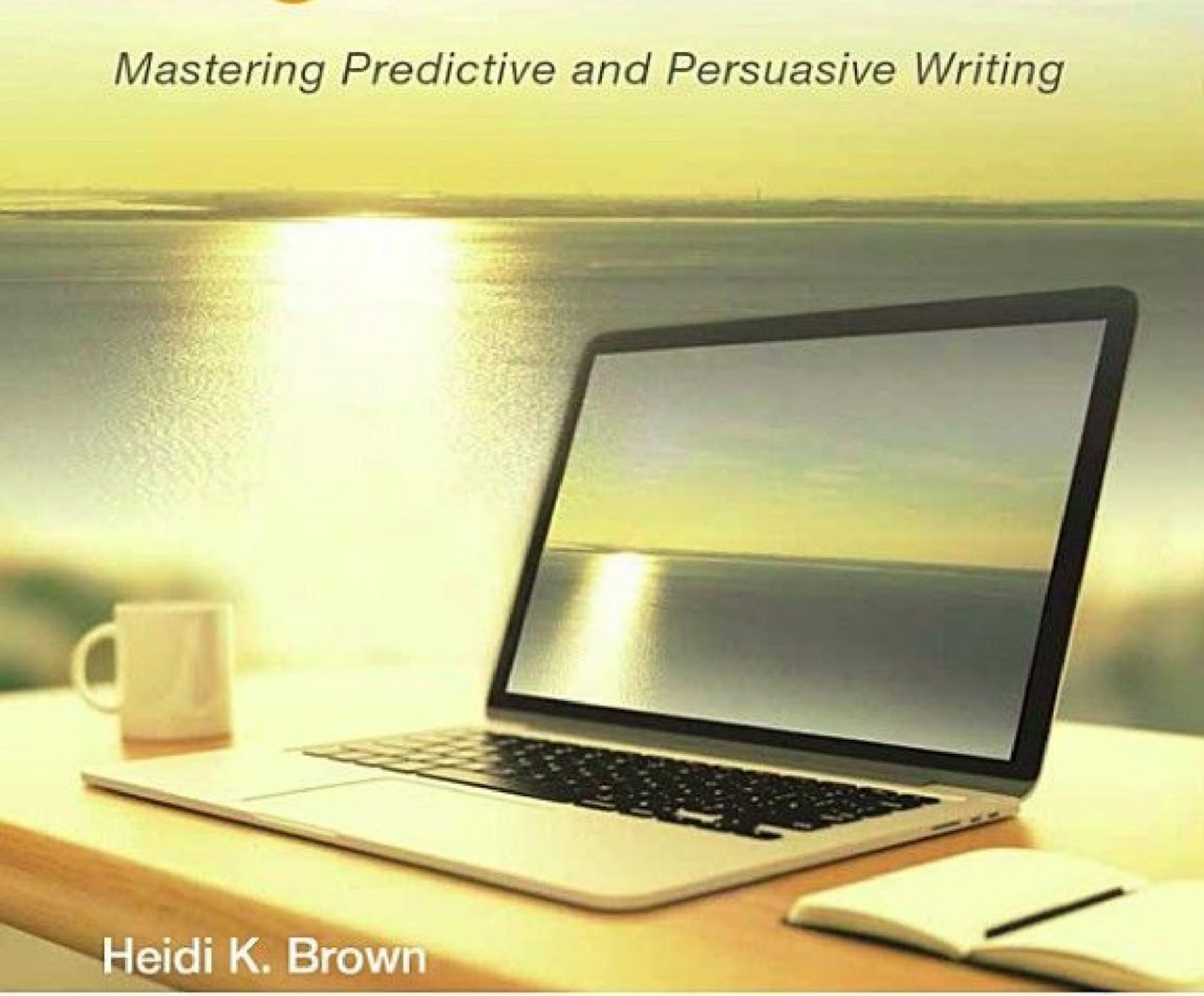
Aspen Coursebook Series

The Mindful Legal Writer

Mastering Predictive and Persuasive Writing



Heidi K. Brown

Wolters Kluwer

Published by Wolters Kluwer in New York.

Wolters Kluwer Legal & Regulatory US serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.WKLegaledu.com)

To contact Customer Service, e-mail customer.service@wolterskluwer.com, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Wolters Kluwer
Attn: Order Department
PO Box 990
Frederick, MD 21705

eISBN 978-1-4548-7962-6

Library of Congress Cataloging-in-Publication Data

Names: Brown, Heidi K. (Heidi Kristin), 1970- author.
Title: The mindful legal writer : mastering predictive and persuasive writing/ Heidi K. Brown, Director, Legal Writing Program, Associate Professor of Law, Brooklyn Law School.
Description: First edition. | New York : Wolters Kluwer, [2016] | Series: Aspen coursebook series
Identifiers: LCCN 2016012483 | ISBN 9781454836179
Subjects: LCSH: Legal composition. | Law—United States—Language.
Classification: LCC KF250 .B766 2016 | DDC 808.06/634—dc23
LC record available at http://lccn.loc.gov/201601248

Summary of Contents

Contents

Section 5: Adjustment, Refinement, and Perfection

Part 2: Persuasive Writing

Section 7: Context

Classroom Exercise

Section 8: Writing Persuasive Letters in the Litigation Context

Chapter 23: Writing Persuasive Letters to an Opposing Party or Counsel

Section 9: Writing Persuasive Pleadings in the Litigation Context

Chapter 24: Drafting a Persuasive Complaint

Section 10: Persuasion in the Scheduling Phase of Litigation

Section 11: Writing Persuasive Motions and Briefs in the Litigation Context

Section 12: Persuasion Through Oral Argument

Section 13: Drafting Persuasive Mediation/Arbitration Papers

Preface

Practicing Mindfulness in Legal Writing

I am not an expert on mindfulness by any means. But I am a rabid aspirational fan. And an activist. And living proof that the concept makes the practice, teaching, and learning of law a more healthy experience for those who open themselves to its ripple effects. This world unequivocally needs more mindful lawyers, law professors, and law students.

Throughout law school and fifteen years of law practice, I was not mindful. At all. In fact, I was mind*less*. I was an introvert playing in the extrovert world, trying to fake it until I made it, forcing myself to be something I so profoundly was not. I suffered from extreme public speaking anxiety—and yet I chose a career in litigation because I was rudderless. I succumbed to the Nike "Just Do It" pressure to bungee-jump off the courtroom cliff in a swell of fabricated confidence, when really all I wanted to do was burrow deep in the most remote carrel of the law firm's library where I could research, write, and think—in enveloping quiet. I was happiest when those still moments were carved out for me, by perceptive mentors (such as Julian Hoffar, my first writing champion) who realized and then overtly declared that not every law firm associate needed to be a fist-pounding orator. They let me write. And think. And research. And write again. And made me feel appreciated and intelligent for it. Through writing, I found my "lawyer voice."

So what exactly does mindfulness mean? Jon Kabat-Zinn, Professor of Medicine Emeritus and creator of the Stress Reduction Clinic and the Center for Mindfulness in Medicine, Health Care, and Society at the University of Massachusetts Medical School, describes mindfulness as "paying attention in a particular way: on purpose, in the present moment, and nonjudgmentally."[1] I have studied mindfulness in the context of helping law students conquer extreme public speaking anxiety, and in overcoming my own struggle with that specific challenge. A helpful psychology-based research source I consulted, Steve Flowers's book, *The Mindful Path Through Shyness*, defines mindfulness as "the awareness that grows from being present in the unfolding moments of our lives without judging or trying to change anything that we experience."[2]

A dedicated cadre of law professors who have called for an integration of mindfulness into legal pedagogy offer the following definitions:

- Professor Leonard Riskin, C.A. Leedy Professor of Law and director of the Center for the Study of Dispute Resolution and the Initiative on "Mindfulness in Law and Dispute Resolution" at the University of Missouri-Columbia School of Law, defines mindfulness as "paying attention deliberately, moment to moment, and without judgment, to whatever is going on in the mind and body."[3]
- Professor Nathalie Martin, Frederick M. Hart Chair in Consumer and Clinical Law at the University of New Mexico School of Law, summarizes mindfulness as "present awareness of one's thoughts as they arise and minute-to-minute awareness of one's existence. … [M]indfulness allows you to pay clear and particular attention to the things around you, so you can do what is best for yourself, those you care about, and the world at large, if you take it that far."[4]
- Professor Larry Krieger, Clinical Professor of Law and Director of Clinical Externship Programs at Florida State University College of Law, and Past Chair of the American Association of Law Schools' Section on Balance in Legal Education, summarizes mindfulness as "the state of being consciously open and attentive to one's experience."[5]

What is my understanding of mindfulness as it applies to legal writing? Slowing down the pace of law school, law teaching, and law practice, and allowing an aspiring lawyer time to think, to be … to touch, feel, and taste the law without striving to be something he or she is not quite yet prepared to be. The cadence of law school and law practice is extraordinarily fast. My hope for law students and their teachers and eventual law office mentors is that we can decelerate our tempo without losing rigor. Bequeath ourselves and our students time to think. Sit with the shades of the rules, the nuances of the facts, the notion of what law is and why it matters. Give ourselves permission to cleave a space of quietude to become better writers by pausing and pondering what we individually and collectively want to say. Reduce the Pavlov pressure to respond instantaneously to a text, a tweet, an instant message, an e-mail, a Socratic question we need a moment to process, an eleventh hour motion filed by opposing counsel. Slow down, or even better, stop. Read. Reflect. Be confounded. Scrunch up our faces in confusion at the complexity of a legal concept. Acknowledge what we don't know or

understand without being embarrassed or ashamed. Steep with our thoughts, ideas, and words. And then, when ready, mindfully respond. And figure it out.

I strongly believe that learning, teaching, and practicing the art and science of legal writing is the ideal opportunity for students, law professors, and lawyers to apply the concept of mindfulness. My aspiration is that, in reading this book, students will understand the value of approaching legal writing in a deliberate, slow-paced manner— starting with visualizing the structural framework of a legal analysis, imagining the play-by-play of a client's factual scenario like a movie, honing the legal issue extracting the applicable legal rule from an array of research sources, carefully considering how best to illustrate the rule of law through vivid examples, methodically and thoughtfully applying the rule to the client's circumstances, and then either predicting a concrete logical outcome derived through this contemplative process (predictive legal writing) or selecting the right words to persuade a reader that the proposed outcome is the correct one (persuasive legal writing). We do not need to start out as experts on mindfulness practice to aspire to experiment with its techniques in our everyday commitment to legal writing excellence. We can begin by paying attention—to words, ideas, rules, facts—and lingering with them longer than we normally might, increasing our awareness of how they might inspire us as counselors-at-law representing human beings, refraining from too-soon reflex judgments about their effects. The more contemplative or meditative we are about client factual scenarios and their interaction with rules of law, the more creative we will be in conceiving effective solutions to legal problems.

I hope that this book inspires law professors and students to step away from the often frantic fray of law school, and commit to a thoughtful approach to writing about the law. I also hope that you will share your observations and reflections as you traverse this circuitous and adventurous lifelong writing trail. Please write me at heidi@theintrovertedlawyer.com. I would love to hear from you.

Heidi K. Brown
April 2016

---

[1] Jon Kabat-Zinn, *Wherever You Go There You Are* 4 (1994).

[2] Steve Flowers, MFT, *The Mindful Path Through Shyness*, 3 (New Harbinger Publications, Inc. 2009).

[3] Leonard L. Riskin, *The Place of Mindfulness in Healing and the Law, in Shifting the Field of Law & Justice* 99-120 (2007).

[4] Nathalie Martin, *Think Like A (Mindful) Lawyer: Incorporating Mindfulness, Professional Identity, And Emotional Intelligence Into The First Year Law Curriculum,* 36 U. Ark. Little Rock L. Rev. 413, 416 (2014).

[5] Lawrence S. Krieger, *Human Nature As A New Guiding Philosophy For Legal Education And The Profession*, 47 Washburn L.J. 247, 285-286 (Winter 2008), citing Kirk W. Brown & Richard M. Ryan, *The Benefits of Being Present: Mindfulness and Its Role in Psychological Well-Being*, 84 J. Personality & Soc. Psychol. 822, 822 (2003).

Acknowledgments

For eight years and counting, it has been an honor to be a member of the legal writing academy. I am grateful to have witnessed and absorbed the creativity, dedication, and inspiration of my legal writing colleagues.

As every legal writing professor knows, we learn and absorb so much from: (a) our colleagues at our own institutions and throughout the academy, (b) contributors to the LWI Listserv and other online communities, (c) the creative and collaborative legal writing conferences across the nation, and (d) the various textbooks and articles written by our cadre of talented legal writing experts. All of my teaching ideas sprouted and then were further influenced, developed, honed, and tweaked over the last eight years through my interaction with all the foregoing resources.

My teaching career started eight years ago through collaboration with my colleagues at Chapman University School of Law (now the Dale E. Fowler School of Law): specifically, Professor Stephanie Lascelles, Professor Jenny Carey, Professor Moujan Walkow, Professor Rita Barnett, Professor Carolyn Larmore, Professor Robin Wellford Slocum, and the Chapman library staff. Due to a larger-than-usual new 1L class, I was hired at the last minute in August 2008 for the Fall semester (I got the call on a Friday and had to teach my first law school class EVER the following week). My Chapman colleagues brought me up-to-speed quickly by sharing their class plans, teaching ideas, and assignments. Their generosity provided a strong foundation for me (as a new teacher) to experiment with creative ideas—some which flopped miserably (!) and others which remain in my classroom wheelhouse today.

After three years at Chapman, my teaching philosophy, ideas, and assignments were further influenced, nurtured, and developed through daily teamwork and collaboration with my Legal Practice colleagues at New York Law School under the leadership of Professor Anne Goldstein. I cannot give enough credit to Professor Goldstein, Professor Kim Hawkins, Professor Erika Wood, Professor Jodi Balsam, Professor Lynnise Pantin, Professor Lynn Su, Professor David Epstein, Professor Cynara McQuillan, Professor Melynda Barnhart, Professor Kirk Burkhalter, Professor Daniel Warshawsky, Professor Parisa Tafti, Professor Chaumtoli Huq, Professor Marcia Levy, Professor Monte Givhan, and Professor Sandra Janin for their influence on my legal writing teaching, and to the New York Law School library staff for their thoughtful research curriculum. I also credit the mentorship of Professor Frank Bress, Professor Doni

Gewirtzman, Professor Kris Franklin, Dean Carol Buckler, and Dean Mariana Hogan.

I have attended numerous legal writing conferences throughout the country over the past eight years, and have been inspired by many creative ideas from the speakers and workshops. I further have learned a great deal from the books and articles written by our talented colleagues throughout the academy, including the following textbooks that have informed and influenced my teaching:

- Robin Wellford Slocum, *Legal Reasoning, Writing, and Persuasive Argument* (LexisNexis 2d. ed).
- Linda H. Edwards, *Legal Writing and Analysis* (Wolters Kluwer 3d 3d.).
- Helene S. Schapo, Marilyn R. Walter, Elizabeth Fajans, *Writing and Analysis in the Law* (Foundation Press, 5th ed.).
- Christine Coughlin, Joan Malmud, Sandy Patrick, *A Lawyer Writes: A Practical Guide to Legal Analysis* (Carolina Academic Press 2d ed).
- Linda J. Barris, *Understanding and Mastering The Bluebook, A Guide for Students and Practitioners* (2d ed. Carolina Academic Press 2010).

I wish to thank the marvelous editing team at Wolters Kluwer, especially Dana Wilson.

Further, I am most appreciative of the education I received from The University of Virginia—in both the College of Arts and Sciences, and the Law School—where I learned to love writing in general, and legal writing specifically (thanks to Professor Jan Levine). I also want to thank the law firm of Watt, Tieder, Hoffar & Fitzgerald, LLP for instilling in me the importance of legal writing excellence from the time I was a rookie associate.

As always, thank you to my family, friends, and students who continue to embolden my twisty voyage on the meandering road less traveled.

Happy writing!

Heidi K. Brown
heidi@theintrovertedlawyer.com
Heidi.Brown@brooklaw.edu
April 2016

Part 1

Predictive Writing

Section 1

Becoming a Mindful Legal Writer: An Opportunity for Personal and Professional Reinvention

Introduction to Part 1

Congratulations and welcome. Just by investing the time in reading this Introduction, you are taking a huge step toward your goal of obtaining a law degree, joining many interesting, intelligent, creative, ambitious folks who have journeyed this same path. In doing so, you also are embarking on a career as a *writer*, like many journalists, novelists, memoirists, poets, screenwriters, playwrights, songwriters, and others. You may find this thought exciting if you enjoy putting words on paper or crafting that perfect phrase to capture a thought. However, you might find this "writing career" idea surprising, and a bit daunting if, in the past, you have felt that writing is one big chore. Or perhaps your college major or pre-law-school profession focused more heavily on science, math, or economics—where writing may not have been emphasized as strongly as other areas of study or competence. Do not fear. This book "evens the playing field" for novice legal writers like you and gives you a solid foundation to find your "lawyer voice" through the written word.

Even if you have substantial writing experience in other fields, learning how to write like a lawyer requires an open-mindedness—to embrace a completely new writing structure and style. Like any other writing genre, legal writing has its own "formula" that legal audiences expect to see so they can process a written intellectual analysis of a complex legal issue.

Imagine this: If you were to sit down at your laptop and write a haiku, a sonnet, or a screenplay, you would follow the expected structures of those media. A haiku—a form of Japanese poetry—consists of 17 "*on*" (similar to syllables), in 3 lines comprised of 5, 7, and 5 syllables. A Shakespearean sonnet entails 14 lines, 10 syllables each, written in iambic pentameter, a rhythm of unstressed and stressed syllables. Screenplays, too, are written in a

traditional format—in Courier 12-point font, with a page of text usually translating to one minute of screen time. The screenplay genre reflects strict industry guidelines for the page layout of scene headings, dialogue, and transitions, and a writing style that conveys what the reader would see and hear on a screen. If you sat down to write in one of these genres, you would not simply click away on your laptop in

your own style and structure, and expect the intended audience to rave. If you submitted a screenplay to a Hollywood agent in your own unique format and style, your creative endeavor likely would end up in the recycling bin, even if the story idea presented the newest spin on the vampire-superhero-wizard craze and offered blockbuster potential. Any time writers experiment with a new category of written communication, they adapt to the audience's expected structural parameters. Even with text messaging, Facebook, and Twitter, new writers learn how to be witty in short sound-bites or 140 characters.

Legal writing requires the same open-minded attitude and commitment. Our eventual audiences—supervising attorneys, opposing counsel, and judges—expect legal documents to follow a certain logic flow, leading the reader down a clear path to a well-reasoned conclusion. This logic thread usually follows some derivation of a writing structure called IRAC (Issue, Rule, Application/Analysis, and Conclusion), or IREAC (Issue, Rule, Explanation, Application/Analysis, and Conclusion), or CREAC (Conclusion, Rule, Explanation, Application/Analysis, and Conclusion). As a novice legal writer, if you embrace this simple formula, you are guaranteed to include all the necessary logic components so your reader can follow your thought process and understand why your ultimate conclusion makes sense. In contrast, if you ignore this formula and construct your own logic configuration—thinking you are novel, clever, and singlehandedly about to change written advocacy for all time—you run the risk of omitting necessary logic "building blocks" and leaving the reader confused, guessing, and frustrated—not a good scenario for your eventual *clients*.

In fact, you must always consider the *client factor* as you learn and then practice legal writing. In college, your written work likely was assignment-based: A professor assigned a writing project that you performed for a grade. No third party relied on your written work for a desired result affecting a person's property, economic well-being, liberty interests, health, or welfare. Law school and law practice are quite different in this respect. They require you to evolve from an assignment-based mindset to an advocacy-based one.

Start thinking of every piece of legal writing, no matter how small, as a "voice" for a client. This client needs your expertise, your logical reasoning, your commitment, and your careful analysis on behalf of his or her cause. He or she may have a lot riding on how well you advocate.

The more you regard yourself as a legal apprentice rather than simply a continuing student, the more thoughtful and emotionally engaged your legal writing will be, and the more it will resonate with your reader. Thoughtful and emotionally engaged writing is not soft or sentimental. Yes, "thoughtful" can mean "heedful anticipation of the needs and wants of others," but in the context of legal writing, the more apt definition is "characterized by careful reasoned thinking."[1] As a thoughtful legal writer, you will put more intention and

consideration into researching your client's issue. You will go deeper than surface level in your research by: (1) organizing the sources of law you find; (2) thinking hard about how these legal principles affect your client's situation; (3) brainstorming about the best way to communicate the application of legal rules to a client's scenario; (4) taking the utmost care to write with clarity, precision, and passion; (5) and then perfecting that piece of writing in its logic flow, phrasing, and presentation.

Also consider what being a mindful legal writer and law student means. "Mindfulness" is defined as "being fully conscious and aware of one's actions and surroundings"[2] or "an awareness that arises through paying attention, on purpose, in the present moment."[3] Law school can be overwhelming: the amount of nightly reading, the pressure to zealously embrace the Socratic method, the competitive dialogue in the hallways about who has outlined the fastest. The pace can feel frantic. Students often cope by racing through piles of reading assignments, sprinting through writing projects, and plowing through study outlines. Slow down the pace if you can, be more deliberate and intentional as you read and write, and pay attention to the twists and turns along the learning path. It doesn't matter whether you process the material as quickly as others; it matters whether the content makes sense to you. Be mindful of what you understand, and acknowledge and note what you don't.

Legal writing is both a science and an art. *Merriam-Webster* defines "science" as "knowledge or a system of knowledge covering general truths or the operation of general laws especially as obtained and tested through

scientific method."[4] If this definition sounds confusing, extract the instructive words: "knowledge," "system," "truths," "laws," "tested," and "method." Science gives us systems to use to find answers—through experiments, tests, dissection, and procedure. Science helps us figure out how things work, by analyzing their internal anatomy, structure, and mechanisms.

As a novice legal writer, you need to begin at an elemental level—with the science, the mechanics, the blueprints. You can become a clear, convincing, and interesting legal writer by starting slowly and methodically with basic fundamentals and by embracing formulas. As you practice those structural set-ups, you will begin to recognize and identify gaps in logic, clarity, and presentation. Then, after mastering those simple, straightforward formulas and learning how to identify and correct deficiencies, you will build from that foundation by adding more complex legal sources as examples for the reader and more sophisticated analysis

and application of rules to client facts. Finally, and the most fun part of all, you will experiment with your lawyer voice and stylistic flair. That is the moment when legal writing becomes art.

Merriam-Webster defines "art" in part as "the conscious use of skill and creative imagination especially in the production of aesthetic objects."[5] The dictionary distinguishes between "skill" and "art." Skill "stresses technical knowledge and proficiency," while art "implies a personal, unanalyzable creative power: the art of choosing the right word."[6] To gain the skill of legal writing, first you will become technically proficient at finding the right legal rules and applying them logically and clearly to your client's situation—as a scientist. Then, you will develop and nurture your personal, creative power to communicate the "right" result to your audience—as an artist. Your creative power will shine through choices of words, themes, imagery, and emotional triggers, but also through contemplative selection of illustrative case law, citation methods, organization of key points, descriptive headings, and so on.

This book breaks down legal writing into step-by-step manageable formulas that may seem overly simplistic and rigid at first glance. However, if you adopt these formulas as a new legal writer, and become comfortable with them as they build on one another to create a powerful whole, you will never inadvertently omit critical logic components from your analysis. Then, once you master these formulas, you can experiment with more sophisticated and advanced structural and stylistic techniques, while at the same time adding

your own lawyer voice.

Consider this: Resist the urge to do too much too soon. If you wanted to try snowboarding for the first time, you probably would not buy the fastest, most high-tech equipment and a plane ticket to the wildest mountain with the "shreddiest" slopes on the globe. Instead, you might sign up for a lesson or two, in which an instructor would start by explaining, in basic vocabulary, the physics of the sport and familiarize you with alien equipment, snow conditions, and pitfalls for novices. Then, you would try out the equipment, getting comfortable with the boots, the board, and your balance, noticing how even the most minimal foot adjustments have significant directional effects on which way the fancy piece of plywood takes you. You might learn how to fall, so it seems less intimidating or hurts less. And then you would practice, and fall, a lot.

Approach legal writing the same way. Start slowly. Learn—and really understand—the most basic writing mechanics and why they are important and function well. Listen to your professor—he or she likely really loves this science and art, and is quite good at it, and excited for you to love it too. Practice the fundamentals repeatedly. Then observe, and appreciate, how minor tunings can have dramatic effects. Slowly, experiment with more advanced techniques and thoughtfully inject your personal lawyering style.

Taken seriously, legal research and writing can be the most exhilarating part of being an attorney. At moments in your career, you will find that needle-in-a-haystack magical case that miraculously produces a viable argument for your client, when you thought one did not exist. You will spend hours writing a brief, painstakingly trying to explain to a judge why your proposed result makes the most logical sense—and is the truly fair thing to do—and months later, you will receive an order from the court awarding summary judgment, saving your client thousands, perhaps even hundreds of thousands, of dollars and countless hours of stress navigating a trial. These are moments that YOU will create through professional creative power.

As you begin this quest, remain open-minded. If legal writing feels unnatural at first or if your professor writes voluminous constructive criticism on your papers—yet you are accustomed to receiving high marks of praise—do not resist. Embrace and practice the formulas, even if they seem overly simplistic or rigid. Transition quickly out of the college-level, assignment-based mindset and into an apprentice attitude. Soon you will have a unique

opportunity to speak on behalf of a client—a person who trusts you—and right a wrong, change something for the better, or create a positive outcome where none existed. Use the law to be a creative solution maker. Don't stop at the easy "yes" or easy "no" answer in your research or your analysis. Think about what the right, fair, best outcome could be—even if it is a result that has never been achieved previously.

You might feel buried under piles of writing rules, first from your professor, eventually from your supervising attorneys, and certainly from the judges before whom you will practice. Welcome these standards and make it your personal mission to satisfy, and hopefully exceed, the expectations of your audience by following these mandates in your written work product. Too many practicing attorneys think court rules are just "recommendations" and then aggravate the judge (and opposing counsel) by submitting briefs and other court submissions that flout these requirements, creating more work for the court staff and slowing down the system for everyone else. Taking writing rules seriously, and using them to make your legal writing the best it can be, enhances your credibility with your audience and paves the way for your substance to resonate with your reader.

Finally, enjoy this learning process. Of course, law school will challenge you and sometimes feel all-consuming. Use your Legal Research and Writing, Lawyering, and Legal Practice classes as a haven for finding the intellectual thrill in law school. In the legal writing classroom, you can experiment with finding your lawyer voice and take on a lawyer persona from day one.

You are the future of legal practice in the United States and beyond. Let legal research and writing be your powerful advocacy tools to effect positive change.

---

[1] Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/thoughtful (last visited Oct. 11, 2014).

[2] *Observation Skills May be Key Ingredient to Creativity*, Ass'n for Psychol. Sci. (June 26, 2014), http://www.psychologicalscience.org/index.php/news/minds-business/observation-skills-may-be-key-ingredient-to-creativity.html.

[3] Carolyn Gregoire, *13 Things Mindful People Do Differently Every Day*, Huffington Post (May 1, 2014), *quoting* Jon Kabat-Zinn, http://www.huffingtonpost.com/2014/04/30/habits-mindful-people_n_ 5186510.html.

[4] Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/science (last visited Oct. 11, 2014).

[5] *Id.*, http://www.merriam-webster.com/dictionary/art.

[6] *Id.*

Chapter 1

Putting Legal Writing in Context

The first few weeks of law school might feel a bit daunting: You're already struggling under stacks of reading, trying to make sense of the Socratic method, learning new vocabulary and a fresh way of analyzing complex subjects, and figuring out where you fit in. You're not even sure where the library is. But you can do this. The Roman poet Ovid offers an inspiring quote that readily applies to law school: "Perfer et obdura; dolor hic tibi proderit olim," or "Be patient and tough; someday this pain will be useful to you."

So, let's get your legal research and writing[1] class off to a great start.

Flash forward three years. You have graduated from law school, have passed the bar exam, and are starting your new job as a practicing lawyer. Your sleek office phone rings. The caller is your supervising attorney assigning your first research and writing project: drafting a set of interrogatories for a case pending in federal court. The deadline is Friday. You hang up the phone. You gaze at your quickly scribbled notes and realize that you do not know what an interrogatory is, what it looks like, what purpose it serves, or how it helps your client. Instead of panicking, your first step is to "get context."

One of the aspects of law practice that new lawyers struggle with the most is how a particular written work product fits into a client's or case's big picture. This is "context." If you approach a legal writing project as a stand-alone, one-off

"assignment"—like a college term paper—the end result might not truly serve its intended, and most effective, purpose. So, from the very beginning of your journey as a legal writer, it is important to understand and ponder how different types of legal writing are used in a relationship with a client. Envisioning how a piece of written work fits into the big picture of a legal case enables you to craft more effective documents. This is true whether your client seeks general legal assistance, such as setting up a business or entering into a contract (examples of "transactional" legal work), or is hiring a law office to resolve a dispute with another individual or entity (often referred to as "litigation" work).[2]

Regardless of the client's ultimate need or goal, legal writing typically involves these activities:

(1) identifying the legal issue(s) impacting the client;
(2) pinpointing the applicable legal rules;
(3) possibly explaining those legal rules, either briefly or in detail, depending on the audience;
(4) applying those rules to the client scenario; and/or
(5) stating a conclusion (either objectively or persuasively, depending on the audience).

The level of specificity the legal writer provides for each category always depends on the audience and the purpose of the written document. If the document is an internal client document (meaning, it will not be circulated to the opposing party or to the court), the writer might make recommendations, weighing the pros and cons of different legal options and the strengths and weaknesses of the client's position. If the document is an external communication to a third party in a pending contract negotiation, or opposing counsel or the judge in a lawsuit, the conclusions will be points of persuasion, to convince the audience to agree with the author's contentions.[3]

In legal writing, your audience might include one or more of the following people:

- A supervising attorney, who asked you to identify the client's issue, research the applicable law, apply the law to the client scenario, and predict the likely outcome
- Your client (sometimes clients are in-house lawyers at companies, but

often they are nonlawyers)[4]

- A third party in a transactional setting (in a non–dispute resolution scenario)
- Opposing counsel
- A judge, a mediator, or an arbitrator

The first half of this book focuses on written communications between you and your supervising attorney who will then convey recommendations to the client—emphasizing predictive or objective legal analysis. Typically, these communications are protected from disclosure to opposing parties by the attorney-client privilege and/or the attorney work product doctrine (which protects the mental impressions and legal theories of an attorney). The second half of this book will focus on written communications between you and (1) the court and (2) opposing counsel—emphasizing persuasive legal analysis.[5]

However, first, as an overview, the next section of this chapter will provide examples of different types of legal documents lawyers create in (1) dispute resolution and (2) transactional legal work.

I. Legal Writing in Dispute Resolution

Legal writing is an essential part of any dispute resolution scenario. Written legal analysis helps clients, lawyers (on both sides of a case), and judges make smart decisions about how to resolve a case.

Most legal cases follow a typical progression and involve similar types of legal documents. To understand how the pieces fit together, envision the following chronology of events.

A. Preliminary Client Advisory Phase

A client—an individual or an entity (via a representative)—contacts a law office seeking legal advice on a potential dispute with another party.

Step 1: Checking for Ethical Conflicts: The first step a lawyer takes before agreeing to represent a client is to conduct a "conflicts check." This process ensures that a potential attorney-client relationship does not create any ethical "conflicts of interest." Many law offices have computer systems that perform these conflicts checks. Also, attorneys often circulate conflicts check e-mails to other lawyers within the firm. Once the lawyer confirms that no ethical conflicts exist, the fact-gathering phase begins.

Step 2: Fact Gathering: The lawyer's goal in the initial client contact—whether on the phone or in person—is to (1) gather the relevant facts triggering to the dispute and (2) begin to identify the legal issue(s) to research. During this phase, it is important for the attorney to establish a rapport with the client so he or she feels comfortable and trusting enough to reveal both favorable and unfavorable facts. Lawyers need to know the client's backstory to effectively apply the governing law to the client's situation and predict a realistic outcome. During this phase, attorneys take thorough notes to keep track of what they learn, but also follow up with questions[6] if they sense gaps in the client's narrative.

After a client meeting, some lawyers begin drafting a "master chronology" of the facts gleaned from the initial client interview. Attorneys add to the chronology as they further flesh out the facts. Any notes taken or chronologies drafted constitute "attorney work product" and should be protected from disclosure to the potential parties on the other side of the case.

During this initial phase, attorneys also send the client an **engagement letter**, describing the terms of the representation and providing information about billing rates and fees. State bar association websites provide ethical guidelines of items to include in a client engagement letter.

Step 3: Identifying the Legal Question: Once the attorney reflects on the client's facts, the next step is to identify the precise legal question posed. Is the client asking whether he has the right to demand that his neighbor cut down a decaying tree that poses a safety hazard on the client's property? Is the client inquiring whether her daughter's school principal overstepped the bounds of privacy by searching the daughter's locker without permission? Is the client requesting advice on whether he has a claim against a company for using his picture in an advertisement without his permission? Once the lawyer knows the basic legal question, legal research commences.

Step 4: Researching the Governing Law and Narrowing the Legal Question: Next, the lawyer searches for governing statutes, regulations, and case law that interpret and apply legal rules to different factual scenarios. (Chapter 4 explains these various sources of law and how to read them and break them down into understandable frameworks.) Depending on the topic, legal research can take several hours or even days, or it might demand just a few minutes if the researcher knows exactly what to look for and the answer is readily available. Lawyers conduct legal research in a law library, using books that codify the governing laws and rules,[7] or by accessing online databases such Westlaw, Lexis,

Bloomberg Law, and others. The goal of the legal research phase is to narrow the legal question further—and identify the governing "rule."

Step 5: Preparing a Legal Research Memorandum: Once the lawyer gathers the client facts and performs careful legal research, it is time to synthesize the legal research results. Research might reveal a single source describing one clear or obvious "rule" or a pile of sources that require sifting. (Chapter 9 explains how to synthesize legal research results.) The first type of legal writing most new law students learn is how to draft a **legal research memorandum**. The memorandum is the vehicle lawyers use to identify the client's pertinent legal issue, describe the applicable rule(s), apply the rule(s) to the client's factual scenario, and objectively predict a realistic outcome. This book explains the step-by-step process for preparing a legal research memorandum in Chapters 8 to 20.

Usually, a legal research memorandum is an internal law office document, meaning that a junior attorney drafts it for a supervising attorney. It should be protected from disclosure to the potential opposing party by the attorney work product doctrine. The supervising attorney uses the written analysis to advise the client on how to handle a legal issue.[8] The legal query could relate to a general question about a particular law or to a specific dispute with a third party. The memo's analysis helps the attorney recommend what action or next steps, if any, the client should take.

Step 6: Advising the Client on the Next Course of Action: Once the legal analysis is complete, lawyers advise the client on the recommended course of action, either in person, on the phone, or via an **opinion letter** or **opinion e-mail**. To create these two types of documents, a lawyer converts

the internal legal research memorandum into an appropriate external communication to the client. As long as the client does not distribute the letter or e-mail to anyone else, the attorney-client privilege should protect the document's contents from disclosure to the potential opposing party. During this advisory phase, the lawyer counsels[9] the client on next steps, such as dispute resolution options (including settlement) or procedures for filing a lawsuit.[10]

B. Prelitigation Settlement

Clients often choose to settle a case short of filing a lawsuit, a decision that saves money, time, and energy fighting in court. In these situations, an attorney may use a favorable analysis extracted from the internal legal research memorandum to convince the opposing party (or his or her attorney if the party is represented by counsel) that the client has a valid argument and would likely prevail at trial. The lawyer can use the research and analysis from the internal legal research memorandum to draft a persuasive **settlement demand letter** to the other side. The demand letter sets forth the legal arguments demonstrating how and why the client would prevail at trial, but might offer to compromise for a particular amount of money or a specific action. Usually, such a letter includes a deadline for compromise and warns the recipient that, if settlement is not reached by that date, the client is prepared to file a legal complaint in the appropriate court.

If settlement is reached, the attorneys draft a **settlement agreement**, summarizing the terms of the compromise and any deadlines for compliance —which the parties sign. Settlement letters and agreements are discussed in Chapters 22 and 23.

C. Phases of Litigation

1. Pleadings

A lawsuit commences when a party, the "plaintiff," files a **complaint** in the appropriate court. When drafting a complaint, a lawyer researches which court

has appropriate jurisdiction over the parties and the subject matter of the client's case. (Chapter 4 explains jurisdiction, a concept that is also taught in Civil Procedure class.) The document that an attorney files with the court to launch a case is called a **pleading** because the party is making a "plea" to the court.

A complaint starts off with a "caption" of the case, which includes the parties' full individual or corporate names and designations (plaintiff(s) and defendant(s)), the court's name, and the title of the pleading (i.e., complaint) so the court clerk can keep track of each document filed in the case. Then, in numbered paragraphs, the attorney describes

- the court's jurisdiction over the case,
- the basic facts giving rise to the dispute, and
- the legal "causes of action" asserted by the plaintiff.

Causes of action are the legal claims that the plaintiff must prove; examples include breach of contract, negligence, fraud, defamation, and slander. Each cause of action has certain required "elements," or component parts, that must be alleged in the complaint. Lawyers research what elements are essential to plead for each cause of action (see, e.g., the boxed example below). The drafter of the

complaint needs to make sure the pleading does not omit mandatory elements of a cause of action, which would cause the complaint to fail.

Six Elements of a Cause of Action for Fraudulent Misrepresentation in Nebraska

A plaintiff must allege

(1) a person made a representation;
(2) the representation was false;
(3) the person knew the representation was false, or made it recklessly without knowledge of whether it was true or false;
(4) the person intended that the plaintiff rely on the representation;
(5) the plaintiff did rely on it; and
(6) the plaintiff suffered damage as a result.

Finally, the complaint states the "remedy," or the result that the plaintiff seeks. The remedy can include monetary damages or performance by the defendant—such as return of a tangible item, or the act of chopping down a rotting tree on adjoining land, or refraining from publishing a compromising photo in a tabloid.

The attorney signs the complaint and then files it with the appropriate court, usually paying a filing fee. Courts may allow and/or require electronic filing, which means the document is uploaded onto the court's electronic database and is assigned a case number (also called a docket number) from the clerk of the court. The complaint is then "served" [11] on the defendant, and the case begins.

After receiving the complaint, the defendant has a certain number of days (defined in the particular court's rules) to file a **motion to dismiss the complaint** or to file an **answer**. A "motion" is a form of legal writing in which an attorney "moves" or requests the court to take a certain action. If the defendant can demonstrate (based on legal research) that the complaint fails to state a viable cause of action or contains various other flaws (which you will learn in Civil Procedure class), a court might grant the motion to dismiss the complaint. The complaint is dismissed, and the lawsuit stops.

Alternatively, the defendant files an answer—which includes the same case caption at the top of the document (adding the case or docket number assigned by the court clerk and the title of "Answer")—and then responds, in numbered paragraphs corresponding to those in the complaint, to each allegation, either admitting or denying each statement. The defendant also uses the answer to assert

---

"defenses" to the causes of action in the complaint. Like the complaint, the answer is called a pleading.

Sometimes, parties also will add new litigants to the case, filing "third-party complaints," or may serve a "cross-complaint" on a co-party. Once all the pleadings have been filed, the case quickly moves into the scheduling phase.

2. Scheduling

Courthouses are very busy places. Courts all over the country manage hundreds of thousands of cases involving numerous parties and attorneys. Scheduling is critical. Many courts promulgate rules that require the attorneys

on both sides of a case to work out a litigation management schedule between themselves, as soon as the pleadings phase ends. Often, counsel for one party coordinates a conference call or a face-to-face meeting with the lawyers representing the other party or parties. Together, the attorneys peruse their calendars and hammer out dates and deadlines for exchanging documents, taking depositions (interviews of witnesses under oath), responding and objecting to written discovery requests, engaging experts, exchanging expert reports, filing written motions to narrow issues for trial, submitting pretrial documents, and filing pretrial evidentiary motions. The parties also try to agree on how many days or weeks of trial are necessary. Hopefully, the attorneys can agree on all these items, but that is not always possible.

At the end of this conference call or meeting, the lawyers draft a **proposed joint case management plan** or **scheduling order** and present it to the court, identifying all items agreed on and those that remain sticking points. The court might accept the plan or adjust it, and then the judge signs the official "case management order" or "scheduling order" for the case. Once the judge issues the order, the case schedule is set, and time extensions are difficult to obtain. Thus, in the scheduling phase, attorneys must take the time to think through realistic durations for completing the numerous activities involved in preparing a case for trial.

3. Fact Discovery

In the fact discovery phase, lawyers become investigators and sleuths. They brainstorm about the many possible witnesses, documents, physical items, or tidbits of information that might be helpful in building and defending the client's case, and then ask for them—nicely—in written documents called **discovery requests**. In litigation, there are four main categories of discovery:

(1) Requests for production of documents or things: Categories of documents or physical objects that the attorneys believe will help them learn the facts of the case and prove or defend the causes of action in the complaint or the defenses in the answer
(2) Interrogatories: Written questions that parties must answer in writing, under oath
(3) Requests for admissions: Written statements that parties must admit or deny

(4) Depositions: Attorneys' interviews of witnesses who testify under oath; court reporters transcribe the questions and answers[12]

Clearly, the discovery phase of a case requires an assortment of legal writing.[13] Lawyers draft voluminous discovery requests to serve on opposing parties. The attorneys receiving the discovery requests draft written **objections** to any requests that the responding party considers to be beyond the scope of the court's discovery rules, and written **responses** to appropriate requests. Depositions also require legal writing: **notices of deposition** or **subpoenas**, and **deposition outlines** of questions to ask the witness and key topics to exhaust during the limited time available.

The discovery phase of litigation can take months, depending on the complexity of the case. Unfortunately, during this phase, lawyers have a habit of getting embroiled in their own quarrels and sometimes accuse one another of withholding key case information. This unpleasant scenario might require a party to file a **motion to compel discovery**, which requires court intervention to resolve the disagreement. However, many judges are disinclined to spend time refereeing discovery disputes and strongly encourage attorneys to work out these issues among themselves instead of consuming valuable judicial resources.

4. Expert Discovery

Some cases necessitate the assistance of expert witnesses to explain important aspects of the case to the jury or judge. For example, different cases might require experts on handwriting, fingerprints, car mechanics, heart surgery, art restoration, weapons, violin construction, or other specialized topics. An expert does not necessarily need advanced degrees or a history of employment at prestigious corporations; in a case involving a vending machine accident, for example, a lawyer could call an experienced local vending machine repair person to testify as an expert on an issue of the particular machine's operation that is beyond the experience of the average layperson. However, there are certain legal standards that a party proposing a certain expert at trial must meet. Legal research is important here as well to ensure that a client does not spend money engaging an expert that the judge later will not allow to testify at trial.

Lawyers work closely with experts in reviewing the case facts and provide the experts with whatever pertinent case documents and deposition transcripts they need to render opinions on the particular subject matter.

The types of legal writing that lawyers perform during the expert phase of litigation include **engagement letters** (identifying the scope and boundaries of an expert's role in the case), **expert deposition outlines**, and **motions** to exclude another party's expert from trial if the expert's opinions do not meet the legal standards of the particular jurisdiction. During this phase, experts draft "expert reports" summarizing their opinions, which are provided to the other party in advance of depositions and trial. Sometimes lawyers are involved in recommending stylistic edits to these reports so they read clearly, but lawyers should not be the substantive authors of the reports.

5. Pretrial

The court's case management order, or scheduling order, typically sets a hard deadline for the cutoff date of all discovery, both fact- and expert-related. After that date, the parties shift gears and begin preparing pretrial submissions, to streamline the case as much as possible before trial. The types of legal writing that lawyers perform during the pretrial phase include the following.

- **Motions to narrow the substantive legal issues** (e.g., motions for summary judgment in which parties request the court to render judgment on a part or all of a cause of action in the complaint)
- **Motions regarding evidentiary issues** ("motions in limine") (e.g., motions requesting the court to decide whether a certain piece of evidence is "admissible" under the court's rules of evidence)
- **Jury instructions** [14] (if the case involves a jury), which explain the law governing the various causes of action in the complaint and the defenses in the answer, in language the jury can understand
- **Exhibit lists**, identifying all the exhibits the parties plan to present as evidence at trial
- **Witness lists**, identifying all the witnesses the parties plan to call to testify at trial

During this phase, litigants often revisit the possibility of settling the case. If a compromise is reached, the attorneys draft the settlement agreement.

6. Trial

The trial is the "big show"—a presentation of the facts and law to the decision maker. Even during trial, attorneys spend hours writing. The types of

legal writing lawyers perform during trial include the following:

p. 20

---

p. 21

- **Opening statements**
- **Witness outlines**, including direct and cross-examination
- Additional **motions** regarding issues that arise during trial
- **Closing arguments**

7. Posttrial

Even after the judge or jury delivers a decision, lawyers still write. A prevailing (winning) party may be entitled to recover interest, attorneys' fees, or other costs; the attorney must file a motion requesting and proving the amounts of these items. The nonprevailing party has a certain number of days to file an appeal, which involves writing **briefs** to the appellate court.

II. Legal Writing in Transactional Lawyering

Many clients seek legal counsel for reasons that have nothing to do with a dispute. For example, individuals and companies seek legal advice regarding property ownership, taxes, real estate purchases, business start-ups and transactions, mergers, estate planning, and contract negotiation. These can all be positive "win-win" experiences for everyone involved, but still require legal research, analysis, and well-thought-out recommendations. The types of legal writing that lawyers do in these scenarios might involve the following:

- Corporate filings
- Legal research memoranda
- Deal "term sheets" (summaries of terms agreed on in a contract negotiation that have not yet been formalized in a contract)
- Negotiation Letters
- Contracts
- Wills
- Leases
- Loan documents

Whatever the type of legal writing, an attorney's goal is to make sure she

- knows all the legally significant facts that affect the client's legal question;
- thoroughly researches and understands the applicable law;
- properly applies the legal rules to the client scenario; and
- communicates clearly in the written document so the drafter and the reader are both fully aware of its intent, purpose, and legal effect.

PRACTICE TIPS

You now have a basic familiarity of the types of legal writing that lawyers do in various phases of a client's representation. When you receive a new assignment from a supervising attorney, take a moment to think about what phase the case or client relationship is in, and how the writing project will be used, perhaps in one of the following stages.

- In the initial stage of a client relationship, to provide advice on what course of action the client should take in a transaction or in a dispute with another individual or company
- In the middle of a case, to gather factual information from an opposing party or demand that the other side provide information to which the client is entitled under the governing rules
- At any phase of a client relationship, to convince a third party or the court to give the client the result or remedy he seeks

Knowing the ultimate purpose of your written work product makes all the difference in how you approach the task of preparing to write it.

Practice Checklist: Types of Legal Writing Attorneys Do

Legal Writing in Dispute Resolution

Prelitigation

- ☑ Client Engagement Letter
- ☑ Master Fact Chronology
- ☑ Legal Research Memorandum
- ☑ Client Opinion Letter (or E-mail)
- ☑ Settlement Demand Letter
- ☑ Settlement Agreement

Pleadings Phase

- ☑ Complaint
- ☑ Motion to Dismiss
- ☑ Opposition to Motion to Dismiss
- ☑ Answer
- ☑ Third-Party Pleadings

Scheduling Phase

- ☑ Joint Proposed Scheduling Plan (or Case Management Plan)

Fact Discovery

- ☑ Any Court-Required Initial Disclosures

- ☑ Requests for Production of Documents or Things
- ☑ Interrogatories
- ☑ Requests for Admissions
- ☑ Motions for Physical or Mental Examination
- ☑ Written Objections and Responses to Discovery
- ☑ Notices of Deposition and/or Subpoenas
- ☑ Deposition Outlines
- ☑ Motions to Compel Discovery
- ☑ Oppositions to Motions to Compel

Expert Discovery

- ☑ Engagement Letters
- ☑ Reviewing (but not Drafting) Expert Reports
- ☑ Expert Deposition Outlines
- ☑ Motions in Limine to Exclude an Expert
- ☑ Oppositions to Motions in Limine

Pretrial Phase

- ☑ Motions for Summary Judgment
- ☑ Motions in Limine on Evidentiary Issues
- ☑ Oppositions to Motions
- ☑ Jury Instructions
- ☑ Voir Dire Questions
- ☑ Exhibit Lists
- ☑ Witness Lists
- ☑ Settlement Agreement

Trial Phase

- ☑ Opening Statements
- ☑ Witness Direct-Examination and Cross-Examination Outlines

- ☑ Trial Motions (and Oppositions)
- ☑ Closing Arguments

p. 23

---

p. 24

Posttrial Phase

- ☑ Motions for Interest, Attorneys' Fees, and/or Costs
- ☑ Appeal Brief

Legal Writing in Transactional Lawyering

- ☑ Client Engagement Letter
- ☑ Corporate Filings
- ☑ Legal Research Memorandum
- ☑ Deal Term Sheet
- ☑ Negotiation Letters
- ☑ Contract
- ☑ Wills
- ☑ Lease
- ☑ Loan Document

---

[1] The class for which you're using this book may be called Legal Research and Writing, Legal Methods, Lawyering, Legal Practice, or some other iteration of those titles. Law school educators and lawyers nationwide have realized the critical importance of providing students a strong foundation in legal research and writing early in their legal careers, and so this class will be a key part of your law school curriculum. This class may require more written work on a weekly basis than some of your other courses (which culminate in a single final exam, with perhaps a midterm test as well), but you will learn key competencies in this course that will help you write better law school exam essays, perform well in your summer jobs, excel on the bar exam, and serve your clients productively in a hopefully long and fruitful legal career.

[2] Law practice generally falls into two categories (though with lots of subcategories): transactional work and dispute resolution. No matter which type of practice in which you decide you are interested, the fundamental analytical and writing skills you learn in your writing class will improve your lawyering competencies.

[3] "Contentions" are your assertions, arguments, claims, or positions.

[4] If you are drafting a document to communicate information directly to the client, you will assess the level of legal knowledge of your reader by considering whether your reader is an in-house corporate attorney or a layperson who does not have a law degree, and adjust your explanation of the legal rules and terminology accordingly.

[5] In your legal career, you also might write transmittal letters, e-mails, contracts, client interview outlines, deposition outlines, witness examination outlines, jury instructions, articles, and a whole slew of other types of documents. Depending on your interests (transactional, litigation, law office management), you might consider choosing elective courses in law school that will give you experience in these other types of legal writing as well.

[6] For guidance on client interviewing, see Stefan H. Krieger & Richard K. Neumann, Jr., *Essential Lawyering Skills* (4th ed. 2011).

[7] When you first learn about various sources of law such as statutes and cases, it often helps to look at hard-copy books containing these resources. While this might seem like an "old school" tactic in our high-tech digital age, legal research is complicated and requires open-mindedness and slow, deliberate learning of new skills—at first. Seeing how the sources of law physically cross-reference one another (e.g., statutes contain "Notes of Decisions" that help you find cases; cases describe statutes; "digests" include summaries of cases; legal encyclopedias refer to statutes and cases) can help you visualize this interconnectedness on paper before you make the leap to online research where the visual connections and links might be more hidden. (You eventually will learn how to follow online research "bread crumbs" and access hyperlinks.) When you start researching online, if you find it difficult to understand how sources of law fit together, consider this strategy. Look first at the same sources in hard-copy books— to understand the big picture.

[8] Sometimes the supervising attorney decides the junior lawyer's memo is so well written that he or she transmits the document directly to the client.

[9] For valuable guidance on client counseling, see Krieger & Neumann, *supra* note 6.

[10] Sometimes parties choose arbitration over litigation. Litigation is explained in detail in Section I.C. Arbitration is a form of alternative dispute resolution in which parties can choose a neutral third person (or a panel of three impartial individuals) to resolve their dispute. The arbitrators typically are people with expertise in the particular industry or subject matter that is the subject of the dispute (e.g., construction, insurance, sports). Arbitration is often faster and less expensive than litigation if the parties agree to limited "discovery" (investigation of the facts of the case through document exchange, witness interviews, and so forth), but drawbacks include the fact that the arbitration panel is the sole decision maker (there is no jury), and typically the parties waive the right to an appeal. Arbitration is described further in Chapter 34.

[11] "Service" is delivery of legal documents to another party, providing notice of the legal matter.

[12] Some cases might necessitate a fifth type of discovery—a request for a physical or mental examination of a party—but these requests require a motion by a party and a court order.

[13] Courts might require that parties exchange "initial disclosures" of categories of documents, potential witnesses, damages summaries, and insurance coverage—which help launch the discovery phase of the case.

[14] In jury trials, lawyers also might be required to draft voir dire questions. *Voir dire* is old French for "to speak the truth." Lawyers and/or judges ask potential jurors voir dire questions during the jury selection phase of a trial to uncover whether jurors are biased, have relationships with any of the parties, or should be removed from the jury pool for any other legitimate reasons.

Chapter 2

Pondering Professional Judgment

Now that you are on your way to becoming a lawyer, you will be using the word "judgment" (spelled "judgment," rather than "judgement") on a regular basis. In the litigation context, the term means "[a] court's final determination of the rights and obligations of the parties in a case"[1]—in other words, the court's decision in a litigation. However, consider engaging with a different kind of judgment in your first few weeks of law school, and every week of your career thereafter: professional judgment.

You probably are going to hear a lot about "professionalism" throughout your law school experience. *Black's Law Dictionary* offers an elegant definition of this term: "The practice of a learned art in a characteristically methodical, courteous, and ethical manner."[2] Likewise, various glossaries define "judgment" as

- "the ability to…make a decision, or form an opinion objectively, authoritatively, and wisely, especially in matters affecting action."[3]
- "good sense, or discretion."[4]
- "the ability to make considered decisions or come to sensible conclusions."[5]

So, what does it mean to exercise professional judgment and be "methodical, courteous, and ethical" as a law student? Can judgment, good sense, discretion, or sensibility be learned or taught, or is it innate?

Carve out some time to think about these words and what professional judgment means to you. Make a commitment to contemplate how you can enhance your professional judgment, starting now as a 1L student. Even if you have been in professional workplace environments before, you are entering a new vocation in which clients will rely on you for advice often in complex, emotionally charged, stressful circumstances. The colleagues, adversaries, parties, authority figures, and decision makers we encounter as lawyers are part of a system greater than ourselves. Acquiring, and then enriching, professional judgment requires new lawyers to reflect on how they fit into the legal system as a whole. What role do you want to play? What role should you play? How will exercising good judgment get you where you want to be?

In law school, you will engage in relationships with classmates, section-mates, professors, administrative staff, alumni, potential employers, family, significant others, friends, and acquaintances. Perhaps you presented yourself a certain way in college (the ambitious achiever? the fun-loving athlete? the happy-go-lucky jokester? the master-of-all-nighters?). Maybe you projected a particular persona in graduate school or in the workforce prior to law school. As you commence this new life phase, grant yourself flexibility to shift the way you portray yourself as a law student and an attorney. Now is your chance to reinvent yourself—into the newer, more professional "you."

> "It is not by muscle, speed, or physical dexterity that great things are achieved, but by reflection, force of character, and judgment."
>
> • Marcus Tullius Cicero

I. Respect Rules

Law is a profession swaddled in rules. Yet, people break the rules all the time: criminals, contracting parties, vehicle drivers, taxpayers, and yes, unfortunately even lawyers. In law school, you will learn many types of rules, including substantive legal rules and procedural rules. Developing professional judgment includes embracing legal rules, deconstructing confusing mandates into understandable components, being interested in the context (the "why") behind these requirements, and respecting the law enough to follow substantive and procedural rules for a greater purpose.

A. Substantive Rules

In law school, rules are a law student's friend; rules are the vehicle for answering legal questions. When in doubt, ask yourself, "Well, what is the legal rule?" Classes such as Contracts, Torts, Criminal Law, Property, Civil Procedure,

Constitutional Law, and Evidence abound with "substantive" rules. "Substantive" means that they "create and define rights and duties."[6] Your job as a law student is to read statutes, regulations, and case law with an eye toward extracting substantive legal rules about parties' entitlements and obligations, and then experiment with applying them to factual scenarios. Often, you will have to "synthesize," or pare down, a single unified rule from a combination of more than one legal source; for example, you might read a collection of cases and notice common themes or patterns, and then consolidate these ideas into a well-constructed, cohesive rule. In analyzing and understanding rules, lawyers are investigators, problem solvers, surgeons —of words. Rules are simply words, with legal significance.

B. Procedural Rules

In contrast to substantive rules, legal "procedural" rules focus on logistical steps, instructions, processes, or ways of facilitating legal results.[7] Procedural rules in law school are just as important as substantive ones. Understanding and following the procedural rules that your law professors use to govern your classes will give you practice in exercising professional judgment regarding the observance of rules issued by courts, arbitrators, regulatory agencies, corporate governance boards, and similar entities later in your career.

Professors invest significant time and energy in structuring law school courses, whether they involve large lecture classes, small legal research/writing classes or seminars. To ensure a rewarding educational experience for each student, professors aspire to create a comprehensive yet reasonably paced "substantive arc" of the course (i.e., the breadth of the subject matter covered), in addition to clear procedures that govern

- daily class preparation,
- class participation,
- submission of written assignments or other "assessments" (such as midterms or exams),
- deadlines,
- interaction with the professors and/or teaching fellows/assistants,
- office hours,
- lateness or absence, and
- grading.

p. 27

---

p. 28

These procedural rules are designed to help students excel, not falter. Yet, too often, students do not recognize the importance of these rules, and—burdened by an overwhelming workload or the inherent stress of law school—forget about them, ignore them, or resist them. The discussion throughout this chapter may seem obvious; "Yes, we get it, follow the rules." But as you embark on a career based on the "rule of law," it is important to contemplate how respect for rules becomes a crucial component of professional judgment in law school and beyond.

II. Beware the Dreaded "Benchslap"

In an alarming multitude of written judicial opinions, judges reprimand lawyers for violating nonnegotiable substantive and procedural rules. Legal "blawgers" affectionately dub these public reprimands "benchslaps."[8] Judges meting out these admonishments take time out of adjudicating a case to describe how the lawyers did not follow the rules and, more importantly, how those rule violations detrimentally affected the court's ability to do its job. Certainly, these written opinions are often entertaining to read, and at first glance, you might think to yourself, "Well, I would never break the rules like that, so a benchslap would never happen to me!" But the truth is, this happens more often than you might think and yet is so easily avoidable. Benchslaps tend to focus on eight categories of legal writing shortcomings:

(1) Written work product that the court cannot understand because it lacks structural logic and clear phrasing

(2) Written work product that is missing substantive components required in the rules (e.g., statements of facts, procedural case history, legal questions presented)
(3) Written work product that poorly handles the case facts (e.g., misstates facts or improperly cites to the factual record)
(4) Written work product that inadequately explains the governing law (e.g., ignores law that is adverse to the lawyer's client or improperly cites legal sources)
(5) Written work product that violates clear procedural and formatting rules (e.g., page/word limits, line spacing, margins)
(6) Written work product riddled with rampant typographical, grammatical, or general proofreading errors
(7) Written work product infused with a disrespectful tone toward the court, opposing counsel, or other parties
(8) Late submissions, in violation of clear court-imposed deadlines

In many of these benchslap cases,[9] judges emphasize why these rule violations, or displays of less-than-professional judgment, impede the court's ability to do its work in processing a legal case. First, on a positive note, many judges accentuate that lawyers who exercise *good* professional judgment, and submit written work product that thoughtfully presents substantive rules and applies them clearly to client facts, enable courts to process complex intellectual material efficiently, so judges can "forge enlightened decisions."[10] Remember, as lawyers, you are representing third parties—the clients—and want judges to render decisions that help clients achieve a fair result or right a wrong. Your professional judgment, displayed often through the vehicle of legal writing, can help courts resolve cases in ways that facilitate equitable outcomes.

Second, on another encouraging note, judges often point out in these written opinions that lawyers who exercise *good* professional judgment and submit written work product that complies with the court's procedural rules help ensure "fairness and orderliness" in the judicial process.[11] Courts' procedural rules are designed to "ensure fairness by providing litigants with an even playing field."[12] This means that lawyers and parties on either side of a case must follow the same set of rules so neither side reaps an unfair advantage. This notion might seem odd in a competitive environment like law

school or the legal arena, but just like on the sports field, a clear and consistently applied set of rules enhances the experience for everyone.

Further, procedural rules facilitate "orderliness by providing courts with a means for the efficient administration of crowded dockets."[13] Courts handle countless legal matters in a single day, processing numerous legal documents whether in hard copy or electronically. When lawyers exercise professional judgment and respect court procedures, court clerks can process all the necessary paperwork more efficiently so judges have ready access to the documents they need to get up-to-speed on each case and so justice can be served for every client.

Overall, a lawyer's professional judgment is one of the most important factors affecting a client's representation. An attorney's poor judgment in submitting substantively weak legal writing hampers a judge's ability to understand the parties' claims and render fair decisions, jeopardizing the client's interests. Likewise, a lawyer's imprudence in submitting written work product that defies procedural rules unfairly increases the workload of others, including courthouse staff and opposing counsel.

III. Respect Procedural Rules in the Law School Classroom

Most law professors provide a detailed, sometimes lengthy syllabus and course policies governing their law school courses. Answers to students' questions about how to excel in the class are almost always found in these two documents. These documents are wide-open windows into the mind of the professor and what he or she is looking for in an excellent student who exhibits the utmost professional judgment.

Substantively, whether the syllabus is cursory or voluminous, it provides an overview of the big picture (or substantive arc) of the course, start to finish. Before you begin the assigned reading in the first week of a law school class, get to know the syllabus as a whole. Notice any particular headings the professor uses to separate subject matter or assign readings. The headings typically offer guidance to the main coverage topics in the course and their sub-components. Consider trying to diagram the headings of a syllabus on your own, to see whether you can understand how the course is designed overall.

Procedurally, the syllabus and course policies furnish guidelines for exhibiting professional judgment in several different categories listed below. The right-hand column identifies some potential questions that mindful law students often ask themselves as they undertake each classroom task.

Professional Judgment Opportunity	Information Likely Provided in the Syllabus	Self-Prompts if the A Not Readily Apparen Syllabus/Policies
Class preparation	Advance reading assignments; substantive topics covered	• In a voluminous rea details does my pr most for class disc • How does this prof questions in class? pattern of question • How can I best prep be able to answer th
Class participation	Whether students will be "on-call," "cold-called," or are encouraged to volunteer	• How can I answer qu professional way tha engaged in deep thir • Even if I am nervou how can I prepare demonstrate my int (even if my answers
Laptop/technology usage	Whether laptops are permitted in class; any restrictions	• Am I tempted to che instant messages c • Is my laptop behav mates around me? • Would I be better c temptation, closing off my phone, and "old-fashioned" wa

Professional Judgment Opportunity	Information Likely Provided in the Syllabus	Self-Prompts if the Ar Not Readily Apparent Syllabus/Policies

Submission of written assignments	E-mail submission requirements (information required in e-mail headers to professors); word count/page limits; font; margins; line spacing; use of footnotes; hard-copy submissions; single-sided or double-sided paper; use of anonymous grading numbers	*Note:* While some of t might seem picky, yo court) has important requiring written doc ted a certain way: • *Font size:* easy to r quantities of inform • *Word count/page li* concise; also proce student papers effic reasonable turnarou ing an "even playin • *E-mail headers:* ke ness of multiple su types of document tions of students o altogether • If I ask for "special t ignore the rules, am professor's workload colleagues who com Am I being perceived
Deadlines	When all graded and nongraded assignments are due throughout the semester	• If I know I am going t an assignment and I reason (i.e., serious i gency), should I let n advance? • How much personal much information" re excuse? • If I ask for special tre excuse, am I being f who submitted their • By submitting assign advance notice, am I my professor (who is
Interaction with my professor/attending office hours	Whether your professor prefers e-mail questions, telephone conferences, scheduled office hours appointments, drop-ins	• If I drop by my profes appointment, am I be or her time? • Even if I have a frien professor, how shou e-mails to him or her • If I have a question a issue, have I first trie myself (e.g., in the s readings)? • If I have an appointm what preparation sho • Should I print out a document I want to professor so he or s strain to look at my

Professional Judgment Opportunity	Information Likely Provided in the Syllabus	Self-Prompts if the Not Readily Appare Syllabus/Policies
Lateness or absence	Whether your professor wants to know in advance if you will be late to, or absent from, class; excused v. unex-cused absences; follow-up for missed classes	• If I know I am goin from, a class and I (i.e., serious illness should I let my pro • How much person much information" absence excuse? • What follow-up car a class (rather thar repeat what he or
Grading and feedback	Rules governing graded assignments; how assignments will be graded; applica-tion of a curve	• If a professor asks time period after re seeking an appoin am I being disresp exception to this p • Before I meet with grade, have I taker process his or her

As you read various course syllabi and policies and apply those rules in your everyday use, try to practice professional judgment in understanding the reasoning behind them. Like courts, professors create these rules not to be onerous or punitive, but to process substance more effectively, maintain fairness among all participants, and facilitate orderliness in evaluating large quantities of individual work product.

In a competitive environment like law school, it might seem counterintuitive to think about fairness to your classmates. It also might feel awkward to respect a system you do not yet fully understand. However, think of law school as practice for the real world of law. Respect for the system is important and requires professional courtesy toward for your colleagues and

adversaries alike.

IV. Consider Professional Judgment When Communicating as a Law Student

Use the following real-life examples of students' writing to law professors to spark your own thoughts about exhibiting professional judgment, being mindful in your written communications in law school, and thoughtfully addressing individuals who eventually may serve as references or mentors.

Example 1: (E-mail from a student to an academic support professor referred by another professor who was worried about the student's nervousness when speaking in class)

prof. i need to meet. i am free after 4 M/T/Th

Example 2: (E-mail from a student who missed a legal writing draft deadline and did not respond to his professor's four reminder e-mails—over a four-day period including a weekend—to set up a one-on-one writing conference)

I just got to school this morning from being away all break[14] and saw your messages. I had not signed up for the meeting yet because I couldn't remember if there was a time we had already set. Can you check and get back to me?

Example 3: (E-mail from a student who was displeased with a grade on a written assignment that he turned in late and that exceeded the professor's word count by 276 words)

I'm pretty shocked about this grade, regardless of the 8 point deduction for word count and the 5 points off for being late which wasn't my fault—I had computer problems. When can we meet so we can try and figure this out? It doesn't look like the curve will help me much on this one.

Example 4: (E-mail from a student who missed a 9 a.m. class)

Sorry I missed today's class. I felt really tired and wound up over sleeping until 11. Outside of going over the logistics of the brief is there anything important I missed?

Example 5: (E-mail from a student who scheduled a 2 p.m. appointment with a professor over a holiday break to obtain advice about a cover letter; the e-mail was

sent an hour after the scheduled appointment time)

Hii,

I could not make it to your office today!! I overslept. I was working on that letter until 4 am! Will you be there after 4pm? I am so sorry!!

Examples of Good Professional Judgment from Law Students

Example 1: Dear Professor: I am writing to let you know in advance that, regrettably, I need to miss Legal Practice class this Thursday to attend a funeral of a family friend. I plan to do the reading and obtain the class notes from a colleague. Please let me know if you would like me to provide any additional information about my absence or perform any extra work outside of class. Thank you very much for your understanding.

Example 2: Dear Professor: I have received my grade on my Memo 1 assignment, and I have taken the time to review your comments in detail. I still have a few questions on certain areas that I would like to improve in my next assignment. May I make an appointment during your next Office Hours to discuss three specific points in my Memo 1 assignment? Thank you very much for your time.

Example 3: Dear Professor: I am looking forward to meeting with you for our Memo 1 conference scheduled next week. Unfortunately, I just realized that my scheduled conference time conflicts with a mandatory professional development seminar. I fully understand that your conference schedule likely is fully booked; however, I spoke with a classmate who offered to switch time slots with me, upon your approval. Would that be possible? Thank you very much for your consideration.

EXERCISE: DEVELOPING YOUR OWN PROFESSIONAL JUDGMENT CHECKLIST

Set aside 30 minutes to develop a set of professional judgment "aspirations"[15] for your law school experience. Or do so with a small group of classmates, as if you are creating your own law firm and agreeing on a set of professional judgment objectives for the office. Think about how you want to

exercise professional judgment in the following areas.

- Preparing in a thoughtful manner for all your classes
- Participating in class in a respectful and engaged way (tone, volunteering, respectfully disagreeing with a professor or classmate)
- Respecting your professors' course policies, expectations, and experience
- Using (or not using) your own technology in the classroom (laptops, iPads, smartphones, Facebook)
- Representing yourself in law school–related social media postings
- Communicating with classmates and professors (via e-mail and in person)
- Showing up on time to classes, meetings, and appointments (and how/when to communicate regarding unavoidable lateness or absence)
- Capturing learning in class (laptops, note taking)
- Presenting yourself in a professional manner while still maintaining your own personality
- Following up with the professor in a courteous manner if you miss a class
- Handling lateness in submitting assignments (legitimate excuses, respectful requests for time extensions/accommodations)
- Interacting with professors outside of class
- Studying with others
- Helping others struggling in law school
- Representing your school off campus
- Conducting yourself in a job search
- Asking for help or seeking mentors to address law school anxiety or substantive questions
- Holding yourself accountable for all of the above

---

[1] *Black's Law Dictionary* (9th ed. 2009).

[2] *Id.*

[3] Dictionary.com, http://dictionary.reference.com/browse/judgment (last visited Oct. 13, 2014).

[4] *Id.*

[5] Oxford Dictionaries, http://oxforddictionaries.com/us/definition/american_english/judgment (last visited Oct. 13, 2014).

[6] Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/substantive (last visited Oct. 13, 2014).

[7] *Id.*, http://www.merriam-webster.com/dictionary/procedure.

[8] According to the *Urban Dictionary*, the term "benchslap" was popularized by David Lat of Above-TheLaw.com (when he was blogging for UnderneathTheirRobes.com). See also Josh Blackman, *The 8 Best Benchslaps of 2012*, Josh Blackman's Blog (Dec. 18, 2012),

http://joshblackman.com/blog/2012/12/18/the-8-best-benchslaps-of-2012/.

[9] See Appendix A for a survey of these benchslap cases.

[10] As the United States Court of Appeals for the First Circuit (a federal court) explained so succinctly in a case called *Reyes-Garcia v. Rodriguez & Del Valle, Inc.*, 82 F.3d 11, 14 (1st Cir. 1996), "rules establish a framework that helps courts to assemble the raw material that is essential for forging enlightened decisions." Deficiencies in legal writing "frustrate any reasonable attempt to understand [a party's] legal theories." *Id.* Further, "Since appellate judges are not haruspices, they are unable to decide cases by reading goats' entrails. They must rely on lawyers and litigants to submit briefs that present suitably developed argumentation...." *Id.* (Chapter 11 explains the use of "*id.*" in legal citations.)

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] By "break" this student was referring to a normal law school weekend, not a holiday.

[15] An "aspiration" is "a strong desire to achieve something high or great." Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/aspiration (last visited Oct. 13, 2014).

Chapter 3
Strategies for Starting a New Legal Writing Assignment

By now you may have received your first legal writing assignment from your professor. Perhaps you obtained a client "case file" containing relevant documents to help you get up-to-speed on who the client is and what type of legal advice is sought. Or maybe you interviewed the client yourself to gather preliminary information.

To approach this assignment as a real lawyer would, gather your case file documents and a fresh legal pad (or your laptop), and then answer the following questions.

- ☑ Who is the client?
- ☑ What is the client's role in society?
- ☑ What is the general situation that caused the client to seek legal advice?
- ☑ What type of document am I being asked to write? What is the expected format of my written work product? Letter? Memorandum? E-mail? Bullet-point outline?
- ☑ Who is my intended audience?
- ☑ What is my deadline? Do I have an internal deadline? An external deadline? Interim deadlines for drafts? (Tip: Check the syllabus.)

- ☑ Are there rules I need to follow for producing and submitting my work product? Law office rules? Supervising attorney rules? Court rules? (Tip: Check the course policies.)
- ☑ How long should the final document be? Is there a word count or page limit?
- ☑ Are there budget limits on the amount of time I can spend on this project? (Tip: In a law office environment, lawyers need to consider the client's budget.)

- ☑ Are there limits on the sources I can consult when researching the legal issue? (Tip: Has the supervising attorney already given you the sources of law? Are you instructed to conduct additional research? Is online research permitted?)
- ☑ What is the purpose of the assignment for the client? Why am I being asked to prepare this document? In what phase or stage of the client representation am I joining the client team (see Chapter 1)?
- ☑ What documents can I consult to get me up-to-speed quickly on the facts of the client's legal matter?

I. Creating a Client Case File

The next task you should undertake when given a new client matter is to create your own physical, hard-copy client case file. This can be a three-ring binder or some sort of folder to which you add documents as they are created (i.e., in chronological order). It is fine to maintain a case file on your computer. However, if you also print a hard copy, the documents will be more readily accessible for you to jot notes, circle or highlight key items, organize facts in chronological order, and visualize how the facts and legal issues relate. Also, when your professor (or a law firm supervisor) asks you to refer to a document quickly in class (or in a meeting), you have the case file handy instead of having to scramble to find an item on the computer.

In a law school assignment, the initial case file may include an instructional memo from the supervising attorney, factual documents (contracts, letters, e-mails, photographs, etc.), and perhaps statutes,

regulations, or cases.[1] Print out these documents, put them in a binder or folder, and bring them to class, or in the law firm environment, to every meeting with the client or supervising attorney. You can experiment with different ways of organizing your case file, but anticipate that it will expand as you perform additional fact-gathering, research, and writing activities. You may need more than one file folder or binder.

Some lawyers organize case files chronologically, with individual sections for different categories of documents:

- Internal law office memoranda (to/from members of the client team within the law office)
- Correspondence
  - To/from the client (including initial client engagement letter, printed e-mails, letters, legal fee bills)

  - To/from opposing parties/counsel
  - To/from third parties (e.g., copy vendors, deposition court reporters, couriers)
- Client factual documents (e.g., contracts, e-mails, letters, photographs)
- Legal research (e.g., copies of statutes, regulations, cases)
- Pleadings (e.g., complaint, answer) and motions
- Court orders

II. Who Is the Client?

After you create your case file, think carefully about who your client is. Is she an individual? A company? Another type of organization? What does the client do for a living? Where does she live or work? How old is she? What is her role in society? Is her life experience similar to or different from yours?

Now review the case file and identify the general situation that has prompted the client to call the law office and seek legal advice. Is the client contemplating entering into a contract or a business transaction? Is the client in a dispute with someone else? Is the client concerned about possibly being sued?

Do not worry if the precise legal issue is not yet clear from the preliminary

information provided. This is normal. Your legal research and synthesis/analysis of the law will help illuminate the precise legal issue and governing rule(s). Your initial job is to identify the general reason the client is seeking legal advice. It might help to start off just by brainstorming about what body of law might govern the question: Contract law? Criminal law? Property law? Tort law? Constitutional law? Marital law? Juvenile law? Immigration law? Maritime law? Animal law?

III. What Exactly Am I Expected to Write?

The next questions you will ask yourself are "what, who, when, why, and how?" First, identify exactly *what* type of document the supervising attorney is asking you to prepare: A legal research memorandum? A letter? An e-mail? An outline? If this is your first assignment in law school, the desired product is likely a **legal research memorandum**. Since presumably you have never written one of these before, first obtain a visual image of what one looks like. In the reading assignments on your syllabus, your professor probably has identified samples of documents that he considers to be examples of solid legal writing in the format he expects to see.[2] Skim these examples (for formatting only) to identify the

various components included in a legal research memorandum; scan and note headings and sections throughout the document.[3]

Next, find out how long or short the end product of your writing assignment should be, and whether there is any word count or page limit.

You also should determine whether your intended audience has imposed any particular rules for submission of the document; professors and some attorneys and law offices have particular formatting requirements, and courts usually have strict rules about written submissions. Obtain copies of these rules before you even begin working on the project. Your legal writing class rules might appear in the course policies or in a separate document in the case file.

IV. Who Is My Audience?

detail in the subsequent chapters of this book.

The initial phase of any legal assignment is to become familiar with the *facts* of the client's case and use them to identify the precise legal *issue* to research. So, dig in and get acquainted with the case file. Sources of client facts might include a summary memo from the supervising attorney, notes from a client interview, and evidentiary documents provided by the client, such as e-mails, letters, photographs, contracts, blueprints, diaries, telephone logs, and/or transcripts. Begin building a chronology of events. Familiarize yourself with the key documents and identify factual gaps so you can seek out additional information from the client or the supervising attorney. Once you have a framework of the facts, it is time to put that attorney mind to work and start researching the law.

New Assignment Worksheet

Who is the client?_____

Client billing/matter number (for law office timesheets):_____

Who are the opposing parties? Any other key characters/players?

_____

_____

_____

What is the general situation that has caused the client to seek legal advice?_____

_____

What type of document am I being asked to write?_____

Who will be reading this document?_____

What is my deadline? Is there an internal deadline and an external deadline? Are there interim deadlines?_____

What is the expected format of my end product? Letter? Memorandum? E-mail? Bullet-point outline? _____

Are there rules I need to follow for the expected format? Supervising attorney rules? Court rules?_____

Do I have a complete, up-to-date copy of these rules?

_____

_____

How long should my document be? Is there any word count or page limit?

_____

_____

Are there budget limits on the amount of time I can spend on the project?

_____

_____

Are there limits on the sources I can consult when researching the legal issue?_____

_____

What is the purpose of the assignment in the law office's legal representation of the client? In what stage of the client representation is the case in, and how will this document be used to advance the client's case?

_____

_____

What documents can I consult to get up-to-speed quickly on the facts of the client's legal matter?_____

_____

_____

Any additional questions for the supervising attorney?

_____

_____

Facts Known So Far[4]

1. Key players/characters in the client "story"?

2. Key events or dates?

3. Key documents?

4. Key physical objects?

5. Any themes appearing so far in the facts?

[1] Often your first legal research assignment in a law school writing class is a "closed universe" assignment—meaning that your professor provides the applicable law; you will not conduct any research on your own. In an "open universe" assignment, you conduct the research yourself. And, of course, in real law practice, your supervising attorney may or may not give you a statute, a regulation, or a case citation to get you started; you likely will conduct the remaining research yourself.

[2] There is a sample single-issue legal office memorandum in Appendix B. However, note that there is not a one-size-fits-all perfect model of a legal office memorandum; different audiences (such as professors and supervising attorneys) have varying preferences of writing style. It is wise to review sample legal documents for overall structure and formatting, but still approach each of your own writing assignments by tailoring the structure specifically to the substantive legal matters at hand and to your particular audience.

[3] In the law firm setting, you should obtain examples of similar documents written or used by your supervising attorney so you can grasp visually how each document is constructed (i.e., what the various components are and how they are organized).

[4] Some or all of these facts eventually appear in your memorandum. (See Chapter 16, "Writing a Statement of Facts in a Legal Office Memorandum.")

Section 2

The Mindful Legal Writer's Raw Materials

Chapter 4

Understanding the Sources of Legal Rules

Once a lawyer has a basic idea of what factual circumstance is prompting the client to seek legal advice, the next step is finding the appropriate sources of law to answer the legal question. To do this, you need to understand how the American legal system works. So let's start with a few refresher civics lessons.

The U.S. legal system is comprised of a federal system and a state system. According to the Tenth Amendment to the U.S. Constitution,[1] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

I. Branches of Federal Government

The U.S. Constitution establishes **three** branches of our government: legislative, executive, and judicial.

Sources of Federal Law

- Constitution
- Statutes (enacted by the legislative branch)
- Regulations (issued by agencies appointed by the executive branch)
- Common law (in opinions written by the judicial branch)

II. Branches of State Government

According to the Tenth Amendment to the U.S. Constitution, mentioned above, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Article IV, Section 4, of the Constitution states, "The United States shall guarantee to every State in this Union a Republican Form of Government." State governments consist of the same three branches as the federal government: executive (led by a governor), legislative (comprised of elected representatives), and judicial (usually a court hierarchy similar to the federal system involving lower-tiered trial-level courts and higher appellate courts).

III. How a Common Law System Works

The U.S. judiciary system is based on "common law." This system differs from a civil law system (common in continental Europe, Latin America, Scotland, and Louisiana[4]), in which statutes are the dominant source of law. In a common law system, judges decide cases under two primary principles: precedent and stare decisis. Two other principles—jurisdiction and type of authority—further impact the effect of common law decisions.

A. Precedent and Stare Decisis

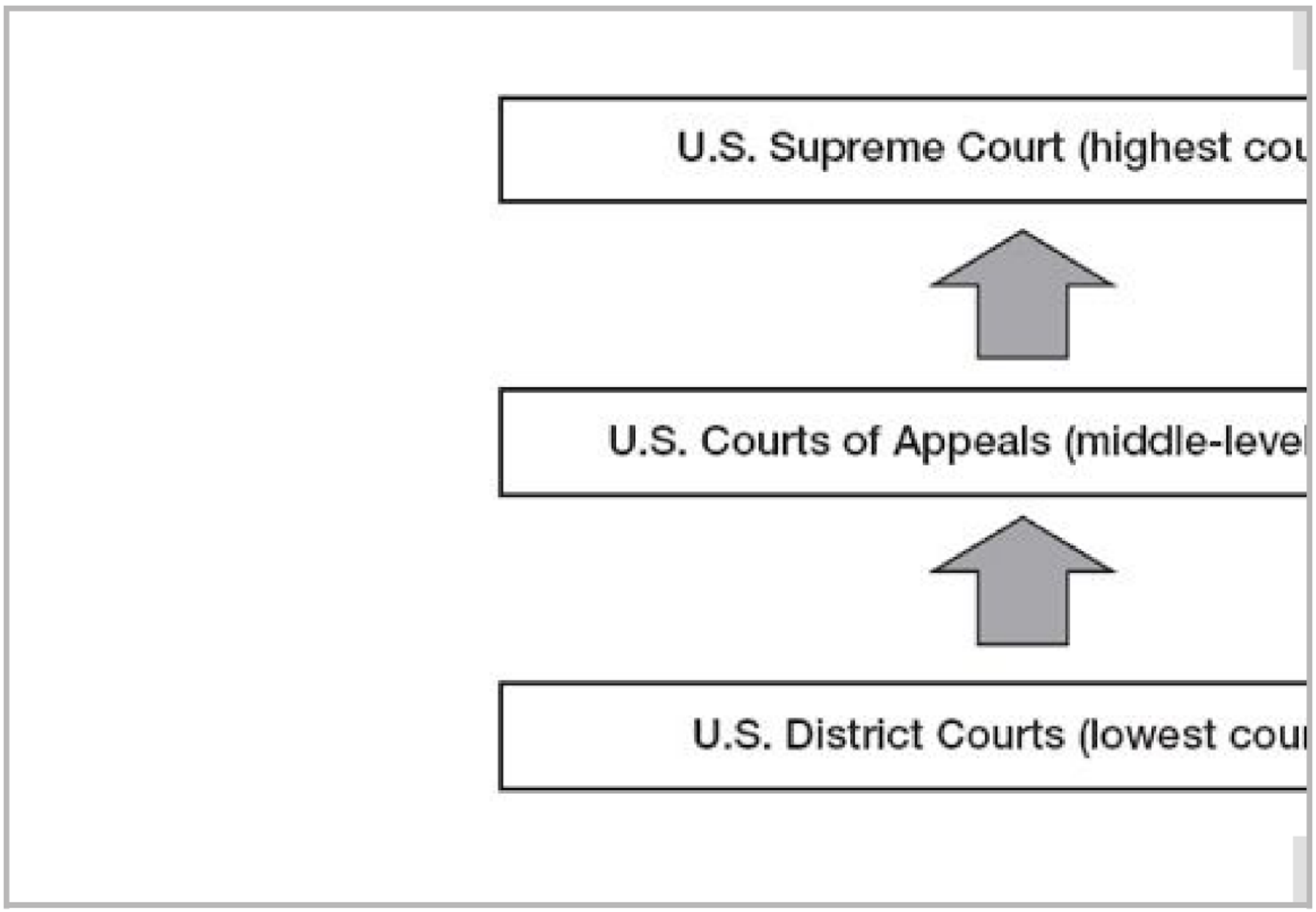
Before entering law school, many of us defined the term "precedent" as

something like "an earlier occurrence of something similar" or "a person or thing that serves as a model."[5] In law school, this term takes on weighty legal significance. *Black's Law Dictionary* defines "precedent" as a "decided case that furnishes a basis for determining later cases involving similar facts or issues." "Stare decisis" (pronounced "star-ay dee-sigh-sis") is Latin for "to stand by things decided." *Black's Law Dictionary* defines this term as the "doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation."[6] The purpose of this doctrine—under which courts *must* follow prior decisions when adjudicating new cases—is to promote certainty, predictability, and stability in the law. In a community governed by the rule of law, individuals need to know what those laws are and how they will be applied consistently.

B. Jurisdiction and Type of Authority

There are limits to what categories of precedent courts are required to follow, based on two other concepts: (1) jurisdiction and (2) mandatory (as opposed to persuasive) authority. The doctrine of "vertical stare decisis" requires courts to follow only decisions rendered by **higher courts** within the same **jurisdiction**. (See Figure 4-1.)

Figure 4-1. Federal Court System Vertical Hierarchy



Decisions by higher courts within the same jurisdiction are referred to as "mandatory authority," meaning that the lower court *must* follow such precedent. If the prior case was decided by a court at the *same* hierarchical level, at a *lower* hierarchical level, or in a *different* jurisdiction, the court *may* rely on such precedent, but is *not required* to follow it; this is "persuasive authority" as opposed to "mandatory authority."

So, you might be asking, what is "jurisdiction," and how do I know the hierarchy of the courts within a particular jurisdiction? Let's look at some examples.

1. Federal Court Hierarchy

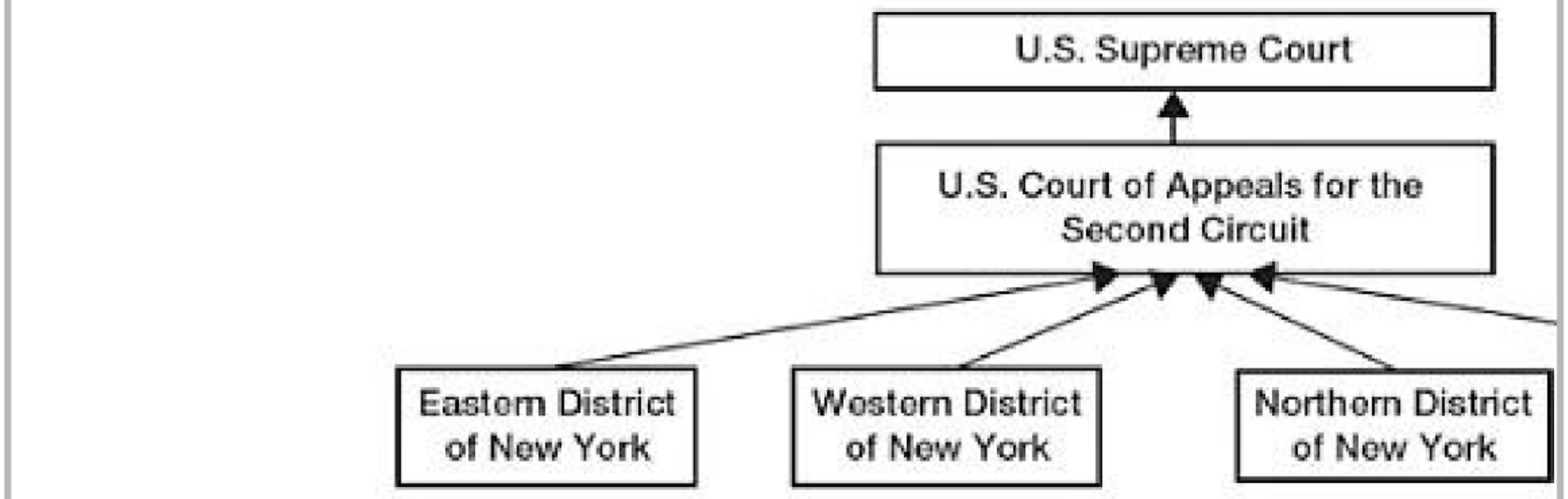
Before you begin reading this section, consider logging onto a website that visually depicts how the federal court system is organized. One excellent online resource is http://www.uscourts.gov, especially the site's court map at http://www.uscourts.gov/about-federal-courts/federal-courts-public/court-

website-links. In the chart below the map find either the state in which you were born or in which you are attending law school so you can absorb how the federal court system governing your chosen location is structured i.e., how many federal district courts exist in that state.

As mentioned in Chapter 1, lawsuits typically start off in a trial-level court. Once a decision is rendered in that court, a party may be able to appeal to an appellate court. In our federal system, the trial-level courts are called federal district courts. Each state has its own federal district court (or courts, depending on the size of the state).[7] Overall, there are "94 federal judicial districts; each state has at least one district, as do the District of Columbia, Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands."[8] The U.S. Courts of Appeals are the first level of appeal for parties who wish to have a higher court review a judgment rendered in a trial-level district court. The courts of appeals are divided into "circuits," or federal appellate jurisdictions. Eleven circuits cover the 50 states; two additional circuits are the District of Columbia Circuit and the Federal Circuit.[9]

Let's look at an example. If you are attending law school in, for instance, New York, and you find the New York State in the chart below the court map on the federal court website map (http://www.uscourts.gov/about-federal-courts/federal-courts-public/court-website-links), you would learn that New York State has four district courts: the Eastern District, the Western District, the Northern District, and the Southern District.[10] From the map on the federal courts website, you also would glean that cases appealed from New York federal district courts (trial-level courts) are heard at the Court of Appeals for the Second Circuit (denoted by the number 2 on the color-coded map)—which also covers federal appeals in Connecticut and Vermont. After that, the case would be appealed to the U.S. Supreme Court. (See Figure 4-2.)

Figure 4-2. Federal Court System Governing the State of New York



Let's try this again with the Commonwealth of Virginia. If you find Virginia in the chart below the federal court map (http://www.uscourts.gov/about-federal-courts/federal-courts-public/court-website-links), you learn that Virginia has only two districts: the Eastern District and the Western District. Further, appeals from the federal district courts in Virginia are heard by the U.S. Court of Appeals for the Fourth Circuit (denoted by the number 4 on the color-coded map) —which also

covers federal appeals in Maryland, West Virginia, North Carolina, and South Carolina. Cases appealed from the Fourth Circuit are sent to the U.S. Supreme Court. (See Figure 4-3.)

Figure 4-3. Federal Court System Governing the Commonwealth of Virginia

terminology for each.

3. Determining Which Court Has Jurisdiction over a Case

We've all heard the term "jurisdiction" when watching a crime show on TV. Picture the scene: Local police are in the midst of handling a criminal investigation when suddenly the FBI swoops in; the characters turn to one another and ask, "Who has jurisdiction here? The state or the feds?" In our legal system, federal courts have jurisdiction over certain cases, and state courts over others. The word "jurisdiction" means a "court's power to decide a case or issue a decree."[13] Jurisdiction is important for determining whether the prior case law that attorneys find in their research is mandatory authority (that the court must follow) or persuasive authority (that can inform the court but that it is not required to follow).

Federal district courts have jurisdiction over the following types of cases:

(1) Cases involving a federal question (i.e., an action arising under the Constitution, a constitutional amendment, a federal statute, an act, or a treaty)
(2) Admiralty or maritime cases ("arising out of commerce on or over navigable water")[14]
(3) Cases affecting ambassadors, other public ministers (such as diplomats), and consuls
(4) Cases in which the United States is a party
(5) Cases between states

(6) Cases involving a state and citizens of another state
(7) Cases involving "diversity of citizenship"—meaning that no plaintiffs and defendants are citizens[15] of the same state—if the amount in controversy exceeds $75,000, not including interest and costs

Separate units of the federal district courts handle bankruptcy matters.

State courts have jurisdiction over the following types of cases:

(1) Most cases involving state laws and constitutions (unless the parties can satisfy the requirements for federal court jurisdiction under the "diversity of

citizenship" rule, the $75,000 threshold, and certain other requirements)
(2) Most criminal cases (although violations of federal criminal laws are handled by federal courts)
(3) Cases involving wills and estates
(4) Most contract cases
(5) State tort cases (personal injuries)
(6) Cases involving family law (i.e., marriages, divorces, adoptions)[16]

In some cases, both federal and state courts could have jurisdiction, so the parties might have a choice.

4. Determining Mandatory v. Persuasive Authority

So, you already learned earlier in this chapter that courts adjudicating new cases follow the doctrine of stare decisis, which means judges rely on precedent when deciding new legal matters. However, two criteria come into play to determine whether a prior case is mandatory authority (the court *must* follow the prior decision in ruling on a new case with similar facts) or persuasive authority (the court may be guided by the prior decision but is not required to follow it): (1) whether the pending case is in the *same* jurisdiction as the earlier case; and (2) whether the decision was rendered by a court of *higher* authority within the same jurisdiction.

Thus, when you begin researching a legal issue, it will be important for you to understand what *jurisdiction* your client's case is in (or likely to be in, if the case is not yet filed) and whether prior decisions were rendered in that jurisdiction by courts of higher authority. Take a look at the following example of mandatory authority in a federal jurisdiction.

Imagine you represent a client in a lawsuit pending in the Southern District of New York—at the trial level. Figure 4-2 shows you that the **mandatory authority** will

come from the higher courts: the U.S. Court of Appeals for the Second Circuit and the U.S. Supreme Court. **Persuasive authority** might come from courts on the same hierarchical level within the New York federal jurisdiction—the Eastern, Western, and Northern Districts. Persuasive authority also might come from courts outside the New York court's jurisdiction (e.g., the District of New Jersey or the Middle District of Pennsylvania).

Now consider an example of mandatory authority in a state jurisdiction

(you might consider searching for an online map of California's appellate court system as you review the following scenario).

> Imagine you represent a California client in an appeal to the Second District Court of Appeal, which covers appeals from the Los Angeles, Ventura, Santa Barbara, and San Luis Obispo Superior Courts. **Mandatory authority** for this state court of appeals will come from the only higher court in California (the Supreme Court of California) (see Figure 4-4) and the highest court in the United States (the U.S. Supreme Court). Cases from the other five California appellate district courts—which are on the same level as the Second District Court of Appeal—will be only **persuasive authority**. Cases from other states (different jurisdictions) will also serve solely as **persuasive authority**.

Now, it can get a bit confusing when trying to discern what, if any, state cases might be mandatory authority in federal courts and vice versa—since federal and state courts are different jurisdictions. Let's break this down as well.

a. Whether Federal Courts Must Follow State Court Decisions

By federal statute, "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."[17] Now, if this statutory language sounds a bit like gobbledygook, let's translate the language into plain English. The question is: when must federal courts follow state court decisions? Remember, in general, federal courts use federal law in deciding cases, so state law often would not be pertinent. However, in situations in which the federal court has jurisdiction based on "diversity of citizenship" (remember that, for a federal court to have diversity jurisdiction, no plaintiffs can be citizens of the same state as any defendants, and the amount in controversy must exceed $75,000), the federal court could be adjudicating an issue of state law.

For consistency and fairness, the federal court must follow the substantive state law that governs the parties' dispute. So, federal courts (with diversity jurisdiction) must apply state statutes and also are bound by the decisions of the state's

highest court—as *mandatory authority*. These federal courts do not need

to follow decisions on the issue rendered by lower state courts if such decisions conflict with the highest state court.

It is possible that a federal court might be presented with a state law issue that the highest state court has never analyzed and decided. In that scenario, the federal court must "give great weight" to the intermediate (middle-level) appellate decisions and try to predict how the state's highest court would rule on the issue.[18] In other words, these federal courts are not bound by these intermediate decisions as mandatory authority, but such cases are regarded as strong persuasive authority.

b. Whether State Courts Must Follow Federal Court Decisions

Here is a chart to help sort out when and whether state courts must follow decisions rendered by federal courts.

	Decision by the U.S. Supreme Court	Decision by a federal district court or circuit court of appeals interpreting a matter of state law	D di co in pr
State court's obligation to follow the federal precedent	Mandatory authority	Not mandatory authority, but may be persuasive authority	N be ru th

5. Cases of First Impression

Because U.S. law is constantly evolving to adjust to societal changes, a court may encounter a case involving legal matters that have never been decided in that jurisdiction or a case applying an established law to a completely new factual scenario. We call this a "case of first impression." In that circumstance, mandatory authority directly on point might not exist, but

the court may gather analogous cases from different jurisdictions as persuasive authority to guide its decision.

p. 55

---

p. 56

IV. Primary v. Secondary Authority

So far in this chapter, you have learned about various sources of law, including statutes enacted by a legislative body, regulations issued by a federal agency established by the executive branch, and case law generated by the judiciary. We call these sources of law "primary authority," which means "authority that issues directly from a law-making body."[19] As you learned above, citizens must follow these laws, and courts adjudicating subsequent cases rely on these sources of law when making decisions in pending cases.

There is another source of legal information that lawyers consult when researching laws and rules, to get a "bigger picture" or clearer understanding of how the law works: "secondary authority." Judges, lawyers, professors, and law students have written thousands of helpful compilations, like legal encyclopedias, treatises, hornbooks, law review articles, and journal publications that help explain the law more clearly. You should not confuse these with sources of law—like statutes, regulations, or case law—but you can use them to grasp the fundamentals of a particular area of law and begin to explore how to apply the rules to a specific client factual situation.

Commonly used secondary sources include the following:

- *American Jurisprudence*
- *Corpus Juris Secundum*
- *Wright & Miller's Federal Practice & Procedure*
- Restatements of the Law
- American Law Institute-American Bar Association Continuing Legal Education materials
- Treatises, hornbooks, and nutshells
- Law review articles and law journals

Various states have their own well-known secondary sources, such as *New York Jurisprudence*, *Arkansas Civil Practice and Procedure*, and Strong's North Carolina Index.

below the map found at http://www.uscourts.gov/about-federal-courts/federal-courts-public/court-website-links. You can see how many different district courts are in your jurisdiction. The different districts will have distinct geographical titles and may include (depending on the state): Eastern, Western, Central, Northern, and/or Southern.

[8] *District Courts*, United States Courts, http://www.uscourts.gov/about-federal-courts/court-role-and-structure (last visited January 27, 2016).

[9] The Court of Appeals for the Federal Circuit has jurisdiction over "specialized cases, such as those involving patent laws and cases decided by the Court of International Trade and the Court of Federal Claims." *Courts of Appeals*, United States Courts, http://www.uscourts.gov/about-federal-courts/court-role-and-structure (last visited January 27, 2016). The Court of Federal Claims is a special trial court with jurisdiction over "most claims for money damages against the United States, disputes over federal contracts, unlawful 'takings' of private property by the federal government, and a variety of other claims against the United States." *District Courts*, *supra* note 8.

[10] Find a map on the Internet that shows the geographical coverage of the federal districts in your state (but be sure not to confuse the federal and state courts). As the next section explains, state courts often are organized in a different geographical manner from the federal courts in the same state.

[11] *California Courts of Appeal*, California Courts, http://www.courts.ca.gov/courtsofappeal.htm (last visited January 27, 2016).

[12] Other trial-level courts in New York include the Court of Claims, the Family Courts, the Surrogate's Courts, and, outside New York City, the County Courts. New York State Unified Court System, http://www.courts.state.ny.us/courts/structure.shtml (last visited January 27, 2016).

[13] *Black's Law Dictionary*, *supra* note 4.

[14] *Id.* ("*Id.*" is Latin for "the same"; in legal citation, it means that the item cited comes from the same source as the prior citation. See Chapter 11 for more about legal citation.)

[15] Citizenship is based on state of domicile, which is the state in which an individual, intentionally resides (for a person) or the state of incorporation or principal place of business (for a corporate entity).

[16] *Comparing Federal and State Courts*, United States Courts http://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts (last visited January 27, 2016).

[17] 28 U.S.C. §1652 (1948). (This format for a federal statute is explained in detail in Chapters 5 and 11.)

[18] 32 Am. Jur. 2d *Federal Courts* §367, n.1 (2014), *citing Lucini Italia Co. v. Grappolini*, 231 F. Supp. 2d 764 (N.D. Ill. 2002). "Am. Jur." is an abbreviation for "*American Jurisprudence*," which is a legal encyclopedia that lawyers refer to as "secondary authority." (See the discussion in Section IV for the distinction between primary authority (statutes, regulations, cases) and secondary authority ("[a]uthority that explains the law but does not itself establish it, such as a treatise, annotation, or law-review article." *Black's Law Dictionary*, *supra* note 4).)

[19] *Black's Law Dictionary*, *supra* note 4.

[20] *Id.*

Chapter 5

Learning How to Read Statutes

If you are starting to tackle your first legal writing assignment in law school, your professor may have given you a case file and a "closed universe" of legal sources—perhaps a **statute**, **regulation**, and/or a handful of **cases**. Alternatively, you may be experimenting with finding the research on your own. This chapter focuses on one of the "raw materials" attorneys use in conducting a legal analysis: **statutes**.

I. Deciphering Statutes

Remember from Chapter 4 that the legislative branch of government enacts laws, which are called statutes. Before learning how to decode statutes, it will help to recall how statutes are drafted and become law in the first place. After all, we are dealing with interpreting written words, so let's see how a writer's words transform into an enforceable law.

A. How Federal Statutes Are Enacted

In the U.S. federal legislative system, law making begins with a document called a **bill** that is introduced to Congress. A bill can range from one or two pages to more than a thousand, depending on the complexity of the proposed law (and the verbosity of its drafters). An original bill might be drafted by

members of

Congress or their staff, citizens, lobbyists, and/or advocacy groups.[1] A member of Congress becomes the sponsor of the bill and then submits it for consideration by the House of Representatives or the Senate. Committees and subcommittees review the bill and conduct hearings to analyze its language and legal effect. The relevant policy committee votes to approve the bill. If it is not approved, the bill does not progress. If it is approved, the House of Representatives or the Senate places the bill on its calendar for consideration. Debate over the bill ensues, and eventually either the House or the Senate votes to approve the bill. A bill must pass both the House and the Senate before it is sent to the president for consideration. Interestingly, the wording of versions of the same bill coming from the House and from the Senate might vary:

> Though the Constitution requires that the two bills have the exact same wording, this rarely happens in practice. To bring the bills into alignment, a Conference Committee is convened, consisting of members from both chambers. The members of the committee produce a conference report, intended as the final version of the bill. Each chamber then votes again to approve the conference report. Depending on where the bill originated, the final text is then enrolled by either the Clerk of the House or the Secretary of the Senate, and presented to the Speaker of the House and the President of the Senate for their signatures. The bill is then sent to the President.[2]

When presented with a bill, the president may either sign it into law or veto it. You might have seen the president signing bills on television, using special pens often given as commemorative souvenirs to key players in the law's creation. If the president vetoes a bill, Congress has the power to override a presidential veto with a two-thirds vote of the House and the Senate.

If the president signs the bill into law or Congress overrides a presidential veto, the bill is printed in the Statutes at Large. The Government Printing Office (GPO) has authority to publish and print statutes under the direction of the Office of the Federal Register. When first printed, new statutes are called public laws and given a number.

Public laws frequently are written as amendments to the *United States*

Code, which is a compilation of federal statutes organized by subject matter to enable lawyers to research and find law on particular legal issues. The *United States Code* has 51 subject matter titles, such as Agriculture, Bankruptcy, Copyrights, Education, Intoxicating Liquors, Labor, Patents, and Transportation. The Office of the Law Revision Counsel of the U.S. House of Representatives prepares and publishes the *United States Code*.[3]

B. How State Statutes Are Enacted

State statutes follow similar procedures. Once state statutes are passed by the state legislature and approved by the governor, they become a public law, or a public act, and are assigned a number. Each state has procedures under which these consecutively numbered public laws are organized into subject matter areas and incorporated into the state statutory codes. Statutes might be organized by chapters or titles, and have a table of contents, a list of definitions, and/or an index.

C. Techniques for Parsing and Deciphering Statutes

Merriam-Webster defines the word "parse" as "to resolve (as a sentence) into component parts of speech and describe them grammatically." The dictionary defines the word "decipher" as "to make out the meaning of, despite indistinctness or obscurity." When analyzing statutes, lawyers do both: (1) "parse" or break down statutory sentences into understandable parts, and (2) use analytical techniques to decipher convoluted legal concepts into clear workable terms. Lawyers approach statutes grammatically—looking for key "indicator" words, phrasing, transitions, and punctuation—to extract clarity from sometimes murky or complex writing. At a basic level, statutes fall into four different categories:

(1) Statutes authorizing or permitting an action
(2) Statutes mandating or requiring an action
(3) Statutes barring or prohibiting an action
(4) Statutes affording a decision maker discretion in handling an action

An example of a statute with required elements is New York's "right of privacy" statute; this law states that it is a misdemeanor for an individual or a company to use another living person's name, portrait, or picture for advertising purposes without written consent.

N.Y. Civ. Rights Law §50 (McKinney 2014)

> A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

The required elements of this statute are

- the use of a *living person's name*, *portrait* or *picture*
- for purposes of *advertising* or *trade*
- without that person's *written consent*

If any one of these elements is missing, there is no violation. For example, if the person is no longer living, there is no violation of this statute. If the person's initials are used instead of his or her name, there is likely no violation. If the person's portrait was used for artistic purposes, instead of advertising or trade, there is no violation. If the person gave written consent, there is no violation.

Another example of a statute with elements is the California rule governing vehicle theft.

Cal. Veh. Code §10851 (West 2011)

> Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or

> temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle…is guilty of a public offense….

To identify the elements of this statute, lawyers look for connector punctuation (like commas) and words like "and," "either," and "or."

Diagramming the Vehicle Code Statute

Any person who:

- drives OR
- takes
  - a vehicle
  - not his or her own,
  - without the consent of the owner thereof, AND
  - with intent EITHER to
    - permanently OR
    - temporarily deprive the owner thereof of his or her title to or possession of the vehicle,
- whether with or without intent to steal the vehicle…

So the elements of the crime of vehicle theft are (1) driving or taking, (2) a vehicle, (3) that is not one's own, (4) without consent of the owner, (5) with the intent to permanently or temporarily deprive the owner of title to or possession of the vehicle. All of these items are required.

B. Examples of Statutes with Factors

An example of a statute that includes factors (instead of elements) is Arizona's law governing the criteria under which an individual may obtain a license to sell lottery tickets.

Ariz. Rev. Stat. Ann. §5-562 (West 2012)

> Before issuing a license as a lottery sales agent to any person, the director shall consider factors such as the financial responsibility and security of the person and the nature of the person's business activity, the person's background and reputation in the community, the accessibility of the person's place of business or activity to the public, the accessibility of existing licensees to serve the public convenience and the volume of expected sales.

So, the director of the state lottery shall consider the following factors.

- The applicant's financial responsibility and security
- The nature of the person's business activity
- The person's background and reputation in the community
- The accessibility of the place of business to the public
- Whether existing licensees serve the public's convenience
- Volume of expected sales

Each of these factors are weighed and balanced.

Similarly, in Hawaii's Crime Victim Compensation statute, the court considers several factors when deciding what type of fee to impose on a convicted defendant to compensate a crime victim, including (1) the seriousness of the offense; (2) the circumstances surrounding the commission of the offense; (3) the economic gain, if any, realized by the defendant; (4) the number of victims; and (5) the defendant's earning capacity, including future earning capacity.[4]

III. Looking for Indicator or Connector Words and Punctuation

Rules of law are not always models of clarity; lawyers refer to some statutes as "inartfully drafted." To make sense of complex or intricate statutes, attorneys hunt for "indicator" or "connector" words, phrases, and punctuation to help outline or diagram the rule and identify lists of elements or factors.

- Assess whether the law is authorizing, mandating, or prohibiting action, or affording discretion.
  - Authorizing indicator words: "may," "can"
  - Mandating indicator words: "must," "shall," "will"
  - Prohibiting indicator words: "must not," "shall not," "will not," "violation," "guilty of"
  - Discretionary indicator words: "shall have power to," "shall exercise discretion," "may consider" "shall consider"
- Look for key connector words like "and," "or," "either," "both," and commas and semicolons to identify required elements or lists of factors to weigh.

EXERCISE: IDENTIFYING REQUIRED ELEMENTS IN A STATUTE

Read the following statutes. Look for—and underline, circle, or highlight—indicator words to determine whether this statute is authorizing, mandating, or prohibiting action. Then outline the required *elements* of the statute (look for connector words and punctuation).

1. Haw. Rev. Stat. §142-63 (1975)

If any cattle, horse, mule, ass, swine, sheep, or goat, trespasses on any properly fenced cultivated ground, the owner thereof shall pay upon proof, the full amount of the damage or loss to the landowners, or to any person in possession of the land, whoever suffers the damage or loss.

Outline:

2. Mich. Penal Code §750.529a (West 2004)

A person who in the course of committing a larceny of a motor vehicle uses force or violence or the threat of force or violence, or who puts in fear any operator, passenger, or person in lawful possession of the motor vehicle, or any person lawfully attempting to recover the motor vehicle, is guilty of carjacking, a felony punishable by imprisonment for life or for any term of years.

Outline:

3. Fla. Stat. Ann. §837.055 (West 2012)

Whoever knowingly and willfully gives false information to a law enforcement officer who is conducting a missing person investigation or a felony criminal investigation with the intent to mislead the officer or impede the investigation commits a misdemeanor of the first degree.

Outline:

---

4. Cal. Health & Safety Code §11362.795 (West 2004)

Any person who is to be released on parole from a jail, state prison, school, road camp, or other state or local institution of confinement and who is eligible to use medical marijuana…may request that he or she be allowed to use medical marijuana during the period he or she is released on parole. A parolee's written conditions of parole shall reflect whether or not a request for a modification of the conditions of his or her parole to use medical marijuana was made, and whether the request was granted or denied.

Outline:

---

[1] *Legislative Process: How a Senate Bill Becomes a Law*, United States Senate, http://www.senate.gov/reference/resources/pdf/legprocessflowchart.pdf (last visited January 27, 2016).

[2] *The Legislative Branch*, The White House, http://www.whitehouse.gov/our-government/legislative-branch (last visited January 27, 2016).

[3] *About the Office and the United States Code*, Office of the Law Revision Counsel, United States Code, http://uscode.house.gov/about/info.shtml (last visited January 27, 2016).

[4] Haw. Rev. Stat. §351-62.6 (West 2005).

Procedural History: Often at the beginning of the opinion, the court recaps the procedural history of the case, which might summarize the complaint and its causes of action, any relevant defenses asserted by the responding party, any motions filed by the parties, any hearings conducted, and prior decisions rendered or orders issued by the court on those motions. The presiding judge uses the procedural history to lay the groundwork for why the court is deciding the particular issue at that point in time.

Facts: Next, the court usually describes the legally significant facts triggering the legal issue. The court conveys the parties' respective stories, relying on the evidence and documentation provided by the litigants. If the parties disagree about certain facts, the court may summarize each side's point of view.

Look for IRAC

One traditional and easy-to-follow structure of a legal analysis (discussed in detail in subsequent chapters) is known as IRAC: Issue, Rule, Analysis, Conclusion. When reading a case for the first time, see whether you can locate the issue, the rule of law, the analysis (or application of the rule to the facts of the case), and the conclusion.

Issues: Next, the court sets forth the precise legal issue (or issues) it is tasked with deciding. When reading a case, determine how many legal issues the court is analyzing. Follow the analysis of one distinct issue at a time.

Rule: Within the opinion, the court describes the applicable rule(s) of law. The rule could be derived from an excerpt from the Constitution, a statute, a regulation, or a common law rule based on elements, factors, or a definition of a legal term synthesized from prior cases.

Analysis/Discussion:

- **Arguments raised by various parties:** Before conducting its own analysis, the court may describe each party's argument(s) on the legal issue at hand and the reasons each party believes the court should rule in its favor.
- **Holding on each issue:** The court conducts its analysis and then

issues the holding: the court's answer to each legal question posed. Search for the court's holding by looking for phrases such as "the court holds," "the court finds," "we hold," or "we find." [1]

- **Rationale behind each holding:** The reasoning, or rationale, underlying the court's holding might be a few sentences or paragraphs, explaining the court's analysis. If the court is applying the elements or factors of a rule to render its overall decision, the court will analyze each element or factor—one at a time—as justification for its holding. The court also might explain "public policy" reasons supporting its holding—such as objectives that benefit society as a whole. Examples of public policy considerations include fairness, equality, efficiency, safety, health and welfare of citizens.
- **Dicta:** One sometimes overlooked component of a court's analysis is called dicta. The origin of the word dicta is the Latin phrase *obiter dictum* ("something said in passing"). Judges sometimes include sentences in case opinions that mention how they would rule under different facts or

circumstances. These sentences are not mandatory authority that would govern the outcome of future cases, but they may be used as persuasive argument. Dicta can sometimes be difficult to distinguish from the rationale of a court's holding; this demarcation takes practice.

Judgment: The judgment in a case is different from the court's holding. The judgment reflects the procedural and substantive *action* to be taken in the case and directly affects the parties. For example, a trial-level court might

- grant a motion to dismiss a case (and "order" such dismissal);
- deny a motion to dismiss a case (and thus, the case would proceed);
- grant a motion for "summary judgment" on a legal issue or "cause of action" (and "order" that the clerk enter judgment in favor of one party);
- deny a motion for summary judgment on a cause of action, and therefore allow the "cause of action" to proceed;
- issue a "declaratory judgment," declaring that a party is entitled to a certain action by the other party;
- issue some form of "equitable" relief, such as a temporary restraining order or preliminary/permanent injunction—to force another party to

either do or stop doing something;

- award monetary damages in a certain amount;
- impose a sentence, sanction, penalty or fine in a certain amount;
- award attorneys' fees, interest, and/or court costs.

A court of appeals might

- reverse the trial court's judgment;
- affirm the trial court's judgment;
- remand (send back) the case to the lower court for further action; or
- vacate (cancel, invalidate, nullify) the decision of the trial court.

The court's decision is put into effect via the court's written "order," which is the court's directive that the mandated action occur.

Concurring or Dissenting Opinions: At the appeals court level, if one or more of the judges[2] agrees with the judgment rendered by the majority of the court, but believes in a different reasoning or rationale to support the decision, such judge(s) may author a concurring opinion, explaining the alternate analysis. If one or more of the judges disagrees with the judgment rendered by the majority, such judge(s) may write a dissenting opinion. The judges' names will appear before such concurring or dissenting opinion, along with a note as to whether the additional opinion is a concurrence or a dissent. These parts of the case opinion are not mandatory authority but may have persuasive value.

II. Marking Up the Structural Components in a Case Opinion

Let's look for the various components discussed above in the following case example.

Court of Appeals
For the Eighth District of Ohio

Parties' names

Dylan Fontaine,

Appellant,

v.

State of Ohio,

Appellee.

Case No. 2015–032619

Docket number

Synopsis

Synopsis: At trial, the jury found Appellant, Dylan Fontaine ("Fontaine"), guilty of the crime of felonious assault with a deadly weapon. The facts are: Fontaine removed a Jimmy Choo high-heel stiletto shoe from her foot and threw it at a local bartender, Jamie Dunham ("Dunham"). She yelled curse words at Dunham while throwing the shoe, and the pointed heel of the stiletto shoe hit Dunham in the forehead, causing a deep gash requiring emergency medical attention. Fontaine appealed the jury verdict, arguing that a stiletto shoe does not constitute a deadly weapon. The Court of Appeals affirmed the conviction.

Headnotes:

[1] Felonious Assault:

Under Ohio Rev. Code §2903.11(A) (2008), the felonious assault statute states that "[n]o person shall knowingly…[c]ause or attempt to cause physical harm to another…by means of a deadly weapon or

dangerous ordnance."

[2] Deadly Weapon:

Ohio Rev. Code §2923.11(A) (2013) defines a "deadly weapon" as "any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon."

Headnotes

[3] Deadly Weapon:

When evaluating whether an otherwise innocuous item qualifies as a deadly weapon under the felonious assault statute, Ohio courts consider (1) the size and weight of the item, (2) the shape and design of the item, (3) the ability of the item to be grasped in the hands of the user in such a way that it may be used on or directed against the body of another, and (4) the ability of the item to be used in a manner and with sufficient force to kill the other person.

Headnotes

Attorneys

Attorneys: Christopher Brown, Esq., for the Appellant, Prosecuting Attorney, Peter Gartner, Esq.

Judges

Judges: Aquino, J., Schonfeld, J., and Prager, J.

Start of opinion

OPINION, per curiam.

While she was able to duck and run into the kitchen, the intruder continued swinging the chair as he made his way to the kitchen. He swung the rocker at the homeowner again, missed, and finally threw the object away. *Id.* After an ongoing struggle and a 911 call, eventually the police arrived and arrested the intruder for the crime of felonious assault. *Id.*

Precedent case explaining the rule

The intruder argued that the wicker rocking chair was not a deadly weapon. *Id.* However, the court held that the chair was indeed a deadly weapon as defined by Ohio law. *Id.* at *2. The court explained, "[a]n instrument, no matter how innocuous when not in use, is a deadly weapon if it is of sufficient size and weight to

inflict death upon a person, when the instrument is wielded against the body of the victim or threatened to be so wielded." *Id.* The court considered the following factors: (1) the size and weight of the chair, (2) the shape and design of the chair, (3) the ability of the chair to be grasped in the hands of the intruder and swung at the victim, (4) the ability of the chair to be used in a manner and with sufficient force to kill the victim. *Id.* Applying these factors, the court emphasized that the intruder swung the wicker rocking chair at the victim's head, while telling her that he was going to kill her. She ducked and the chair missed her face by one-and-a-half feet. These factors supported the court's finding that the chair constituted a deadly weapon. *Id.*

Similarly, in *State v. Ware*, No. 57546, 1990 WL 151499 (Ohio Ct. App. Oct. 11, 1990), an ex-boyfriend entered his ex-girlfriend's home and, as she was putting a broom behind a door, struck her on the head with an iron and said, "I am going to kill you." *Id.* at *1. The man continued to strike the woman with the iron while she screamed for help. She struggled toward her bed and grabbed a pillow to protect herself from the blows of the iron. The man continued to swing the iron, hitting her

Precedent case explaining the rule

and the wall, until the iron fell apart. Eventually, she got away. *Id.* The ex-boyfriend was charged with felonious assault with a deadly weapon. He argued that the iron did not qualify as a "deadly weapon." *Id.*

The court held that the iron was a deadly weapon. *Id.* at *6. Applying the above-mentioned factors to determine whether the iron was capable of inflicting death, the court emphasized that the ex-boyfriend used the iron in such a manner by striking the victim several times and caused her to sustain multiple abrasions and lacerations, requiring several stitches. The court found this sufficient to qualify the iron as capable of inflicting death. *Id.*

Further, in *State v. Maydillard*, No. CA99-06-060, 1999 WL 988822 (Ohio Ct. App. Nov. 1, 1999), an inmate at a correctional institution in Ohio entered the cell of another inmate carrying a plastic shaving razor from which he had removed the plastic guards to expose the blades. The first inmate brandished the razor at the second inmate in an attempt to collect a debt owed. *Id.* at *1. A struggle ensued. Guards arrived at the cell, pulled the inmates apart, and handcuffed them. During a pat-down search, a guard found the razor. The inmate was charged with possession of a deadly weapon while under detention. *Id.*

Precedent case explaining the rule

In applying the statutory definition of a "deadly weapon" to the razor, the *Maydillard* court held that the razor possessed by the

inmate was a "deadly weapon" by the manner of its use or adaptation. *Id.* at *4. The court explained that cases that have found a razor not to be a deadly weapon involved circumstances where the razor was used or possessed in a manner consistent with its legitimate purpose, such as a barber's razor or a pocket knife used for cutting packing tape and rope. *Id.* at *3.

However, this inmate had adapted the razor, by removing the plastic guards, to function as a deadly weapon. *Id.* at *4. Further, he brandished it as a weapon. Finally, the court emphasized that the inmate presented no testimony that he was using the razor in a manner consistent with its legitimate purpose. *Id.*; *see also State v. Salinas*, No. F-84-8, 1985 WL 7568 (Ohio Ct. App. July 26, 1985) (holding that a jury reasonably could find that a baseball bat constituted a deadly weapon when the perpetrator swung the bat at a victim, causing injury to his jaw, ribs, and arms); *State v. Deboe*, 406 N.E.2d 536 (Ohio Ct. App. 1977) (holding that a club-like instrument three inches in diameter wrapped in spongy material, which the perpetrator swung rapidly at the victim, hitting him 15 or 20 times on the head, arms, back, shoulders, and kidneys, causing black and blue welts and bruises, constituted a deadly weapon).

Signal citations of precedent cases explaining the rule

In contrast, in *State v. Kaeff*, No. 20519, 2004 WL 2245095 (Ohio Ct. App. Sept. 24, 2004), a husband was indicted for one count of domestic violence and one count of felonious assault with a deadly weapon after using only his hands to attempt to strangle the victim, his wife. *Id.* at *1. The husband filed a motion to dismiss the count of felonious assault on the ground that a person's hands cannot, as a matter of law, be considered a deadly weapon. The trial court granted the motion and dismissed the count. The prosecution appealed the court's ruling. *Id.*

Precedent case explaining the rule

The prosecution argued that hands (1) fit within the definition of an "instrument," (2) are capable of inflicting death, and (3) can be used as a weapon. However, the court held that hands do not meet the definition of a deadly weapon. *Id.* at *4. The *Kaeff* court reasoned that the factors defining a deadly weapon suggest the use of an object apart from one's own body. Thus, one's hands are not within the scope of the statutory definition. *Id.*

In evaluating whether Fontaine's Jimmy Choo stiletto qualifies as a deadly weapon, this court must consider (1) the size and weight of the shoe, (2) the shape and

design of the shoe, (3) the ability of the shoe to be grasped in the hands of the user in such a way that it may be used on or directed against the body of another, and (4) the ability of the shoe to be used in a manner and with sufficient force

Transition to Court's analysis of facts

p. 77

---

p. 78

to kill the other person. Applying these factors, we hold that the stiletto shoe was a deadly weapon."

Holding

The facts indicate that Fontaine's "instrument" was a size 7 champagne-colored Jimmy Choo high-heel stiletto shoe. The shoe was constructed of suede and leather and was a platform peep-toe stiletto. The heel height measured 3.9 inches and was constructed of steel with a gold-colored point attached to a small rubber sole. The platform part of the shoe was less than half an inch. The shoe was neither lightweight nor small. Further, the pointy shape of the nearly four-inch metal heel, and the weight of the platform peep toe structure, rendered the shoe capable of causing harm when thrown with force. Fontaine was able to grasp the heavy unwieldy shoe in her hand and hurl it toward the body of Dunham, specifically his head. The weight and shape of the shoe, when thrown in the manner Fontaine propelled it, likely had sufficient force to kill another person.

Rationale

Unlike the perpetrator in *Maydillard* who modified an everyday razor by removing plastic safety guards, Fontaine did not modify or adapt the shoe from its original purpose. Further, unlike the assailants in *Redmon*, *Ware*, and *Deboe*, who swung their respective weapons—a rocking chair, an iron, and a sponge-covered bat—numerous times against the body of their victims, Fontaine heaved the shoe only one time at Dunham. However, given the shoe's size, weight, shape, design, and ability to be grasped by Fontaine in