradigm uses the deductive format of syllogistic reasoning—that is, applying a general, often abstract principle to a particular situation and arriving at a conclusion.

General principle (from rule explanation section)	Covenants not to compete are enforceable if the duration, the geographical scope, and the nature of the activity restrained are reasonable.
Application to particular facts	These three terms of the Watson/Carrolton covenant are reasonable.
Conclusion	Therefore, the Watson/Carrolton covenant is enforceable.

Although rule-based reasoning is still important in this second half of the paradigm, factual inferences, narrative, analogical reasoning, policy and principle-based reasoning, and custom-based reasoning are at least as important to rule application.

I. TWO APPROACHES TO WRITING THE APPLICATION SECTION

Because the point of the paradigm is to apply the rule you have just explained, the rule application section should track the rule explanation section. Each aspect of the rule you described in the rule explanation section should now be applied to your client's facts. Thus, some writers use the rule explanation section as their outline as they write the rule application section. If you use this approach, simply work your way through the application section by applying each point you discussed in the explanation section. This way you are sure to apply the rule you just explained instead of allowing your application section to wander.

You might find, however, that a slightly different approach works better for you. Although a written legal analysis ultimately should be framed in tightly reasoned logic, you might find that rigid allegiance to the structure of the rule explanation section stifles your own writing process. If you choose to open your early drafts to a broader writing process, you can begin writing the rule application section by focusing on the narrative (the facts) without looking back to the rule explanation section. You will have the rule in mind, but more impressionistically so. This strategy frees you to think like a storyteller and to focus more on the narrative themes the key facts suggest, and on the policies and principles they implicate. Be sure to compare your client's facts to the facts of precedent cases, pointing out relevant similarities and differences.

When you have a draft of each section, revise them both so the rule explained in the first half matches the rule applied in the second half. Perhaps you will need to add application of a point you discussed in rule explanation but forgot to apply in the application section. However, just as often, you will need to return to the explanation section to add or edit the discussion of a point you had not noticed until you began to write about your client's facts. No matter which way you approach the writing process, the end result should be the same—a logical analysis built on a narrative theme.

II. CONTENT OF RULE APPLICATION

Although the organization of each rule application section will be unique to the rule and the facts involved, here are some general principles to keep in mind:

1. *Begin with a sentence or two stating your factual conclusion,* for example: "A judge would probably find that a reasonably prudent lawyer in Howard Gavin's situation would have checked the title for easements."
2. Then *apply each point from the rule explanation section,* keeping the most important points early in the discussion.
3. For each point, *write a thesis sentence* stating how that point will apply to your client's case.
4. In one or more paragraphs following each thesis sentence, *use your client's facts to explain why your thesis sentence is accurate.* If your role is predictive, explain the inferences and factual conclusions you think a judge or jury would draw from these facts. If your task is persuasive, use the facts to set out and support the inferences you want the court to draw.

   Use common sense. Imagine the situation your client has described to you. What would it have looked like? Seemed like? What other things might have been true if these are the facts? What additional unconfirmed facts might you be assuming? How might the scenario look to a judge or a jury? What facts would be important to a judge or a jury? Could someone else take the same facts and characterize them differently—that is, paint a different picture using the same facts?
5. Where possible, *support your thesis with direct fact-to-fact comparisons.* Identify the factual similarities between your client's situation and relevant precedent cases, explaining how these similarities demonstrate your points. Also, identify any significant factual *differences,* and

explain the point they demonstrate. Chapter 11 explains this important reasoning skill more thoroughly.

6. If helpful, *apply the rule's underlying policies to your client's situation.* Your client's facts might raise the precise concerns the rule was designed to address. If so, a court will be more likely to apply the rule strictly to your client's situation. A court will be less likely to limit the rule or to apply an exception. A court will be more likely to resolve doubts of application in favor of achieving the policy results the rule seeks. Conversely, if your client's facts do not raise the policy concerns the rule was designed to address, the court will be less willing to apply it strictly to your client.

   Reread the sample office memo in Appendix A, this time noticing particularly the uses of policy to help predict a result. A similar use of policy can persuade as well.
7. In an office memo, *identify any unknown facts that would be important to a resolution of the legal issue.* The assigning attorney will need to know if potentially important facts are missing from the analysis.[1]
8. Where necessary, *refute any alternative rule applications.* In Chapter 8, we saw that you sometimes need to address and refute alternative interpretations of the rule. Just so, in the rule application section, there might be alternative views of how the rule might apply to your client's facts. This process is sometimes called "counter-application" or simply "counter-analysis." In predictive writing, your reader will need to understand these alternative views. In persuasive writing, you will need to address and refute your opponent's position.

   Note the difference between counter-analysis in the two stages: In the rule explanation stage, the theories disagree over what the rule means. Here, the alternative theories disagree over how the rule should apply to the facts. In either case, however, do not let your analysis become lost in your focus on counter-analysis. Good writing and effective advocacy call for keeping your own explanation and application of the rule at the center of the conversation.
9. *Restate your conclusion.* After you have worked through your explanation of how the rule applies to your client's facts, restate the conclusion. If the analysis has been long or complex and your document will not have a separate "Conclusion" section, summarize the key reasons supporting the conclusion.

III. COMMON TROUBLE SPOTS IN RULE APPLICATION SECTIONS

The three most common weaknesses in rule application sections are (1) failing to apply the rule as the first half of the paradigm explained it, (2) asserting the predicted outcome without sufficiently explaining the reasoning that supports the prediction, and (3) failing to realize the diverse possible interpretations of

1. In a law office setting, if you realize that facts are missing, it is best to inform the assigning attorney immediately in case the facts can be obtained readily and therefore included in the memo's analysis.

the facts. Understanding these three weaknesses will help you avoid falling victim to them in your own analysis.

We have already discussed in some detail the first common weakness: failing to apply the rule as it was explained. Yet this is such a common difficulty that it merits a reminder. Be sure to complete the rule application section by matching its coverage and approach to the explanation section. Equally important, be sure to revise the rule explanation section to reflect the deepened and sharpened rule understanding you gained by writing out the factual analysis. This double-checking of rule-based and narrative reasoning against each other is an example of why both are critical to good legal writing.

The second common weakness may result from a belief that the application of the rule to the client's facts is so obvious that no explanation of the supporting reasoning is necessary. Nearly always this belief is erroneous. Explaining the supporting reasoning is particularly important because sometimes this process shows the writer that the application might not be as obvious as it first appeared. Even in cases where the application is clear, *some* explanation of the supporting reasoning is necessary.

The third common weakness is failing to realize the diverse possible interpretations of the facts. Sometimes this weakness results from forgetting to think independently and realistically about the facts. Many writers new to law study fall into the trap of assuming the infallibility of the inferences that someone else—like the client or the requesting attorney—has drawn from the facts. Yet, rare is the set of facts that does not support diverse inferences and interpretations.

Another and more insidious cause of this weakness is the difficulty of imagining multiple interpretations simultaneously. Perhaps an analogy will demonstrate how hard this can be. Look at Figure 9-1. You might have seen a graphic like this before. Do you see the old woman in this graphic? Do you see a young woman as well? Your brain can organize the black and white shapes of the graphic into a picture of either, but most of us can only see one at a time. More pointed for our purposes, once your brain has organized the sections to display one figure, it is difficult to find the other figure at all. Imagining diverse interpretations of facts is at least as hard as imagining diverse interpretations of these black and white shapes.

Not "seeing" these diverse interpretations of the facts is the most difficult weakness for a writer to diagnose and cure. If your assignment permits, ask others to help you imagine diverse interpretations of the facts. Present a friend or colleague with a simple chronology or other sanitized version of the facts rather than with your written description of them. Your goal is to learn what story someone else might see in the facts, especially someone who has not first seen the story through your or your client's eyes.

If you must work alone, you must think both critically and creatively about the facts. Try to imagine how the various other parties to the situation would describe it. Imagine how you would describe it if you were representing those parties. Imagine how the facts might appear to someone who disliked your client and was therefore looking for an interpretation different from your client's position. This task will never be easy, and it will be particularly difficult in your early years of law study and practice. However, each year of law practice will improve your ability to see diverse interpretations of a set of facts. Take the opportunity presented by your first few writing assignments to begin practicing this lawyering skill.