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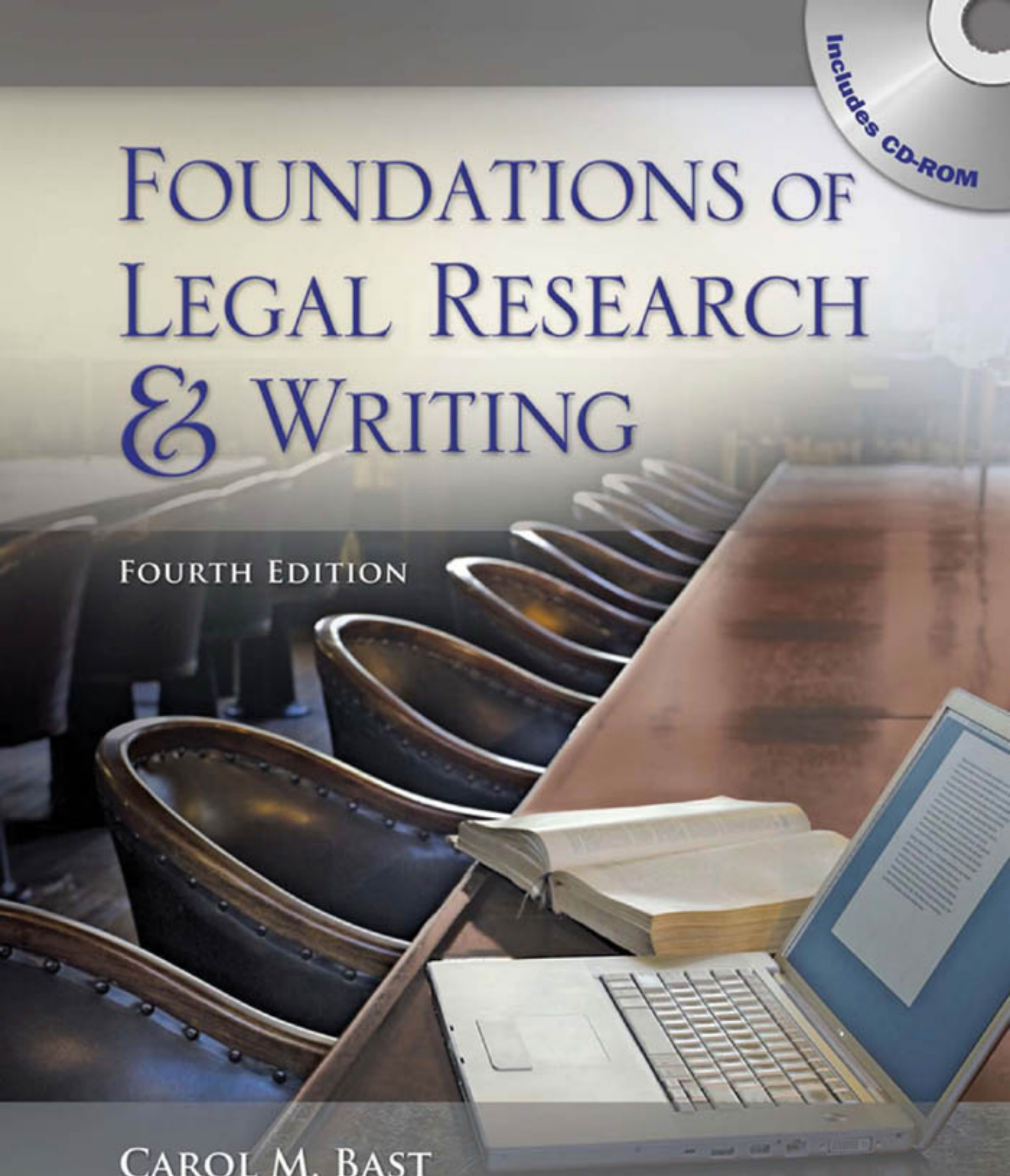
Fourth Edition



Carol M. Bast
Margie Hawkins

Foundations of Legal Research and Writing

Fourth Edition

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Foundations of Legal Research and Writing

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CAROL M. BAST
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Carol M. Bast and Margie Hawkins

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Library of Congress Control Number: 2009921209

ISBN-13: 978-1-4390-5558-8

ISBN-10: 1-4390-5558-0

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Preface

When I first started teaching legal research and legal writing, I found no single text in either legal research or legal writing that had what I needed. I was looking for a text that would contain:

a) a clear explanation of basic information; and

b) exercises to give the student the necessary practice in researching and writing.

The ideal text also would be "user-friendly" and readable while balancing the need for detail. Visual tools such as charts, tables, and flowcharts could be used for information that is hard to follow in narrative form. Sample pages from legal sources would be included so the students could see the format of the particular legal source and the professor would not have to supplement the text. Each chapter would cover only a manageable amount of material for someone who has not been previously exposed to the law.

This book attempts to fill that need for the paralegal and legal studies student and professor. The objectives of the legal research portion of the book are to teach the student how:

1. to competently perform legal research in the law library and on the computer;
2. to use correct citation form; and
3. to understand the fundamentals of legal research.

The objectives of the legal writing portion of the book are:

1. to explain the fundamentals of legal analysis and writing;
2. to teach the student how to communicate clearly; and
3. to explain how to eliminate mechanical errors.

ORGANIZATION OF THE TEXT

The legal research portion of the book and Appendix B include sample pages of the legal sources discussed in the text and contains basic citation rules and research exercises. To facilitate the student's participation, this portion emphasizes the process of finding and using primary sources and gives the student "hands-on" experience through completing legal research exercises. Chapters 1 and 2 give an important overview of the legal system and legal reasoning. Chapters 3 through 6 introduce legal encyclopedias, digests, *American Law Reports*, cases, constitutions, statutes, court rules, administrative law, and citators. The chapters also contain lengthy research assignments, allowing the professor to assign certain of the exercises one term and a different set of exercises another term. Chapter 7 gives an overview of the research process and explains how the various legal sources studied relate to each other. Chapter 8 introduces computer-assisted legal research and explores the Internet as a legal research tool.

Primary and secondary sources are covered in separate chapters in the text. This organization allows the professor the freedom to choose which type of source to cover first. The chapter on secondary sources precedes the chapters on primary sources because many legal research professors cover secondary sources before primary sources.

The sequence chosen for these chapters tracks the order in which a researcher who is unfamiliar with a particular area of the law commences a research assignment. Unless the legal researcher has somehow already found a primary source on point, the researcher will most likely begin research by referring to a secondary source first.

The legal writing portion of the book explains how to write legal documents and includes samples of various types of legal documents. Chapters 9 and 10 give an introduction to legal writing and legal writing fundamentals. Chapters 11 through 15 are each devoted to a different type of legal document, starting with the transmittal letter and the client opinion letter and continuing through pleadings and motions, the office memo, the memorandum of law, and the appellate brief.

The various types of legal documents are explained in separate chapters, again to allow the professor to choose which chapters are to be covered, time permitting. A professor who does not usually cover a particular type of document may enjoy the challenge of teaching something a little different. In addition, the book is a good reference for the student who is asked later to write a type of legal document not studied in legal writing class.

The appendices contain additional material that could be profitably used in either legal research or legal writing. They provide the student with an explanation of and necessary practice in eliminating mechanical errors, quoting correctly, and writing short- and long-form citations correctly. The rules for quotations and short-form citations are not covered in many other texts but are something the student should master. Appendix E contains four fact patterns. These fact patterns can serve as the subject of a legal research assignment, and then later, as the subject of a client opinion letter, office memo, memorandum of law, or appellate brief.

MAKING THE BOOK "USER FRIENDLY" BY INCLUDING A SEARCH AND SEIZURE PROBLEM

A legal research and writing book could easily be the most boring textbook in the entire bookstore. My challenge was to write a book that would spark student interest and involve the student in the research and writing process. Students learn more if they are involved in the course materials. I found that students are keenly interested in "search and seizure" because the topic is easy to "picture" and understand. I decided to use the topic to make the book student friendly.

The text entices the student to participate in the learning process by including interesting and relevant examples of primary sources and documents relating to the search and seizure topic. The search and seizure materials are fairly easy to understand, contain interesting and easy-to-grasp facts, and can be a basis for a number of class discussions. References throughout the book to the search and seizure topic involve the students in the course materials and provide continuity. The search and seizure topic also lends itself to some great class discussions. By using this important topic, students will learn legal research and writing and some substantive law at the same time. Where the search and seizure topic is not used, other topics appear several times in the text and in the exercises.

Appendix A expands the student's involvement with Jennifer, who was first introduced in Chapter 2. The United States Supreme Court case reproduced in Chapter 4, and the eavesdropping statutes reproduced in Appendix L are suggested as primary authorities to use in answering the issues raised in *Weiss*. Information on search and seizure is included in Appendix M. These materials can profitably be used when completing the writing exercises found at the end of the appendix.

DECREASING PROFESSOR PREPARATION TIME

Legal research and legal writing are typically very time-consuming courses in a paralegal/legal studies curriculum. Many professors shy away from teaching these courses because of the time commitment. Just keeping up with grading assignments leaves very little time for outside preparation of material.

The first few semesters I taught legal research and writing, I spent hours upon hours preparing additional student-friendly materials to supplement commercial texts. I also used several different texts and *The Bluebook* those first few semesters because I could not find one text that contained all the information I wanted my students to know. From this experience, I know that a "professor friendly" book would be self-contained and would eliminate the need for a great deal of professor-prepared materials.

This book is designed to be the only one the student and the professor need for legal research and legal writing. Basic citation rules are included, thus eliminating the need for the *Bluebook*. However, some professors may require students to purchase a *Bluebook* for reference. The citation rules are consistent with *Bluebook* form so that the advanced student can later refer to the *Bluebook* when necessary. As explained, the legal research portion of the book contains sample pages from the various authorities and research exercises. The legal writing portion of the book contains sample documents, heavily footnoted to offer the student guidance on the writing process.

KEY FEATURES OF *FOUNDATIONS OF LEGAL RESEARCH AND WRITING*

This book continues the features that have been well-received:

- the writing style is student-friendly;
- key terms are bolded on first use and defined in the margins;
- visual aids are included throughout the book;
- Chapters 1 through 7 contain a lengthy discussion of sources of law and law library resources;
- Chapters 3 through 6 contain sample pages from law library resources;
- Chapter 2 provides a detailed explanation of legal analysis and legal reasoning;
- Chapter 6 contains a detailed explanation of the use of print *Shepard's*;
- Chapter 8 provides a comprehensive, but not overly detailed, explanation of computer-assisted research;
- Chapters 11 through 15 contain sample legal writing documents that are heavily annotated by footnotes to provide writing assistance to students; and
- Each chapter includes cyberlaw exercises and references.

FEATURES NEW TO THIS EDITION

- a new "Research Tip" feature highlighting procedure that students might otherwise overlook;
- new research exercises for legal encyclopedias, American Law Reports, digests, case law, statutes, and citators;
- a new "Legal Analysis Tip" feature highlighting information that students might otherwise overlook;
- a recent United States Supreme Court case in chapter 4;
- the explanation of how to locate and cite to cases was moved from Chapter 4 to Appendix B, thus making Chapter 4 a more palatable length for students and allowing the instructor to cover case citation as a separate reading assignment;

- examples from a variety of states other than the authors' state, Florida;
- discussion points to spark classroom discussion;
- a new "You Be the Judge" feature that students can use to enhance their critical thinking skills and the instructor can use to spark classroom discussion;
- a new "Writing Tip" feature highlighting writing advice that might otherwise overlook;
- an expanded discussion of ethical obligations in writing legal documents with examples from recent cases included in Chapter 9;
- an expanded discussion of editing and proofing in Chapter 10;
- a discussion of e-mail correspondence;
- Appendix K contains the full text of cases referenced in You Be the Judge, Research Tips, Legal Analysis Tips, and Writing Tips;
- Appendix L contains the text of wiretapping statutes discussed in Chapter 5;
- Appendix M contains background information on search and seizure; and
- the chapter on writing contracts was moved from the book to the CD and the Online Companion.

SUPPLEMENTAL TEACHING MATERIALS

- **Instructor's Manual**—An **Instructor's Manual and Test Bank** by the authors of the text accompanies this edition and has been greatly expanded to incorporate all changes in the text and to provide comprehensive teaching support. It includes the following:
  1. Keys to research and writing exercises presented in the text
  2. Teaching suggestions
  3. Test bank and answer key

- **Student CD-ROM**—The new accompanying **CD-ROM** provides additional material to help students master the important concepts in the course. This CD-ROM includes the Chapter on Contracts.

- **Spend Less Time Planning and More Time Teaching**—With Delmar, Cengage Learning's *Instructor Resources to Accompany Fundamentals of Legal Research and Writing*, preparing for class and evaluating students has never been easier!

This invaluable instructor CD-ROM allows you anywhere, anytime access to all of your resources:

- The **Instructor's Manual** contains various resources and answers for each chapter of the book.
- The **Computerized Testbank** in ExamView makes generating tests and quizzes a snap. With many questions and different styles to choose from, you can create customized assessments for your students with the click of a button. Add your own unique questions and print rationales for easy class preparation.
- Customizable **PowerPoint® Presentations** focus on key points for each chapter.

PowerPoint® is a registered trademark of the Microsoft Corporation.

All of these Instructor materials are also posted on our Web site, in the Online Resources section.

- **WebTutor™ on WebCT and BlackBoard**—The **WebTutor™** supplement allows you, as the instructor, to take learning beyond the classroom. This

Online Courseware is designed to complement the text and benefit students and instructors alike by helping to better manage your time, prepare for exams, organize your notes, and more. WebTutor™ allows you to extend your reach beyond the classroom.

- **Online Companion™**—The **Online Companion™** contains chapter summaries and cyberlaw exercises. The Online Companion™ can be found at www.paralegal.delmar.cengage.com in the Online Companion™ section of the Web site.
- **Web page**—Come visit our Web site at www.paralegal.delmar.cengage.com where you will find valuable information such as hot links and and sample materials to download, as well as other Delmar Cengage Learning products.

Please note that the Internet resources are of a time-sensitive nature. URL addresses may often change or be deleted.

ACKNOWLEDGMENTS

I could not have written this book without the help of a number of people I would like to acknowledge here. Some of them provided me with valuable ideas along the way, and others gave me the emotional support I needed.

I would first like to recognize those people whose contribution was both informational and inspirational: my colleague, Dr. Ransford Pyle, now retired from the University of Central Florida as Associate Professor Emeritus, and my former colleague, Dr. Daniel Hall, Executive Director of the Hamilton Campus and Professor of Political Science at Miami University. Dr. Pyle wrote portions of Chapters 2 and 4. Dr. Hall wrote portions of Chapters 1, 2, 4, and 5.

Special thanks go to three important people in my life: my children, Christopher and Kathryn Elizabeth, and my life partner, Ken Witte.

Carol M. Bast

I would like to thank my co-author, Carol Bast, for the opportunity to work together again on this 4th revision of our collaboration.

Special thanks go to family and friends, the attorneys and paralegals in the Orlando office of Holland & Knight LLP, and my fellow librarians at the law firm for their continued support and encouragement. Most importantly, I wish to thank my late father, Harry Albright, for his never-ending love, support and frequent [constructive] criticism.

Margie A. Hawkins

REVIEWERS

Many thanks to the following reviewers for their suggestions:

Beverly Broman
Everest Institute
Pittsburgh, PA

Michele Bradford
Gadsden State Community College
Gadsden, AL

Deb Keene
Lansing Community College
Lansing, MI

Steven Kempisty
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Derek Thomson
Bryant and Stratton College
Rochester, NY

Stonewall Van Wie III
Del Mar College
Corpus Christi, TX

About the Authors

Carol M. Bast, J.D., is an Associate Professor in the Department of Criminal Justice and Legal Studies at the University of Central Florida, Orlando, Florida. She earned a B.A. from Kalamazoo College, an M.A. from the University of Wisconsin-Madison, and a J.D. from New York Law School. Dr. Bast is a member of the Orange County Bar Association, The Florida Bar, the American Society of Writers on Legal Subjects, the Legal Writing Institute, the Academy of Legal Studies in Business, and the Southeastern Academy of Legal Studies in Business. She has authored numerous articles on legal research and legal writing.

Margie A. Hawkins, M.L.I.S., is a Law Librarian in the Orlando office of Holland and Knight LLP. She earned a B.A. in Legal Studies and a B.A. in History and Sociology from the University of Central Florida, and a Masters Degree in Library and Information Science from the University of South Florida. Ms. Hawkins is a member of the Florida and Caribbean Chapter of the Special Libraries Association, the American Association of Law Libraries (AALL), the Southeastern Chapter of AALL, and the Orange County (FL) Bar Association. She is a former long-standing member of the Valencia Community College Paralegal Program Advisory Committee.

Introduction

If you are just starting your study of law, you may be wondering what legal research and legal writing have to do with law. After all, you do not see television and movie lawyers performing legal research or writing legal documents. They are usually portrayed arguing eloquently to the judge and jury. What television and movies do not show is all the legal research and writing that took place before the lawyer entered the courtroom.

The job of the lawyer and those working with the lawyer is to competently deal with the client's problem. The client may need the lawyer to either help the client avoid a problem or help the client solve a problem. A client may ask the lawyer to write a will or contract or represent the client in a real estate closing. In these types of transactions, the lawyer helps the client avoid problems by advising the client of the client's rights and responsibilities, by helping the client plan the best course of action, and by drafting any necessary legal documents. Where a problem exists, the client may ask the lawyer to file a lawsuit on the client's behalf or defend the client in a lawsuit. In dealing with a litigation matter, the lawyer advises the client, drafts any necessary legal documents, and represents the client in court.

Legal research and writing are the basic skills necessary for avoiding and solving legal problems. To deal with a problem, the lawyer first has to know the relevant law. Discovering what the law is requires legal research. Inadequate knowledge of relevant law may cause the client to lose money or lose a lawsuit. Once the lawyer knows the relevant law, the lawyer avoids or solves problems by communicating—with the client, another lawyer, the court, the jury, and others. Many times the communication is oral, but the lawyer often must communicate using the lawyer's legal writing skills.

Besides causing the client problems, inadequate legal research or mistakes in written communication may cause the lawyer to be disciplined or disbarred because state lawyer ethics rules also govern lawyer legal research and communication.

The provisions of a number of lawyer ethics rules are discussed in Chapters 7 and 9. The attorney must perform legal tasks in a timely manner. The lawyer generally may not reveal client confidential information. The lawyer has a duty to give the client honest advice. The lawyer may not represent the client if the claim or defense is frivolous. The lawyer must be truthful in dealing with the court and others and has a duty to explain the law to the court. The lawyer must respect the legal rights of others and not cause undue "embarrass[ment], delay or burden." The lawyer must supervise nonlawyer assistants and may be held responsible for the actions of the nonlawyer assistants. A lawyer may not falsely attack the reputation of a judge, a juror, or a legal official. A lawyer may not engage in conduct that violates an ethics rule or that is dishonest, fraudulent, or deceitful.

In today's competitive legal job market, you need to know how to competently research and write. Potential employers and colleagues are looking for someone who has these skills. Once on the job, those you come in contact with will assume that you know how to perform

legal research and write legal documents. They may not have enough time to teach you those skills if you do not already have them. You will have to work hard to build credibility. You may easily lose this credibility if your colleagues sense you lack basic skills.

The legal researcher must find all law relevant to the legal question being researched, must apply the law to the legal question, and must reach an answer. An answer to a legal question is inadequate if it is not supported by legal principles, if it is not based on current law, or if it is based on incomplete legal research. A lawyer's competency is immediately in question if the lawyer's argument does not take into account recent changes in the law or applicable legal principles.

The legal writer has the challenge of representing the best interests of the client while often facing a hostile audience. A court document will be closely scrutinized by the judge and opposing counsel. The details of a will are studied when the decedent's estate is administered and may be challenged by relatives omitted from the will. The wording of a contract will be analyzed as the contract is performed, especially if a problem arises. Drafting legal documents is an important part of a lawyer's role; the reader judges the competency of the writer by the clarity and effectiveness of the legal document. Poor writing will deter and prejudice the reader and may cause problems if the writing is misunderstood; poor writing may cause litigation; unclear writing obscures the message the writer is attempting to communicate.

Legal research and legal writing are skills learned with practice. This book is written to give you basic information on legal research and legal writing; it contains research and writing exercises to help you learn how to perform legal research and write legal documents. The first half of the book describes basic legal research materials found in the law library and online. You will be searching these materials to find relevant legal principles. You will apply the legal principles you discover to answer legal research exercises. The second half of the book first helps you improve your basic writing skills by avoiding common errors, writing in plain English, and organizing. The book then introduces the traditional format of common legal documents—letters, office memos, pleadings, memoranda of law, and appellate briefs.

Now that you know why legal research and legal writing are important to someone dealing with the law, it is time for you to learn how to perform legal research and write legal documents. If you would like to get a taste of legal research by reviewing legal ethics rules, you may want to access <http://www.legalethics.com>.

CHAPTER 1

Law and Sources of Law

INTRODUCTION

Your study of material in Chapters 2 through 8 will teach you basic legal research skills. This chapter is designed to provide you with an understanding of:

- the American system of law,
- our tripartite system of government, and
- sources of law.

The first portion of the chapter introduces you to basic terminology such as *common law*, *civil law*, and *federalism*. The second portion of the chapter discusses the roles of the three branches of government and the interplay among the three branches in lawmaking. The final portion of the chapter introduces you to the terms *primary sources*, *secondary sources*, and *finding tools*. This portion also provides you with a brief introduction to legal publishers.

The information in this chapter may be a review for those of you who have completed an introductory law course; for others, the chapter may contain new information. The chapter provides you with basic information needed to better understand subsequent chapters concerning legal research; thus, the chapter describes a framework into which you can fit the pieces of the legal research puzzle. You may find yourself referring to this chapter as you learn to perform legal research. You will be amazed how much better you understand the material in this chapter after you have covered subsequent chapters.

THE AMERICAN SYSTEM OF LAW

OUR COMMON LAW HERITAGE

"**Common law**" is the system of law developed in England and transferred to most of the English-speaking world. Many other countries are civil law jurisdictions. Louisiana is the only state in the United States that is a civil law jurisdiction. Because of the state's French and Spanish heritage, Louisiana's Civil Code is based on the French Code Napolean and the Spanish Fuero Real. Common law and civil law systems rely on different sources of law.

A traditional common law system emphasizes case law or common law over legislation. The other approach is the **civil law** system that traditionally emphasizes a comprehensive statutory code over case law. Because of its French heritage, Louisiana is the only state whose law is based on both the common and civil law systems.

common law

1. Either all caselaw or the caselaw that is made by judges in the absence of statutes. 2. The legal system that originated in England and is composed of caselaw and statutes that grow and change, influenced by ever-changing custom and tradition.

civil law

1. Law handed down by the Romans. Law that is based on one elaborate document or "code," rather than a combination of many laws and judicial opinions. 2. "Noncriminal law."

Common law is law developed case-by-case from court decisions. Legal principles are developed over time as cases are decided. Judges decide cases after examining what other courts have done in similar cases in the past. Judges may have to examine many cases before reaching a decision. Common law combines stability and flexibility. It is predictable, yet it allows legal principles either to be expanded to fit new situations or to be replaced with a new legal principle that better accommodates new or changing social and economic conditions. The common law system considers prior case law to be a very high source of authority and follows the **doctrine of stare decisis**. Stare decisis means "let the decision stand." Under the doctrine of stare decisis, a court should follow the legal principle decided by that court or a higher court in a prior case where the facts of the prior case are substantially the same as the facts in the present case.

doctrine of stare decisis
(Latin) "Let the decision stand." The rule that when a court has decided a case by applying a legal principle to a set of facts, the court should stick to the principle and apply it to all later cases with clearly similar facts unless there is a strong reason not to, and that courts below must apply the principle in similar cases.

At the founding of this country, common law was the primary source of law, except in Louisiana. There was no important body of United States statutory law until the late nineteenth century. Until the turn of the century, the courts were more active than the legislatures in developing the law. Congress and the state legislatures played a subsidiary role to the courts until the late nineteenth and early twentieth centuries. Congress and the state legislatures began to be very active at the beginning of twentieth century with the advent of the industrial revolution. Federal and state legislatures became more active with the increase in population, the change from a rural to an urban economy, and the increase in industrial accidents following the industrial revolution. The legislatures felt the need to provide broad and detailed solutions to the problems of an increasingly industrialized society. Legislation could provide resolution to commonly occurring disputes without waiting for the courts to decide on a case-by-case basis. Statutory law changed many common law principles to reflect societal changes. The increasing legislative activity shifted the focus of lawmaking from the courts to federal and state legislatures. Legislatures were better able to deal with problems inherent in a rapidly-growing, increasingly-industrialized country. The federal and state legislatures began to pass statutes to safeguard the welfare of an increasingly industrialized workforce and to guarantee the safety of mass-produced products to the consumer. As federal and state legislatures became more active, statutory law increased in importance. Statutes have replaced the common law as the primary source of law.

CIVIL LAW

Civil law is based on a civil code, a systematic and comprehensive written set of rules of law. Judges look to the civil code to settle disputes, rather than rely on precedent. The civil law system considers the legislative code of laws to be a very high source of authority. The legislative code provides comprehensive coverage of all of the basic law of the country. In deciding a legal problem, the code must be reviewed to find the appropriate code provision, and the provision must be applied to solve the legal problem. In applying code provisions, judges rely primarily on scholarly articles and books written by professors rather than on prior case law. Cases may also be reviewed, but prior case law is not binding, as it is in a common law system. Judges also consult the interpretive notes following court decisions. The professors writing the interpretive notes discuss the relationship of the court decision to applicable code provisions and legal principles.

For example, the Louisiana Civil Code is comprised of articles; the articles contain short, declarative sentences without subparagraphs or internal definitions. Attorneys and judges faced with a legal problem consult the detailed rules of the Code; the Code contains a mixture of general legal principles and answers to specific legal problems. The Code governs wills, estates, succession law and marital property, sales, real property transactions, mortgages, conflicts of laws, statutes of limitation, co-ownership, contract formation

and interpretation, tort liability, and allocation of loss. Louisiana follows the doctrine of **jurisprudence constante** rather than the doctrine of stare decisis. As explained earlier, courts following the doctrine of stare decisis are bound to follow a decision of the same court or a higher court where the facts in the prior decision are substantially the same as the facts in the present case. Under jurisprudence constante, a court respects a prior decision but is not bound to follow even the decision of a higher court where the higher court decision differs from the language of the Code. In applying a provision of the Louisiana Civil Code that is similar to a Code Napoleon provision, state courts might consult scholarly treatises interpreting the Code Napoleon.

jurisprudence constante
In deciding a legal problem, the code must be reviewed to find the appropriate code provision and the provision must be applied to solve the legal problem. In applying code provisions, judges rely primarily on scholarly articles and books written by professors rather than on prior case law. Cases may also be reviewed, but prior case law is not binding as it is in a common law system.

FEDERALISM*

The United States **Constitution** contains the fundamental law for the country, establishes the framework of the government, and contains basic principles of law. Similarly, a state constitution contains the fundamental law for the state, establishes the state framework of government, and contains basic principles of law. The United States has a legal system for the federal government and a legal system for each state and the District of Columbia. In addition, local governments, such as counties, cities, and towns, can enact local ordinances.

constitution
1. A document that sets out the basic principles and most general laws of a country, states, or organization.
2. The U.S. Constitution is the basic law of the country on which most other laws are based, and to which all other laws must yield.

The United States Constitution divides power between the federal and state governments. This division is known as **federalism** (Exhibit 1-1). Federalism represents a vertical division of power between the federal government and the government of the states.

federalism
A system of political organization with several different levels of government (e.g., city, state, and national) co-existing in the same area with the lower levels having some interdependent powers.

The Constitution specifically enumerates the powers of the federal government. Articles I, II, and III set forth the powers of Congress, the President, and the judiciary. The powers of the states are not specifically enumerated, for the most part. The absence of an enumeration of state powers concerned states rights advocates at the time the Constitution was adopted. The Tenth Amendment (Exhibit 1-2) was included in the Bill of Rights to appease these concerns.

		SEPARATION OF POWERS		
		Executive	**Legislative**	**Judicial**
FEDERALISM	**United States**	*President*	*Congress*	*Federal Courts*
		• Second-level executive officials	• Senate • House	• Supreme Court • Appeals court • Trial courts • Non-Article III courts
	States	*Governor*	*State Legislatures*	*State courts*
		• Second-level officials	• Typically bicameral	• Highest court • Intermediate appeal • Trial

EXHIBIT 1-1
Dividing Governmental Power. *(Hall, Daniel, E.: Feldmeir, John.* Constitutional Values: Governmental Power and Individual Freedoms, *First Edition. © 2007, Pg. 30. Reprinted by permission of Pearson Education, Inc., Upper Saddle River, NJ.)*

The Tenth Amendment to the United States Constitution provides:

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.

EXHIBIT 1-2
The Tenth Amendment to the United States Constitution.

*Grateful thanks to Daniel E. Hall, Ed.D., J.D., who authorized portions of this section and the following section entitled "The Supremacy Clause." Hall, Daniel, E.: Feldmeir, John. *Constitutional Values: Governmental Power and Individual Freedoms*, First Edition. © 2007, Pgs. 23, 28, 29. Reprinted by permission of Pearson Education, Inc., Upper Saddle River, NJ.

The Constitution gives the federal government certain powers. Exhibit 1-3 contains the text of Article I, sections 8 and 10, of the United States Constitution. Section 8 lists the powers explicitly granted to Congress. Section 10 prohibits the states from exercising certain powers granted to Congress. Powers exclusively granted to the federal government cannot be exercised by the states. Examples of exclusive national powers are coining money, declaring war, conducting foreign diplomacy, making treaties, regulating interstate and international commerce, establishing a post office, taxing imports and exports, regulating naturalization of citizenship, and establishing bankruptcy law (Exhibit 1-4).

EXHIBIT 1-3
Article I, Sections 8 and 10, of the United States Constitution.

Article I, section 8 of the United States Constitution provides:

(1) The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

(2) To borrow Money on the credit of the United States;

(3) To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

(4) To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

(5) To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

(6) To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

(7) To establish Post Offices and post Roads;

(8) To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

(9) To constitute Tribunals inferior to the supreme Court;

(10) To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

(11) To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

(12) To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

(13) To provide and maintain a Navy;

(14) To make Rules for the Government and Regulation of the land and naval Forces;

(15) To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

(16) To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

(17) To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

(18) To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article I, section 10 of the United States Constitution provides:

(1) No state shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of contracts, or grant any Title of Nobility.

(2) No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

(3) No State shall, without the consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of Delay.

EXHIBIT 1-3
(continued)

EXCLUSIVE NATIONAL POWERS	CONCURRENTLY HELD POWERS
Coining money	Taxing citizens
Foreign diplomacy	Chartering banks
Making treaties	Constructing roads
Regulating interstate and foreign commerce	Borrowing money
Establishing a post office	Eminent domain
Taxing imports and exports	Punishing crime
Regulating naturalization of citizenship	**POWERS DENIED TO BOTH**
Regulating immigration and emigration	Ex post facto laws
Establishing bankruptcy law	Bills of attainder
EXCLUSIVE STATE POWERS	Other encroachments upon civil rights protected by the Constitution
Providing for the health and welfare of state citizens	
General police and fire protection	
Licensing most prefessions	
Providing education	

EXHIBIT 1-4
Comparing State and Federal Powers. *(Hall, Daniel, E.: Feldmeir, John.* Constitutional Values: Governmental Power and Individual Freedoms, *First Edition. © 2007, Pg. 28. Reprinted by permission of Pearson Education, Inc., Upper Saddle River, NJ.)*

In some circumstances, the federal government is deemed to have **preempted** state action. If it is determined that Congress has preempted a policy area, all state laws, even if consistent with federal law, are void. The **preemption doctrine** holds that in three instances state regulation is precluded or invalidated by federal regulation:

preempted
Foreclosed, prevailed over, took precedence over.

preemption doctrine
Describes the first right to do anything. For example, when the federal government preempts the field by passing laws in a subject area, the states may not pass conflicting laws and sometimes may not pass laws on the subject at all.

1. When Congress expressly states that it intends to preempt state regulation.
2. When a state law is inconsistent with federal law, even though no express preemption statement has been made by Congress.
3. When Congress has enacted a legislative scheme that comprehensively regulates a field.

The Constitution grants the federal government other powers on a nonexclusive basis. Granting a power on a nonexclusive basis means that the federal government can pass a statute and a state can pass a statute concerning similar activity within the state. These powers are held concurrently by the federal and state governments (Exhibit 1-4). The powers to tax citizens, charter banks and corporations, and build roads are examples.

If the power over a policy area has been delegated to the federal or state governments, the delegatee is generally permitted to engage in regulation of any type—civil, administrative, or criminal. Frequently, the result is an overlapping of administrative functions as well as civil and criminal laws. For example, the United States Department of Transportation has overlapping jurisdiction with state agencies charged with highway administration. Also, robbery

of a federally insured or chartered bank is a violation of both state and federal law. The state in which the robbery occurred has jurisdiction pursuant to its general police powers, and the federal government has jurisdiction by virtue of its charter or insurance coverage.

THE SUPREMACY CLAUSE

Article VI of the United States Constitution states in part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

supremacy clause
The provision in Article VI of the U.S. Constitution that the U.S. Constitution, laws, and treaties take precedence over conflicting state constitutions or laws.

Because of this provision, known as the **supremacy clause**, no federal statute, state constitution, or state statute may conflict with the United States Constitution. A constitutional or statutory provision found by a court to be in conflict would be held unconstitutional and thus ineffective.

When there is a conflict between a federal and a state statute in an area governed concurrently by both federal and state governments, the federal statute will control. For example, the Fair Labor Standards Act, a federal act, requires most employers to pay employees at least a specified minimum wage and prohibits employment of children under fourteen years of age. A state statute that allows employers to pay less than the federal specified minimum wage or to employ twelve- or thirteen-year olds would be in direct conflict with the federal act. A court would hold the state statute unconstitutional and unenforceable.

Powers not given to the federal government are reserved to the states under the Tenth Amendment to the United States Constitution (Exhibit 1-2).

charter
An organization's basic starting document.

ordinance
A local or city law, rule, or regulation.

legislative
Lawmaking, as opposed to "executive" (carrying out or enforcing laws), or "judicial" (interpreting or applying laws). Concerning a legislature.

judicial
1. Having to do with a court.
2. Having to do with a judge.
3. Describes the branch of government that interprets the law and that resolves legal disputes.

Another piece to fit into the research puzzle is local law. Counties, townships, municipalities, and other local governmental entities have laws governing matters such as zoning, occupational licenses, and construction permits considered to be "local" in nature. Local laws include **charters** and **ordinances** (sometimes referred to as resolutions). A charter is similar to federal and state constitutions in that a charter is the fundamental document setting up the local government. Once formed, the local government passes ordinances to implement the power given it under its charter. Just as state statutes are grouped by subject matter into a state code, ordinances may be compiled into a code. If not available at the public library, a copy of the local government's charter and ordinances or code usually may be purchased from the local governmental entity or may be available without charge on the Internet.

OUR TRIPARTITE SYSTEM

The United States Constitution also allocates power horizontally among the three branches of government. State constitutions establish similar frameworks for the states. The federal and state governments are each divided into three branches: **legislative**, **judicial**, and **executive** (Exhibit 1-5). Each of the branches has a role in making law, and there is an important interplay among the three branches. The chart in Exhibit 1-6 shows these

executive
The branch of government that carries out the laws (as opposed to the judicial and legislative branches). The administrative branch.

EXHIBIT 1-5
Division of Governmental Powers. *(Hall.* Criminal Law and Procedure. *© 2004 Delmar Learning, a part of Cengage Learning, Inc. Reproduced by permission. www.cengage.com/permissions.)*

	Legislative Branch	Executive Branch	Judicial Branch
The Government of the United States (Federal Government)	United States Congress	President of the United States	Federal Courts
State Governments	State Legislatures	Governors	State Courts

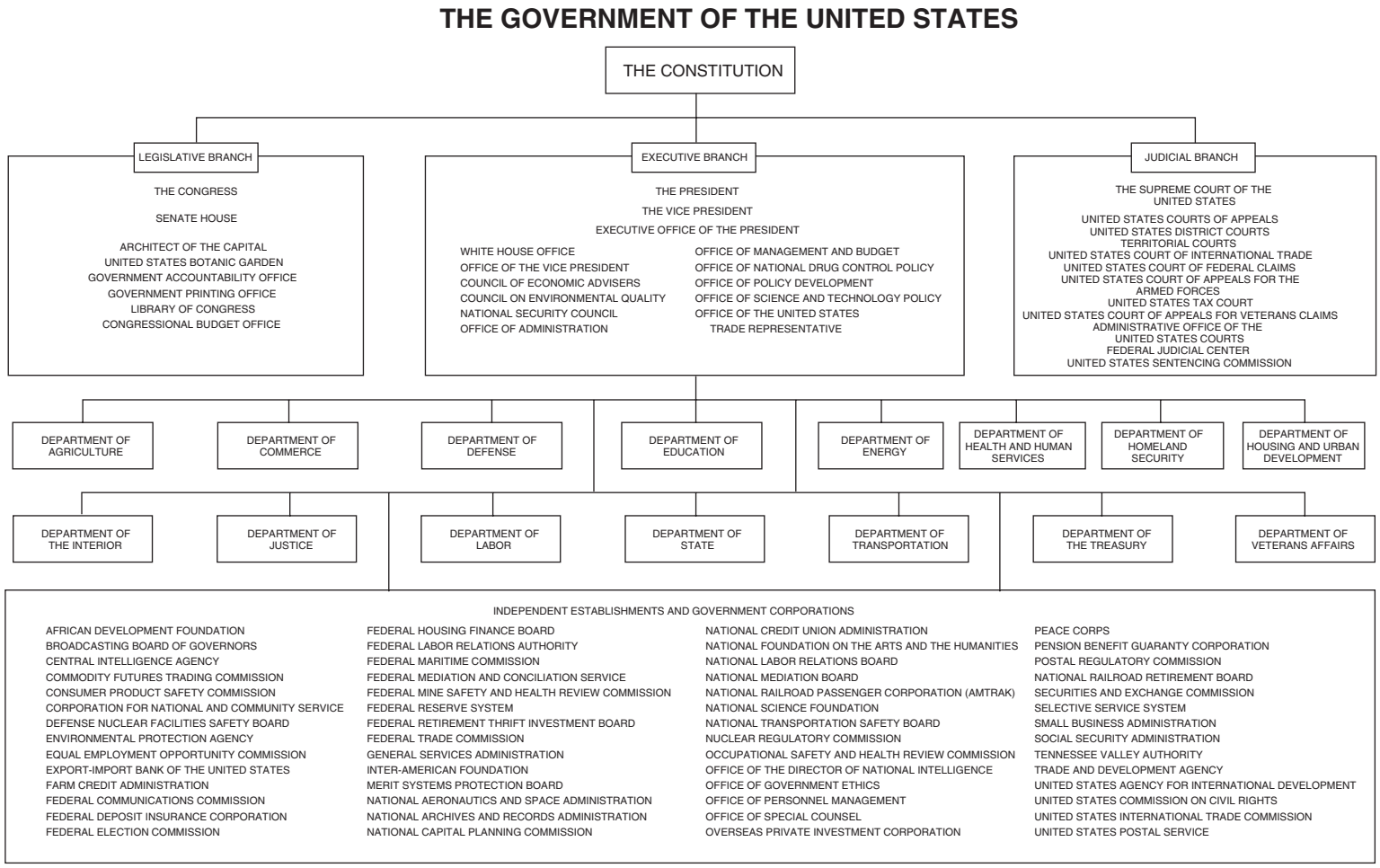

EXHIBIT 1-6

The Government of the United States. *(Reprinted from http://frwebgate.access.gpo.gov/cgibin/getdoc.cgi?dbname=2007_government_manual&docid=211657tx_xxx-3.pdf.)*

three branches of the federal government. Legislatures pass statutes setting forth broad public policies. The legislative branch is discussed more fully later in this chapter and in Chapter 5. The President is responsible for administering and enforcing the nation's laws, conducting foreign affairs, and negotiating treaties and is the commander-in-chief of the military.

administrative agency
A sub-branch of the government set up to carry out the laws. For example, the police department is a local administrative agency and the I.R.S. is a national one.

Administrative agencies, often considered a part of the executive branch, promulgate detailed administrative rules and regulations that have the force of law. The executive branch is discussed more fully in this chapter and in Chapter 5. The courts make law; interpret constitutions, statutes, and administrative regulations; and settle disputes based on the law. Federal courts can hold a statute that conflicts with the United States Constitution unconstitutional. Similarly, a state statute that conflicts with the United States Constitution or a state constitution can be held to be unconstitutional. The judicial branch is discussed more fully in this chapter and in Chapter 4.

INTERPLAY AMONG THE THREE BRANCHES OF GOVERNMENT IN LAWMAKING

The three branches of government have different roles in the law-making process. These roles and the interplay among the three branches balance the law-making power, with each branch checking the law-making power of the other two.

INTERPLAY BETWEEN THE LEGISLATIVE AND JUDICIAL BRANCHES

Look first at the interplay between the legislative and judicial branches. Legislatures pass statutes to address a public problem. Where statutory language is very general, the courts have a lot of freedom to interpret statutes through cases in which the courts decide if and how a statute applies to a problem. Even where statutory language is much more specific, a court may be called upon to interpret particular statutory language or to decide if a statute applies to the problem before the court.

Legislatures enact statutes governing many different types of matters. However, statutes do not cover all legal problems that arise. Where a legal problem is not covered by a statute, attorneys and judges consult case law (common law). Judges make common law principles. Common law principles emerge as cases are decided.

The founders of the American legal system chose to adopt the common law system as the basis of our country's law. Common law is based on the doctrine of precedent. Precedent lends fairness, coherence, predictability, and reliability to the common law. The common law is stable, yet flexible, changing to meet the needs of a dynamic society. Historically, case law was emphasized over legislation, but this has changed with the rapid growth of and importance of legislation. Today, some areas of the law, such as torts, continue to be governed almost exclusively by case law; some areas are governed by statutes (as interpreted by the courts and administrative agencies); and other areas are governed partly by case law and partly by statutes.

In *Marbury v. Madison*, Chief Justice John Marshall wrote that federal courts could determine if a statute were invalid because it was in conflict with the United States Constitution. Judicial review of the constitutionality of a statute is grounded in the supremacy clause and the clause giving federal courts jurisdiction over cases "arising under this Constitution." Federal courts in the United States can declare a statute invalid if it conflicts with the United States Constitution. State courts can declare a statute invalid if it conflicts with the United States Constitution or the state constitution. This is commonly known as the **doctrine of judicial review**.

doctrine of judicial review
Principle that a higher court examines a lower court decision.

The legislature can change the common law by passing statutes that supersede the common law. One reason to change the prior common law is because the legislature

recognizes a need to systematically regulate an area of the law previously governed by case law. An example of this is the Uniform Commercial Code, at least a portion of which, in some form, has been adopted by all 50 states. Another reason to change the prior common law is to "overrule" unpopular court decisions. In 1989, the United States Supreme Court ruled that burning the United States flag was constitutionally protected as an expression of free speech. In response, several members of Congress proposed amending the United States Constitution to outlaw flag burning. Because it generally takes such a long time to amend the Constitution, they suggested passing a federal statute prohibiting flag burning in the meantime. Congress enacted a federal statute criminalizing the same conduct, in obvious contravention of the First Amendment. That statute might have been enforced until challenged in court. After the statute was challenged in court, the United States Supreme Court declared it unconstitutional in 1990.

Once enacted, constitutions, statutes, and regulations are then interpreted by the courts. In applying constitutions, statutes, and regulations to a particular case, a court in effect explains what a provision means. The court's interpretative role is such a significant one that constitutions, statutes, and regulations must be read in light of case law application of them. Sometimes a court is asked to determine the constitutionality of a statute or regulation. For example, in *Roe v. Wade*, 410 U.S. 113 (1973), the United States Supreme Court based its decision on an implied constitutional right to privacy. Although this right is not explicitly stated in the Constitution, the United States Supreme Court interpreted the Bill of Rights to require the existence of this unstated right under the theory that other important rights such as the right against unreasonable search and seizure would be meaningless without an implied right to privacy. The Court thus struck down Texas antiabortion statutes because they conflicted with the constitutional right to privacy.

Congress possesses considerable authority over the jurisdiction of the federal courts. Political concerns could, therefore, cause legislators to limit the jurisdiction of the judiciary over certain issues. Congress has the authority to remove cases from the appellate jurisdiction of the United States Supreme Court and, presumably, could limit the jurisdiction of lower courts. Also, because the courts inferior to the United States Supreme Court were created by Congress, they could be abolished by Congress.

THE CHIEF EXECUTIVE

The primary role of the **chief executive** is to enforce the law. Article II, section 1 of the United States Constitution provides:

chief executive
The head of the executive branch of government. For a state, the chief executive is the governor and, for the federal government, the chief executive is the President.

> The executive Power shall be vested in a President of the United States of America.

Article II, section 2, clause 2 of the United States Constitution gives the President the following powers:

> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

In addition, the chief executive sets policy on enforcing the law. With limited resources, all laws cannot be enforced to the maximum. Policy set by the executive branch influences the extent to which different laws will be enforced. The chief executive can issue

executive orders that direct the actions of agencies and officials. Several of the president's official roles, including United States military commander, give the President the power to issue proclamations and executive orders. These documents have the force of law, just like case law or statutory law.

No provision in the Constitution gives the President the power to directly make law. Regardless, all American presidents have made law through executive orders and presidential proclamations. Orders and proclamations are tools used by the President to perform executive functions. As such, they are not an independent source of presidential authority. A President only uses orders and proclamations to enforce otherwise lawful presidential power. If lawfully promulgated, orders and proclamations have the effect of statutes. Presidential proclamations and executive orders and administrative regulations are printed chronologically in the *Federal Register*. Later, these documents are codified in the Code of Federal Regulations (C.F.R.).

The executive branch affects and is affected by the other two branches in a number of ways. The chief executive may veto legislation. Vetoed legislation can be enacted only if the legislature has sufficient votes to override the veto. The chief executive also greatly influences enforcement of legislation, in part through funding and publicity. Usually there is insufficient money and personnel to enforce all legislation, so the executive may direct that special attention be paid to certain laws. A priority in recent years has been the enforcement of criminal statutes prohibiting the illegal drug trade. The most lasting effect a President has may be from the constitutional mandate to nominate federal judges. Once confirmed by the Senate, such an appointment is for life, unless the judge resigns or is impeached.

The President conducts foreign affairs and negotiates treaties. Congress, the Senate in particular, must ratify treaties. The President is the commander-in-chief of the military, but Congress possesses significant authority over the military as well. It is charged with making rules regulating the military and is responsible for declaring war. The President has been delegated the authority to nominate federal judges and other governmental officers, but the appointments are final only after Senate confirmation. As a check on both the President and the judiciary, Congress holds the power of impeachment.

THE JUDICIAL BRANCH

Many of the petitions filed with the Supreme Court are filed by the United States, by the Solicitor General of the United States. Such filings are examined with special care by the Court when it determines whether to hear the appeals. The executive branch, therefore, influences the Court by its partial control over the issues presented to the Court.

Although the United States Supreme Court is insulated from politics, it is generally believed that politics and public opinion play at least a minor role in influencing the Court's decision making. Because the Court has no method of enforcing its orders, it relies on the executive branch. This unenforceability, some contend, keeps the Court's decisions within the bounds of reason; that is, within a range the public will tolerate and the executive will enforce.

Politics also play a role in the selection of Article III judges. Supreme Court justices and judges of federal district and appellate courts are selected by the political branches of government; the President nominates and the Senate must confirm. In recent years, the process has been criticized as being too political, focusing on the political and ideological beliefs of nominees rather than on other qualifications, such as education, employment experience, prior judicial experience, intellectual ability, and the like. The confirmation hearings of Robert Bork (nominated by President Reagan and rejected by the Senate) and

Clarence Thomas (nominated by President Bush and confirmed by the Senate) are used to illustrate this point.

Once appointed, an Article III judge maintains his or her position until one of three occurrences: retirement, death, or **impeachment**. The power to impeach a judge rests with Congress. Congress may impeach for high crimes and misdemeanors. This is, therefore, another limitation upon the judiciary by an external force. Congress has been true to the purpose of impeachment and has not used the power to achieve political objectives.

impeachment
The first step in the removal from public office of a high public official. To impeach the United States President, the House of Representatives drafts articles of impeachment, votes on them, and presents them to the Senate. But impeachment is popularly thought to include the process that may take place after impeachment: the trial of the President in the Senate.

ADMINISTRATIVE AGENCIES

By statute, federal and state legislatures can delegate some of their powers to administrative agencies. Statutes establish an administrative agency and allocate to the administrative agency the power to promulgate **administrative regulations**; the agency is usually given the power to enforce the regulations and the quasi-judicial power for administrative law judges to decide disputes concerning the administrative regulations and impose sanctions.

administrative regulations
Law written by administrative agencies.

Administrative agencies are an important source of law. Some consider these agencies a "fourth branch" of government; however, Exhibits 1-7 and 1-8 place them under the executive branch because the heads of administrative agencies may be nominated by the chief executive (president or governor). Legislatures delegate rulemaking authority to

FEDERAL GOVERNMENT		
Judicial Branch	**Legislative Branch**	**Executive Branch**
United States Supreme Court (9 Justices) *slip opinions* *looseleaf services* United States Law Week *reporters* United States Reports Supreme Court Reporter United States Supreme Court Reports, Lawyers' Edition	**Senate** **House of Representatives** *slip laws* *advance session law service* United States Code Congressional and Administrative News *session laws* United States Statutes at Large *code* United States Code *annotated codes* United States Code Annotated United States Code Service	**President** *Presidential Documents*
United States Courts of Appeals *reporters* Federal Reporter Federal Appendix		**Administrative Agencies** *daily publication* Federal Register *code* Code of Federal Regulations
United States District Courts *reporters* Federal Supplement Federal Rules Decisions		

EXHIBIT 1-7
The Three Branches of the Federal Government Are the Legislative, the Executive, and the Judicial.

EXHIBIT 1-8
State Governments, like the Federal Government, have three co-equal branches.

STATE GOVERNMENT		
Judicial Branch	**Legislative Branch**	**Executive Branch**
court of last resort	**state legislature**	**Governor**
slip opinion	*slip laws*	**Administrative Agencies**
looseleaf service	*advance session law service*	*daily or weekly publications*
reporters	*session laws*	*code*
intermediate appellate court	*code*	
looseleaf service	*annotated codes*	
reporter		
trial level courts		
reporters		

administrative agencies. Administrative agencies have quasi-legislative, quasi-executive, and quasi-judicial functions. They promulgate administrative rules and regulations, they enforce the rules and regulations, and they settle disputes concerning the rules and regulations. Administrative agencies are an important source of law—**administrative law**. Administrative rules and regulations have the force of law, just like case law or statutory law; however, administrative agencies can promulgate administrative rules and regulations only if a constitution or a statute gives them the power to do so.

administrative law
Rules, regulations, and orders written by administrative agencies.

Federal agencies include the Federal Trade Commission, the Environmental Protection Agency, the Internal Revenue Service, and the Food and Drug Administration. States have state administrative agencies. For example, Florida has the Department of Natural Resources, Department of Business and Professional Regulation, and the Department of Children and Families.

Administrative agencies promulgate administrative rules and regulations that have the force of law. These rules and regulations are, in effect, an interpretation of statutes passed by the legislature. To function, administrative agencies must interpret the law, often before any court has had an opportunity to address objections to that law. Further, the agencies' priorities in regulation and enforcement influence both the legislative and the judicial branches.

Now that you know something about the law produced by the three branches of our government, you need to know where to look to find it. The next section briefly introduces primary sources, secondary sources, and finding tools. Chapters 3 through 6 contain an in-depth discussion of primary sources, secondary sources, and finding tools.

primary sources
Primary sources contain the actual law itself and are given the most weight by courts. Examples of primary law include cases, constitutions, statutes, administrative regulations, municipal codes and ordinances, and court rules.

secondary sources
Secondary sources are designed to explain legal concepts and can be used to understand basic legal terms and general concepts. They provide the researcher with background information and a framework of an area of the law, arranging legal principles in an orderly fashion. In contrast to primary authority (constitutions, cases, statutes, court rules, and administrative regulations), secondary sources do not have the force and effect of law.

finding tools
Those sources in a law library used to locate primary and secondary authority.

SOURCES OF LAW

Your first trip through the law library may seem overwhelming. The law library contains all kinds of sources you need to consult when researching a legal question. By the end of your legal research class, you will be familiar with many of these sources. Primary sources, secondary sources, and finding tools are all sources of law, but they are used in different ways. Their use depends on the information they contain and how authoritative they are. **Primary sources** contain the law itself and may be mandatory authority, **secondary sources** contain commentary on the law, and **finding tools**, as the name implies, are used to find primary and secondary sources. Chapter 2 contains a discussion of

mandatory authority and persuasive authority. Primary sources are given the most weight, but secondary sources are considered persuasive and may be used if no primary sources are available. Finding tools are not authoritative and may not be quoted or cited. Nevertheless, finding tools are an important part of legal research. You may be able to locate relevant primary and secondary sources only by using finding tools.

Exhibits 1-7 and 1-8 show the judicial, legislative, and executive branches for the federal and state governments; these exhibits give the names of the various entities within those branches and the reference materials containing the law made by each entity. You may want to add state-specific references to Exhibit 1-8 as a quick and handy guide for your state's law.

PRIMARY SOURCES AND SECONDARY SOURCES

The difference between primary sources and secondary sources is critical when working with the law. Exhibit 1-9 lists common and frequently used primary and secondary sources and finding tools. These sources are covered in greater depth in later chapters.

Primary sources are law. Exhibit 1-10 lists constitutions, cases (common law), statutes, administrative regulations, ordinances, and court rules as primary sources. Secondary sources, containing a commentary on the law, include treatises, legal periodicals, law review articles, legal encyclopedias, American Law Reports annotations, law dictionaries, legal thesauruses, continuing legal education publications, restatements, and hornbooks. Finding tools are reference publications used to find primary and secondary sources. They include digests, citators, and the *Index to Legal Periodicals*.

A major goal in legal research is to locate the primary sources relevant to the problem you are researching. Secondary sources are often used to find primary sources. Another reason for consulting a secondary source is to gain a basic understanding of the subject matter being researched.

Primary Sources	Secondary Sources	Finding Tools
constitutions†	treatises*	digests*
statutes†	law review articles*	citators††
court rules†	legal periodicals*	*Index to Legal Periodicals**
administrative regulations†	law dictionaries*	
cases**	legal thesauruses*	
looseleaf services*	continuing legal education publications*	
	Restatements*	
	hornbooks*	
	American Law Reports annotations*	
	legal encyclopedias*	
	looseleaf services*	

EXHIBIT 1-9
Legal Sources and Finding Tools.

*See Chapter 3

**See Chapter 4

†See Chapter 5

††See Chapter 6

EXHIBIT 1-10
Primary Sources of Law. *(Hall.* Criminal Law and Procedure, *© 2004 Delmar Learning, a part of Cengage Learning, Inc. Reproduced by permission. www.cengage.com/permissions.)*

PRIMARY SOURCES OF LAW

Source	Comment
Constitution	The United States and every state have a constitution. The United States Constitution is the supreme law of the land. Amendment of the federal Constitution requires action by both the states and United States Congress.
Statutes	The written law created by legislatures, also known as codes. State statutes may not conflict with either their own constitution or the federal constitution. State statutes are also invalid if they conflict with other federal law, and the federal government has concurrent jurisdiction with the states. Statutes of the United States are invalid if they conflict with the United States Constitution or if they attempt to regulate outside federal jurisdiction. Legislatures may change statutes at will.
Common Law or Case Law	Law which evolved, as courts, through judicial opinions, recognized customs, and practices. Legislatures may alter, amend, or abolish the common law at will. In criminal law the common law is responsible for the creation of crimes and for establishing defenses to crimes.
Regulations	Created by administrative agencies under a grant of authority from a legislative body. Regulations must be consistent with statutes and constitutions and may not exceed the legislative grant of power. The power to make rules and regulations is granted to "fill in the gaps" left by legislatures when drafting statutes.
Ordinances	Written law of local bodies, such as city councils. Must be consistent with all higher forms of law.
Court Rules	Rules created by courts to manage their cases. Court rules are procedural and commonly establish deadlines, lengths of filings, etc. Court rules may not conflict with statutes or constitutions.

CITATION TO LEGAL SOURCES

cite
1. Refer to specific legal references or authorities.
2. Short for "citation."

In legal writing, always **cite** the relevant primary source. Determining which primary sources are relevant and then deciding which of those sources to cite requires an understanding of legal reasoning and performance of legal analysis. (Legal reasoning and legal analysis are discussed in Chapter 2.) If you have found few or no relevant primary sources, you may cite certain types of secondary sources. The preferred secondary sources are treatises, legal periodicals, law review articles, law dictionaries, legal thesauruses, restatements, and continuing legal education publications. Digests should never be cited. Although you may cite legal encyclopedias and American Law Reports annotations, they are not a preferred citation source and you should do so with caution. It is always better to find ("pull") the primary authority referred to in the legal encyclopedia or annotation and cite that primary authority rather than the secondary authority.

LEGAL PUBLISHING

Legal publishing has been transformed during the late twentieth and early twenty-first centuries in two different ways. First, the publishing vehicle has changed. Prior to the 1990s, print was the primary publication medium, although on-line legal research via WESTLAW or LexisNexis was increasing in popularity. At the end of the century, legal materials were also available on CD-ROM and on the Internet. Chapter 8 discusses computer-assisted legal research in more detail.

Second, the legal publishers have changed. On one hand, a number of legal publishers were acquired by large corporations, resulting in two major legal publishing

companies—The Thomson Corporation and Reed Elsevier. On the other hand, recently-founded companies, such as Loislaw and Versuslaw, are making fee-based databases containing primary sources accessible via the Internet, and all levels of government are making primary sources available on the Internet.

In older legal research books you would find many references to Lawyers Cooperative Publishing Company and West Publishing Company. Lawyers Cooperative Publishing Company and West Publishing Company formerly were the two legal publishing giants. Both companies are now part of Thomson/West, often referred to as "West." West is a part of Thomson Reuters, an international information and publishing company.

West produces Corpus Juris Secundum, Supreme Court Reporter, Federal Supplement, Federal Reporter, Federal Appendix, and the United States Code Annotated, formerly published by West Publishing Company. In addition, West produces American Jurisprudence and American Law Reports, formerly published by Lawyers Cooperative Publishing Company.

The other giant in legal publishing is Reed Elsevier, an international publisher and information provider. LexisNexis is a division of Reed Elsevier. Matthew Bender, Martindale-Hubbell, Shepard's, and Michie are part of LexisNexis.

LexisNexis produces United States Code Service and United States Supreme Court Reports, Lawyers' Edition.

SUMMARY

- The federal and state governments are each made up of three branches: legislative, judicial, and executive.
- The judicial branch (the courts) produces what is called common law, case law, or judge-made law.
- Common law is law developed case-by-case from court decisions.
- The legislative branch (elected representatives) passes statutes.
- Administrative agencies (often considered part of the executive branch) promulgate administrative rules and regulations.
- The chief executive (the president or governor) issues proclamations and executive orders.
- Federal and state laws are a product of an important interplay among the three branches of government.
  - The legislature can pass statutes that supersede the common law.
  - The courts interpret and apply constitutions, statutes, and administrative regulations.
  - The chief executive may veto legislation, sets priorities in law enforcement, and appoints judges.
- The Supremacy Clause of the United States Constitution makes the United States Constitution the supreme law of the land. No federal or state statute or state constitution may conflict with it.
- In the law library primary sources contain the law itself while secondary sources and finding tools are used to locate relevant primary sources.
- In addition to books from the law library, many legal researchers use computers to assist them in legal research; computer-assisted legal research includes online services, services contained on CD-ROM, and the Internet.

KEY TERMS

administrative agencies
administrative law
administrative regulations
charters
chief executive
cite
civil law
common law
Constitution
doctrine of judicial review
doctrine of stare decisis
executive branch
federalism
finding tools
impeachment
judicial branch
jurisprudence constante
legislative branch
ordinances
preempted
preemption doctrine
primary sources
secondary sources
supremacy clause

EXERCISES

1. Fill in the State Government chart on page 12 with the appropriate information from your state.
2. Visit the law library you will be using and identify the federal and state primary sources, secondary sources, and finding tools you will be using in your research. Compare the list on page 13 with the books available in your law library.
3. Find out what types of computer-assisted research are available to you.

CYBERLAW EXERCISES

1. For a lighthearted comparison of print and online research go to <http://www.youtube.com> and watch the video "medieval helpdesk."
2. Are you fairly new to the Internet? If so, you may like to use the tutorials offered at <http://learnthenet.com>. Try one of the tutorials.
3. The Federal Judiciary homepage is located at <http://www.uscourts.gov/>. Using the homepage, locate your federal district court and federal court of appeals.
4. The United States Supreme Court's Web page is located at <http://www.supremecourtus.gov/>. Using the homepage, read some of the information in its "Visitor's Guides," accessible from "Visiting the Court."
5. Thomas is the name of Congress' homepage, located at <http://thomas.loc.gov/>. Using Thomas, find the names of the senators and representatives from your state in the House and Senate directories.
6. The White House homepage is located at <http://www.whitehouse.gov>. Using the homepage, go into the news page and read several of today's releases.
7. The homepage of the National Center for State Courts links you to Web sites for the courts of your state. The homepage is located at <http://ncsconline.org>. Use the page to locate information on the courts of your state. Try "Court Web Sites."

DISCUSSION POINTS

1. What are the advantages of a common law system over a civil law system? What are the disadvantages?
2. On a daily basis, how are you affected by federal law? How are you affected by state law?
3. Some have accused the Senate of unduly delaying the confirmation of federal judges. Is this a fair accusation?

Student CD-ROM
For additional materials, please go to the CD in this book.

Online Companion™
For additional resources, please go to http://www.paralegal.delmar.cengage.com.

CHAPTER 2

Legal Reasoning and Analysis

> When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark.
>
> *Louisville Gas. Co. v. Coleman*, 277 U.S. 32, 41 (1928) (Holmes, J., dissenting)

INTRODUCTION

Attorneys and judges use the process of legal reasoning and analysis to plan transactions and to solve legal problems by applying cases and rules (constitutions, statutes, court rules, and administrative regulations). When you research a legal problem, you are looking for primary sources applicable to your problem. You must use legal reasoning and analysis to determine whether a source is in fact applicable and how it applies. This chapter begins with a quotation by Justice Oliver Wendell Holmes in which Justice Holmes talks of making legal distinctions. In performing legal reasoning analysis, you first are making a legal distinction between whether a legal source applies or does not apply. If you determine that a legal source applies, you then must determine how it applies.

This chapter is designed to provide you with an understanding of:

- the doctrine of stare decisis,
- judicial opinions,
- legal analysis of statutory law,
- legal analysis of constitutional law, and
- reasoning by analogy and deductive reasoning.

The first portion of this chapter discusses the doctrine of stare decisis, a term central to understanding cases, and provides an example of the term. The second portion of the chapter discusses the types of judicial opinions and the terms *mandatory authority*,

persuasive authority, *obiter dictum*, *judicial restraint*, and *judicial activism*. The third portion of the chapter discusses the principles of statutory interpretation, namely:

- legislative intent,
- the plain meaning rule,
- strict construction, and
- legislative history.

The fourth portion of the chapter discusses the methods of interpreting the Constitution:

- originalism,
- modernism,
- literalism, and
- democratic reinforcement.

The final portion of the chapter discusses reasoning by analogy and deductive reasoning.

DOCTRINE OF STARE DECISIS

The doctrine of stare decisis states that when a court has set forth a legal principle, that court and all lower courts under it will apply that principle in future cases where the facts are substantially the same.

The doctrine of stare decisis can be illustrated with an example.

landmark case
A court case that makes major changes in the law, especially a U.S. Supreme Court case that resolves a major issue and has substantial practical impact.

Griswold v. Connecticut, 381 U.S. 479 (1965) was a **landmark case** in which the United States Supreme Court first recognized an implied right to privacy under the United States Constitution. A landmark case is a case that establishes a new and important legal principle and is regularly cited by the courts when referring to the principle. *Griswold* involved a Connecticut statute that banned the use of contraceptives, even between husband and wife. The constitutionality of the statute was first challenged in the Connecticut state courts. After the Supreme Court of Errors of Connecticut (the highest state court) affirmed the lower state court's enforcement of the state statute, the United States Supreme Court reviewed the case. The United States Supreme Court has jurisdiction to review final decisions of the highest state court, rejecting claims based on federal constitutional law. Thus, the United States Supreme Court makes the final interpretation of the meaning of the United States Constitution.

penumbra doctrine
The principle that specific constitutional rights have less clear, but still real, implied rights, such as the right to privacy.

The Court found that "specific guarantees in the Bill of Rights have **penumbras**, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy." The Court then determined that the Connecticut ban on the use of contraceptives "concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees" and held the Connecticut statute unconstitutional.

LEGAL ANALYSIS TIP

Terms Helpful in Understanding the Discussion of Legal Analysis

penumbra:
a partially lighted area around an area of full shadow (e.g., the moon's penumbra during an eclipse)

penumbra doctrine:
the doctrine of constitutional law that the rights specifically guaranteed in the Bill of Rights have "penumbras" creating other rights that are not specifically enumerated

privacy:
an example of a penumbra right

Look again at the definition of the doctrine of stare decisis: "when a court has set forth a legal principle, that court and all lower courts under it will apply that principle in future cases where the facts are substantially the same." Consider the definition in light of the explanation of *Griswold*. Applying the definition to *Griswold*, "a court" and "that court" refer to the United States Supreme Court, the highest court that decided *Griswold*. In *Griswold*, the "legal principle" is that there is a constitutionally protected right to privacy. "Lower courts" to the United States Supreme Court are all federal courts and all levels of state courts in all fifty states. (See Chapter 4 for a discussion of the hierarchical structure of the federal and state courts.) Because the Court has established this principle, it and all lower courts should reach the same decision in future cases, but they only need to do so if "the facts are substantially the same."

Legal reasoning involves determining what the legal principle is and when the facts of the present case are "substantially the same" as the prior case so that the prior case would be used as **precedent**. A precedent-setting case is a case that sets forth a legal principal followed in later cases. This is sometimes called **reasoning by analogy** or **reasoning by example** because similar past cases are reviewed to determine the outcome of the present case. The terms reasoning by analogy and reasoning by example are more fully discussed in the final portion of this chapter.

precedent
A court decision that sets forth a legal principal followed in later cases.

reasoning by analogy or reasoning by example
Is reasoning by applying the doctrine of stare decisis: the researcher identifies case law relevant to the legal problem being researched; compares the similarities and differences among the legal problem and relevant case law; and reviews the significance of the various similarities and differences to determine if and how prior case law will control the answer to the legal problem being researched.

Griswold itself was binding only on the parties to the case. The doctrine of stare decisis makes the legal principle set forth in *Griswold* applicable to future cases. Although no two cases have material facts that are exactly the same, the facts of two cases may be similar.

ROE V. WADE AND THE DOCTRINE OF STARE DECISIS

The United States Supreme Court decided *Roe v. Wade* eight years after *Griswold*. *Roe v. Wade* was brought by a pregnant woman ("Jane Roe" was a pseudonym) challenging the constitutionality of Texas abortion laws. The laws made abortion a crime, except to save the mother's life. Before the case reached the United States Supreme Court, the federal district court had held the laws unconstitutional.

In *Roe*, the issue before the United States Supreme Court was whether the Texas laws were constitutional. Roe argued that a "woman's right [to an abortion] is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way and for whatever reason she alone chooses." Texas argued that "life begins at conception and is present throughout pregnancy, and that therefore, the State has a compelling interest in protecting that life from and after conception."

In deciding *Roe*, the United States Supreme Court was bound by the doctrine of stare decisis to use *Griswold* as precedent if the facts in *Griswold* were "substantially the same" as the facts in *Roe*. The Court apparently decided that the facts in *Griswold* and *Roe* were similar and found that the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." The Court held that "the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation." The Court also held that the Texas statute was unconstitutional, but that the state could regulate the right to an abortion during the second trimester and prohibit it during the third trimester.

APPLICATION OF *ROE V. WADE* TO A LATER CASE

Would a state abortion statute requiring a twenty-four hour wait and spousal consent be constitutional? That was the issue in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) after the Pennsylvania abortion statute containing these provisions was challenged in federal court.

The attorney for plaintiffs who challenged the statute might have characterized *Roe* by saying that it was "**on point**" with *Casey*. If a case is on point with a second case, the facts

on point
A term meaning that facts and the applicable law in two cases being examined are similar but not as similar as two cases on all fours. Because of the similarity, the earlier-decided case may serve as precedent for the case under considersation.

on all fours
A term meaning that facts and the applicable law in two cases being examined are very similar. Because of the similarity, the earlier-decided case may serve as precedent for the case under considersation.

and the applicable law are similar but not as similar as two cases **on all fours**. If a case is on all fours with a second case, facts and the applicable law in the two cases are very similar. The plaintiffs' attorney probably urged the court to apply the doctrine of stare decisis and hold the Pennsylvania statute unconstitutional. The attorney would have argued that the facts in *Casey* were substantially the same as those in *Roe* because the waiting period and consent requirements effectively denied the right to an abortion to a woman who could not obtain her spouse's consent, or had to travel a great distance, or could not afford to stay overnight.

In *Casey*, the attorney for the defendant—the state of Pennsylvania—might have argued that the facts in *Casey* were different from the facts in *Roe*. The state might have claimed the difference was that the Pennsylvania statute did not criminalize almost all abortions, as did the statute in *Roe*, and would have argued that the waiting period and consent requirements made sure the woman did not make hasty or ill-informed decisions. The state would thus be **distinguishing** *Casey* from *Roe* on the facts. The state might have then argued that, because the two statutes were not substantially the same, holding the statute constitutional would not violate the doctrine of stare decisis.

distinguishing
Point out basic differences. To distinguish a case is to show why it is irrelevant (or not very relevant) to the lawsuit being decided.

In *Casey*, the United States Supreme Court reaffirmed that *Roe* was still good law and applied the holding of *Roe* to *Casey*. The United States Supreme Court ruled that the twenty-four hour wait was constitutional, but the spousal consent requirement was unconstitutional. The decision was a plurality opinion. Justices O'Connor, Kennedy, and Souter announced the judgment of the Court. Justices Stevens, Blackmun, and Scalia, and Chief Justice Rehnquist, each wrote separate opinions concurring in part and dissenting in part. Justices White, Scalia, and Thomas joined in the separate opinion by Chief Justice Rehnquist, and Justices White and Thomas and Chief Justice Rehnquist joined in the separate opinion by Justice Scalia.

In deciding *Casey*, the Court explicitly reaffirmed *Roe* and restated *Roe*'s holding:

> It must be stated at the outset and with clarity that Roe's essential holding, the holding we reaffirm, has three parts. First is the recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortion after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.

AT LEAST TWO SIDES TO EVERY PROBLEM

In *Casey*, the state and the plaintiffs' attorneys reached opposite conclusions about the applicability of *Roe*. The state urged the court to hold the Pennsylvania statute constitutional, while the plaintiffs' attorney urged the court to hold the statute unconstitutional. They were pressing opposite decisions because their legal analysis of the effect of *Roe* on *Casey* was different. The state emphasized the differences between *Roe* and *Casey*, while the plaintiffs' attorney emphasized the similarity between *Roe* and *Casey*.

Every legal problem has at least two sides. The job of each attorney is to represent the client's best interest. An attorney represents the client's best interest by explaining to the court which primary sources apply to the problem, why certain primary sources apply, and what decision the court should reach based on applicable primary sources. Assuming that both attorneys have competently performed their legal research of a problem, they both have the

same primary sources on which to base their arguments. Although the attorneys are relying on the same primary sources, their answers will be much different because of the way they have applied the primary sources to the problem. Each attorney will argue that the primary authority favorable to the client's case is substantially similar to the problem and should control. In contrast, each attorney will argue that primary authority unfavorable to the client's case is readily distinguishable from the problem, or they argue that the court should change the law.

The doctrine of stare decisis has worked well over the centuries because it gives case law stability and predictability, while at the same time allowing for gradual change. There is stability and predictability because courts are bound to look to prior cases in deciding present cases. Much of what an attorney does is to research the law to find cases on point and then predict how a court will decide—or try to convince the court to decide—based on those prior cases. Although the United States Supreme Court and the highest courts of the state have the power to **overrule** prior decisions, they hesitate to do so. A chronic practice of overruling prior decisions undermines the stability and predictability of the legal system.

overrule
To reject or supercede. For example, a case is overruled when the same court, or a higher court in the same system, rejects the legal principles on which the case was based. This ends the case's value as a precedent.

LEGAL ANALYSIS TIP

Overrule and Reverse

When a court overrules a case, the court nullifies a prior decision as precedent. It usually occurs when the same court in a later case establishes a different rule on the same point of law involved in the earlier case. You might think of overruling as horizontal in effect, because a court is announcing that it is nullifying one of the cases it previously decided.

When a court reverses a case, an appellate court sets aside (reverses) the decision of the lower court. You might think of reversing as vertical in effect, because a higher court reverses the decision of a lower court.

Courts rarely state explicitly that they are overruling a prior case. Decades may pass between a precedent-setting case and a later case that overrules it. In *Plessy v. Ferguson,* 163 U.S. 537 (1896), the United States Supreme Court held that separate but equal accommodations for black and white railway passengers were constitutional. Over the years, *Plessy* was used to justify separate but equal public schools. It was not until over fifty years later that the Court overruled *Plessy*. In *Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954), the Court held that separate but equal public school accommodations violated the Equal Protection Clause of the United States Constitution (Exhibit 2-1).

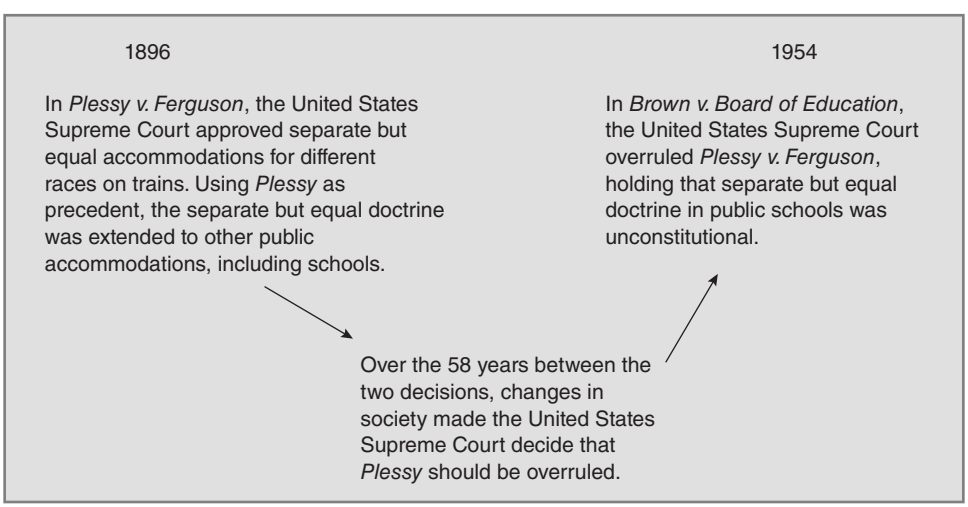

EXHIBIT 2-1
Brown v. Board of Education overruling *Plessy v. Ferguson*.

Instead of explicitly overruling a prior case, courts may limit its effect. The effect of a landmark case like *Roe* is unclear until the United States Supreme Court applies it in later cases. Many have argued that *Roe* was not the correct interpretation of the Constitution. In *Casey*, the Court was under great pressure to overrule *Roe*. The Court ruled only that the states may place certain limits, such as a twenty-four hour waiting period, on the abortion right.

The *Casey* plurality opinion contained some interesting comments on the Court's apparent struggle to decide whether *Roe* should be overturned and how it applied to *Casey*:

> [I]t is common wisdom that the rule of stare decisis is not an "inexorable command," . . . . Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proved to be intolerable simply in defying practical workability . . . ; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation . . . ; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine . . . ; or whether facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification. . . .
>
> . . . .
>
> . . . Within the bounds of normal stare decisis analysis, . . . the stronger argument is for affirming Roe's central holding, with whatever degree of personal reluctance any of us may have, not for overruling it.

JUDICIAL OPINIONS

The type of opinion (majority, plurality, concurring, dissenting, per curiam, or en banc opinion) in a case is important.

MAJORITY OPINION

majority opinion
A case decision agreed upon by at least a majority of the judges deciding the case.

A **majority opinion** is an opinion agreed upon by at least a majority of the judges deciding the case. Usually one judge writes the opinion and other judges who agree with the opinion join in it.

PLURALITY OPINION

plurality opinion
A case decision agreed upon by more judges than any other opinion, although less than a majority.

A **plurality opinion** is an opinion agreed upon by more judges than any other opinion, although less than a majority. *Casey* is an example of a plurality opinion. In *Casey* only three Justices agreed upon the opinion. The only courts issuing plurality opinions are the United States Supreme Court, the highest court of the state, and intermediate appellate courts sitting en banc, because they are the only courts with enough members to have a plurality opinion.

CONCURRING OPINION

concurring opinion
An opinion in which a judge agrees with the result reached in an opinion by another judge in the same case but not necessarily with the reasoning that the other judge used to reach the conclusion.

A **concurring opinion** is one agreeing with the result reached in the majority opinion but for different reasons. In *Casey*, a number of Justices agreed with (concurred in) the result but wrote separate concurring opinions to explain how their reasoning differed from the reasoning of the plurality opinion.

DISSENTING OPINION

A **dissenting opinion** is written by a judge who disagrees with the result reached by the majority opinion; it expresses the judge's reasons for the disagreement. One or more judges may join in a concurring or dissenting opinion. A judge may join in any part of any decision. For example, a judge may join in part in the majority opinion, write his or her own concurring opinion as to another part of the majority opinion, and join in part of another judge's dissenting opinion.

dissenting opinion
A judge's formal disagreement with the decision of the majority of the judges in a lawsuit.

PER CURIAM OPINION

A **per curiam opinion** is written by the whole court rather than by one particular judge. Usually you will see a per curiam opinion in a relatively unimportant case. In contrast, an **en banc opinion** is usually reserved for the most important or controversial cases, decided by the entire membership of the intermediate appellate court rather than by a three-judge panel.

per curiam opinion
(Latin) "By the court." Describes an opinion backed by all the judges in a particular court and usually with no one judge's name on it.

en banc opinion
(French) All the judges of a court participating in a case all together, rather than individually or in panels of a few.

COURT MEMBERSHIP

Except for en banc decisions, intermediate appellate courts sit in panels to decide cases. The panels are made up of three judges selected at random from the membership of the intermediate appellate court. Sometimes one of the judges on the panel may be a lower court judge specially designated to hear an intermediate appellate case. After the three judges review the appellate briefs and hear any oral argument, they meet to decide the case. One of the two or three judges agreeing on how the case should be decided is assigned to write the majority opinion. Any judge disagreeing may choose to write a concurring or dissenting opinion. Before the opinion is announced, it is circulated to the other judges. A judge disagreeing with the opinion may either negotiate with the judge who wrote the opinion, to attempt to change certain language, or decide not to join in the opinion after all. A judge who originally intended to concur or dissent may decide to join in the majority opinion instead.

The entire membership of the United States Supreme Court and the highest state court in the state usually sit to decide a case. Each member of the United States Supreme Court is referred to as a "Justice" rather than a "judge," with the leader of the Court called the "Chief Justice." The members of the highest court in your state may also be referred to as "Justices."

A judge may be excused from hearing a case because of illness or because the judge **recuses** him- or herself. A judge may recuse him- or herself because of a conflict of interest. For example, a judge may have had prior dealings with or have represented one of the parties to the case, which would lead the judge to believe that he or she could not be entirely impartial in deciding the case. A party also may request that a judge be recused because of a real or perceived conflict of interest.

recusal
The process by which a judge is disqualified (or disqualifies him- or herself) from hearing a lawsuit because of prejudice or because the judge has a conflict of interest.

The procedure for deciding a case in the United States Supreme Court or in the highest court of a state is similar to that described for the intermediate appellate courts. Decisions of the United States Supreme Court and the highest state courts, sometimes referred to as **courts of last resort**, are not called *en banc* decisions, though, because the standard procedure is for the entire membership of the court to hear cases.

court of last resort
The highest tier in the federal court system and the state court system, which usually contains one court, referred to as the court of last resort.

Most of the opinions you will use in research are published opinions of **appellate courts**, but not all opinions are published. If you learn of an unpublished opinion you would like to use as authority, the opinion may be available through computer-assisted legal research or you may obtain a copy of the opinion from the clerk of the court issuing the opinion, usually for a nominal fee. Before citing to an unpublished opinion, check applicable court rules to determine whether this is permitted; some states place limits on the use of

appellate court
Refers to a higher court that can hear appeals from a lower court. The role of the appellate court is to determine whether the lower court applied the law correctly.

unpublished opinions. You very rarely see published opinions of trial courts in researching state case law of certain states. Perhaps this is because it is not customary to publish them because they are only persuasive authority for other courts. Published opinions of federal district courts are easily accessible in Federal Supplement.

MANDATORY AND PERSUASIVE AUTHORITY

mandatory authority
Binding authority.

binding authority
Sources of law that must be taken into account by a judge deciding a case; for example, statutes from the same state or decisions by a higher court of the same state.

controlling case
A court decision on a question of law (how the law affects the case) that is binding authority on lower courts in the same court system for cases in which those courts must decide a similar question of law involving similar facts.

persuasive authority
All sources of law that a judge might use, but is not required to use, in making up his or her mind about a case, for example, legal encyclopedias or related cases from other states.

holding
The core of a judge's decision in a case. It is that part of the judge's written opinion that applies the law to the facts of the case and about which can be said "the case means no more and no less than this."

A **mandatory authority** is a case that must be followed under the doctrine of stare decisis. Mandatory authority is also referred to as **binding authority**; a case that is mandatory or binding authority might be referred to as a **controlling case**. A **persuasive authority**, just as the term implies, is a case that is only persuasive and is not required to be followed. More precisely, the part of the case that is mandatory authority and therefore binding on other courts is the **holding** of the majority opinion.

LEGAL ANALYSIS TIP

Holding and Obiter Dictum

The holding of a case is the court's decision and the significant or material facts upon which the court relied in arriving at its determination. This is the binding portion of the case.

Obiter dictum is everything else in the decision.

Brown v. Board of Education is mandatory authority for the United States Supreme Court, unless the Court overrules it, and for all lower courts. (See Chapter 4 for a discussion of the hierarchical structure of the federal and state courts.) This means that *Brown* must be followed; it is binding on all federal and all state courts because it is the most current interpretation of the United States Constitution.

A decision of a United States Court of Appeals is binding on that circuit and all federal district courts within that circuit. (See Chapter 4 for a discussion of the hierarchical structure of the federal and state courts.) The decision of a United States Court of Appeals is not mandatory authority for another circuit because all circuits are on the same level. For example, the United States Court of Appeals for the Eleventh Circuit covers Alabama, Georgia, and Florida. The United States Court of Appeals for the Fifth Circuit covers Texas, Louisiana, and Mississippi. A decision of one three-judge panel of the Eleventh Circuit would be mandatory authority for any future Eleventh Circuit case and any federal district courts in Alabama, Georgia, and Florida. That decision would only be persuasive authority, however, for the Court of Appeals for the Fifth Circuit and federal district courts within Texas, Louisiana, and Mississippi. Interestingly enough, a decision of a United States district or circuit court is considered persuasive rather than mandatory authority for state courts, even state courts geographically located within the district or circuit. This is because a case that is appealed through the various state courts of a state to the highest court in the state would go up to the United States Supreme Court rather than to a United States circuit or district court. In practice, though, a state court may give great weight to decisions of United States district and circuit courts covering the same geographical area when the federal court decisions deal with constitutional issues.

Plurality, concurring, and dissenting opinions are considered persuasive authority, as are all secondary sources. A decision of a court in one state is persuasive authority on the courts of another state. Although not binding, persuasive authority may be cited if there is no mandatory authority on point, or it may be cited to back up one's argument that the court should change the law by overruling a precedent.

Before becoming a United States Supreme Court Justice, Thurgood Marshall was one of the attorneys who argued *Brown* before the Court, claiming that *Plessy v. Ferguson* should be overruled. Marshall had only persuasive authority to rely on in his argument, because the only way the Court could rule in favor of his client was to overrule *Plessy v. Ferguson*. The Court accepted his argument that the law should be changed and did overrule *Plessy v. Ferguson*.

A decision of the highest court in the state is binding on all courts within the state. A decision of an intermediate appellate court is binding on the trial-level courts within the geographical area covered by the intermediate appellate court. If the intermediate appellate court in your state is divided into districts or circuits, it would be interesting for you to research whether the decision of one district or circuit is mandatory or persuasive authority for other districts or circuits. You will very likely find that the relationship between different intermediate appellate courts in your state is that of "sister courts," with the decision of one intermediate appellate court considered persuasive rather than mandatory. The United States Courts of Appeals have this same relationship.

Another question is what effect a decision of an intermediate appellate court has on the trial-level court geographically located outside the area covered by the intermediate appellate court. The decision of the intermediate appellate court could be considered either mandatory or persuasive authority.

Some examples will show the difference between mandatory and persuasive authority. In *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985), the Florida Supreme Court held that "where the seller of a home knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer." In *Johnson*, the homeowner knew that the roof leaked but failed to disclose this to the buyer. The court ruled that the seller's "fraudulent concealment" entitled the buyer to the return of the buyer's deposit plus interest, costs, and attorneys' fees.

Johnson was a landmark case because the law in Florida had previously been that the **doctrine of caveat emptor** ("let the buyer beware") applied to home sales. The *Johnson* court cited decisions from California, Illinois, Nebraska, West Virginia, Louisiana, New Jersey, and Colorado in announcing its decision that the doctrine of caveat emptor would no longer apply to the sale of homes in Florida. These other state decisions constituted persuasive authority for the Florida court. After *Johnson*, a Florida trial court considering a similar case would have to follow *Johnson* and hold the home seller liable for fraud if the home seller knew the home had a leaky roof but failed to disclose it to the buyer. *Johnson* is mandatory authority in Florida for cases concerning material home defects undisclosed to the buyer.

doctrine of caveat emptor
(Latin) "Beware"; warning. Caveat emptor means "let the buyer beware."

OBITER DICTUM*

Not everything that is expressed in an opinion is precedent. The author of an opinion is free to make comments that go beyond the immediate issues to be decided. The remarks, opinions, and comments in a decision that exceed the scope of the issues and the rules that decide them are called **dictum**, plural dicta, from the older Latin phrase **obiter dictum**, and are not binding on future cases. Dictum is a Latin word meaning "said" or "stated." Obiter means "by the way" or "incidentally." Obiter dictum, then, means something stated incidentally and not necessary to the discussion, usually shortened to *dictum* or its plural

dictum
See obiter dictum.

obiter dictum
(Latin) 1. Singular of dicta. 2. a remark by the way, as in "by the way, did I tell you . . ."; a digression; a discussion of side points or unrelated points.

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dicta. In law, it refers to a part of a judicial decision that goes beyond the scope of the issues and is considered mere opinion and not binding precedent.

The process of adjudication commonly results in the making of new rules or the interpretation of existing rules. This is an unavoidable result of the necessity of resolving disputes. However, when a judge attempts to expand an argument to issues or facts not before the court in the dispute, adjudication ends and legislation begins. Although these statements are worthy of consideration in subsequent cases, they are not considered binding precedent and need not be followed; they are *dicta* rather than rule.

Brendlin v. California is a United States Supreme Court case reprinted in Chapter 4. In *Brendlin*, a police officer stopped a car containing the driver and a passenger to check a temporary operating permit. The officer recognized Brendlin and a computer check showed that Brendlin was in violation of parole and had an outstanding arrest warrant against him. The officer arrested Brendlin and a search of the car produced illegal drugs. After Brendlin was charged with illegal drug possession, he filed a motion to suppress the evidence obtained from an unconstitutional stop.

The issue in the case was whether Brendlin, a passenger, could challenge the constitutionality of the stop. The Court stated that the test for determining whether Brendlin had been seized was whether "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." The Court concluded that Brendlin was seized but that the conclusion would have been different had the car in which Brendlin been riding been stuck behind a car pulled over in a traffic stop. "[A]n occupant of a car who knows that he is stuck in traffic because another car has been pulled over . . . would not perceive a show of authority as directed at him or his car." In essence, the Court presents a hypothetical of a car stopped as the indirect result of a police traffic stop directed at another vehicle and indicates that the result would have been different had the passenger in the car following the vehicle stopped by the officer alleged that the passenger been seized. It is a hypothetical because Brendlin was the passenger in the car stopped by the officer and not in the car following the vehicle involved in the traffic stop.

The Court's reference to a passenger in a vehicle indirectly stopped as a result of a traffic stop is *dictum* because those are not the facts of *Brendlin*. Should a case arise that is similar in facts to *Brendlin*, except that the passenger is in a car other than the one stopped by the officer, the statement in the prior paragraph from *Brendlin* would not be mandatory authority because the facts differ from the facts in *Brendlin*.

Analytically, the way to distinguish *dictum* from the rule of law is to determine the legal and factual issues presented by a dispute and analyze the reasoning that leads to their resolution. Thus, in *Brendlin*, we have a passenger in the car stopped by the officer, and the passenger claims that he was seized. Anything outside this reasoning and the rule behind it is dictum. Thus, the Court's implication that the result would have been different had the passenger of another car claimed he was seized is *dictum*.

JUDICIAL RESTRAINT AND JUDICIAL ACTIVISM*

judicial restraint
A judge's decision and decision making that excludes the judge's personal views and relies strictly on precedent.

In the American judiciary, a principle has evolved called **judicial restraint**. Because ultimate authority resides in the United States Supreme Court, which is made up of judges who are appointed for life and subject only to removal by impeachment, it is necessary that judges restrain themselves from actively entering the political arena. This can be effectively accomplished by judges devoting themselves to deciding cases according to existing law. In simple terms, this means that judges interpret the law rather than make it, the latter function being

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reserved for the legislature. Ideally, judicial decisions are based on the authority of legal principles already in existence and not on the moral, political, or social preferences of the judges.

It is currently part of the American democratic folklore that judges merely interpret but do not "make" law. The fallacy of this notion lies in the fact that the power to interpret the law inevitably leads to making the law. Every time a judge is called upon to interpret the law, lawmaking occurs. Because judges ordinarily rely on the authority of existing law, judicial interpretation of the law invokes changes that are nearly imperceptible, but when faced with novel or difficult cases, judges formulate statements of the law that form important new principles.

The following section describes principles commonly used in statutory interpretation.

LEGAL ANALYSIS OF STATUTORY LAW*

For the legal researcher, the most important problem with legislation is interpretation. Over the course of many years, a number of principles have been developed to guide the courts in resolving disputes over the meaning of statutes. The principles governing statutory interpretation are commonly called **rules of construction**, referring to the manner in which courts are to construe the meaning of the statutes. The overriding principle governing statutory interpretation is to determine the intent of the legislature and give force to that intent. This section discusses some of the rules and priorities employed to further this goal.

rules of construction
Guidelines used to determine the meaning and effect of statutory language.

LEGISLATIVE INTENT

The underlying purpose behind statutory construction is the search to determine **legislative intent**.

legislative intent
The principle that when a statute is ambiguous, a court should interpret the statute by looking at its legislative history to see what the lawmakers meant when they passed the statute.

THE PLAIN MEANING RULE

This rule can actually be used to evade legislative intent. The **plain meaning rule** states simply that if the language of a statute is unambiguous and its meaning clear, the terms of the statute should be construed and applied according to their ordinary meaning. Behind this rule is the assumption that the legislature understood the meaning of the words it used and expressed its intent thereby. This rule operates to restrain the court from substituting its notion of what the legislature really meant if the meaning is already clear.

plain meaning rule
The principle that if a contract, statute, or other writing seems clear, the meaning of the writing should be determined from the writing itself, not from other evidence.

The application of the plain meaning rule may in fact undermine legislative intent. Although legislation is usually carefully drafted, language is, by its nature, susceptible to ambiguity, distortion, or simple lack of clarity. Because legislation is designed to control disputes that have not yet arisen, the "perfect" statute requires a degree of clairvoyance absent in the ordinary human being, including legislators, so that a statute may apply to a situation not foreseen by the legislators, who might have stated otherwise had they imagined such a situation.

The plain meaning rule obviates the need to pursue a lengthy inquiry into intent. Consider the nature of the legislative process. First, legislative intent is difficult to determine. The final product of the legislative process, the statute, would thus seem to be the best evidence of legislative intent. Legislatures are composed of numerous members who intend different things. In many instances, legislators do not even read the laws for which they vote. To believe there is a single legislative intent is to ignore reality. Many statutes are the result of compromise, the politics of which are not a matter of public record and cannot be accurately determined by a court. The precise language of the statute, then, is the best guide to intent. If, in the eyes of the legislature, the court errs in its application of the statute, the legislature may revise the statute for future application.

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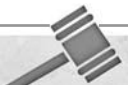


YOU BE THE **JUDGE**

Where Blackie entertained passersby by "talking," would you require Blackie the Talking Cat's owners to purchase a business license?

In reaching your decision, consider the following information:

When Blackie talks, Blackie's owners accept contributions from passerbys.

Also, consider the following questions:

- What argument can Blackie's owners make that they are not operating a business?
- What argument can the city make that Blackie's owners are required to purchase a business license?

To see how a federal court answered the questions, see *Miles v. City Council of Augusta, Georgia*, 710 F.2d 1542 (11th Cir. 1983) in Appendix K.

LIMITATIONS ON THE PLAIN MEANING RULE

Adherence to the plain meaning rule is neither blind nor simple-minded. A statute that is unambiguous in its language may be found to conflict with other statutes. Statutes are typically enacted in "packages," as part of a legislative effort to regulate a broad area of concern. Thus, alimony is ordinarily defined in several statutes embraced within a package of statutes covering divorce, which in turn may be part of a statutory chapter on domestic relations. The more comprehensive the package, the more likely some of its provisions may prove to be inconsistent. A sentence that seems unambiguous may be ambiguous in relation to a paragraph, a section, or a chapter.

preamble
An introduction (usually saying why a document, such as a statute, was written).

Language must thus be interpreted in its *context*. In fact, this principle often operates to dispel ambiguity. Comprehensive statutes commonly begin with a **preamble** or introductory section stating the general purpose of the statutes collected under its heading. This statement of purpose is intended to avoid an overly technical interpretation of the statutes that could achieve results contrary to the general purpose.

The preamble is frequently followed by a section defining terms used in the statutes. This, too, limits the application of the plain meaning rules, but in a different way: the definitions pinpoint terms that have technical or legal significance to avoid what might otherwise be a non-technical, ordinary interpretation.

On occasion, a provision in a statute may turn out to defeat the purpose of the statute in a particular set of circumstances; the court is then faced with the problem of giving meaning to the purpose of the statute or the language of the clause within the statute. In *Texas & Pacific Railway v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), the United States Supreme Court was called upon to interpret the Interstate Commerce Act, which set up the Interstate Commerce Commission (ICC) and made it responsible for setting rates and routes for the railroads. A disgruntled shipper sued the railroad under an old common law action for "unreasonable rates." The Act had a provision, commonly included in legislation, stating that the Act did not abolish other existing remedies. However, the court reasoned that if persons were able to bring such actions any time they were unhappy with the rates, the rate structures established by the ICC would have little meaning, depending instead upon what a particular jury or judge considered reasonable. The court limited the effect of the clause and argued that Congress could not have intended for the clause to be used to completely undermine the purpose of the Act: "in other words, the act cannot be held to destroy itself."

The court will not ordinarily disregard the plain meaning of a statute, especially in a criminal case.

AIDS TO STATUTORY INTERPRETATION

Single statutes do not exist in a legal vacuum. They are part of a section, chapter, and the state or federal code as a whole. Historically, statutes developed as an adjunct to the traditional common law system that established law from custom.

Like case law, statutory construction relied heavily on *authority*. Interpretation is a formal reasoning process in the law, which in our legal tradition depends less on the creative imagination than on sources of the law. In the reasoning process, an overriding judicial policy insists that the body of laws be as consistent and harmonious as possible. It was for this reason that the court held in *Abilene Oil* that the statute "cannot be held to destroy itself."

If a clause seems to conflict with its immediate statutory context, it will be interpreted so as to further the general legislative intent, if such can be ascertained. In a sense, this is simply intelligent reading; words and phrases take their meaning from their contexts. The principle can be extended further, however. Statutes taken from different parts of a state or federal code may be found to conflict. The court will interpret the language to harmonize the inconsistency whenever possible. Legislative intent may become quite obscure in such situations because the presumption that the legislature meant what it said is confronted by the problem that it said something different elsewhere. In reconciling the conflict, the court may use its sense of overall legislative policy and even the general history of the law, including the common law. The obvious solution to these conflicts is action by the legislature to rewrite the statutes to resolve the inconsistencies and provide future courts with a clear statement of intent.

STRICT CONSTRUCTION

Words, by their nature, have different meanings and nuances. Shades of meaning change in the context of other words and phrases. Tradition has determined that certain situations call for broad or liberal constructions, whereas others call for narrow or **strict construction**, meaning that the statute in question will not be expanded beyond a very literal reading of its meaning.

strict construction
Strict construction of a law means taking it literally or "what it says, it means" so that the law should be applied to the narrowest possible set of situations.

"Criminal statutes are strictly construed." This rule of construction has its source in the evolution of our criminal law—in particular, in the many rights we afford those accused of crime. Out of fear of abuse of the criminal justice system, we have provided protection for the accused against kangaroo courts, overzealous prosecutors, and corrupt police. It is an accepted value of our legal system that the innocent must be protected, even if it means that the guilty will sometimes go free.

Although many basic crimes, such as murder, burglary, and assault, were formulated by the common law in the distant past, today most states do not recognize common law crimes but insist that crimes be specified by statute. Conversely, if a statute defines certain conduct as criminal, "ignorance of the law excuses no one" (***ignorantia legis neminem excusat***). If public notice of prohibited conduct is an essential ingredient of criminal law, strict construction is its logical conclusion. If conduct is not clearly within the prohibitions of a statute, the court will decline to expand its coverage.

ignorantia legis neminem excusat
(Latin) Ignorance of the law is no excuse.

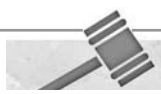
A second category of statutes that are strictly construed is expressed by the principle that "statutes in derogation of the common law are strictly construed." The following two paragraphs discuss a Connecticut case in which a state statute superceded the common law. State legislatures frequently pass laws that alter, modify, or abolish traditional common law rules. The principle that such changes are narrowly construed not only shows respect for the common law, but also reflects the difference between legislative and judicial decision making. Whereas judicial decisions explain the reasons for the application of a particular rule, allowing for later interpretations and modifications, statutes are presumed to mean

what they say. The intent of the legislature is embodied in the language of the statute itself, which if well drafted can be seen to apply to the situations for which it was intended.

Under the common law, an individual who questions the competency of a physician to practice medicine might be sued for libel for damaging the physician's reputation. Connecticut statutes allowed individuals to provide information concerning the competency of a physician to practice medicine to the state medical board so long as the individuals do not do so with malice. Because these statutes change the common law of libel, the statutes are in derogation of the common law of libel.

In 2001, the Connecticut Superior Court decided *Chadha v. Administrator, Charlotte Hungerford Hospital*. In *Chadha*, Chadha was a physician with admitting privileges at Charlotte Hungerford Hospital. The hospital and three physicians complained to the state authorities that Chadha was not fit to practice medicine. After the Connecticut Medical Examining Board suspended Chadha's medical license, Chadha sued the hospital and the three physicians. The defendants filed a motion for summary judgment, contending that the court should enter judgment for them because they did not act with malice. The court denied the motion, recognizing that the statutes allowing the defendants to provide information to the state medical examining board should be strictly construed. The court found that summary judgment was not appropriate because the defendants failed to present any evidence to refute the plaintiff's claim that they had acted with malice.

A statute should stand alone with its meaning clear. Unfortunately, this is not always possible. If there is some question of meaning, a statute that appears to conflict with prior principles of the common law can be measured against that body of law. In other words, the court has recourse to a wealth of time-tested principles and need not strain to guess legislative intent. This is particularly helpful when the statute neglects to cover a situation that was decided in the past. If the statute is incomplete or ambiguous, the Court will resolve the dispute by following the common law.



YOU BE THE **JUDGE**

Can McBoyle be convicted under the National Motor Vehicle Theft Act for stealing an airplane?

In reaching your decision, consider the following information:

The Act defines motor vehicle as "an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails."

Also, consider the following questions:

- What argument can McBoyle make that he is not subject to the Act?
- What argument can the federal government make that McBoyle is subject to the Act?

To see how the United State Supreme Court answered the questions, see *McBoyle v. United States*, 283 U.S. 25 (1931) in Appendix K.

LEGISLATIVE HISTORY

legislative history
The background documents and records of hearings related to the enactment of a bill. These documents may be used to decide the meaning of the law after it has been enacted.

If the application of a statute remains unclear in its language and in its written context, the intent of the legislature may be ascertained by researching the statute's **legislative history**. This includes the records and documents concerning the process whereby the statute became law. The purpose and application of the statute may sometimes become clear with these additional materials. Several committees may have held hearings or discussion on the law during its enactment that have become part of the public record and demonstrate the concerns of the legislators and the reasons for enactment. Inferences may be made based on different drafts of the statute and the reasons expressed for the changes. If two houses

of the legislature began with different language, the final compromise language also may suggest conclusions. Legislative debates may similarly clarify legislative intent.

The following documents may be compiled to provide the legislative history of a federal statute:

documents concerning hearings or a presidential recommendation prior to the introduction of a bill into Congress

text of the bill as introduced into Congress

records of committee hearings

reports of committee hearings

records of Congressional debates

presidential statements concerning the bill

Some of this documentation may be available in United States Statutes at Large or United States Code Congressional and Administrative News, on WESTLAW, on LexisNexis or at the congressional Web site. Specialized commercial publications or services may provide necessary documentation.

Research into legislative history can be a lengthy process involving extensive analytical skills; but an examination of the entire process for a particular enactment will tend to dispel plausible, but incorrect, interpretations of legislative intent. The informal politics of negotiation and compromise, however, are not always reflected in the record, so the reasons for the final decisions on the language of the statute may remain obscure.

A CAVEAT ON STATUTORY INTERPRETATION

The preceding discussion touched on only a few of a multitude of rules of interpretation employed by the courts in resolving issues of statutory interpretation that a given court or judge favors. For example, any specific rule may be avoided by declaring that it conflicts with the primary intent of the legislature. There is a subjective element to this analysis that provides a court great discretion.

Courts ordinarily attempt to give force to legislative intent. They are assisted by a great variety of technical rules of construction that have been developed in the precedents of prior judges faced with the problem of statutory meaning. But judges differ in their thinking from legislators. They not only deal with abstract rules, but on a daily basis must also resolve difficult problems with justice and fairness. Very few judges will blindly follow a technical rule if the result would be manifestly unfair. They can justly reason that the legislature never intended an unjust result. When arguing the interpretation of a statute, a lawyer must keep in mind the importance of persuading the court that the proposed interpretation is not only correct but also fair and just.

LEGAL ANALYSIS OF CONSTITUTIONAL LAW*

The constitution does not state how it is to be interpreted. In many ways, the issue of what method of interpreting the Constitution should be used parallels the question of what is the role of the judiciary in the United States. The authority to make policy has been delegated to the legislative and, to a lesser degree, the executive branches, which are accountable to the people through the voting booth. However, federal judges are not elected, and once installed, they leave office only through death, retirement, or impeachment. Therefore,

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EXHIBIT 2-2
Methods of Interpreting the Constitution. *(Hall, Daniel, E.: Feldmeir, John.* Constitutional Values: Governmental Power and Individual Freedoms, *First Edition. © 2007, Pg. 50. Reprinted by permission of Pearson Education, Inc., Upper Saddle River, NJ.)*

CONSTITUTION INTERPRETATION METHODS

Method	Description	Evidence
Originalism	Constitution is interpreted and applied in a manner consistent with the framers' intentions	• Convention records • Writings of the framers and their contemporaries (e.g., Federalist Papers) • Ratification debate records • Laws of the era and preexisting constitution
Modernism/ Instrumentalism	Constitution is interpreted and applied in contemporary terms	• Objective indicators of public values • Social scientific evidence
Literalism—historical	Constitution is interpreted and applied by focusing on its terms, syntax, and other linguistic features that were in use at the time of adoption/ ratification	• Text of the Constitution • Evidence of language use at time of adoption/ ratification
Literalism—contemporary	Constitution is interpreted and applied by focusing on its terms, syntax, and other linguistic features that are currently in use	• Text of the Constitution • Evidence of contemporary language use
Democratic/normative reinforcement	Constitution is interpreted and applied in a manner that reinforces the document's underlying democratic themes	• Evidence of framers' intentions • Structure/organization inherent in Constitution • Objective evidence of reinforcement of norms

the issue is whether the Constitution should be interpreted in a manner that permits justices to consider policy matters. Should they be guided by their own ideologies or by the nation's?

The following section describes methods of constitutional interpretation. (See Exhibit 2-2 for a summary of these methods.)

ORIGINALISM

doctrine of original intent
Principle that the Constitution is interpreted and applied in a manner consistent with the framers' intentions.

Originalists follow the so-called **doctrine of original intent**. It is not truly a constitutional doctrine; rather, it is an approach to interpreting the Constitution. Originalists hold that the Constitution should be interpreted to mean what the framers originally intended it to mean.

They contend that by examining the records from the Constitutional Convention, letters written by the framers, the *Federalist Papers* and related publications, the records from the state ratification debates, and other documents, it is possible to determine the framers' intent. Originalists assert that by using this approach, the Court's decision will be less normative. Said another way, decisions will not be the result of the personal opinions (beliefs, mores, biases, etc.) of Justices; they will be arrived at "objectively." This being so, the Court's decisions will be more predictable and stable and will be perceived as objective, not as a product of the Court's ideological bent. Thereby, the institution itself will be more respected. Originalists argue that once the original intent has been declared, change can come only through the amendment process.

Opponents of the original intent approach argue that the very premise of originalism is unfounded. They ask how one intent can be attributed to the entire group of framers. Individual delegates may have had different reasons for supporting a particular provision of the Constitution.

Also, because the document was ratified by the states, should the intent of all the participants at the state conventions be considered? Maybe the intent of the framers is not even relevant—after all, the Constitution is a document of the people. Should an attempt to understand the people's general beliefs and attitudes be made? Furthermore, there is evidence that some provisions were intentionally drafted vaguely (such as the due process clause of the Fifth Amendment) so that the precise meaning could be developed at a later date. What of these provisions? There is also some evidence that the framers did not intend for their subjective intentions to live in perpetuity. For example, James Madison believed that a document must speak for itself and that any meaning derived from its reading should not be displaced by a contrary finding of original intent. He also stated, "[a]s a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the convention can have no authoritative character." He believed that the "public meaning" of the Constitution should prevail over the individual intentions of the framers. Public meaning could be shown, according to Madison, through precedent and consensus. That is, if there is consensus in the government and with the people as to what the Constitution means, and they have acted accordingly for some time, then the meaning is established, regardless of any original intent.

It is also argued that original intention cannot be discerned in most instances, because the framers did not consider every possibility. This is especially true when one considers the significant changes the nation has seen since the Constitution was ratified. The industrial revolution, technological revolution, rapid modernization, population explosion (there were fewer than four million people in the United States at the time the Constitution was ratified), and changes in social, political, and economic attitudes brought with them problems that could not have been foreseen by the framers.

Opponents also disagree with the conclusion that predictability and stability will be assured. Courts can differ in their interpretation of intent and even in the method of determining original intention; therefore, decisions could be changed because of differences in opinion concerning the framers' original intentions.

MODERNISM

Many of those who criticize originalism are **modernists**, also known as **instrumentalists**. Associate Justice William Brennan, Jr., was a member of this ideological group. He contended that the Constitution should be interpreted as if it were to be ratified today—a "contemporary ratification" or "living constitution" approach. Originalists discover the meaning of the Constitution by examining the intent of the framers. Modernists find meaning by reading the language of the Constitution in light of contemporary life. Through this approach, the judiciary contributes to the social and moral evolution of the nation. Some oppose this method as countermajoritarian. That is, they contend that it is not the function of nine un-elected individuals to make policy decisions for the nation. Proponents hold that, as an institution, the Court must engage in this form of decision making to perform its function of shielding the individual from governmental excesses and to assure that its decisions will be respected.

modernists
Also known as Instrumentalists, they are those individuals who find meaning through reading the language of the Constitution in light of contemporary life, and through this approach the judiciary contributes to judicial, social, and moral evolution of the nation.

instrumentalists
See Modernists.

In addition to the philosophies previously mentioned, the adherents of this school oppose the doctrine of original intention because it causes the Constitution to become dated and out-of-touch with contemporary problems. They contend that the Constitution's strength comes from its dynamic, flexible nature. Although it affirmatively establishes

certain principles, it does so in language that permits it to change as America changes—not drastic changes, but change within certain parameters. Change outside of the perimeters of reason must occur by amendment.

Modernists do not discard original intention or stare decisis; they recognize them as factors in judicial decision making. But the needs of society also are taken into account, as is the nature of the dispute that gave rise to the case before the Court. To the modernist, the framers could not anticipate every issue that would be presented to the Court, nor did they try. It is the duty of the Court to read the Constitution and apply its terms in a manner that gives due deference to the nation's history and customs, as well as contemporary conditions and public expectation.

The results of scientific research also may play a role in judicial decision making. Judges following the modernist tradition are more likely to be receptive to the use of scientific data than if they were following another method. For example, in *Brown v. Board of Education*, the evidence produced by social scientists indicating that segregation has detrimental effects on black people was relied upon in striking down the separate-but-equal doctrine. Critics charge that, by its nature, much scientific data, particularly the results of social science research, are unreliable and are used by the Court only to justify policy objectives (social engineering), a task better left to Congress and the states.

Reference to contemporary values may also be part of modern analysis. For example, the Eighth Amendment prohibits cruel and unusual punishments. The Court applies both original and modern approaches in Eighth Amendment cases. First, all punishments believed by the framers to be cruel and unusual are forever forbidden. Second, the Court has held that the Eighth Amendment is not "bound by the sparing humanitarian concessions of our forebears" and that punishments must be in accord with "evolving standards of decency that mark the progress of a maturing society." The Court has said that when necessary to determine contemporary values, it will look to "objective factors," such as how other states punish the crime in question, how the jurisdiction in question punishes other crimes, and (in death penalty cases) how often sentencing juries choose the punishment.

HISTORICAL AND CONTEMPORARY LITERALISM

literalism
1. The process of discovering or deciding the meaning of a written document by studying only the document itself and not the circumstances surrounding it.
2. Studying the document and surrounding circumstances to decide the document's meaning.

textualism
1. The process of discovering or deciding the meaning of a written document by studying only the document itself and not the circumstances surrounding it.
2. Studying the document and surrounding circumstances to decide the document's meaning.

Another approach to interpreting the Constitution is **literalism**, also known as **textualism**. This method focuses on the actual text of the Constitution. Literalists believe that the words of the document must be examined first. Words have objective meaning that may differ from the drafters' intentions. Language is paramount, not the intentions of the framers. The framers were particular in their choice of language, and accordingly, those words should be respected. The first tenet of literalism is the plain meaning rule, which states that if the meaning of a word is immediately apparent, then that meaning must be accepted and applied, regardless of any other factors.

However, the meanings of words change. The phrase "modern means of production" is historically contextual. It has a different meaning today than it did in 1799. The same can be said of the language of the Constitution. Does the phrase "cruel and unusual punishment" mean the same today as it did in 1791?

Those in the historical literalism camp believe that the meaning of the words at the time the provision was ratified must be used. This approach is similar to originalism. However, do not confuse the two approaches. An originalist may transcend the language of the document in order to find the original intent; a literalist would not.

There is a second group of literalists that advocate contemporary literalism—that is, the view that contemporary definitions should be applied. They are similar to modernists but focus on language more than a modernist does.

Historical literalists assert, as do originalists, that their method deemphasizes the effect the ideologies of judges have on decisions, and further, that it makes the law more predictable and stable. Contemporary literalists concede that because the meanings of terms evolve, this method may result in slightly less stability. Nevertheless, they believe that they strike the proper balance between keeping the Constitution current and preventing justices from engaging in policy making.

DEMOCRATIC REINFORCEMENT

Another approach to interpreting the Constitution has been termed **democratic or representation reinforcement**. Proponents of this theory suggest that the framers did not intend to establish a set of specific substantive principles. Rather, they created a document that defines the processes, structures, and relationships that constitute the foundation of the American democracy. The first three articles of the Constitution, for example, establish the structure of the national government and its actors and establish the procedures that must be followed in deciding who will occupy high government positions. Even rights usually thought of as purely substantive have procedural or structural aspects. For example, the First Amendment's religion clauses are recognized as protecting the individual's substantive right to choose and exercise religious beliefs, but it also establishes a structure separating governmental and religious institutions. Although structural components of the Constitution are generally easy to define, substantive portions are not. This is because the language of the Constitution is vague or broad when it comes to substance. "Due process," "equal protection," and "cruel and unusual punishments" are examples.

democratic or representation reinforcement
A method of Constitutional interpretation based on the principle that the Constitution defines the processes, structures, and relationships that constitute the foundation of the American democracy and those basic republican themes are interpreted within the context of contemporary society.

From these facts, some analysts glean that the framers did not intend to establish a precise set of substantive laws. Rather, they intended to define the who, what, where, and when of substantive rulemaking. Following this theory, judicial interpretation should be guided by the general republican principles underlying the Constitution. However, the analysis is contemporary. The basic republican themes established by the framers are used as a base, but those themes are interpreted within the context of contemporary society. By allowing change in this way, constitutional law actually reflects the will of people. Accordingly, the United States Supreme Court is not viewed as a countermajoritarian institution, but one that reinforces democracy and republicanism.

THE INTERPRETATION PROCESS

Few judges can be said to subscribe exclusively to any one approach. The same judge may favor originalism for one issue and modernism for another. This does not necessarily mean that the judge is inconsistent; rather, each judge develops his or her own approach to interpretation. For example, all judges must begin with the language of the Constitution. Nearly all judges believe they have an obligation to enforce language that is plain and clear on its face.

Although there are proponents and opponents of every approach discussed here, there is no one correct method. Justices differ in their approaches, and legal scholars differ sharply on the subject as well. Be aware of the different methods; understanding them will increase your understanding of constitutional law and also will enhance your ability to predict the outcome of future cases.

REASONING BY ANALOGY AND DEDUCTIVE REASONING

Legal analysis involves reasoning by analogy and **deductive reasoning**. The following section describes a hypothetical fact pattern. The fact pattern will be used in this portion of the chapter to explain legal analysis, reasoning by analogy, and deductive reasoning.

deductive reasoning
Legal rules (constitutions, statutes, court rules, and administrative regulations) are general statements of what the law permits, requires, and prohibits; therefore, it may not be clear whether a particular rule applies to a given factual situation. Deductive reasoning is used to determine if the rule applies; it involves reasoning from the general (rule) to the specific (the impact of the rule on a particular fact pattern).

JENNIFER WEISS ILLUSTRATIVE FACT PATTERN

Jennifer Weiss, a student at Middle Western University, suffered from severe back pain as a result of a car accident she had been involved in the prior semester. She had been attending all of her classes but relied on fellow students to drive her to campus because her injury kept her from driving. The doctor prescribed 40 milligrams of OxyContin twice during the day and 20 milligrams at night for the pain.

That Wednesday, Jennifer's back was especially painful, she ran out of her medication, and she dreaded the extra trip to the drug store to pick up her refill prescription. Her fellow students had been very nice to her and that day Jill, a good friend and a student in the class, gave Jennifer a very large bottle of OxyContin that an aunt no longer needed. Jennifer realized that the bottle was nearly full, which meant that she did not need to spend money to get her prescription refilled and could avoid the trip to the drug store for a while.

That day, Wanda Mason was giving Jennifer a ride home after class. Nearly in front of Jennifer's house, a police car pulled them over and the officer approached the driver's side of the car. Jennifer commented that she could not wait until she could get inside, where she could get some water to take her next dose of medicine and lie down, and opened the passenger door wide. Wanda responded that she was sure that the police officer would not have any reason to bother Jennifer but that Wanda could use a little moral support. Wanda handed Jennifer a bottle of water and asked Jennifer to stay to keep Wanda company.

As Jennifer finished taking her medicine, Wanda rolled down her window and the officer asked for Wanda's driver's license and registration. He noted the large prescription bottle in Jennifer's lap and gave her a funny look. He said that he had pulled them over because the window tinting appeared to be overly dark, which violated a traffic ordinance. He then apologized, returned Wanda her documents, and said that he was mistaken but it would have been a violation if the tinting had been any darker.

The officer began to walk back to the patrol car, but suddenly turned and approached the car again. He asked Wanda, "You don't have anything illegal in your car, do you? You don't mind if I search the car, its contents, and all containers therein, do you?" Wanda was completely taken by surprise and responded, "No. I don't mind." The officer suggested that Wanda and Jennifer wait in the backseat of the patrol car for their safety and comfort.

Jennifer grabbed her cell phone, leaving everything else in Wanda's car, and Jennifer and Wanda took a seat in the back of the patrol car. Jennifer immediately called Jill to tell her what had happened. Jill gasped and said, "I had a feeling I shouldn't have given you the medicine. You know how many people are addicted to OxyContin these days. My aunt's name is on the prescription bottle rather than yours and the large number of capsules might make him suspicious that you are selling them." Jennifer answered, "I know this doesn't look good for me. He'll see that it is not my name on the prescription from my driver's license in my purse."

The officer returned to the patrol car and announced that Jennifer was under arrest. Later, Jennifer discovered that an automatic recording device had recorded her side of the cell phone conversation when she was in the patrol car; she is worried that her innocent remark may incriminate her.

Jennifer faces two criminal drug charges: one for simple possession and a second for possession with intent to distribute illegal drugs.

LEGAL ANALYSIS

Legal analysis is a sequential process (see Exhibit 2-3). First, one must find all authority relevant to the problem. Some areas of the law are governed wholly by case law; other areas are governed by constitutions, statutes, court rules, or administrative regulations, as applied and interpreted by the courts. When researching case law, one must search for a

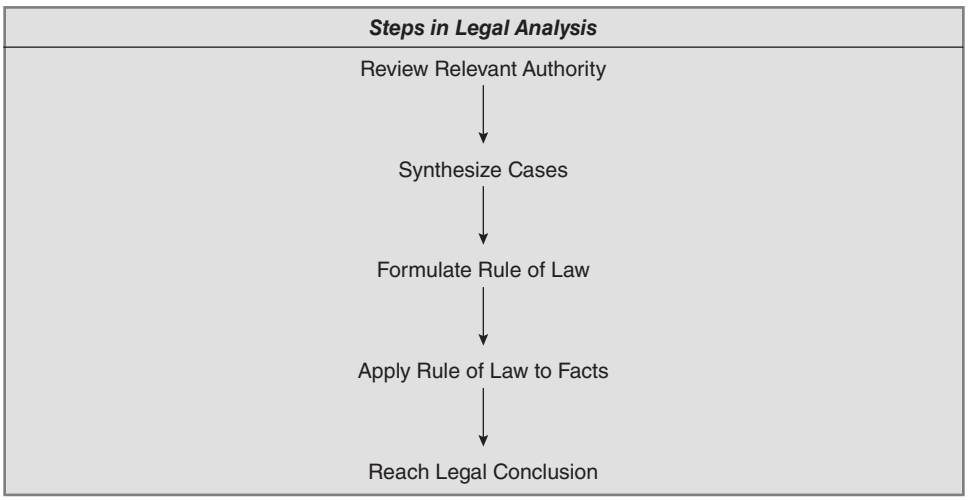

EXHIBIT 2-3
The Sequential Process of Legal Analysis Begins with Reviewing Relevant Legal Authority.

prior case decided by the highest possible court in the jurisdiction with the same issue as presented in the legal problem you are researching and with as similar as possible material facts. Any case found should be further researched to make sure it has not been later heard and decided by a higher court or overruled or that there is not a more recent case from the same or a higher court. When researching constitutions, statutes, court rules, and administrative regulations, one must search for an applicable primary source and any case law applying or interpreting the primary source. A statute should be further researched to make sure it has not been amended, repealed, or held unconstitutional. Constitutions, court rules, and administrative regulations should be further researched to make sure they have not been amended.

In the *Weiss* problem, found on pages 36 in this chapter, Jennifer Weiss was arrested on federal criminal charges for drug possession and possession with intent to distribute. Because Jennifer's comment on the tape recording makes it appear Jennifer knew that using someone else's prescription drugs was wrong, Jennifer would like to have the tape suppressed. The federal eavesdropping statutes may apply and are discussed in the following section.

DEDUCTIVE REASONING

Deductive reasoning involves reasoning from the general (rule) to the specific (the impact of the rule on a particular fact pattern). The principle of deductive reasoning will be illustrated by using the *Weiss* case and the federal wiretapping and eavesdropping statutes.

The first step in deductive reasoning is identifying the rules that may apply to a particular fact pattern. A rule that may apply is referred to as the **major premise**. The second step is to state the facts in terms of the rule. This statement is called the **minor premise**. The facts must be weighed in light of the language of the rule to formulate the minor premise. In other words, should the language of the rule be interpreted to include the facts of the fact pattern? The last step is to reach a conclusion, after analyzing the relationship between the major premise and the minor premise.

major premise
The basis for a logical deduction. The facts or arguments upon which a conclusion is based.

minor premise
The basis for a logical deduction weighed in light of the major premise. The facts or arguments upon which a conclusion is based.

The federal wiretapping and eavesdropping statutes may apply to *Weiss*. The federal statutes prohibit secretly tape recording an "oral communication." An oral communication is defined as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." A penalty for tape recording an oral communication is that the tape recording may not be used in court.

For *Weiss*, a major premise is: If an oral communication is secretly tape-recorded, the tape recording can be suppressed.

It might be helpful to state two alternative minor premises:

1. Jennifer will be successful in having the tape recording of her side of the conversation in the patrol car suppressed because she had a reasonable expectation that the police officer would not tape record her conversation while she sat in the back of the patrol car.
2. Jennifer will not be successful in having the tape recording of the conversation in the patrol car suppressed because it was not reasonable to expect that the police officer would not tape record her conversation while they sat in the back of the patrol car.

The following are two alternative conclusions:

1. Because the conversation in the backseat of a patrol car was an oral communication, it should be suppressed.
2. Because the conversation in the backseat of a patrol car was not an oral communication, it should not be suppressed.

The researcher would have to determine which minor premise and which conclusion is the most likely to be employed by the court deciding *Weiss*. The determination hinges on the meaning of "reasonable" in "reasonable expectation of privacy." If Jennifer's expectation of privacy in the rear seat of the patrol car was reasonable, then the tape should be suppressed; if not, then the tape would not be suppressed under the federal statute. If the facts were at one end or the other of the spectrum, formulation of the minor premise would be easy. An individual probably would have a reasonable expectation of privacy when conversing in the individual's home with the doors and windows closed; an individual probably would not have an expectation of privacy if conversing on a street corner in a loud voice. Were the facts toward the middle of the spectrum, it would be more difficult to determine whether an individual has a reasonable expectation of privacy.

The word "reasonable" is vague when we attempt to determine whether Jennifer has a reasonable expectation of privacy when conversing in the back of a patrol car. Case law interpretation of the statute may help make the determination.

The following section discusses cases in which a police officer secretly taped a conversation of suspects while the suspects were seated in the officer's patrol car.

REASONING BY ANALOGY

Because we have a common law system, cases are central to legal analysis. Although a case settles a particular dispute as to the parties to the case, the case may be applicable to future cases through the doctrine of stare decisis. Determining whether a past case should apply to a case presently before a court and what impact the earlier case has on the later cases involves reasoning by analogy.

Reasoning by analogy first involves finding a past case with facts that appear to be similar to the case presently being decided. No two fact patterns are identical, even if they involve similarly situated parties or what appears to be the same issue. Therefore, there will always be similarities and differences between the two fact patterns. The second step is to compare the facts of the two cases to determine which facts are similar and which facts are different. The third step is to determine whether the facts of the two cases are so substantially similar that the past case should determine the result in the present case. If the facts in the two cases are substantially different, then the result in the present case might differ from the result in the past case. In examining factual differences and similarities, one must determine whether the similarities or differences are more significant. A few similarities between crucial facts in the two cases may outweigh numerous differences in unimportant facts.

Because Jennifer Weiss is facing criminal drug charges in the United States District Court for the Middle District of Florida, a researcher would look for the mandatory authority of case law from the United States Supreme Court or from the Court of Appeals for the Eleventh Circuit.

The United States Supreme Court has never discussed whether it is permissible for police officers to tape such conversations; however, case law research has located two cases from the eleventh circuit that may be relevant. The cases are *United States v. Gilley*, 43 F.3d 1440 (11th Cir. 1995) and *United States v. McKinnon*, 985 F.2d 525 (11th Cir. 1993). In *Gilley* and *McKinnon*, the courts held that someone seated in a patrol car does not have a reasonable expectation of privacy. *Gilley* and *McKinnon* may apply because the facts in those two cases seem to be similar to the facts in *Weiss*.

In the deductive reasoning section of this chapter, we determined that it was unclear whether the federal eavesdropping statutes would apply to *Weiss*. In *Gilley* and *McKinnon*, the eleventh circuit decided that the federal eavesdropping statutes did not apply to the tape recorded conversation because the suspects had no reasonable expectation of privacy while seated in a patrol car. This is the rule of law from the two cases. (See Exhibit 2-3.)

The next step in legal analysis (Exhibit 2-3) is to apply the rule of law to the facts of the problem. Application of law to facts requires one to determine how the rule of law and the authority backing it up is similar to or different from the facts in the problem. If the facts in prior cases are substantially the same, then the result in the problem should be the same as the result in the prior cases. This is the step sometimes overlooked when students perform legal analysis. Students tend to carefully explain the rule of law and then skip directly from the rule of law to the conclusion. Instead, the reasoning followed must be explained. Legal analysis should lead step by step from the rule of law through the application of the rule of law to the facts in the problem to the conclusion.

In comparing *Gilley* and *McKinnon* to *Weiss*, there are many similarities. The *McKinnon* and *Weiss* cars were stopped for alleged traffic violations. In all three cases, the cars contained two occupants. In all three cases, the occupants were seated in the patrol car while their car was searched. In all three cases, the officers recorded the suspects while seated in the rear seat of the patrol car. All the tapes contained incriminating statements. The suspects were not under arrest when their conversations were recorded. There are also some differences. The reason the *Gilley* car was stopped is unknown and the alleged traffic violations in *McKinnon* and *Weiss* were different. In *Gilley* and *McKinnon*, the occupants of the car were males; in *Weiss*, the occupants were females. In *McKinnon* and *Weiss*, the driver consented to the search; in *Gilley*, legal basis for the search is unknown.

The last step (Exhibit 2-3) is to reach a conclusion by tying together the rule of law and the application of law to facts. The conclusion is the solution to the problem and must be thoroughly supported by the rule of law and the application of the rule of law to the facts in the problem. The conclusion is also a prediction of what a court will do based on relevant authority.

The federal eavesdropping statutes could be used to suppress the tape recorded conversation if there was a reasonable expectation of privacy. *Gilley* and *McKinnon* can be used to determine if suspects have a reasonable expectation of privacy while seated in a patrol car. The *Gilley* and *McKinnon* courts held that there was no reasonable expectation of privacy under the facts presented in that case. Using the doctrine of stare decisis, *Gilley* and *McKinnon* are binding on *Weiss* if the facts in the three cases are substantially similar. Although there are some factual differences among the three cases, the facts concerning the taping in the patrol car are virtually identical. While the police officers were conducting a car search the car occupants were asked to sit in the patrol car. While in the patrol car, they made incriminating statements that were tape recorded. Because the facts in the three cases were substantially similar, the court deciding *Weiss* should decide that the tape recording may not be suppressed under the federal eavesdropping statutes.

SUMMARY

- The doctrine of stare decisis states that when a court has set forth a legal principle, that court and all lower courts under it will apply that principle in future cases where the facts are substantially the same.
- *Roe v. Wade* illustrates the doctrine of stare decisis:
  - In *Roe v. Wade*, the United States Supreme Court held that a Texas statute making abortion a crime was unconstitutional but that the state could regulate the right to an abortion during the second trimester and prohibit it during the third trimester.
  - Applying the doctrine of stare decisis, *Roe v. Wade* is used as precedent in later cases where the facts are "substantially the same."
  - If the facts in a later abortion case in which a state abortion statute is challenged are substantially the same as the facts in *Roe v. Wade*, then the court in the later case should hold the challenged abortion statute unconstitutional.
  - However, if the challenged abortion statute in the later case is distinguishable from the *Roe* statute, a court may uphold the constitutionality of the challenged statute.
- The doctrine of stare decisis gives case law predictability while allowing gradual change.
- There are at least two sides to every problem and the attorney represents the client's best interest by arguing that authority favorable to the client's case should be applied and that unfavorable authority is distinguishable.
- When reading a court decision, note what type of opinion it is: majority, plurality, concurring, dissenting, per curiam, or en banc.
- A case may be mandatory authority, which must be followed under the doctrine of stare decisis, or a case may be persuasive authority, which may, but is not required, to be followed.
- In interpreting statutes, the legal researcher may consider legislative intent, the plain meaning of the statutory language, the immediate statutory context, strict construction of the statutory language, and legislative history.
- The methods of interpreting the United States Constitution include originalism, modernism, literalism, and democratic or representation reinforcement.
- Legal analysis involves three steps: 1.) reading and synthesizing all relevant authority to extract a rule of law; 2.) applying the rule of law to the facts of the problem; and 3.) reaching a conclusion.

KEY TERMS

appellate courts
binding authority
concurring opinion
controlling case
courts of last resort
deductive reasoning
democratic or representation reinforcement
dictum (plural, dicta)
dissenting opinion
distinguishing
doctrine of caveat emptor
doctrine of original intent
en banc opinion
holding
ignorantia legis neminem excusat
instrumentalists
judicial restraint
landmark case
legislative history
legislative intent
literalism
major premise
majority opinion
mandatory authority
minor premise
modernists

obiter dictum
on all fours
on point
overrule
penumbras
per curiam opinion
persuasive authority
plain meaning rule
plurality opinion
preamble
precedent
reasoning by analogy
reasoning by example
recuses
rules of construction
strict construction
textualism

EXERCISES

1. What was the holding (the central decision) of *Griswold v. Connecticut*?
2. What were the arguments of the two attorneys in *Roe v. Wade*?
3. Was *Griswold* used as precedent in *Roe*?
4. What was the issue (legal question before the court) in *Planned Parenthood of Southeastern Pennsylvania v. Casey*?
5. What were the arguments of the two attorneys in *Casey*?
6. Was *Roe* used as precedent in *Casey*?
7. What are the differences among majority, plurality, concurring, dissenting, per curiam, and en banc court decisions?
8. What is a "court of last resort"?
9. Give an example of mandatory authority for federal courts and for the courts of your state.
10. Give an example of persuasive authority for federal courts and for the courts of your state.
11. One of the issues before the court in *U.S. Fidelity and Guar. Co. v. Braspetro Oil Services Co.*, 369 F.3d 34 (2d Cir. 2004) was whether the sureties were liable for $36,700,000 in attorneys' fees under the contract provision obligating the sureties to pay "legal costs." According to the court, did the contract term legal costs include attorneys' fees? What was the court's reasoning?
12. *Muscarello v. United States*, 540 U.S. 31 (1998) consolidated two cases that involved a federal statute imposing a mandatory five-year prison term for anyone who "uses or carries a firearm" during an illegal drug offense. In one case, the firearm was in a locked glove compartment and in the other case the firearm was in the trunk of a car. What was the issue, and what was the holding? What was the court's reasoning?

CYBERLAW EXERCISES

1. Washburn University School of Law maintains Washlaw Web, a site with numerous links to other law-related Web sites. Washlaw Web is accessible at ‹http://www.washlaw.edu›. Review the materials accessible through the site.
2. A well-known legal research site where you can start your legal research is ‹http://www.findlaw.com›. Use this site to find the full opinions of *Griswold v. Connecticut*, *Roe v. Wade*, and *Planned Parenthood of Southeastern Pennsylvania v. Casey* by using the volume and first page numbers of the cases. In a case citation, the first number is the volume number. The volume number is followed by an abbreviation of the set of books containing the opinion. The abbreviation is followed by the number of the first page of the case.
3. The Library of Congress Web site is located at ‹http://www.loc.gov›. A portion of the Web site is designed for law researchers. Review the offerings accessible through the site.
4. A comprehensive legal research site is American Law Sources Online, ‹http://www.lawsource.com/also›. Review the offerings accessible through the site.
5. Another good starting point is Cornell Law School's Legal Information Institute, ‹http://www.law.cornell.edu›. Review the offerings accessible through the site.

DISCUSSION POINTS

1. Was the United States Supreme Court bound by the doctrine of stare decisis to decide *Roe v. Wade* the way it did?
2. Does every legal problem have two sides?
3. Review some recent decisions of the United States Supreme Court. How many were unanimous? How many of the decisions contained a concurring or dissenting opinion? Did you note any plurality decisions?
4. Review a decision of the United States Supreme Court in which the Court interpreted a statute. Which rules of construction did the Court use in interpreting the statute?
5. Have you noted any examples of judicial restraint or judicial activism in the news lately? If so, what are they?

Student CD-ROM
For additional materials, please go to the CD in this book.

Online Companion™
For additional resources, please go to http://www.paralegal.delmar.cengage.com.

CHAPTER 3

Secondary Sources and Finding Tools

INTRODUCTION

This chapter introduces secondary sources and finding tools. It includes explanations of:

- legal encyclopedias,
- American Law Reports,
- attorney general opinions,
- restatements of the law,
- treatises,
- legal dictionaries,
- legal directories,
- formbooks,
- loose-leaf services,
- legal periodicals, and
- digests.

Secondary sources are designed to explain legal concepts. They can be used to understand basic legal terms and general concepts. They provide the researcher with background information and a framework of an area of the law, arranging legal principles in an orderly fashion. In contrast to primary authority (constitutions, cases, statutes, court rules, and administrative regulations), secondary sources do not have the force and effect of law. They function as citation finders, leading the researcher to relevant primary sources. It is preferable to cite to the primary authority found through secondary sources rather than citing to the secondary sources themselves.

Finding tools are used to find primary sources. Secondary sources also can be classified as finding tools because the legal researcher often uses citations found in secondary sources to find relevant primary sources. However, several legal publications function solely as finding tools; these include digests and citators. Citators are covered in Chapter 6. Digests and citators are neither primary nor secondary authority and are never cited.

ENCYCLOPEDIAS

Legal encyclopedias offer a useful commentary on the law as it is and serve as a case finder to locate cases with which one can begin the research process. The legal encyclopedia is one of the many tools in the law library and should generally be used in combination with other legal research tools.

legal encyclopedias
Legal encyclopedias are a secondary source that offer a useful commentary on the law as it is and serve as a case finder to locate cases with which one can begin the research process.

In organization, legal encyclopedias have much in common with general encyclopedias. Legal encyclopedias are organized like the multivolume encyclopedias found in schools and public libraries. They are multivolume sets covering broad topics arranged in alphabetical order, with the topics divided into sections. Index volumes are located at the end of the set. Each topic gives a textual explanation of the law relating to that topic. Topic coverage serves as a valuable frame of reference for more in-depth research in other sources.

Corpus Juris Secundum
A multivolume national legal encyclopedia.

American Jurisprudence 2d
A multivolume national legal encyclopedia.

The two widely-used national legal encyclopedias are ***Corpus Juris Secundum*** and ***American Jurisprudence 2d***. They are designed to systematically explain the law as it exists in the United States; they may be consulted to gain an overview of the law from a national perspective. Each contains over 400 topics.

The researcher may begin to access the legal encyclopedia either in an index (the general index or the volume index) or in a topic table of contents. Detailed subject index volumes are located at the end of the set, allowing the researcher to locate relevant material by looking up key terms. In addition, each volume is separately indexed and may contain more detailed information concerning the topics covered in that particular volume than the general index. Each legal encyclopedia topic is preceded by two tables of contents, the first listing major topic sections and the second listing topic sections and subsections in detail.

Legal encyclopedias can be used as a starting point for a researcher. They serve to educate the reader on the basic aspects of a topic with which the reader is unfamiliar; a more knowledgeable reader can refresh his or her understanding of the topic. The first sections of a topic in the legal encyclopedia give the reader a general basic statement of the law. Those sections are followed by a more detailed description of all aspects of the substantive law. The final sections generally describe available remedies.

In contrast to general encyclopedias, legal encyclopedias are heavily footnoted. The footnotes are a valuable feature of the legal encyclopedia, furnishing the legal researcher primary source citations useful in the research process. Legal encyclopedias were first published at a time when the emphasis of the law was on case law rather than statutes or regulations. Legal encyclopedias still tend to emphasize case law over statutes and regulations. A researcher should carefully search for relevant statutes and regulations; legal encyclopedias may not reference highly relevant statutes and regulations.

pocket part
An addition to a lawbook that updates it until a bound supplement or a new edition comes out. It is found inside the back (or occasionally, front) cover, secured in a "pocket," and should always be referred to when doing legal research.

Each volume of the legal encyclopedia is annually updated with a cumulative pamphlet, generally referred to as a "pocket part." A **pocket part** is a paperbound "booklet" containing recent legal information. When researching, it is essential to check the pocket part for updated material. Pocket parts are usually reprinted annually and contain more recent information than the hardbound volume. The pocket part is inserted inside the back cover of the volume for easy reference and the pamphlet from the prior year is discarded; the pocket part contains textual material and citations, new since the copyright date of the hardbound volume. Over time, the information for the annual pocket part supplement becomes too voluminous to be easily stored inside the volume's back cover; when this happens, the information is printed either in a separate paperbound volume, shelved next to the hardbound volume, or absorbed into the reprinted hardbound volume. The researcher should consult both the hardbound volume and the supplement.

When researching, note the copyright date of the hardbound volume and then the date on the front of the pocket part. Also note the date of coverage for the pocket part (this currency date tells the date on which research and update for that pocket part was cut off). This information is found in the first few pages of the pocket part. Because of its inherent

datedness, a pocket part dated May of the current calendar year may only cover material through December of the preceding year.

The copyright date of the hardbound volumes varies greatly. As just stated, volumes are recompiled and reprinted from time to time when the supplementary material becomes unwieldy. A recompiled volume incorporates new material and eliminates out-of-date information; volumes relating to more rapidly changing areas of the law are reprinted more frequently than other volumes. There may be no pocket part published in the year in which the reprinted volume is published because the material in the hardbound volume would be current without reference to a pocket part.

Many states have state legal encyclopedias; they cover the law in a similar fashion, although from a state perspective, and are arranged similarly to the national legal encyclopedias. The state legal encyclopedia attempts to explain the law as it exists in that particular state. State legal encyclopedias generally provide more extensive treatment of state-specific topics, such as community property, homestead, and oil and gas law, and provide more state-specific citations. For example, California law is covered in California Jurisprudence 3d (Cal. Jur. 3d). If you were researching California law, California Jurisprudence would be your first choice. If your research did not locate any primary sources from California, you could consult the national encyclopedias to find authority from other states. You could use this authority as persuasive authority to answer your legal question.

RESEARCH TIP

Use of Hardbound Volumes and Pocket Parts

When researching in print sources, the researcher must make it a practice to check both the hardbound volume and the pocket part to obtain complete information.

CAVEAT ON USE OF LEGAL ENCYCLOPEDIAS

Use legal encyclopedias while keeping in mind their limitations. The text provides a short summary of the law, without detail, which gives some background but is not usually specific enough to answer a legal question. You must look up a case cited in the legal encyclopedia. Do not rely on what the legal encyclopedia says about a case, because it may not be completely accurate. Researchers generally do not quote from legal encyclopedias. Because a legal encyclopedia only contains the publisher's interpretation of the law at the time it was written, it is preferable to use the primary source itself. Do not omit statutory research. Legal encyclopedias emphasize case law rather than statutory law and may not reference applicable statutes. See Exhibit 3-1 for a summary of ways to use legal encyclopedias.

Do—

1. use footnotes to locate relevant primary authority.
2. pull and read primary authority.
3. check pocket parts for recent information.
4. update information found.

Do not—

1. rely on a legal encyclopedia alone as an accurate statement of the law.
2. generally cite to a legal encyclopedia.

EXHIBIT 3-1
Tips on Using Legal Encyclopedias.

Once considered persuasive authority, legal encyclopedias are now considered a research tool, helpful in gaining a general understanding of a topic and locating case citations useful as a basis for further research. Because of the exponential growth of the law and the limits of the legal encyclopedia, topic coverage tends to be general, elemental, and oversimplified. Legal encyclopedias are not designed to put the law into a historical or sociological perspective. An exhaustive and complex treatment of the law would require a much larger set of books. Even with annual supplements, the information in the legal encyclopedia quickly becomes outdated, and the cases cited may be a representative rather than exhaustive reference to all relevant cases.

No longer considered persuasive authority, legal encyclopedias are generally not cited as authority in legal documents. Information gleaned from the legal encyclopedia may be the starting point in the research of a legal problem, but certainly not the conclusion to the research process. A solution offered by the legal encyclopedia may be inapplicable because of the peculiar fact pattern, more recent case law, or applicable statutes or regulations not discussed in the legal encyclopedia.

EXCERPTS FROM A LEGAL ENCYCLOPEDIA

The excerpted pages in Exhibit 3-2 are from the "Searches and Seizures" topic of American Jurisprudence 2d. Exhibit 3-2 contains pages from the hardbound volume. In doing your research, you should check the pocket part supplement to determine if there was any relevant material added since the copyright date of the hardbound volume. The Searches and Seizures topic begins with the notes entitled, "Scope of Topic," "Federal Aspects," "Treated Elsewhere," and "Research References." As might be expected, the first three notes explain what is covered in the topic and give references to other topics in American Jurisprudence that contain related information. "Research references" lists citations to related material in primary and secondary sources.

Legal encyclopedias divide each topic into sections. An outline of section numbers and subjects appears at the beginning of the legal encyclopedia topic. Two outlines precede the topic text. The first is an abbreviated outline and the second is a detailed outline that functions as a table of contents.

Once you locate a relevant topic in the legal encyclopedia, it is a good idea to glance over the table of contents for the topic to determine which sections might answer your question. If you had questions on electronic surveillance and wiretapping, you could start your research by reading §§ 327–468 in Searches and Seizures. (The symbol "§" stands for "section" and two section symbols (§§) stand for "sections." Thus §§ 327–468 means sections 327 through 468.)

The footnotes are quite extensive compared to the text portion. For example, the footnotes on several sample pages cover at least a quarter of those pages.

The index volumes usually refer you to a topic and section number so that you can turn directly to that section. Using index volumes, you may encounter the terms "infra" and "supra." Infra means "below" and is often used to reference information included on an index page located later in the index; supra means "above-mentioned" and is often used to reference information included on an index page located earlier in the index.

USE OF LEGAL ENCYCLOPEDIAS

In summary, legal encyclopedias are best used:

1. To find primary authority; and
2. To give the researcher general background information.

For information on how to make legal encyclopedias a part of your research strategy, see Chapter 7.

SEARCHES AND SEIZURES

by

John R. Kennel, J.D., and Jane E. Lehman, J.D., of the National Legal Research Group, Inc.

Scope of Topic: This article discusses the prohibitions against unreasonable searches and seizures found in the United States Constitution and in various state constitutions, and implemented in various federal and state statutes. In particular, the article will discuss questions regarding the scope or extent of such prohibitions, the requisites for compliance with the constitutional mandate of reasonableness, and the circumstances under which particular searches and seizures have been regarded as satisfying or failing to satisfy the constitutional requirements. The article also includes a discussion of the disposition of property seized and civil and criminal actions based on search and seizure. In addition to a treatment of searches and seizures of property or the person, the article also discusses electronic surveillance and wiretapping, including an examination of what constitutes an interception, the necessity of obtaining a warrant or order, the form and content of an application for an order and the order itself, execution of the order, post-execution procedures, and extensions of orders.

Federal Aspects: The most commonly cited and applied statutory provision concerning searches and seizures is the prohibition of unreasonable searches and seizures contained in the Fourth Amendment to the United States Constitution. The issuance and execution of search warrants in federal criminal cases is governed by Rule 41 of the Federal Rules of Criminal Procedure and several federal statutes. Issues regarding electronic surveillance or wiretapping are in some instances governed by Title III of the Omnibus Crime Control and Safe Streets Act, and in certain other circumstances by the Foreign Intelligence Surveillance Act or the Communications Assistance for Law Enforcement Act. Federal statutes also provide for administrative inspections as a means of enforcing federal statutes regulating food, drugs, and cosmetics, and controlled substances. For USCA citations, see "Federal Legislation," below.

Treated Elsewhere:

Admissibility of evidence of property obtained through search and seizure, or communications intercepted through electronic surveillance, motions to suppress such evidence, and standing to raise such questions, see 29 Am Jur 2d, Evidence §§ 601–625

Aliens' rights respecting searches and seizures, see 3A Am Jur 2d, Aliens and Citizens §§ 98, 113, 114, 139–143; 3B Am Jur 2d, Aliens and Citizens §§ 1547, 1913, 2312–2320, 2384–2386; 3C Am Jur 2d, Aliens and Citizens §2614

Customs searches and seizures, generally, see 21A Am Jur 2d, Customs Duties and Import Regulations §§ 327–357

Debtor's property, seizure under warrant of attachment, see 6 Am Jur 2d, Attachment and Garnishment §§ 1 et seq.

Enemy-owned property, seizure and confiscation in time of war; seizure and capture in naval warfare, see 78 Am Jur 2d, War §§ 43–73, 95–113, 155–158

Forfeiture or destruction of property seized, generally, see 36 Am Jur 2d, Forfeitures and Penalties §§ 1 et seq.

Gambling devices, summary seizure and destruction of, see 38 Am Jur 2d, Gambling §§ 190–195

Beginning of topic

Explains topic coverage

List of related topics

(continues)

EXHIBIT 3-2
Pages from the Searches and Seizures Topic of American Jurisprudence 2d. *(Reprinted with permission of Thomson Reuters/West.)*

EXHIBIT 3-2
(Continued)

SEARCHES AND SEIZURES 68 Am Jur 2D

Inmate or prisoner searches, generally, see 60 Am Jur 2d, Penal and Correctional Institutions §§ 98, 99

Intoxicating liquor and vehicles or other property used in connection therewith, search, seizure, and forfeiture rules applicable to, see 45 Am Jur 2d, Intoxicating Liquors §§ 431–486

Lewd, indecent, or obscene matter, search and seizure rules specifically applicable to, see 50 Am Jur 2d, Lewdness, Indecency, or Obscenity §14

Parolees' rights to be free from unreasonable searches, see 59 Am Jur 2d, Pardon and Parole §94

Shipping laws and regulations, particular rules pertaining to search and seizure of vessels in the enforcement of, see 70 Am Jur 2d, Shipping §§ 120–131

Tax enforcement, seizure or forfeiture of property as means of, see 35 Am Jur 2d, Federal Tax Enforcement §§ 25–37, 90–104

List of other resources a researcher could consult

Research References

Text References:

Burkoff, Search Warrant Law Deskbook

Cook, Constitutional Rights of the Accused (3d ed)

LaFave, Search and Seizure (3d ed)

Ringel, Searches and Seizures, Arrests and Confessions

Torcia, Wharton's Criminal Procedure (13th ed)

8 Federal Procedure, L Ed, Criminal Procedure

Annotation References:

ALR Digest: Search and Seizure

ALR Index: Abandonment of Property or Right; Administrative Law; Arrest; Automobiles and Highway Traffic; Eavesdropping and Wiretapping; Garbage and Refuse; Knock and Announce; Pen Registers; Physical and Mental Examinations; Privacy; Schools and Education; Search and Seizure

Practice References:

Hermann, Search and Seizure Checklists

7 Federal Procedural Forms, L Ed, Criminal Procedure

1A Am Jur Pl & Pr Forms (Rev), Administrative Law; 8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure; 22 Am Jur Pl & Pr Forms (Rev), Searches and Seizures

29 Am Jur Proof of Facts 591, Wiretapping; 30 Am Jur Proof of Facts 113, Electronic Eavesdropping by Concealed Microphone or Microphone-Transmitter; 18 Am Jur POF2d 681, Third Party's Lack of Authority to Consent to Search of Premises or Effects; 26 Am Jur POF2d 465, Consent to Search Given Under Coercive Circumstances

59 Am Jur Trials 79, Driving Under the Influence: Tactical Considerations in Sobriety Checkpoint Cases

Federal Legislation:

U.S. Const. Amend. IV

Fed R Crim P 41 (authority to issue search warrants, property which may be seized thereunder, issuance and contents of warrant, execution and return with inventory, motion for return of property, etc.)

18 USCA §§ 913 (falsely representing oneself as an officer, agent, or employee of the United States and in such assumed character searching the person, buildings, or other property of any person); 2231 (resistance or interference with service or execution of search warrant); 2232 (destruction or removal of property to prevent seizure); 2233 (rescue of seized property); 2234 (exceeding authority in executing search warrant or exercising it with unnecessary severity); 2235 (procuring search

EXHIBIT 3-2
(Continued)

warrant maliciously and without probable cause); 2236 (searches without warrant); 2510–2521 (Title III of Omnibus Crime Control and Safe Streets Act, also known as the Electronic Communications Privacy Act or the Federal Wiretap Act); 3105 (persons authorized to serve search warrant); 3107 (seizures under warrant by Federal Bureau of Investigation) 3109 ("knock and announce" rule governing breaking of doors or windows of house by officer to execute search warrant or to liberate himself or another); 3121, 3112 (installation or use of pen registers or trap and trace device)

21 USCA §§ 374(a) (inspections, by persons designated by Secretary of Department of Health and Human Services, of places where food, drugs, devices, or cosmetics are processed, manufactured, packed, or held); 880(a), (b) (administrative inspections of records, documents, or reports required to be kept by facilities where controlled substances may be lawfully manufactured, distributed, dispensed, or administered)

42 USCA § 1988(b) (award of attorney's fees to prevailing party in civil rights action)

47 USCA §§ 1001 et seq. (Communications Assistance for Law Enforcement Act, governing duty of telecommunications carriers to cooperate in intercepting communications for law enforcement purposes)

50 USCA §§ 1802, 1805 (provisions of Foreign Intelligence Surveillance Act, governing electronic surveillance concerning activities of foreign governments or agents thereof)

Some cases cited herein may be reported only on electronic media. The reader should consult local rules or statutes for any restrictions that may be imposed by a particular jurisdiction on the citation of such cases by parties to litigation.

Table of Parallel References

To convert General Index references to section references in this volume, or to ascertain the disposition (or current equivalent) of sections of articles in the prior edition of this publication, see the Table of Parallel References beginning at p ix.

Outline

Beginning of abbreviated topic outline

(continues)

EXHIBIT 3-2
(Continued)

b. AVAILABLE CAUSES OF ACTION

§ 308. Generally; federal civil rights action
§ 309. Replevin and trespass
§ 310. Mental and emotional distress
§ 311. Seizure of property as compensable taking
§ 312. Malicious prosecution

c. LIABILITY OF PARTICULAR PERSONS

§ 313. Generally; law enforcement officers and agents
§ 314. Private persons
§ 315. Private persons procuring warrants

d. DEFENSES

§ 316. Generally; consent to search
§ 317. —Consent from a third person
§ 318. Acting under authority of warrant
§ 319. —Property damage during search
§ 320. —Qualified immunity
§ 321. —Good faith

2. CRIMINAL ACTIONS

§ 322. Generally; resisting or impeding search
§ 323. Federal statutory offenses concerning resistance to the execution of warrants
§ 324. Contempt
§ 325. Wrongfully causing or conducting search
§ 326. Malicious procurement of warrant; related federal offenses

III. ELECTRONIC SURVEILLANCE; WIRETAPPING

A. IN GENERAL

§ 327. Generally
§ 328. Federal statutes; Federal Wiretap Act
§ 329. —Constitutional challenges
§ 330. —Communications Assistance for Law Enforcement Act
§ 331. State statutes

B. INTERCEPTION

1. COMMUNICATIONS SUBJECT TO INTERCEPTION

§ 332. Generally
§ 333. Under the Federal Wiretap Act
§ 334. Oral communications
§ 335. —Examples
§ 336. Wire communications
§ 337. Electronic communication

Part of detailed topic outline

Beginning of material relevant to electronic surveillance and wiretapping

Sample pages provided for sections 327 and 328

EXHIBIT 3-2
(Continued)

§ 1 SEARCHES AND SEIZURES 68 Am Jur 2d

Abbreviation for American Jurisprudence 2d

2. CRIMINAL ACTIONS

a. IN GENERAL

§ 459. Generally
§ 460. Purpose
§ 461. Validity of statutes
§ 462. Persons who may commit offense

Section of topic

b. ELEMENTS OF OFFENSE

§ 463. Generally; need for willfulness; intent
§ 464. Effect on interstate commerce
§ 465. Interception of communications
§ 466. Disclosure of communication

c. PROSECUTION AND PUNISHMENT

§ 467. Generally; indictment
§ 468. Jury instructions

I. IN GENERAL; FOURTH AMENDMENT [§§ 1–15]

Beginning of topic text

A. Generally [§§ 1-7]

Research References

42 USCA § 1983
ALR Digest: Search and Seizure §§ 1, 2
ALR Index: Privacy; Search and Seizure
40 Am Jur POF3d 237, Government Liability for Liberty or Privacy Deprivation Resulting from Erroneous Information in Agency Records
West Digest, Searches and Seizures 11, 12, 23

§ 1. Generally

Both state and federal constitutional provisions protect individuals from unreasonable searches and seizures,[1] in order to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.[2]

The Fourth Amendment of the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, without

1. State v. Jones, 586 N.W.2d 379 (Iowa 1998); State v. Harris, 590 N.W.2d 90 (Minn. 1999); State v. Smith, 1999 ND 9, 589 N.W.2d 546 (N.D. 1999), cert. denied, 119 S. Ct. 2054, 144 L. Ed. 2d 221 (U.S. 1999); State v. Meyer, 1998 SD 122, 587 N.W.2d 719 (S.D. 1998).

Both the federal and state constitutions protect a person's right to be free from unreasonable searches and seizures by providing generally that a person may be searched only if the search is preceded by probable cause and the issuance of a warrant. State v. Martinson, 581 N.W.2d 846 (Minn. 1998).

As to protection from unreasonable searches, generally, see § 10.

2. In re Patrick Y., 124 Md. App. 604, 723 A.2d 523 (1999), cert. granted, 354 Md. 113, 729 A.2d 404 (1999); Dorwart v. Caraway, 1998 MT 191, 290 Mont. 196, 966 P.2d 1121 (1998), reh'g denied, (Nov. 12, 1998) and cert. denied, 119 S. Ct. 1358, 143 L. Ed. 2d 519 (U.S. 1909); State v. Bridges, 963 S.W.2d 487 (Tenn. 1997).

As to the protection of privacy interests, see § 5.

(continues)

EXHIBIT 3-2
(Continued)

reasonable cause, any other building or property without a search warrant, except when he or she is (a) serving a warrant of arrest; or (b) arresting or attempting to arrest a person committing or attempting to commit an offense in his presence, or who has committed or is suspected on reasonable grounds of having committed a felony; or (c) making a search at the request or invitation, or with the consent, of the occupant of the premises.[21]

In addition, it is a criminal offense to represent oneself falsely to be an officer, agent, or employee of the United States, and in such assumed character to search the person, buildings, or other property of any person.[22]

III. ELECTRONIC SURVEILLANCE; WIRETAPPING [§§ 327–468]

A. IN GENERAL [§§ 327–331]

Research References
18 USCA § 2511; 47 USCA §§ 1001 et seq.
28 CFR §§ 100.1 et seq.
ALR Digest: Telephones § 4
ALR Index: Eavesdropping and Wiretapping
29 Am Jur Proof of Facts 591, Wiretapping §§ 8–14
5 Am Jur Trials 331, Excluding Illegally Obtained Evidence § 2
West Digest, Telecommunications 492

§ 327. Generally

With the possible exception of situations involving the national security,[23] electronic surveillance, such as attaching an electronic listening device to a telephone booth and recording the words of the occupant, constitutes a search and seizure within the meaning of the Fourth Amendment.[24] The Fourth Amendment protects an individual's reasonable expectation of privacy.[25] The test for determining whether a person has a reasonable or justifiable expectation of privacy has two prongs: first, whether the person's conduct exhibits a subjective expectation of privacy, and second, whether the person's subjective expectation of privacy is one that society is willing to recognize as reasonable.[26] Thus, whether warrantless eavesdropping by the police violates the Fourth

21. 18 USCA § 2236.

22. 18 USCA § 913.

23. § 347.

24. Katz v. U.S., 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); People v. Green, 63 Misc. 2d 435, 312 N.Y.S.2d 290 (City Crim. Ct. 1970) (abrogation recognized on other grounds by, People v. Rusciano, 171 Misc. 2d 908, 656 N.Y.S.2d 822 (J. Ct. 1997)).

As to particular methods of electronic surveillance, see §§ 338 et seq.

Law Reviews: Lennon, The Fourth Amendment's prohibitions on encryption limitation: Will 1995 be like "1984"? 58 Albany LR 2:467–508 (1995).

Dery, Remote frisking down to the skin: Government searching technology powerful enough to locate hole in Fourth Amendment fundamentals. 30 Creight LR 2:353 (1997).

Practice References: Search and seizure generally; searches without a warrant. 5 Am Jur Trials 331, Excluding Illegally Obtained Evidence § 2.

25. § 5.

26. U.S. v. McKinnon, 985 F.2d 525 (11th Cir. 1993).

Review footnotes for citations to relevant primary or secondary sources

EXHIBIT 3-2
(Continued)

Amendment depends on whether the defendant had a justified expectation of privacy at the place and time of the communication.[27]

- *Illustration:* Calling a beeper does not violate the Fourth Amendment under any circumstances because there simply is no reasonable expectation of privacy connected with a beeper.[28]
- *Observation:* The Fourth Amendment's protection of persons in their houses from unreasonable searches and seizures includes the right to be free from indiscriminate government video surveillance of the interior of an apartment.[29]

§ 328. Federal statutes; Federal Wiretap Act

The basic statute regulating wiretapping and electronic surveillance is Title III of the Omnibus Crime Control and Safe Streets Act, also known as the Electronic Communications Privacy Act or the Federal Wiretap Act.[30]

- *Observation:* Although the Wiretap Act does not specifically refer to covert entry, the language, structure, and history of the statute indicate that Congress has conferred upon the courts the power to authorize a law enforcement officer's covert entry into private premises to install "bugging" equipment.[31]

The Federal Wiretap Act regulates the interception of "electronic," as well as "wire" and "oral" communication.[32]

§ 329. —Constitutional challenges

Title III of the Omnibus Crime Control and Safe Streets Act is not unconstitutionally vague,[33] nor does it authorize such broad intrusions as to allow the obtaining of testimonial evidence in violation of the Fifth and Fourth Amendments.[34]

The failure of Title III to proscribe unconsented and unannounced entries does not render it unconstitutional,[35] nor does the provision permit an unconstitutional invasion of privacy,[36] or constitute a violation of equal protec-

27. People v. Palmer, 888 P.2d 348 (Colo. Ct. App. 1994), reh'g denied, (May 4, 1995).
As to the grounds for suppressing evidence involving illegal wiretapping and electronic surveillance, see 29 Am Jur 2d, Evidence §§ 609–625.

28. U.S. v. Diaz-Lizaraza, 981 F.2d 1216, 37 Fed. R. Evid. Serv. (LCP) 1095 (11th Cir. 1993).

29. U.S. v. Falls, 34 F.3d 674 (8th Cir. 1994).

30. 18 USCA §§ 2510–2520.
As to the necessity for an order or warrant, generally, see §§ 346 et seq.
As to the applicable rule where one party has consented to the interception, see § 356.

31. Dalia v. U. S., 441 U.S. 238, 99 S. Ct. 1682, 60 L. Ed. 2d 177 (1979).

Practice References: Wiretaps pursuant to statute. 29 Am Jur Proof of Facts 591, Wiretapping §§ 8–14.

32. 18 USCA § 2511.
As to what constitutes an electronic communication, see § 337.

33. U.S. v. Spy Factory, Inc., 951 F. Supp. 450 (S.D.N.Y. 1997), reconsideration denied, 960 F. Supp. 684 (S.D.N.Y. 1997).

34. U. S. v. Sklaroff, 506 F.2d 837 (5th Cir. 1975).

35. U. S. v. Giacalone, 455 F. Supp. 26 (E.D. Mich. 1977).

36. U. S. v. Sklaroff, 323 F. Supp. 296 (S.D. Fla. 1971).

Citation to statutes discussed in Chapter 5

CITATION TIP

Check for Correct Citation Form

Do not assume that the legal citations found when researching are in correct citation form. Citations, even those included in cases, may or may not comply with the citation rules your professor has asked you to use. Always check your citations against the appropriate citation rule for correct form.

CITATION TO LEGAL ENCYCLOPEDIAS

Although legal encyclopedias are not usually cited in documents submitted to court or opposing counsel, you will need to cite legal encyclopedias for assignments and more informal documents such as office memos. (See Chapter 13 for an explanation of the purpose and use of office memos.) Exhibit 3-3 is the citation for sections 327–468 of the American Jurisprudence Searches and Seizures topic. The number "68" is the volume in which sections 327 through 468 are located; "2000" is the copyright year of the volume; 2008 is the year of the pocket part supplement. (Note: American Jurisprudence is now a West publication.) The ampersand ("&") indicates that the material you are referring to was found both in the hardbound volume and the pocket part supplement. The citation should be revised to show only "2000" in the parentheses if the material you are referring to was found only in the hardbound volume. Similarly, the parentheses should contain only "Supp. 2008" if the material you are referring to was found only in the pocket part supplement.

Sections 327–468 of Searches and Seizures discuss electronic surveillance and wiretapping. An analogous discussion is found in sections 215–254 of the Telecommunications topic in Corpus Juris Secundum. Exhibit 3-4 contains the citation to those sections. The number "86" is the volume in which sections 215 through 254 are located; "2006" is the copyright year of the volume; "2008" is the year of the pocket part supplement.

A citation to a state legal encyclopedia would be in similar form except for substituting the abbreviation for the legal encyclopedia used instead of "Am. Jur. 2d" as shown in Exhibit 3-3.

AMERICAN LAW REPORTS

The first major attempt at case reporting as a commercial venture began in the late 1800s. The two major approaches to case reporting were the exhaustive approach and the selective approach. As the names imply, the exhaustive approach undertook to publish all case opinions, from the most significant landmark decisions to the short, and often relatively unimportant, decisions; the selective approach published a limited number of cases selected by the publisher as "leading cases," because of their landmark status or their treatment of a novel or interesting legal issue, and accompanied the selected cases with a commentary, called an

68 Am. Jur. 2d *Searches and Seizures* §§ 327–468 (2000 & Supp. 2008).

EXHIBIT 3-3
Citation to American Jurisprudence. *(Reprinted with permission of Thomson Reuters/West.)*

86 C.J.S. *Telecommunications* §§ 215–254 (2006 & Supp. 2008).

EXHIBIT 3-4
Citation to Corpus Juris Secundum. *(Reprinted with permission of Thomson Reuters/West.)*

"annotation." The annotation explored a particular legal issue in depth and referenced other cases concerning the same issue. The West Publishing Company followed the exhaustive approach. The **American Law Reports Series** ("ALR") typifies the selective approach.

American Law Reports Series
A secondary source that offers useful commentary on selected legal issues, publishes selected cases, and serves as a case finder to locate cases with which one can begin the research process.

The exhaustive approach to case reporting won out over the selective approach, but ALR survived as a valuable research tool. Each ALR volume contains approximately twenty cases, with accompanying annotations. Now the researcher consults ALR most frequently for the annotations and infrequently for the cases it reports. The ALR 6th reflects the diminishing importance of the cases reported and the increasing importance of the case annotations by printing the reported cases at the end of each volume, following the annotations.

American Law Reports, published by West (formerly published by Lawyers Cooperative Publishing), combines case reporter and legal encyclopedia features. This reference series is like reporters in that it contains cases, and the full text of selected cases is included. A case is selected for publication in American Law Reports because it contains an important, novel, or interesting legal issue. American Law Reports are also similar to legal encyclopedias in that they contain textual explanations (called **annotations**) of the law with lengthy footnotes to relevant cases. A case selected for publication in American Law Reports illustrates a legal issue covered in the annotation.

annotation
A note or commentary intended to explain the meaning of a legal issue (as in ALR) or a statutory passage (as in an annotated code).

While legal encyclopedias are designed to provide a comprehensive general treatment of the law, ALR provides a much more detailed and complex treatment of a particular legal issue. An ALR annotation provides a detailed discussion of cases concerning that legal issue from jurisdictions across the country. The cases are analyzed and the annotation is organized to provide a framework for further research of the issue. The researcher should consult the opening sections of the annotation to determine the often-narrow scope of the annotation. Those sections conveniently reference other annotations concerning related issues.

Because its coverage is not comprehensive, the researcher will not always be lucky enough to find an ALR annotation concerning the issue being researched. In those instances when a relevant ALR annotation exists, the annotation can significantly speed one's research by providing an extensive discussion of relevant legal principles, majority and minority rules, and a synthesis of relevant case law. Each annotation represents an extensive study of the development and treatment of a particular issue across the jurisdictions. Where there is no case law from the researcher's jurisdiction, case law from other jurisdictions furnishes persuasive authority.

In addition, the ALR annotation functions as a case-finder, giving citations to cases with which the researcher can start researching to find more cases from a particular jurisdiction.

Exhibit 3-5 shows that there are six series of ALR: ALR, ALR 2d, ALR 3d, ALR 4th, ALR 5th, and ALR 6th. There is another series, ALR Federal, which began in 1969 and focuses on issues arising in federal courts. Prior to 1969, the first through third series of American Law Reports had covered both federal and state material. Since 1969, federal material has been covered in American Law Reports Federal. For state material since 1969, you would consult the third through the sixth series of American Law Reports.

Use the index and digest volumes of American Law Reports to find relevant annotations. Updates to the index and digest volumes are contained in pocket parts. The index also contains an "Annotation History Table," which reveals if an annotation has been supplemented or superceded. An annotation that supplements an earlier annotation should be read together with the earlier annotation. When an annotation supersedes an earlier annotation, only the later annotation should be read.

Exhibit 3-5 also shows how the various American Law Reports are updated. Update the third through the six series and ALR Federal and ALR Federal 2d annotations by consulting pocket parts. Update ALR 2d by consulting the ALR Later Case Service volumes

EXHIBIT 3-5
Series of American Law Reports.

AMERICAN LAW REPORTS		
American Law Reports	(1919–1948)	supplemented by the ALR Bluebook of Supplemental Decisions
American Law Reports 2d	(1948–1965)	supplemented by the ALR Later Case Service volumes and pocket parts
American Law Reports 3d	(1965–1980)	pocket parts
American Law Reports 4th	(1980–1992)	pocket parts
American Law Reports 5th	(1992–2004)	pocket parts
American Law Reports 6th	(2005–present)	pocket parts
American Law Reports Federal	(1992–2004)	pocket parts
American Law Reports Federal 2d	(2005–present)	pocket parts

and the pocket parts to those volumes. Update the first series by consulting the ALR Bluebook of Supplemental Decisions.

ALR format has changed several times with the start of a new series, but the format in ALR 3d, ALR 4th, ALR 5th, ALR 6th, ALR Fed, and ALR Fed 2d is relatively uniform. Hardbound volumes in ALR 3d, ALR 4th, ALR 5th, ALR 6th, ALR Fed, and ALR Fed 2d are annually updated by pocket parts; the annotation in the hardbound volume should be reviewed in tandem with updated information from the pocket part. The researcher can find relevant annotations by searching key words in the ALR Index (covering ALR 2d, ALR 3d, ALR 4th, ALR 5th, ALR 6th, ALR Fed, and ALR Fed 2d). From time to time, an annotation in an earlier ALR series is superceded in a later ALR series.

Unlike the topical arrangement of legal encyclopedias, annotations are published in the order they are written. The legal issues covered by annotations grow with developing case law. Extensive changes in case law may require a new "superceding" annotation. Annotations from one of the earlier series may be consulted for topics with little change.

Occasionally, the researcher may need to consult the first two series of ALR for issues not superceded in a later series. The researcher can find relevant annotations by searching key words in the ALR Index covering ALR and ALR 2d or searching under a relevant topic in the ALR Digest covering ALR and ALR 2d. ALR and ALR 2d are updated by separate volumes, called the "ALR Bluebook" for ALR and "ALR 2d Later Case Service," with accompanying pocket parts, for ALR 2d.

RESEARCH TIP

Use of Hardbound Volumes and Pocket Parts

When researching in-print sources, the researcher must make it a practice to check both the hardbound volume and the pocket part to obtain complete information.

THE STRUCTURE OF AN ALR ANNOTATION

This section describes the structure of an ALR annotation using the annotation in Exhibit 3-6 as an example. Exhibit 3-7 contains the case on which the annotation was based. The annotation is from ALR 6th. Although similar, the format for annotations from ALR 3d, ALR 4th, ALR 6th, ALR Fed, and ALR Fed 2d varies slightly.

EXHIBIT 3-6
Pages of 25 ALR 6th 201. (Reprinted with permission of Thomson Reuters/West.)

25 A.L.R.6th 201

Volume 25 of American Law Reports 6th Series, Page 71

EXPECTATION OF PRIVACY IN TEXT TRANSMISSIONS TO OR FROM PAGER, CELLULAR TELEPHONE, OR OTHER WIRELESS PERSONAL COMMUNICATIONS DEVICE

Title of annotation

by
Robin Miller, J.D.

Author of annotation

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Supreme Court has uniformly held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a "justifiable," "reasonable," or "legitimate" expectation of privacy that has been invaded by government action. Evolving forms of technology have led to the application of this standard to governmental intrusion into the communication of text messages. For example, in Quon v. Arch Wireless Operating Co., Inc., 445 F. Supp. 2d 1116. 25 A.L.R.6th 649 (C.D. Cal. 2006), in which a police officer's usage of the police department's pager system was audited by the department, the court held that the officer had a reasonable expectation of privacy, for purposes of the Fourth Amendment, in the text messages he sent and received over the pager system. This annotation collects and analyzes all the federal and state cases discussing whether a reasonable expectation of privacy exists, for the purpose of the Fourth Amendment or a similar state constitutional provision, in a text message transmitted to or from a pager, cellular telephone, or other wireless personal communications device with text messaging capabilities.

Case Summary

Citation to case annotated

Quon v. Arch Wireless Operating Co., Inc. is fully reported at page 649, infra.

Note indicates that the case on which the annotation is base is reprinted in Volume 25 beginning on page 649

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ARTICLE OUTLINE

Outline of annotation text, which begins on page 211

Coverage of annotation, Summary of annotation

(continues)

EXHIBIT 3-6
(Continued)

B. SEARCH BY GOVERNMENTAL EMPLOYER

§ 8 Expectation of privacy supportable
§ 9 Expectation of privacy not established

ELEVENTH CIRCUIT

Langdon v. U.S., 2007 WL 656460 (M.D. Fla. 2007) — § 5
U.S. v. Jones, 149 Fed. Appx. 954 (11th Cir. 2005) — § 5

DISTRICT OF COLUMBIA CIRCUIT

U.S. v. Jones, 451 F. Supp. 2d 71 (D.D.C. 2006) — § 3

CALIFORNIA

People v. Bullock, 226 Cal. App. 3d 380, 277 Cal. Rptr. 63 (3d Dist. 1990) — §§ 3, 4
People v. Ewell, 2004 WL 944479 (Cal. App. 5th Dist. 2004) — § 7

HAWAII

Haw. Const. art. I, § 6. See § 9
Black v. City & County of Honolulu, 112 F. Supp. 2d 1041 (D. Haw. 2000) Hawaii — § 9

NEW JERSEY

State v. DeLuca, 168 N.J. 626, 775 A.2d 1284 (2001) — §§ 3, 4
State v. DeLuca, 325 N.J. Super. 376, 739 A.2d 455 (App. Div. 1999) — § 3

NEW YORK

People v. Pons, 133 Misc. 2d 1072, 509 N.Y.S.2d 450 (Sup 1986) — § 7

TEXAS

Giles v. State, 1998 WL 704021 (Tex. App. Houston 1st Dist. 1998) — § 5

WASHINGTON

Wash. Rev. Code § 9.73.030. See § 3
State v. Wojtyna, 70 Wash. App. 689. 855 P.2d 315 (Div. 1 1993) — §§ 3, 5

End of Table of Cases, Laws, and Rules
Beginning of annotation text

I. PRELIMINARY MATTERS

§ 1 Scope

This annotation collects and analyzes all the federal and state cases discussing whether a reasonable expectation of privacy exists, for the purpose of the Fourth Amendment or a similar state constitutional provision, in a text message transmitted to or from a pager, cellular telephone, or other wireless personal communications device with text messaging capabilities. A "text message," for the purpose of this annotation, is one that is entered via a keypad rather than spoken into a receiver. The annotation specifically excludes, however,

Explains what annotation covers

EXHIBIT 3-6
(Continued)

communications via computers connected to the Internet, a matter that is addressed elsewhere.[1]

Some opinions discussed in this annotation may be restricted by court rule as to publication and citation in briefs; readers are cautioned to check each case for restrictions. A number of jurisdictions may have rules, regulations, constitutional provisions, or legislative enactments directly bearing upon this subject. These provisions are discussed herein only to the extent and in the form that they are reflected in the court opinions that fall within the scope of this annotation. The reader is consequently advised to consult the appropriate statutory or regulatory compilations to ascertain the current status of all statutes discussed herein.

§ 2 Summary and comment

Summary of annotation

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Supreme Court has uniformly held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a "justifiable," a "reasonable," or a "legitimate" expectation of privacy" that has been invaded by government action. This inquiry normally embraces two discrete questions. The first is whether the individual, by his or her conduct, has exhibited an actual (subjective) expectation of privacy. The second question is whether the individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable.[2]

When these principles have been applied to governmental intrusion into the communication of text messages, the results depend, in part, upon the capacity in which the government is acting. Where the government acts in a law enforcement capacity, the courts are in agreement that a person using a pager, cellular telephone, or other wireless personal communications device with text messaging capabilities has a reasonable expectation of privacy, against a search by law enforcement personnel, in text messages received by and stored on the device (§ 4), even where, at least under the circumstances, the person does not own the device (§ 6). The courts have also been in agreement that a person who sends a text message to a pager or other wireless personal communications device, or a person to whom such a message relates, has no reasonable expectation of privacy, against a search by law enforcement personnel, in text messages.

[1]See Expectation of Privacy in Internet Communications, 92 A.L.R.5th 15.

[2]See Smith v. Maryland, 442 **U.S.** 735, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979).

Each annotation is accompanied by a court opinion, with an issue from the court opinion the subject of the annotation. In ALR 6th, the accompanying court opinion is printed at the end of the volume rather than immediately preceding the annotation as it was in other series. In our example, the first page of the annotation, *Expectation of Privacy in Text Transmissions to or from Pager, Cellular Telephone, or Other Wireless Personal Communications Device*, indicates that the accompanying case, *Quon v. Arch Wireless Operating Co., Inc.*, begins on page 649. The first page also contains an abstract of the annotation.

The following parts precede the body of the annotation text:

Table of Contents

Research References

Index

Table of Cases, Laws, and Rules

EXHIBIT 3-7
First Page of Sample Case from American law Reports. *(Reprinted with permission of Thomson Reuters/West.)*

The annotation concerning this case begins on page 201 of this volume

Title of annotation

SUBJECT OF ANNOTATION

Beginning on page 201

Expectation of Privacy in Text Transmissions to or from Pager, Cellular Telephone, or Other Wireless Personal Communications Device

Jeff QUON, Jerilyn Quon, April Florio, Doreen Klein, and Steve Trujillo, Plaintiffs,
v.

ARCH WIRELESS OPERATING COMPANY, INC.; City of Ontario; Ontario Police Department; Lloyd Scharf, and Debbie Glenn, Defendants.

United States District Court, C.D. California.

Aug. 15, 2006.

Case is published in Federal Supplement and American Law Reports

445 F. Supp. 2d 1116, 25 A.L.R.6th 649

SUMMARY OF DECISION

Case Syllabus

Background: City police department employees, and one employee's wife, sued a wireless communications provider, city, city police department, its chief of police, and a sergeant, asserting federal claims for violations of the Stored Communications Act (SCA) and the Fourth Amendment, and state law claims for violations of the California constitution, the California Penal Code, invasion of privacy, and defamation. The Parties cross–moved for summary judgment.

Holdings: The District Court, Larson, J., held that:

(1) government defendants were not liable under the SCA;
(2) the provider's retrieving for subscribers text messages that had been

The Table of Contents, the Index, and the Table of Cases, Laws, and Rules help the researcher identify and locate relevant sections of the annotation. These parts identify relevant sections by section and subsection number. The Research References aid the researcher in further research by cross-referencing parts of other sources in the law library that could be profitably consulted in further research.

The first two sections of the body of the annotation contain introductory material. Section 1, *Scope*, identifies the issue covered in the annotation. Section 2, *Summary and comment*, briefly summarizes the information covered in the remainder of the annotation. The remainder of the annotation reviews cases concerning the issue that is the subject of the annotation, with the cases being organized around their facts and holdings. For example, for the annotation in Exhibit 3-6, section 4 is entitled *View that person using pager or similar device has reasonable expectation of privacy, against search by law enforcement personnel, in text messages stored on device* and section 5 is entitled *View that person sending message to pager or other device, or person to whom message relates, has no reasonable expectation of privacy, against search by law enforcement personnel, in text messages stored on device.* Thus, section 4 discusses cases finding that a person has a reasonable expectation of privacy in text messages, and section 5 discusses cases finding that a person has no reasonable expectation of privacy in text messages.

USE OF AMERICAN LAW REPORTS

The same cautions given about legal encyclopedias apply to American Law Reports. An annotation is a summary of the law and may not contain enough detail for your research. Be sure to review the cases cited in the annotation rather than relying on the annotation. The emphasis in the annotation is on case law, so do not omit statutory research. Never assume that the cases cited in the annotation—even in the pocket part to the annotation—are the most recent available. Use the cases cited in the annotation as starting points and use citators to locate more recent ones (see Chapter 6).

Do not rely on the annotation as an accurate explanation of the law. The law may have changed since the annotation was written.

Generally, in legal writing, you would not quote from or refer to an ALR annotation because ALR annotations are not the law. They contain only the publisher's interpretation of the law. It is preferable to refer to the primary source itself.

In summary, American Law Reports are best used:

1. To find primary authority; and
2. To give the researcher general background information.

Exhibit 3-8 provides useful tips on utilizing American Law Reports. For information on how to make American Law Reports a part of your research strategy, see Chapter 7.

CITATION TIP

Check for Correct Citation Form

Do not assume that the legal citations found when researching are in correct citation form. Citations, even those included in cases, may or may not comply with the citation rules your professor has asked you to use. Always check your citations against the appropriate citation rule for correct form.

CITATION TO AMERICAN LAW REPORTS

Exhibit 3-9 is the proper citation for the annotation entitled *Expectation of Privacy in Text Transmissions to or from Pager, Cellular Telephone, or Other Wireless Personal Communications Device* beginning on page 201 of volume 25 of American Law Reports Sixth Series, copyright 2007. The first page of the annotation indicates that the author is "Robin Miller, J.D.," with "J.D." an abbreviation for "Juris Doctor," indicating that Robin Miller is an attorney.

Do—

1. use footnotes to locate relevant primary authority.
2. pull and read primary authority.
3. check pocket parts, Later Case Service, or ALR Bluebook for recent information.
4. update information found.

Do not—

1. rely on an American Law Reports annotation alone as an accurate statement of the law.
2. generally cite to American Law Reports.

EXHIBIT 3-8
Tips on Using American Law Reports.

Robin Miller, Annotation, *Expectation of Privacy in Text Transmissions to or from Pager, Cellular Telephone, or Other Wireless Personal Communications Device*, 25 A.L.R. 6th 201 (2007).

EXHIBIT 3-9
American Law Reports Citation.

Notice that the citation begins with the author's name (but omitting J.D.), the word "annotation," followed by the annotation title (either in italics or underlined), followed by the volume, "A.L.R. 6th," followed by the first page of the annotation, followed by the copyright year (in parenthesis). The title of the annotation is fairly descriptive of the scope of the annotation. The case published in American Law Reports, which serves as a springboard for the annotation, is *Quon v. Arch Wireless Operating Co., Inc.*, 445 F. Supp. 2d 1116 (C.D. Cal. 2006).

The citation to an annotation from American Law Reports Federal would be similar in form except for substituting "A.L.R. Fed." for "A.L.R. 6th."

ATTORNEY GENERAL OPINIONS

The United States Attorney General is the chief law enforcement officer of the federal government and heads the United States Department of Justice. The Attorney General is the country's legal representative and gives opinions when requested by the President or heads of departments within the executive branch. **Attorney General opinions** are published in Official Opinions of the Attorneys General, containing opinions beginning with 1789. Few opinions of the Attorney General have been published in recent years. The following is an excerpt from an opinion of the Attorney General.

Attorney General opinions
Legal opinions of the country's legal representative given at the request of the President or heads of departments within the executive branch and concerning the meaning of laws administered by the executive branch.

United States Attorney General

NATIONAL FLAG OF THE UNITED STATES.

May 15, 1925.

The placing of a fringe of the national flag, the dimensions of the flag and the arrangement of the stars in the union are matters of detail not controlled by statute, but are within the discretion of the President as Commander-in-Chief of the Army and Navy.

The desecration or improper use of the national flag outside the District of Columbia has not been made a Federal offense. This matter has been left to the States for action, but should Congress wish to assume such control it has the power under the Constitution to do so.

To the PRESIDENT.
SIR:

I am in receipt of a letter from the late President Harding, dated February 15, 1923, requesting from my predecessor then in office an opinion defining precisely what is the National Flag of the United States, and what official action is proper in order to preserve the flag from desecration. Accompanying this letter is a petition from officers of the Military Order of the Loyal Legion requesting the President to obtain such an opinion.

The only statute now in force which defines the flag or regulates its design is the Act of April 4, 1818, chapter 34 (3 Stat. 415), reenacted as sections 1791 and 1792 of the Revised Statutes of the United States. Section 1791 provides that 'the flag of the United States shall be thirteen horizontal stripes, alternate red and white; and the union of the flag shall be thirty-seven stars, white in a blue field.' Section 1792 provides that 'on the admission of a new State into the Union one star shall be added to the union of the flag; and such addition shall take effect on the fourth day of July then next succeeding such admission. . . . The effect of the two sections is that the number of stars now prescribed is forty-eight (48).

. . .

The Office of Legal Counsel within the United States Department of Justice drafts Attorney General opinions requested by the President and heads of departments within the executive branch. In addition, the Office of Legal Counsel issues written opinions requested by the President's office and various governmental agencies. These opinions are published in the Opinions of the Office of Legal Counsel of the Department of Justice, containing opinions beginning with 1977. The following is an excerpt of an opinion from the Office of Legal Counsel.

OFFICE OF LEGAL COUNSEL
U.S. Department of Justice
Constitutional Law—Fourth Amendment
Interception of Oral Communications—Legality of Television Surveillance in Government Offices
February 2, 1979

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This responds to your request for our opinion concerning the legality of using concealed television cameras for surveillance in buildings owned by or leased to the Government, where the Government officer occupying the particular space has consented to the surveillance.

While existing statutes govern certain aspects of television surveillance, no statute specifically regulates the surveillance for law enforcement purposes. The requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. S 2510 et seq., would apply if a television device intercepts an oral communication 'uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.' 18 U.S.C. S 2510(2). In the area of foreign intelligence and foreign counterintelligence, the recently enacted Foreign Intelligence Surveillance Act of 1978 specifically encompasses television surveillance 'under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.' 50 U.S.C. S 1801(b)(4). That Act generally requires that any such surveillance undertaken for foreign intelligence purposes be authorized by judicial order.

. . .

Each state has an attorney general that performs a similar function as chief law enforcement officer for the state. The state attorneys general also issue written opinions. For example, in 1996, an Illinois state's attorney asked the Illinois Attorney General:

> whether a person in police custody may be deemed to have consented to the recording of his or her conversation, for purposes of the Illinois eavesdropping statutes, when a law enforcement officer notifies the individual that his or her comments are being recorded and places the tape-recorder in full view, and, thereafter, the person continues to make unsolicited comments and statements.

The Illinois Attorney General opined that the person's consent might be inferred from the circumstances.

CITATION TIP

Check for Correct Citation Form

Do not assume that the legal citations found when researching are in correct citation form. Citations, even those included in cases, may or may not comply with the citation rules your professor has asked you to use. Always check your citations against the appropriate citation rule for correct form.

EXHIBIT 3-10
Citations to Opinions of the United States Attorney General and to the Department of Justice's Office of Legal Counsel.

Official Opinions of the Attorneys General of the United States	34 Op. Atty. Gen. 483 (1925).
Opinions of the Office of Legal Counsel of the Department of Justice	3 Op. Off. Legal Counsel 64 (1979).

CITATIONS TO ATTORNEYS GENERAL OPINIONS

Exhibit 3-10 contains sample citations to opinions of the United States Attorneys General and to the Office of Legal Counsel of the Department of Justice.

RESTATEMENTS OF THE LAW

Restatements of the Law
Books published by the American Law Institute that tell what the law in a general area is, how it is changing, and what direction the authors think this change should take.

The American Law Institute publishes ***Restatements of the Law***. The American Law Institute was founded in 1923 to "restate" or, in other words, to summarize major legal principles. Members of the American Law Institute are eminent legal scholars, judges, and attorneys. The American Law Institute aimed:

> To present an orderly restatement of the general common law of the United States, including in that term not only the law developed solely by judicial decision, but also the law that has grown from the application by the courts of statutes that were generally enacted and were in force for many years.

The principles of law in the restatements often summarize the existing law; the principles of law are viewed by some as forward-thinking statements of what an enlightened court would do. Although a secondary source, the restatements have been highly persuasive in many of the cases citing to the restatements.

The following procedure was followed in preparing each restatement. The American Law Institute selected an accepted and well-known authority, called a "reporter," to write a first draft of each restatement. The reporter met with an advisory group of other recognized experts in the field (individually called "advisors") who discussed and made recommendations concerning the draft. The draft was then submitted to the Council of the Institute and submitted for discussion and approval to the members of the Institute at a series of annual meetings.

Restatements have been published in the following specific areas of law:

Topic	Series
Agency	(First, Second, Third)
Conflict of Laws	(First, Second)
Contracts	(First, Second)
Law of the Foreign Relations Law of the U.S.	(First, Second, Third)
Judgments	(First, Second)

Law Governing Lawyers	(First, Second, Third)
Property	(First, Second, Third)
Restitution	(First)
Security	(First)
Suretyship and Guaranty (superceding Security)	(First, Second, Third)
Torts	(First, Second, Third)
Trusts	(First, Second, Third)
Unfair Competition	(First, Second, Third)

Each restatement is divided into chapters, with the chapters divided into sections. The sections are numbered continuously throughout the restatement. Each section first contains a statement of a rule of law. The rule of law is followed by explanatory comments, with some comments followed by illustrations of the application of a comment. Reporter's notes generally follow the comments or are included in an appendix. The notes provide background information on the development of the section. An appendix contains summaries of and citations to cases citing the restatement. Cumulative annual pocket parts and supplements and semiannual interim citations pamphlets update the restatements.

CITATION TIP

Check for Correct Citation Form

Do not assume that the legal citations found when researching are in correct citation form. Citations, even those included in cases, may or may not comply with the citation rules your professor has asked you to use. Always check your citations against the appropriate citation rule for correct form.

CITATIONS TO RESTATEMENTS

Exhibit 3-11 contains sample citations to section 1 of the Restatement (Second) of Contracts. The first citation is to section 1 and the second citation is to the illustration appearing in comment e of section 1.

TREATISES

Treatises are another legal resource. The treatise is a work, often multivolume, generally covering a single field of law and written by one or more legal scholars. The treatise contains text, explaining the field in detail, supported by citation to relevant authority. Like the legal encyclopedia, lengthy footnotes to the treatise text furnish the researcher citations to relevant cases. The treatise treatment of a topic is much more in depth than the treatment

treatises
The treatise is a work, often multivolume, generally covering a single field of law and written by one or more legal scholars. The treatise contains text, explaining the field in detail, supported by citation to relevant authority.

Restatement (Second) of Contracts § 1 (1981).

Restatement (Second) of Contracts § 1 cmt. e, illus. 1 (1981).

EXHIBIT 3-11
Citations to the Restatements.

of the topic in a legal encyclopedia. Some treatises intended for the practitioner may contain relevant forms.

A treatise may be published in hardbound volumes, in looseleaf binders, or in paperbound pamphlets. The treatise usually has a table of contents, an index, and a table of cases. Hardbound treatises are usually updated with pocket parts; looseleaf publications are updated by newsletter-type supplements or by pages to be interfiled amongst the existing pages.

For example, the treatise *Wiretapping & Eavesdropping: Surveillance in the Internet Age (Third Edition)*, written by Clifford S. Fishman and Anne T. McKenna, is published in two looseleaf binders. The treatise is updated annually with new pages and with cumulative paper pamphlet supplements. The new pages are filed among existing pages, often in the place of older pages, which are removed. The cumulative supplements are filed inside the back cover of the second ring binder. Exhibit 3-12 contains two pages from the treatise concerning the statutory definition of "oral communication."

CITATION TIP

Check for Correct Citation Form

Do not assume that the legal citations found when researching are in correct citation form. Citations, even those included in cases, may or may not comply with the citation rules your professor has asked you to use. Always check your citations against the appropriate citation rule for correct form.

EXHIBIT 3-12
Pages from a Treatise.
(Reprinted with permission of Thomson Reuters/West.)

ment investigators, and the penalties for unlawful access, vary widely, depending on how such communications were classified.

However, the USA PATRIOT Act[2] amended the definition of "wire communication" to delete that definition's reference to "electronic storage of [wire] communication[s]."[3] As a result, stored voice mail communications are no longer considered "wire communications"; it is now quite clear that a standard search warrant, rather than a Title III or ECPA interception order, suffices to permit law enforcement officials to obtain such messages.[4] This amendment would have expired on December 31, 2005 unless renewed by Congress.[5] On March 7, 2006, in the "USA PATRIOT Improvement and Reauthorization Act of 2005," Congress made the provision permanent.[6]

Concerning state coverage of stored voice mail, see § 2:10.

III. "ORAL COMMUNICATION"

A. STATUTORY DEFINITION AND CONSTITUTIONAL PRINCIPLES

§ 2:22 Statutory definition of oral communication: 18 U.S.C.A. § 2510(2)

[2]Pub. L. 107-56, § 209, 115 Stat. 272 (2001).

[3]The complete definition is provided in § 2:3.

[4]18 U.S.C. § 2703(a) so provided before enactment of the USA PATRIOT Act; see § 7:47. The amendment eliminates the apparent conflicting language in the definition of "wire communication." See section-by-section analysis of the USA PATRIOT Act released by Senator Patrick Leahy's office, http://www.senate.gov/~200110/102401a.html, 3/4/02, p. 4; Congressional Research Service Report for Congress, Terrorism: Section by Section Analysis of the USA PATRIOT Act, p. 8.

[5]Pub. L. 107-56, § 224(a).

[6]120 Stat. 192, Pub. L. 109-177, § 102(a).

Research References

West's Key Number Digest, Telecommunications 1426, 1428, 1436

18 U.S.C.A. § 2510(2) provides:

> "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication, . . .[1]

The Electronic Communications Privacy Act of 1986 added the language following the comma to make it clear that "an oral communication is one carried by sound waves, not by an electronic medium."[2] Radio communications therefore are not to be analyzed in privacy terms to determine if they are oral communications.[3] Thus, an "oral communication" is a conversation or monologue[4] by, between or among one or more human beings that is unaided by any technology (other than a hearing aid).

It is the nature of the communication, not the means of interception, that governs. Thus, a face-to-face conversation in a car is an oral communication, even if it is intercepted by means of cellular technology that is part of the car's standard equipment.[5]

§ 2:23 Nexus to interstate commerce

Research References

West's Key Number Digest, Telecommunications 1426, 1428, 1436

Issues occasionally arise as to whether Congress has authority to regulate the interception of oral communications under circumstances lacking a nexus to interstate commerce. Such issues are analyzed in § 1:12.

[Section 2:22]

[1]"Electronic communication" is defined in 18 U.S.C.A. § 2510(12). See § 2:131.

[2]Senate Rpt. No. 99-541 at 13, reprinted in 1986 US Code, Cong & Admin News 3555, 3567.

[3]Senate Rpt. No. 99-541 at 13, reprinted in 1986 US Code, Cong & Admin News 3555, 3567. Nevertheless, a few state courts, applying their own substantially identical statutes, have held that the radio transmissions from a cordless telephone are in fact "oral communications." State v. Mozo, 655 So. 2d 1115 (Fla. 1995); State v. Bidinost, 71 Ohio St. 3d 449, 1994-Ohio-465, 644 N.E.2d 318 (1994).

[4]What a person says when she is speaking out loud to herself is an "oral communication," so long as she says it with a reasonable expectation of non-interception.

[5]In re U.S. for an Order Authorizing Roving Interception of Oral Communications, 349 F.3d 1132, 1127-1138 (9th Cir. 2003).

EXHIBIT 3-12
(Continued)

CITATION TO A TREATISE

Exhibit 3-13 contains a sample citation to section 2:22 of the treatise shown in Exhibit 3-12.

LEGAL DICTIONARIES

The two major **legal dictionaries** used in the United States are *Black's Law Dictionary* and *Ballentine's Law Dictionary*. Each is a single volume and provides definitions to legal terms and their pronunciation (if necessary), with citations to relevant case law. Exhibit 3-14 contains the definition of "eavesdropping" from *Black's Law Dictionary*. Exhibit 3-15 contains a sample citation to Exhibit 3-14.

Words and Phrases is a multivolume judicial legal dictionary. It is classified as a judicial legal dictionary because the definitions come from judicial opinions. The defined words and phrases are arranged in alphabetical order, with each word or phrase followed

legal dictionaries
Provide definitions of legal terms and their pronunciation, with citation to relevant case laws. The two major legal dictionaries used in the United States are the *Black's Law Dictionary* and the *Ballentine's Law Dictionary.*

Words and Phrases
A multivolume judicial legal dictionary in which defined words and phrases are arranged in alphabetical order, and each word or phrase is followed by a paragraph summary of the word or phrase as used in a case.

Clifford S. Fishman & Anne T. McKenna, Wiretapping & Eavesdropping: Surveillance in the Internet Age § 2:22 (3d Ed. 2007).

EXHIBIT 3-13
Citation to a Treatise.

EXHIBIT 3-14
Page from Black's Law Dictionary. *(Reprinted with permission of Thomson Reuters/West.)*

required to write a solar easement containing highly detailed, technical information often included in these easements." Sandy F. Kraemer, *Solar Law* 42 (1978).

timber easement. An easement that permits the holder to cut and remove timber from another's property.

easement appurtenant. See EASEMENT.

easement by estoppel. See EASEMENT.

easement by necessity. See EASEMENT.

easement in gross. See EASEMENT.

easement of convenience. See EASEMENT.

easement of natural support. See *lateral support* under SUPPORT.

Easter-offerings. *Eccles. law.* Small sums of money paid as personal tithes to the parochial clergy by the parishioners at Easter. • Under the Recovery of Small Tithes Act (1695), Easter-offerings were recoverable before justices of the peace. St. 7 & 8 Will. 3, ch. 6. — Also termed *Easter-dues.*

Easter sittings. *English law.* A term of court beginning on April 15 of each year and usu. ending on May 8, but sometimes extended to May 13. • This was known until 1875 as *Easter term.* Cf. HILARY SITTINGS; MICHAELMAS SITTING.

East Greenwich (eest **gren**-ich). *Hist.* The name of a royal manor in the county of Kent, England. • Historically, this manor was mentioned in royal grants or patents as descriptive of the tenure of free socage.

East India Company. *Hist.* The company that was originally established to pursue exclusive trade between England and India, and that later became more active in political affairs than in commerce. • In 1858, by the Government of India Act, the government of the company's territories was transferred to the Crown. The company was dissolved in 1874. St. 21 & 22 Vict., ch. 106.

EAT. *abbr.* Earnings after taxes.

eat inde sine die (**ee**-ət **in**-dee **sI**-nee **dI**-ee) [Latin] Let him go thence without day. • These words were used on a defendant's acquittal, or when a prisoner was to be discharged, to signify that the matter be dismissed without any further judicial proceedings. See GO HENCE WITHOUT DAY.

eaves-drip. 1. The dripping of water from the eaves of a house onto adjacent land. **2.** An easement permitting the holder to allow water to drip onto the servient estate. See DRIP RIGHTS; STILLICIDIUM.

eavesdropping. The act of secretly listening to the private conversation of others without their consent. Cf. BUGGING; WIRETAPPING.

ebba et fluctus (**eb**-ə et **flək**-təs), *n.* [Latin "ebb and flow"] *Hist.* The ebb and flow of tide; ebb and flood. • The time of one ebb and flood, plus an additional 40 days, was anciently granted to a person who was excused from court for being beyond seas. See EBB AND FLOW; ESSOIN; BEYOND SEAS.

ebb and flow. The coming in and going out of tide. • This expression was formerly used to denote the limits of admiralty jurisdiction.

ebdomadarius (eb-dom-ə-**dair**-ee-əs), *n.* [Latin "weekly"] *Eccles. law.* An officer in a cathedral church who supervises the regular performance of divine service and prescribes the duties of choir members.

EBIT. *abbr.* Earnings before interest and taxes.

EC. *abbr.* **1.** ETHICAL CONSIDERATION. **2.** European Community. See EUROPEAN UNION.

ecclesia (i-**klee**-z[h]ee-ə), *n.* [Latin "assembly"] **1.** A place of religious worship. **2.** A Christian assembly; a church.

ecclesiarch (i-**klee**-zee-ahrk), *n.* The ruler of a church.

ecclesiastic (i-klee-zee-**as**-tik), *n.* A clergyman; a priest; one consecrated to the service of the church.

ecclesiastical (i-klee-zee-*as*-ti-kəl), *adj.* Of or relating to the church, esp. as an institution. — Also termed *ecclesiastic.*

ecclesiastical authorities. The church's hierarchy, answerable to the Crown, but set apart from the rest of the citizens, responsible for superintending public worship and other religious ceremonies and for administering spiritual counsel and instruction. • In England, the several orders of the clergy are (1) archbishops

EXHIBIT 3-15
Citation to law Dictionary.

Black's Law Dictionary 529 (7th Ed. 1999).

by paragraphs summarizing the way in which the word or phrase was defined in cases. Each summary paragraph ends with the corresponding case citation. *Words and Phrases* is updated by pocket parts. Exhibit 3-16 contains pages from the volume of *Words and Phrases* defining "eavesdropping."

EATING PLACES

Ohio App. 10 Dist. 1995. Proposed restaurant was permitted use under zoning ordinance permitting retail services to include "eating places," despite claim that restaurant was "convenient quick-stop" service violating intent language of ordinance stating purpose of community commercial district at issue, and despite claim that restaurant fell under definition of prohibited "drive-in facility"; intent clause, while serving as guide, could not be construed as prohibition upon language defining permitted uses, and proposed restaurant, which did not include drive-through window, was not "drive-in facility," despite possibility that customers would serve themselves and consume food or beverages in their automobiles. Bexley, Ohio, Ordinance §§ 1244.11, 1252.03(j), 1268.10, 1268.24.—Elbert v. Bexley Planning Comm., 670 N.E.2d 245, 108 Ohio App.3d 59, appeal not allowed 663 N.E.2d 1304, 75 Ohio St.3d 1477.—Zoning 287.

EAVES

Mo.App. 1959. Word "eaves" as used in restriction forbidding erection of any building which, with exception of "eaves," extends closer than 8 feet from property line, means reasonable extensions of roof edges to keep rain from running down exterior sidewalls, and extension or overhang of whole gable end of building is not an "eave" and is in violation of the restriction.—Hanna v. Nowell, 330 S.W.2d 595.—Covenants 51(2).

EAVESDROP

Utah 1978. Where undercover agent consented to procedure whereby the agent's conversation with defendant was transmitted to police officers via an electronic broadcasting unit attached to the agent's body, procedure did not constitute "eavesdropping" for purposes of the statute which defines "eavesdrop" to encompass overhearing, recording or transmitting any part of a communication of another "without the consent of at least one party thereto." (Per Ellett, C. J., with one Justice concurring and two Justices concurring in the result.) U.C.A. 1953, 76–9–401(2).—State v. Boone, 581 P.2d 571.—Tel 1438.

EAVES-DROPPER

Ill. 1966. Term "eavesdropper" in Illinois eavesdropping statute encompasses not only person who participates in operation of eavesdropping device but one who uses or divulges information so obtained. S.H.A. ch. 38, §§ 14–2(b), 14–5.—People v. Maslowsky, 216 N.E.2d 669, 34 Ill.2d 456, appeal dismissed Maslowsky v. Cassidy, 87 S.Ct. 94, 385 U.S. 11, 17 L.Ed.2d 11, rehearing denied 87 S.Ct. 234, 385 U.S. 924, 17 L.Ed.2d 148.—Tel 1440.

N.Y.Sup. 1957. As respects disclosure of confidential information between attorney and witness overheard by third person, an "eaves-dropper" is one who is secretly, a listener to conversation between others, and would include a person who merely overheard communications or conversations between an attorney and client. Penal Law. § 721.—In re Lanza, 163 N.Y.S.2d 576, 6 Misc.2d 411, affirmed 164 N.Y.S.2d 534, 4 A.D.2d 252, appeal denied 166 N.Y.S.2d 302, 4 A.D.2d 831, appeal denied Reuter, Matter of (Cosentino), 3 N.Y.2d 710.—Witn 206.

N.D. 1982. Defendant husband's alleged statement to wife that he had started the fire in question in arson prosecution because of her constant complaints about money was not within husband-wife privilege, in view of fact that the statement was made in presence of third party; husband, who had not made the statement in a low voice, could not have reasonably believed that the statement would not be overheard by such third party, who was seated next to wife in automobile, and the third party, who had not surreptitiously listened in on the conversation, was not an "eavesdropper." Rules of Evid., Rules 504, 504(a), 504 note.—State v. McMorrow, 314 N.W.2d 287.—Witn 193.

Wis. 1889. An "eavesdropper" is one who is secretly a listener to conversations between others, and would include a person who merely overheard communications or conversations between a husband and wife.—Selden v. State, 42 N.W. 218, 74 Wis. 271, 17 Am.St.Rep. 144.

EAVESDROPPING

C.A.6 (Ohio) 1973. There is no "interception" or "eavesdropping" when party to conversation, or third person acting with consent of one of parties to conversation, records that conversation. 18 U.S.C.A. § 2520.—Smith v. Cincinnati Post and Times-Star, 475 F.2d 740, 25 A.L.R. Fed. 755.—Tel 1440.

(continues)

EXHIBIT 3-16
Pages from the Pocket Part Supplement to Volume 14 of *Words and Phrases*. *(Reprinted with permission of Thomson Reuters/West.)*

EXHIBIT 3-16
(Continued)

S.D.N.Y. 1966. There was no "eavesdropping" within meaning of section of New York Penal Law provision that person not present during conversation or discussion, who wilfully and by means of instrument overhears or records such conversation or discussion without consent of party to such conversation or discussion, is guilty of felony, where federal officers, with consent of client, made recordings of conversations between client and defendant attorney in sheriff's office in jail. Penal Law N.Y. §§ 738 and subd. 2, 739.—U.S. v. Kahn, 251 F.Supp. 702.—Tel 1440.

S.D.Ohio 1972. One who was party to telephone conversation was not "eavesdropping" or "wiretapping" when he recorded such conversation. 18 U.S.C.A. §§ 2510(5), (5)(a), 2511(2)(d), 2515.—Smith v. Wunker, 356 F.Supp. 44.—Tel 1440.

Cal.App. 4 Dist. 1989. Although Penal Code sections which prohibit wiretapping and eavesdropping envision and describe the use of same or similar equipment to intercept communications, the manner in which such equipment is used is clearly distinguished and mutually exclusive; "wiretapping" is intercepting communications by an unauthorized connection to the transmission line whereas "eavesdropping" is interception of communications by the use of equipment which is not connected to any transmission line. West's Ann.Cal.Penal Code §§ 631(a), 632(a).—People v. Ratekin, 261 Cal. Rptr. 143, 212 Cal.App.3d 1165, review denied.—Tel 1436.

Colo.App. 1980. Warrantless monitoring of defendant's conversations with her husband, which took place in jail visiting room while husband was confined in county jail, by jail officials did not violate statute requiring prior court authorization in order for a law enforcement officer to lawfully "engage in any wiretapping or eavesdropping," in that definitions of terms "wiretapping" and "eavesdropping" are synonymous with terms "wire communication" and "oral communication" as defined in statute concerning offenses involving communications, and defendant's conversations were not within statutory definition of a "wire communication" since they did not involve facilities of a common carrier, and they were not within statutory definition of an "oral communication" since there was no justifiable expectation of privacy. C.R.S. 1973, 16–15–101, 16–15–102(9, 10), 18–9–301, 18–9–301(8, 9), 18–9–303, 18–9–304, 18–9–304(1)(a), 18–9–305, 18–9–305(4).—People v. Blehm. 623 P.2d 411, 44 Colo.App. 472.—Tel 1462.

Ga.App. 1972. Overhearing of defendant's telephone conversations with another named individual by police officers who were in motel room adjacent to defendant's room did not constitute "eavesdropping" and police officers were not required to seek prior judicial approval for surveillance. Code, §§ 26–3001, 26–3004, 26 3009: 18 U.S.C.A. §§ 2515–2519.— Satterfield v. State, 194 S.E.2d 295. 127 (ia.App. 528. —Tel 1437).

Ill.App. 2 Dist. 1975. Statute proscribing offense of eavesdropping was enacted to protect individual from interception of communication intended to be private: term "eavesdropping" refers to listening to or recording of those oral statements intended by the declarant to be of private nature, and not merely listening to or recording of any oral communication. S.H.A. ch. 38. § 14–1 et seq.—People v. Klingenberg, 339 N.F.2d 456, 34 Ill. App.3d 705.—Tel 1429.

Kan. 1972. Installation or use of an electronic device to record communications transmitted by telephone with consent of person in possession or control of the facilities for such communication does not constitute "eavesdropping" within purview of eavesdropping statute. K.S.A. 21–4001(1)(c).—State v. Wigley, 502 P.2d 819, 210 Kan. 472.—Tel 1440.

N.Y.Sup. 1957. As respects the attorney-client privilege with respect to information obtained by "eavesdropping", such was offense of listening under walls or windows or the caves of a house to harkening after discourse and thereupon frame slanderous and mischievous tales.—In re Lanza. 163 N.Y.S.2d 576, 6 Misc.2d 411, affirmed 164 N.Y.S.2d 534, 4 A.D.2d 252, appeal denied 166 N.Y.S.2d 302, 4 A.D.2d 831, appeal denied Reuter, Matter of (Cosentino), 3 N.Y.2d 710.—Witn 206.

Utah 1978. Where undercover agent consented to procedure whereby the agent's conversation with defendant was transmitted to police officers via an electronic broadcasting

EXHIBIT 3-16
(Continued)

unit attached to the agent's body, procedure did not constitute "eavesdropping" for purposes of the statute which defines "eavesdrop" to encompass overhearing, recording or transmitting any part of a communication of another "without the consent of at least one party thereto." (Per Ellett, C. J., with one Justice concurring and two Justices concurring in the result.) U.C.A. 1953, 76–9–401(2).—State v. Boone. 581 P.2d 571.—Tel 1438.

EAVESDROPPING DEVICE

Ill.App. 1 Dist. 1990. Radio scanner used to overhear mobile telephone conversation was not "eavesdropping device" under Illinois statute making evidence obtained by means of eavesdropping inadmissible in any civil or criminal trial. S.H.A. ch. 38, ¶¶ 14–1(a), 14–2, 14–5.—People v. Wilson, 143 Ill.Dec. 610, 554 N.E.2d 545, 196 Ill. App.3d 997, appeal denied 149 Ill.Dec. 335, 561 N.E.2d 705, 133 Ill.2d 571, dismissal of post-conviction relief affirmed 240 Ill.Dec. 486, 717 N.E.2d 835, 307 Ill.App.3d 140, appeal denied 243 Ill.Dec. 567, 723 N.E.2d 1168, 186 Ill.2d 588, dismissal of habeas corpus affirmed Wilson v. Battles, 302 F.3d 745, rehearing and suggestion for rehearing denied, certiorari denied 123 S.Ct. 1639, 538 U.S. 951, 155 L.Ed.2d 496.—Crim Law 394.3.

Ill.App. 1 Dist. 1987. In determining whether telephone is an "eavesdropping device" for purposes of applying eavesdropping statute, emphasis must be placed on whether telephone used to overhear conversation is capable, while being so used, of performing its ordinary functions of transmitting as well as receiving sound: when telephone cannot transmit sound while it is being used to receive, it is an illegal "eavesdropping device" regardless of method used to prevent such transmission. S.H.A. ch. 38. ¶¶ 14–1, 14–2, 108A–1, 108A–6; S.H.A. Const. Art. 1. § 6.—People v. Shinkle, 112 Ill.Dec. 463, 513 N.E.2d 1072, 160 Ill. App.3d 1043, appeal allowed 115 Ill.Dec. 407, 517 N.E.2d 1093, 117 Ill.2d 551, reversed 132 Ill.Dec. 432, 539 N.E.2d 1238, 128 Ill.2d 480.—Tel 1437.

Ill.App. 1 Dist. 1984. A telephone extension is not an "eavesdropping device" as defined by Illinois law.—People v. Jenkins, 84 Ill.Dec. 118, 471 N.E.2d 647, 128 Ill. App.3d 853, appeal denied.—Tel 1437.

Ill.App. 1 Dist. 1978. A camera is not an "eavesdropping device" within purview of eavesdropping statute because it is not capable of being used to hear or to record conversation. S.H.A. ch. 38. § 14–2.—Cassidy v. American Broadcasting Companies, Inc., 17 Ill.Dec. 936, 377 N.E.2d 126, 60 Ill. App.3d 831.—Tel 1436.

Ill.App. 1 Dist. 1974. Unaided human car listening to a telephone on which a conversation is being conducted does not constitute the use of an "eavesdropping device" within meaning of statute prohibiting the use of eavesdropping devices. S.H.A. ch. 38. §§ 14–1(a), 14–2(a).—People v. Giannopoulos, 314 N.E.2d 237, 20 Ill. App.3d 338.—Tel 1437.

Ill.App. 1 Dist. 1970. Police officer, who obtained defendant's whereabouts by putting his ear to telephone while defendant's girl friend was talking with defendant, was not using an eavesdroppingdevice" within statute excluding evidence

Many digests include *Words and Phrases* volumes. Each word or phrase listed in those volumes is followed by citations to cases in which the word or phrase was defined.

LEGAL DIRECTORIES

The ***Martindale-Hubbell Law Directory*** has been published since 1868. It is an annual multivolume directory of attorneys and law firms, also available on CD-ROM and on the Internet. It provides extensive information on attorneys practicing in the United States and more selective coverage on attorneys and law firms in 160 other countries. Attorneys practicing in the United States are listed by city, with cities listed by state and the states arranged in alphabetical sequence. The directory contains biographical information on the attorneys and information on the law firms, such as representative clients and areas of practice.

Martindale-Hubbell Law Directory
A multivolume book that lists many lawyers by location and type of practice. Other volumes contain summaries of each major area of the law in each state and most foreign countries.

Another feature of the set is the "law digest." The law digest contains brief summaries of the law of all fifty states within the United States and of eighty other countries.

There are numerous other legal directories, including directories of attorneys practicing in a particular field of law or a particular state or region and judicial directories.

FORMBOOKS

Formbooks contain model forms that can be used as a basis in drafting documents. Commercially prepared formbooks may be comprehensive, covering forms usable in a wide range of areas of practice; other commercially prepared formbooks may be state-specific, topic-specific, or both. A law office or individual attorney may have a file of frequently used documents usable as forms.

formbooks
A collection of legal forms with summaries of relevant law and information on how to use the forms.

Multivolume, comprehensive **formbooks** include American Jurisprudence Legal Forms 2d, American Jurisprudence Pleading and Practice Forms Annotated, Fletcher Corporation Forms Annotated, and West's Legal Forms 3d. Formbooks are commonly indexed and checklists accompany many of the forms in formbooks. The careful drafter can use the checklist, modified to fit the particular transaction, to ensure that all relevant provisions are included in the document.

LOOSELEAF SERVICES

Many sources in the law library are updated by pocket parts and pamphlet supplements. **Looseleaf services** present another format that is easily updated. The information in looseleaf services is stored in binders rather than formatted as hardbound volumes and paper pamphlet supplements. The binder format allows easy insertion of new material and removal of outdated material. With some looseleaf services, new material is received weekly.

looseleaf services
A format for some law library sources in which information is stored in binders that allow easy insertion of new material and removal of outdated material.

Looseleaf services are generally of one of two types. One type is newsletter, and the other type is interfiled. With the newsletter format, newsletter pamphlets contain new information. New pamphlets are filed at the end of a division within the binder to supplement pamphlets previously filed. With the interfiled format, new information is printed on individual pages. The individual pages are referenced by paragraph number or are numbered so they can be filed among already-existing pages, often in the place of older pages, which are removed.

The legal sources appearing in looseleaf format include state annotated codes, state administrative codes, formbooks, and services providing a collection of source material in a particular subject area. The looseleaf, subject-specific services typically contain primary and secondary sources. The primary sources might include the text of relevant statutes and administrative regulations and summaries or the text of cases interpreting the statutes and regulations. The secondary sources might include a textual explanation and discussion of the area of law.

Bureau of National Affairs (BNA) and Commerce Clearing House (CCH) are well-known publishers of looseleaf services. BNA publishes United States Law Week. Federal Securities Law Reporter is an example of a CCH publication.

United States Law Week is an example of a newsletter format looseleaf service. Current information is housed in two ring binders. One binder contains the General Law Section and the other binder contains the Supreme Court Section. The General Law Section contains a national survey of current developments in the law and summarizes and analyzes significant court opinions. The Supreme Court Section provides comprehensive coverage of the United States Supreme Court. It allows the researcher to monitor the

status of cases, read the summaries of selected oral arguments before the Court, and read the full text of all United States Supreme Court opinions.

The Federal Securities Law Reports are comprised of eight looseleaf volumes. The material in the volumes includes the text of the Securities Act of 1933 and the Securities Exchange Act of 1934, relevant court decisions, Securities and Exchange Commission (SEC) rulemaking and interpretive releases, SEC administrative decisions, SEC no-action letters, annotations of securities law materials, and explanations of securities law topics.

LEGAL PERIODICALS

Legal periodicals can be a valuable source of information. They differ from other secondary sources in a number of ways. First, as the name implies, they are published periodically and contain articles, usually on a range of different issues and legal developments. The articles generally contain narrative text and citations to relevant primary sources.

There a number of different types of legal periodicals, ranging from law school **law reviews**, to bar association periodicals, to commercial **journals**, to **legal newspapers**.

legal periodicals
Legal periodicals are a secondary source, published periodically, that contain articles, usually on a range of different issues and legal developments. The articles generally contain narrative text and citations to relevant primary sources.

law reviews
A type of legal periodical published by a law school, bar association, or academic organization with articles on legal subjects such as court decisions and legislation.

journals
A type of legal periodical published by a law school, bar association, or academic organization with articles on legal subjects such as court decisions and legislation.

legal newspapers
Legal periodicals that provide information on recent court decisions, changes in the law, legal publications, and other items of interest to the legal community.

LAW SCHOOL LAW REVIEWS

Law reviews are considered by many to be the most prestigious legal periodical and are commonly cited in judicial opinions. Every accredited law school has at least one law review, and many law schools have one or more specialized law reviews focusing on specific subject areas.

Generally, there are three or four issues of a law review published annually. The majority of the issues contain articles on a wide range of topics; other issues may be devoted to a particular topic. Generally, legal scholars, judges, and practitioners author law review articles. The hallmarks of the typical law review article are a textual narrative of a particular issue or legal development and numerous footnotes containing citations to relevant primary and secondary authority. Law reviews also typically contain student notes and comments and book reviews. Student comments resemble law review articles in format, but they may not be regarded as highly as law review articles because of the student authorship. Generally, student notes are shorter than articles and comments and each note usually focuses on a single case or statute.

Law reviews differ from scholarly journals in fields outside law in that they are edited and produced by law school students in their second and third years of study. Generally, student membership on the staff of the law school's primary law review is determined by high grade-point average or writing ability demonstrated through a writing competition. Typically, students in their first year on law review perform tedious tasks, such as checking citations for accuracy. Students in their second year on law review often assume positions as editors.

Exhibit 3-17 contains selected pages from the December 2006 issue of *The Yale Law Journal*. *The Yale Law Journal* is one of the more prestigious law reviews. Exhibit 3-18 contains a sample citation to an article contained in that issue.

BAR ASSOCIATION PERIODICALS

Most national and state bar associations publish bar journals. Many specialized and local bar associations publish bar journals or newsletters. The quality and prestige of the various bar journals varies widely; some are considered fairly scholarly, while others are more practitioner-oriented. The American Bar Association publishes a number of well-respected subject-specific journals. State bar association journals may be a good source of state-specific articles.

EXHIBIT 3-17
Pages from *The Yale Law Journal. (Reprinted with permission of the Yale Law Journal Company, Inc.)*

The Yale Law Journal

VOLUME 116 **DECEMBER 2006** **NUMBER 3**

EXHIBIT 3-17
(Continued)

The Yale Law Journal

MARY SARAH BILDER

The Corporate Origins of Judicial Review

ABSTRACT. This Article argues that the origins of judicial review lie in corporate law. Diverging from standard historical accounts that locate the origins in theories of fundamental law or in the American structure of government, the Article argues that judicial review was the continuation of a longstanding English practice of constraining corporate ordinances by requiring that they be not repugnant to the laws of the nation. This practice of limiting legislation under the standard of repugnancy to the laws of England became applicable to American colonial law. The history of this repugnancy practice explains why the Framers of the Constitution presumed that judges would void legislation repugnant to the Constitution - what is now referred to as judicial review. This history helps to resolve certain debates over the origins of judicial review and also explains why the answer to other controversies over judicial review may not be easily found in the history of the Founding era. The assumption that legislation must not be repugnant to the Constitution produced judicial review, but it did not resolve issues such as departmentalism or judicial supremacy that arose with the continuation of this repugnancy practice after the Constitution.

AUTHOR. Professor of Law, Boston College Law School. My thanks to Bernard Bailyn, Alfred Brophy, Lawrence Cunningham, Michael Dorf, Richard Fallon, Elizabeth Foote, David Mackey, Catherine Patterson, David Seipp, Aviam Soifer, and the participants of the Boston College Faculty Colloquium, the Harvard Law School Legal History Colloquium, and the Yale Legal History Workshop. I also thank Michael Fleming, Nicole Liguori, and Michael Smith for research assistance, and Katic Sosnoff for interlibrary loan assistance. I am grateful to the Boston College Law School Fund for making possible some of this research.

(continues)

EXHIBIT 3-17
(Continued)

ARTICLE CONTENTS

NON-STUDENT-EDITED JOURNALS

In addition to student-edited law reviews, some law schools and academic organizations produce peer-edited journals, each generally devoted to a specific topic. Commercial publishers produce a number of single-topic journals as well.

LEGAL NEWSPAPERS AND NEWSLETTERS

Legal newspapers provide information on recent court decisions, changes in the law, legal publications, and other items of interest to the legal community. Some legal newspapers print recent court opinions. National legal newspapers include the *National Law Journal* and the *American Lawyer*. Local legal newspapers include the *Chicago Lawyer*, the *New Jersey Lawyer*, and the *New York Law Journal*.

Index to Legal Periodicals
A print index used to locate periodicals and law reviews by either subject or author.

Current Law Index
A print index used to locate periodicals.

LEGAL PERIODICAL INDEXES

The ***Index to Legal Periodicals*** and the ***Current Law Index*** are the most widely used print indexes used to locate legal periodicals. The researcher may locate relevant law journal articles online in Westlaw or LexisNexis using key word searches.

DIGESTS

digests
A multivolume set of books that functions as an index, allowing the researcher to locate cases with similar subject matter, facts, and issues as that of the legal problem being researched. Digests contain summaries of cases and references to other research materials, with the case summaries arranged by topic, allowing one to find cases related to a particular legal principle.

The researcher is usually searching for cases containing facts and issues similar to those contained in the legal problem being researched. Finding similar cases would be almost impossible without **digests** or the ability to perform computer-assisted legal research. Digests have an essential role in the research process because of the manner in which

EXHIBIT 3-17
(Continued)

INTRODUCTION

This Article traces a new historical account of the origins of judicial review. It argues that judicial review arose from a longstanding English corporate practice under which a corporation's ordinances were reviewed for repugnancy to the laws of England. This English corporation law subsequently became a transatlantic constitution binding American colonial law by a similar standard of not being repugnant to the laws of England. After the Revolution, this practice of bounded legislation slid inexorably into a constitutional practice, as "the Constitution" replaced "the laws of England." With the Constitution understood to embody the supreme authority of the people, the judiciary would void ordinary legislation repugnant to this supreme law. Over a century later, this practice gained a new name: judicial review. The widespread acceptance of this name eventually obscured the degree to which the origins of the practice lay in older practices regarding the delegated nature of corporate and colonial authorities, rather than in a new constitutional theory of judicial power.

Only on rare occasions do we now think now about judicial review in terms of repugnancy. The word mainly appears in quotations of older court opinions. In 2005, Justice John Paul Stevens declared that "[b]ecause the statute itself is not repugnant to the Constitution . . . , the Court does not have the constitutional authority to invalidate it."[1] A recent opinion piece in the *New York Times* on judicial activism described judicial review as "an act of great delicacy, and only to be performed where the repugnancy is clear'"[2]

Despite the contemporary infrequency of the word, what we think of as "judicial review" was once routinely described in terms of repugnancy. Kent's *Commentaries* used the heading "Laws repugnant to the constitution void" to discuss judicial review.[3] In 1889, almost a century of cases involving judicial review appeared in the *U.S. Reports* under the caption "Cases in Which Statutes or Ordinances Have Been Held To Be Repugnant to the Constitution

[1]United States v. Booker, 543 U.S. 220, 283 (2005) (Stevens, J., dissenting) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

[2]Paul Gewirtz & Chad Golder, *So Who Are the Activists?*, N.Y. Times, July 6, 2005, at A19 (quoting Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 251 (1867)).

[3]1 James Kent, Commentaries on American Law, at xvi, *448 (N.Y., O. Halsted 2d ed. 1832).

Mary Sarah Builder, *The Corporate Origins of Judicial Review*, 116 Yale L.J. 502 (2006).

EXHIBIT 3-18
Citation to a Law Review.

cases are published. Cases are printed in rough chronological order in **reporters**, unorganized by subject matter, facts, or issues. A set of reporters contains no index volume. The case digest is a multivolume set of books that functions as an index, allowing the researcher to locate cases with similar subject matter, facts, and issues as that of the legal problem being researched. Digests contain summaries of cases and references to other research materials. The summaries are called "annotations." The case summaries are arranged by topic and subtopic to allow you to find cases related to a particular legal principle.

reporters
Sets of books containing published court decisions.

Your law library probably contains several sets of digests. Exhibit 3-19 contains a list of many of the most common digests. Usually, a digest set is shelved near the set of reporters with which it is used. As indicated in Exhibit 3-19, West's *American Digest System* covers cases from all state and federal courts. There are two digests covering cases from the United States Supreme Court. The West federal digest series covers cases from various federal courts, including the district courts, courts of appeal, and the United States

EXHIBIT 3-19
Digests.

Digests

West's American Digest System—state and federal courts
Century Digest
Decennial Digests (each covers a five- to ten-year period)
General Digest (updates the latest Decennial Digest)
Digest for United States Supreme Court cases
United States Supreme Court Digest (West)
United States Supreme Court Digest, Lawyers' Edition (LexisNexis)
Federal Courts—(United States Supreme Court, courts of appeals, and district courts) (West)
Federal Digest (through 1939)
Modern Federal Practice Digest (1940–1960)
Federal Practice Digest 2d (1961–1975)
Federal Practice Digest 3d (1975–1983)
Federal Practice Digest 4th (1983–present)
Regional Digests—(West)
Atlantic Digest
North Western Digest
South Eastern Digest
Pacific Digest
State Digests
(West publishes digests for many states)

Supreme Court. Separate sets of digests accompany five of the seven regional reporters. State digests are published for most states. A state digest covers cases from the state courts of a particular state. In addition, there are subject-specific digests. For example, *Bankruptcy Law Digest, Second Edition* would allow the researcher to locate cases concerning issues in bankruptcy law.

Digests are organized by topics, with the topics arranged in alphabetical sequence. The West Key-Number System, the most commonly used arrangement of topics, contains over 400 topics. Other publishers use a similar alphabetical sequencing of topics in their digests. Each topic is further divided into subtopics, with some subtopics divided into sub-subtopics. Each subtopic and sub-subtopic represents a single point of law. Each subtopic and sub-subtopic receives a corresponding number, with a separate number sequence used for each topic. Thus, a topic and a number identify a single point of law. In a West publication, this is commonly referred to as the topic and "key number" because of the key outline preceding the number.

Digests have a number of advantageous as well as limiting characteristics. The extensive number of digest topics makes the digest comprehensive in scope; digests are an essential case-finding tool. The identical West key-number system is used throughout all West publications. The digest is devoid of the case commentary and analysis found in secondary sources; case law analysis and synthesis is left to the researcher. The digest summaries are not primary sources; the digest is a finding tool, and digest material should never be cited to or quoted. The researcher relies on the summary alone at the researcher's peril. Instead, the researcher should read the case itself. The summary may be inaccurate, may take on a different meaning in the context of the entire case, or may have digested dictum rather than the holding of the case. Classification of a summary under a particular digest topic and

number is an arbitrary decision made by the publisher; the text of the opinion supercedes any misleading digest classification. At the same time, an important point of law from a case may have been overlooked by the publisher and lack a corresponding headnote.

WEST KEY NUMBER SYSTEM

The West key number system divides the law into over 400 topics and numerous subtopics within those topics (see Exhibit 3-20 for topics). Each subtopic is assigned a key number. For example, if you were researching the hypothetical problem involving Jennifer Weiss and wanted to find case law interpretation of when a passenger in an automobile that was stopped by police officer can challenge the constitutionality of the traffic stop under the Fourth Amendment, you might look under key number 349(10) of "Automobiles." Notice from the sample page in Exhibit 3-21 that that key number is entitled "What is arrest or seizure; stop distinguished." To refer back to the same key number later, or to give an answer on a research assignment, you need to note both the topic and key number. There is a "key number 349(10)" in many different topics. If you write down just "349(10)" you may not remember that you looked at key number 349(10) of "Automobiles" and if you write down just "Automobiles" you may not remember you looked under key number 349(10). The topics comprising the West key number system are printed inside the cover of each West digest. A table of contents containing the key numbers and titles of subtopics appears at the beginning of each topic of the digest.

LexisNexis publishes digests to accompany reporters such as *United States Supreme Court Reports, Lawyers Edition*, published by LexisNexis. LexisNexis publications use similar topics and subtopics, even though they are not referred to as "key numbers."

The sample pages are from *Federal Practice Digest Fourth Series* (Exhibit 3-21), which contains summaries of federal cases. *Federal Practice Digest Fourth Series* uses the West key number system. This key number system is universal in West publications.

RELATIONSHIP BETWEEN DIGESTS AND REPORTERS

Digests are closely related to case headnotes. Before a case is published in a reporter, an attorney on the publisher's staff prepares a number of short paragraphs, each of which summarizes an important legal principle from the case. Each summary is assigned a corresponding topic and number from the publisher's topic classification scheme. Some summaries that correspond to more than one topic or number can be assigned multiple topics and numbers or multiple numbers within a single topic, or both. The summaries, with their corresponding topics and numbers, are printed as "headnotes" at the beginning of the published opinion. The number of headnotes per case varies based on the length and complexity of the case. Some cases have a single headnote; other cases may have as many as several dozen.

The headnote summaries are reprinted in the digests under the appropriate topic and number. Each summary is followed by its case citation. Thus, in the digest, the topic number is followed by a collection of paragraphs, each relating to the same point of law. The digest is comprised entirely of topic number headings and summary paragraphs reprinted from case headnotes.

DEVELOPMENT OF DIGEST ABSTRACTS

To better understand the digests and their relationship to reporters, this section examines how the digest material is generated. Before a case such as *Brendlin v. California* is published by West, an editor reads it and writes the syllabus (a summary) of the case. This syllabus may be in addition to the syllabus prepared by the official reporter. This is the reason some cases may be preceded by two syllabi. The editor also writes paragraphs, called **headnotes**, summarizing the important principles contained in the case. Each headnote contains one

headnotes
A summary of a case, or of an important legal point made in the cases, placed at the beginning of the case when it is published. A case may have several headnotes.

EXHIBIT 3-20
Topics and Subtopics in the West Key Number System. *(Reprinted with permission of Thomson Reuters/West.)*

DIGEST TOPICS

See, also, Outline of the Law by Seven Main Divisions of Law, Page VII
The topic numbers shown below may be used in Westlaw searches for cases within the topic and within specified key numbers.

1 Abandoned and Lost Property
2 Abatement and Revival
3 Abduction
4 Abortion and Birth Control
5 Absentees
6 Abstracts of Title
7 Accession
8 Accord and Satisfaction
9 Account
10 Account, Action on
11 Account Stated
11A Accountants
12 Acknowledgment
13 Action
14 Action on the Case
15 Adjoining Landowners
15A Administrative Law and Procedure
16 Admiralty
17 Adoption
18 Adulteration
19 Adultery
20 Adverse Possession
21 Affidavits
22 Affray
23 Agriculture
24 Aliens
25 Alteration of Instruments
26 Ambassadors and Consuls
27 Amicus Curiae
28 Animals
29 Annuities
30 Appeal and Error
31 Appearance
33 Arbitration
34 Armed Services
35 Arrest
36 Arson
37 Assault and Battery
38 Assignments
40 Assistance, Writ of
41 Associations
42 Assumpsit, Action of
43 Asylums
44 Attachment
45 Attorney and Client
46 Attorney General
47 Auctions and Auctioneers
48 Audit a Querela
48A Automobiles
48B Aviation
49 Bail
50 Bailment
51 Bankruptcy
52 Banks and Banking
54 Beneficial Associations
55 Bigamy
56 Bills and Notes
57 Blasphemy
58 Bonds
59 Boundaries
60 Bounties
61 Breach of Marriage Promise
62 Breach of the Peace
63 Bribery
64 Bridges
65 Brokers
66 Building and Loan Associations
67 Burglary
68 Canals
69 Cancellation of Instruments
70 Carriers
71 Cemeteries
72 Census
73 Certiorari
74 Champerty and Maintenance
75 Charities
76 Chattel Mortgages
76A Chemical Dependents
76H Children Out-Of-Wedlock
77 Citizens
78 Civil Rights
79 Clerk of Courts
80 Clubs
81 Colleges and Universities
82 Collision
83 Commerce
83H Commodity Futures Trading Regulation
84 Common Lands
85 Common Law
86 Common Scold
88 Compounding Offenses
89 Compromise and Settlement
89A Condominium
90 Confusion of Goods
91 Conspiracy
92 Constitutional Law
92B Consumer Credit
92H Consumer Protection
93 Contempt
95 Contracts
96 Contribution
97 Conversion
98 Convicts
99 Copyrights and Intellectual Property
100 Coroners
101 Corporations
102 Costs
103 Counterfeiting
104 Counties
105 Court Commissioners
106 Courts
107 Covenant, Action of
108 Covenants
108A Credit Reporting Agencies
110 Criminal Law
111 Crops
113 Customs and Usages
114 Customs Duties
115 Damages
116 Dead Bodies
117 Death
117G Debt, Action of
117T Debtor and Creditor
118A Declatory Judgment
119 Dedication

EXHIBIT 3-20
(Continued)

120 Deeds
122a Deposits and Escrows
123 Deposits in Court
124 Descent and Distribution
125 Detectives
126 Detinue
129 Disorderly Conduct
130 Disorderly House
131 District and Prosecuting Attorneys
132 District of Columbia
133 Disturbance of Public Assemblage
134 Divorce
135 Domicile
136 Dower and Curtesy
137 Drains
138 Drugs and Narcotics
140 Dueling
141 Easements
142 Ejectment
143 Election of Remedies
144 Elections
145 Electricity
146 Embezzlement
147 Embracery
148 Eminent Domain
148A Employers' Liability
149 Entry, Writ of
150 Equity
151 Escape
152 Escheat
154 Estates in Property
156 Estoppel
157 Evidence
158 Exceptions, Bill of
159 Exchange of Property
160 Exchanges
161 Execution
162 Executors and Administrators
163 Exemptions
164 Explosives
165 Extortion and Threats
166 Extradition and Detainers
167 Factors
168 False Imprisonment
169 False Personation
170 False Pretenses
170A Federal Civil Procedure
170B Federal Courts
171 Fences
172 Ferries
174 Fines
175 Fires
176 Fish
177 Fixtures
178 Food
179 Forcible Entry and Detainer
180 Forfeitures
181 Forgery
182 Fornication
183 Franchises
184 Fraud
185 Frauds, Statute of
186 Fraudulent Conveyances
187 Game
188 Gaming
189 Garnishment
190 Gas
191 Gifts
192 Good Will
193 Grand Jury
195 Guaranty
196 Guardian and Ward
197 Habeas Corpus
198 Hawkers and Peddlers
199 Health and Environment
200 Highways
201 Holidays
202 Homestead
203 Homicide
204 Hospitals
205 Husband and Wife
205H Implied and Constructive Contracts
206 Improvements
207 Incest
208 Indemnity
209 Indians
210 Indictments and Information
211 Infants
212 Injunction
213 Innkeepers
216 Inspection
217 Insurance
218 Insurrection and Sedition
219 Interest
220 Internal Revenue
221 International Law
222 Interpleader
223 Intoxicating Liquors
224 Joint Adventures
225 Joint-Stock Companies and Business Trusts
226 Joint Tenancy
227 Judges
228 Judgment
229 Judicial Sales
230 Jury
231 Justices of the Peace
232 Kidnapping
232A Labor Relations
233 Landlord and Tenant
234 Larceny
235 Levees and Flood Control
236 Lewdness
237 Libel and Slander
238 Licenses
239 Liens
240 Life Estates
241 Limitations of Actions
242 Lis Pendens
245 Logs and Logging
246 Lost Instruments
247 Lotteries
248 Malicious Mischief
249 Malicious Prosecution
250 Mandamus
251 Manufactures
252 Maritime Liens
253 Marriage
255 Master and Servant
256 Mayhem
257 Mechanics Liens
257A Mental Health
258A Military Justice
259 Militia
260 Mines and Minerals
261 Miscegenation
265 Monopolies
266 Mortgages
267 Motions
268 Municipal Corporations
269 Names
270 Navigable Waters
271 Ne Exeat
272 Negligence

(continues)

EXHIBIT 3-20
(Continued)

273 Neutrality Laws
274 Newspapers
275 New Trial
276 Notaries
277 Notice
278 Novation
279 Nuisance
280 Oath
281 Obscenity
282 Obstructing Justice
283 Officers and Public Employees
284 Pardon and Parole
285 Parent and Child
286 Parliamentary Law
287 Parties
288 Partition
289 Partnership
290 Party Walls
291 Patents
292 Paupers
294 Payment
295 Penalties
296 Pensions
297 Perjury
298 Perpetuities
299 Physicians and Surgeons
300 Pilots
301 Piracy
302 Pleading
303 Pledges
304 Poisons
305 Possessory Warrant
306 Post Office
307 Powers
307A Pretrial Procedure
308 Principal and Agent
309 Principal and Surety
310 Prisons
311 Private Roads
312 Prize Fighting
313 Process
313A Products Liability
314 Prohibition
315 Property
316 Prostitution
316A Public Contracts
317 Public Lands
317A Public Utilities
318 Quieting Title
319 Quo Warranto
320 Railroads
321 Rape
322 Real Actions
323 Receivers
324 Receiving Stolen Goods
325 Recognizances
326 Records
327 Reference
328 Reformation of Instruments
330 Registers of Deeds
331 Release
332 Religious Societies
333 Remainders
334 Removal of Cases
335 Replevin
336 Reports
337 Rescue
338 Reversions
339 Review
340 Rewards
341 Riot
342 Robbery
343 Sales
344 Salvage
345 Schools
346 Scire Facias
347 Seals
348 Seaman
349 Searches and Seizures
349A Secured Transactions
349B Securities Regulation
350 Seduction
351 Sequestration
352 Set-Off and Counterclaim
353 Sheriffs and Constables
354 Shipping
355 Signatures
356 Slaves
356A Social Security and Public Welfare
357 Sodomy
358 Specific Performance
359 Spendthrifts
360 States
361 Statutes
362 Steam
363 Stipulations
365 Submission of Controversy
366 Subrogation
367 Subscriptions
368 Suicide
369 Sunday
370 Supersedeas
371 Taxation
372 Telecommunications
373 Tenancy in Common
374 Tender
375 Territories
376 Theaters and Shows
378 Time
379 Torts
380 Towage
381 Towns
382 Trade Regulation
384 Treason
385 Treaties
386 Trespass
387 Trespass to Try Title
388 Trial
389 Trover and Conversion
390 Trusts
391 Turnpikes and Toll Roads
392 Undertakings
393 United States
394 United States Magistrates
395 United States Marshals
396 Unlawful Assembly
396A Urban Railroads
398 Usury
399 Vagrancy
400 Vendor and Purchaser
401 Venue
402 War and National Emergency
403 Warehousemen
401 Waste
405 Waters and Water Courses
406 Weapons
407 Weights and Measures
408 Wharves
409 Wills
410 Witnesses
411 Woods and Forests
413 Workers' Compensation
414 Zoning and Planning

EXHIBIT 3-21
Sample Page from *Federal Practice Digest Fourth Series.* *(Reprinted with permission of Thomson Reuters/West.)*

Citation to *Brendlin V. California*

Same wording as headnote from *Brendlin V. California* (Chapter 4)

349(8) AUTOMOBILES

alcoholic beverage coming from the vehicle, and upon a pat-down search of motorist's clothing, pushed officer's hand away and reached inside his jacket pocket. U.S.C.A. Const.Amend. 4.—Strepka v. Sailors, 494 F.Supp.2d 1209.

D.Puerto Rico 2007. Reasonable suspicion justified investigatory stop of pickup truck driven by defendant, where officers had observed truck proceed through red traffic light, and, after instructing driver to pull over, learned via radio that license plate was classified as "lost"; fact that traffic ticket for running red light was not written until truck, defendant and police reached police department's stolen vehicles facility did not negate reasonable suspicion. U.S.C.A. Const.Amend. 4.—U.S. v. Garcia-Robledo, 488 F.Supp.2d 50.

Probable cause supported warrantless arrest, for vehicle theft, of driver of pickup truck stopped for running red light, based on police officer's learning that truck had "lost" license plate number, fact that truck was not registered under driver's name, indications that vehicle registration obtained from driver was false or altered, including use of obsolete duty stamp and impossible date, and confirmation that vehicle identification number (VIN) had stolen vehicle lien or hold. U.S.C.A. Const.Amend. 4.—Id.

349(9).—— Roadblock, checkpoint, or routine or random stop.

D.Kan. 2007. Trooper did not violate defendant's equal protection rights by deciding to stop his truck, and subsequently deciding to detain him for questioning, despite claim of racial profiling, where there was no evidence that defendant's race played any part in trooper's decisions; defendant initially stopped at checklane on his own volition, stop was justified in any case by trooper's desire to do a commercial truck check, and fact that defendant was asked to exit truck and enter scale house with his papers was a normal incident of, such a check. U.S.C.A. Const.Amend. 14.—U.S. v. Mercado-Nava, 486 F.Supp.2d 1271.

349(10).——What is arrest or seizure; stop distinguished.

U.S.Cal. 2007. In Fourth Amendment terms, a traffic stop entails a "seizure" of the driver even though the purpose of the stop is limited and the resulting detention quite brief. U.S.C.A. Const.Amend. 4.—Brendlin v. California, 127 S.Ct. 2400, 168 L.Ed.2d 132.

Passenger of automobile that was pulled over by police officer for traffic stop was "seized" under the Fourth Amendment from moment automobile came to hall on roadside and, therefore, was entitled to challenge constitutionality of traffic stop; any reasonable passenger would have understood police officers to be exercising control to point that no one in the automobile was free to depart without police permission; abrogating *People v. Jackson*, 39 P.3d 1174; *State v. Mendez*, 137 Wash.2d 208, 970 P.2d 722. U.S.C.A. Const.Amend. 4.—Id.

349(14).——Conduct of arrest, stop, or inquiry.

See 349(14.1).

349(14.1).——In general.

†**C.A.11 (Ga.) 2007**. Canine sniff of drug defendant's vehicle was lawful, where officers had objectively reasonable basis to stop defendant's vehicle.—U.S. v. Terry, 220 Fed.Appx. 961.

†**C.A.4 (S.C.) 2007**. Stop of driver for running red light was not effectuated with unreasonable force when officers ordered defendant out of car at gunpoint and frisked him, considering time of day, defendant's behavior, and fact that shots had been fired in vicinity. U.S.C.A. Const.Amend. 4.—U.S. v. Miller, 221 Fed.Appx. 248.

D.Colo. 2007. Under the two-part inquiry for determining the constitutionality of a traffic stop, the court first determines whether the stop was justified at its inception, then it determines whether the officer's actions during the detention were reasonably related in scope to the circumstances which justified the interference in the first place. U.S.C.A. Const.Amend. 4.—Strepka v. Sailors, 494 F.Supp.2d 1209.

349(16).——Ordering occupants out of vehicle.

†**C.A.5 (Tex.) 2007**. Police officer's actions in ordering defendant out of his vehicle to respond to questioning unrelated to speeding violation did not exceed scope of permissible traffic stop; officer had reasonable suspicion based on articulable

(continues)

EXHIBIT 3-21
(Continued)

facts that defendant was involved in drug trafficking, after officer's suspicions were aroused by the "roaring noise" emanating from the vehicle's dashboard, defendant's shaking hand and nervousness, a recently issued insurance certificate, the discrepancy between the addresses on defendant's license and the insurance certificate, defendant's averting his eyes when asked if he carried contraband, and the fact that defendant was driving a known drug-courier route. U.S.C.A. Const.Amend. 4.—U.S. v. Sanchez, 225 Fed.Appx. 288.

349(17).——Detention, and length and character thereof.

†**C.A.11 (Ala.) 2007**. For purposes of § 1983 claim brought by motorist against state trooper, state trooper had reasonable suspicion to detain motorist during traffic stop for 43 minutes to wait for canine unit to arrive; after pulling motorist over, trooper ran a check of the driver's license that motorist had provided, a Florida license listing an Alabama address, and learned that motorist also had a current Alabama driver's license as well as a prior drug arrest, and, further, motorist evaded trooper's question about whether he had a prior arrest for a drug offense. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.—Morris v. Dean, 223 Fed.Appx. 937.

†**C.A.10 (Colo.) 2007**. Officer developed particularized and objective reasonable suspicion of criminal activity during lawful traffic stop, justifying continued detention of driver after return of driver's paperwork and issuance of citation for excessively tinted windows, where driver and his passenger gave inconsistent answers to officer's questions regarding their destination. U.S.C.A. Const.Amend. 4.—U.S. v. Martinez, 230 Fed.Appx. 808.

Detention of lawfully stopped driver was not unlawfully prolonged by investigation on part of police officer unrelated to purpose of stop, where stop was occasioned by officer's observation that vehicle's windows appeared to be tinted to degree greater than that allowed by state law, and upon stopping vehicle, officer obtained driver's license, registration, and insurance papers, ran status of license and vehicle's registration, measured tint level of vehicle's window, and discussed with driver and passenger their travel plans, and completed writing citation as he did so. U.S.C.A. Const.Amend. 4.—Id.

†**C.A.11 (Fla.) 2007**. Delay between lawful traffic stop and canine sniff of stopped vehicle was reasonable and did not violate driver's Fourth Amendment right to be free from unlawful search and seizure, where backup officer with canine arrived approximately four or five minutes into stop, while officer who made stop was still writing.

†This Case was not selected for publication in the National Reporter System

legal principle. After completing the annotations, the editor assigns each one to one or more topics and key numbers. *Brendlin v. California* has six headnotes (Exhibit 4-5). Headnotes 1 through 3 and 6 were assigned the topic "Arrest" and key number 68(4). In addition, headnotes 4 and 5 were assigned the topic "Automobiles" and key number 349(10). (See the sample digest page in Exhibit 3-21, which demonstrates how case headnotes are reproduced as digest paragraphs under the relevant topic.)

Each summary paragraph from a headnote of *Brendlin v. California* is reprinted in a digest under the topic and key number to which it has been assigned. Because *Brendlin v. California* was decided by a federal court, the headnotes from *Brendlin v. California* will be reprinted in *Federal Practice Digest Fourth Series* (the latest series of the digest set covering federal courts). For example, the following summary paragraph from headnote 5 will be reprinted under the topic "Automobiles," key number 349(10):

> Passenger of automobile that was pulled over by police officer for traffic stop was "seized" under the Fourth Amendment from moment automobile came to halt on roadside and, therefore, was entitled to challenge constitutionality of traffic stop; any

reasonable passenger would have understood police officers to be exercising control to point that no one in the automobile was free to depart without police permission; abrogating *People v. Jackson*, 39 P.3d 1174; *State v. Mendez*, 137 Wash.2d 208, 970 P.2d 722. U.S.C.A. Const.Amend. 4.

DIGEST PAGE FORMAT

Examine the format for digest paragraphs using the sample page. Exhibit 3-21 shows a sample page from the topic "Automobiles," key numbers 349(9), 349(10), 349(14), 349(14.1), 349(16), and 349(17), in the *Federal Practice Digest Fourth Series*. This portion of the automobiles topic concerns traffic stops, and key number 349(10) is entitled "What is arrest or seizure; stop distinguished." Under each key number on the sample page, you see case summary paragraphs, with two case summary paragraphs from *Brendlin v. California* under key number 349(10). Where a key number is followed by a number of case summaries from various levels of courts, case summaries from the highest court come first; then, case summaries from other courts are arranged in descending order. If under key number 349(10) there were a number of case summaries besides the two case summaries for *Brendlin v. California*, summaries from *Brendlin v. California* would come first, followed by paragraph summaries from the federal courts of appeals, followed by paragraph summaries from the federal district courts. Also, the summaries of cases of a particular court are arranged with the most current one first (reverse chronological order). The abbreviation in bold type at the beginning of the case summary identifies the court and the year of the decision. For example, **U.S.Cal. 2007** indentifies that *Brendlin v. California* was decided by the United States Supreme Court, and the case originated in California. Notice the three case summaries following key number 349(14.1); **C.A.11 (Ga.) 2007** identifies a 2007 case originating from Georgia decided by the United States Court of Appeals for the Eleventh Circuit, **C.A.4 (S.C.) 2007** identifies a 2007 case originating from South Carolina decided by the United States Court of Appeals for the Fourth Circuit, and **D.Colo. 2007** identifies a case summary from a case decided by a United States district court, with the case originating from Colorado. The material in bold is followed by the case summary, and the case summary is followed by the case citation.

The two case summaries under key number 349(10) are reprints of the summary paragraphs from headnotes 4 and 5 of *Brendlin v. California*. The wording contained in those paragraphs is identical to the wording in headnotes 4 and 5. The first summary paragraph is followed by the citation to *Brendlin v. California*. "*Id.*" at the end of following case summary paragraph means that the case citation is identical to the immediately preceding case citation. In other words, this references the citation to *Brendlin v. California*.

TYPES OF DIGESTS

The *Federal Practice Digest Fourth Series* sampled in Exhibit 3-21 is just one of many digests published. A list of digests and their coverage appears in Figure 3-19. When choosing which digest to use, pick the one that will give you results the quickest. The West *American Digest System* (comprised of the *Century Digest*, *Decennial Digests*, and the *General Digest*) is the most comprehensive digest, covering state and federal cases since 1658.

United States Supreme Court Digest, Lawyers' Edition covers United States Supreme Court cases. A note on *United States Supreme Court Digest, Lawyers' Edition* (L. Ed.): Because this digest is published by LexisNexis, it does not use the West key number system. It does use a similar classification system with topics and subtopics.

The *Federal Practice Digest Fourth Series* covers federal cases.

West's *California Digest* is an example of a state digest. It covers California cases.

FINDING RELEVANT MATERIAL IN DIGESTS

How would you choose which digest to consult? Look at a few examples. If you wanted to find a United States Supreme Court opinion, you could consult the West *American Digest System*, West's *United States Supreme Court Digest*, *Federal Practice Digest*, or *United States Supreme Court Digest, Lawyers' Edition*. *United States Supreme Court Digest, Federal Practice Digest*, or *United States Supreme Court Digest, Lawyers' Edition* would be your preferred choices because these digests are considerably less massive than the West *American Digest System*. If you wanted to find a United States circuit court opinion, you could consult the West *American Digest System* or *Federal Practice Digest*. Your choice would be *Federal Practice Digest* rather than the West *American Digest System* because *Federal Practice Digest* contains only federal court case summaries. If you wanted to find a Supreme Court of California opinion, you could consult the West *American Digest System* or *California Digest*. Your choice would be *California Digest* rather than the West *American Digest System* because *California Digest* contains only California case summaries.

Currency is important in using digests. Digests are published in series. Each hardbound volume of the digest is annually updated with a cumulative pamphlet, generally referred to as a "pocket part." The pocket part is inserted inside the back cover of the volume for easy reference and the pamphlet from the prior year is discarded; the pocket part contains headnote summaries from cases decided after the publication of the hardbound volume. Over time, the information for the annual pocket part supplement becomes too voluminous to be easily stored inside the volume's back cover; the information is printed in a separate paperbound volume, shelved next to the hardbound volume. Paperbound supplementary pamphlets update the pocket parts. The pamphlets are updated by digest paragraphs found in any later hardbound volumes or advance sheets of the applicable reporter. The researcher should consult both the hardbound volume and the supplements.

RESEARCH TIP

Use of Hardbound Volumes and Pocket Parts

When researching in-print sources, the researcher must make it a practice to check both the hardbound volume and the pocket part to obtain complete information.

At the time this chapter was being written, neither the hardbound volume nor the pocket part from West's *Federal Practice Digest Fourth Series* contained information on *Brendlin v. California*. The Exhibit 3-21 sample page was from the October 2007 pamphlet supplementing the 2007 pocket parts.

The copyright date of the hardbound volumes varies greatly. Volumes are recompiled and reprinted from time to time to incorporate new material and eliminate out-of-date information; volumes containing topics frequently referenced in cases are reprinted more frequently than other volumes.

Start your digest research with the most recent series. If there are no case summaries printed for the digest subtopic you are researching, look in the prior series. For example, if you are looking for a traffic stop case from a United States circuit court, you would start with *Federal Practice Digest Fourth Series*. Review the "Automobiles" topic in the hardbound volume, the pocket part to the volume, any available supplement pamphlet, and any later hardbound volumes or advance sheets of the applicable reporter. For summaries of earlier cases, consult a prior series of the digest.

Exhibit 3-22 contains some basic tips on digest use.

Do—

1. use citations to locate relevant primary authority.
2. pull and read primary authority.
3. check pocket parts for recent information.
4. update information found.

Never—

1. rely on a digest entry as an accurate summary of a case.
2. cite to or quote from digests.

EXHIBIT 3-22
Tips on Using Digests.

USING DIGESTS TO FIND CASES

There are three basic approaches to finding cases using a digest. They are:

1. Using a digest topic and number from a known case;
2. Using the digest subject indexes; and
3. Using a digest topic outline.

The first approach allows you to use a known case and its headnotes to find other cases with similar facts or issues. You might have a case that contains facts or issues similar to those contained in the legal problem you are researching. To find more cases with similar facts or issues, look for the corresponding headnote. Use the topic and number from that headnote and locate case summaries under the same topic and number in the digest. Once you find the case on point, determine the topic and key number from the case that are relevant to your search. Then look at the topic and key number in the digests. Cases concerning the same legal principle are grouped together under the same topic and key number.

The second approach requires you to use the digest's indexes, located at the end of the digest set. Identified as "Descriptive-Word Indexes" in West publications, these indexes are nothing more than subject indexes. The indexes supply a topic and key number when you look up key words in the indexes. Using key words from your legal problem, you can locate relevant digest topics and numbers. In brainstorming to find key words, you may consider the following case elements suggested by West:

1. the *parties* involved;
2. the *places* where the facts arose, and the *objects* or *things* involved;
3. the *acts* or *omissions* that form the *basis of action* or *issue*;
4. the *defense* to the action or issue; and
5. the *relief* sought.

A similar set of elements was suggested by Lawyers Cooperative Publishing Company (now part of West):

1. the *things* involved in the case;
2. the *acts* involved in the case;
3. the *persons* involved in the case; and
4. the *places* where the facts arose.

The third approach requires you to use digest topic outlines. If you know a topic relevant to your problem, look at the table of contents at the beginning of the topic. From the titles of the subtopics, identify relevant key numbers to research. Each digest topic in the hardbound volumes begins with two outlines. The first is an abbreviated topic outline,

and the second is a detailed topic outline. If you are fairly certain that a particular topic is relevant to the legal problem you are researching, you can review the topic outline for relevant topic numbers. Once you locate relevant topic numbers, review summaries following the relevant topic numbers.

TABLES OF CASES, DEFENDANT-PLAINTIFF TABLES, AND WORDS AND PHRASES INDEX

You may have a case name and know that a particular court decided the case but have no other citation information. Each set of digests has volumes toward the end of the set marked "Table of Cases" and "Defendant-Plaintiff Table." A Table of Cases volume lists cases alphabetically by the first-named party. Each case listing provides the corresponding case citation. The Defendant-Plaintiff Table volume lists cases alphabetically by the first-named opposing party (defendant, respondent, or appellee). Each case listing provides the corresponding citation.

If there is a particular term that is important to your research, you can look up the term in the *Words and Phrases* index located at the end of the digests. This index will give you citations to cases defining that term.

SUMMARY

- Legal encyclopedias can be used as secondary authority and as finding tools.
- *Corpus Juris Secundum* and *American Jurisprudence 2d* are the two most widely used national encyclopedias. There may also be a legal encyclopedia for the law of your state.
- Legal encyclopedias contain a textual explanation of hundreds of legal topics, with the explanation heavily footnoted to give citations to relevant primary authority.
- Legal encyclopedias are best used to find primary authority and to give the researcher general background information.
- *American Law Reports* annotations contain selected cases, accompanied by a textual explanation (called an *annotation*) of the law with lengthy footnotes to relevant cases.
- *American Law Reports* are best used to find primary authority and to give the researcher general background information.
- *Restatements of the Law*, another secondary source, summarize major common law legal principles.
- Other secondary sources include treatises, legal dictionaries, legal directories, formbooks, legal periodicals, law review articles, legal thesaurium, continuing education publications, and restatements.
- Digests are finding tools that contain case summaries and references to other research materials.
- Digests serve as indexes to cases and allow the researcher to locate relevant cases.
- When using digests, try to use the digest set that is most specific to the type of cases you are trying to find: a United States Supreme Court digest for cases from that court, a federal digest for cases from any of the federal courts, your state's digest for cases from your state, etc.
- Legal encyclopedias, digests, and other law books are updated by annual pocket parts and by paperbound supplementary pamphlets.

KEY TERMS

American Jurisprudence 2d
American Law Reports Series
annotations
Attorney General opinions
Corpus Juris Secundum
Current Law Index
digests
formbooks
headnotes
Index to Legal Periodicals
journals
law reviews
legal dictionaries
legal encyclopedias
legal newspapers
legal periodicals
looseleaf services
Martindale-Hubbell Law Directory
pocket part
reporters
Restatements of the Law
treatises
Words and Phrases

CYBERLAW EXERCISES

1. The homepage for *Martindale-Hubbell* is located at ‹http://www.martindale.com/›. Use the home page to learn more about the publication.
2. *The National Law Journal* is available online at ‹http://www.nlj.com›. Locate *The National Law Journal* and read a few of the current articles.
3. West ‹http://west.thomson.com› produces numerous series standard to the law library. Browse through the online bookstore to learn information on the company's publications. The online bookstore includes pictures of many of the publications.
4. Many law journals are available on-line by accessing ‹http://www.lawreview.org/›. Access a few of the journals.
5. Legal news is accessible at ‹http://LegalNews.FindLaw.com›. Read a few of the news items.
6. Information concerning Bureau of National Affairs publications is available at ‹http://www.bna.com›. Review the information on a few of the BNA's products.
7. The Practicing Law Institute home page is located at ‹http://www.pli.edu›. Read about the history of the Practicing Law Institute.
8. TruTV (formerly CourtTV) is located at ‹http://trutv.com›. Review the offerings of TruTV.
9. Court TV news coverage can be accessed at ‹http://cnn.com/crime›. Review the offerings of TruTV news.

LEGAL RESEARCH ASSIGNMENT—LEGAL ENCYCLOPEDIAS

1. Answer the following questions concerning legal encyclopedias:
   a. What are the names of the two most widely used national legal encyclopedias?
   b. What are the common abbreviations for those names?
   c. What is the legal encyclopedia for your state?
   d. What is the common abbreviation for the name of that encyclopedia?
   e. What type of authority is a legal encyclopedia?
   f. Is it proper to cite to a legal encyclopedia in legal writing? Why or why not?
2. Using *Corpus Juris Secundum* or *American Jurisprudence*:
   a. What is the definition of "abuse of process"?
   b. What is the correct citation for your answer?
3. Using *Corpus Juris Secundum* or *American Jurisprudence*:
   a. Does a landowner have any duty to an adjoining landowner?
   b. What is the correct citation for your answer?
4. Using *Corpus Juris Secundum* or *American Jurisprudence*:
   a. What is an *amicus curiae* and what purpose does an *amicus curiae* serve?
   b. What is the correct citation for your answer?
5. Using *Corpus Juris Secundum* or *American Jurisprudence*:
   a. What is the purpose of a *writ of certiorari*?
   b. What is the correct citation for your answer?

6. Using *Corpus Juris Secundum* or *American Jurisprudence*:
   a. When does a conflict of law question arise?
   b. What is the correct citation for your answer?
7. Using *Corpus Juris Secundum* or *American Jurisprudence*:
   a. May a legislature authorize a government to take a landowner's property under the government's eminent domain power without payment?
   b. What is the correct citation for your answer?
8. Using *Corpus Juris Secundum* or *American Jurisprudence*:
   a. How have some jurisdictions regulated fortunetelling?
   b. What is the correct citation for your answer?
9. Using *Corpus Juris Secundum* or *American Jurisprudence*:
   a. What is the basis for suing for malicious prosecution?
   b. What is the correct citation for your answer?
10. Using *Corpus Juris Secundum* or *American Jurisprudence*:
    a. What is the definition of an "Act of God"?
    b. What is the correct citation for your answer?
11. Using *Corpus Juris Secundum* or *American Jurisprudence*:
    a. What is the difference between a couple having their marriage annulled and a couple divorcing?
    b. What is the correct citation for your answer?
12. Using *Corpus Juris Secundum* or *American Jurisprudence*:
    a. May a state require an attorney to be a member of the state bar association as a condition for practicing law in the state?
    b. What is the correct citation for your answer?
13. Using *Corpus Juris Secundum* or *American Jurisprudence*:
    a. What is the difference between bribery and extortion?
    b. What is the correct citation for your answer?
14. Using *Corpus Juris Secundum* or *American Jurisprudence*:
    a. What is a burglary?
    b. What is the correct citation for your answer?
15. Using *Corpus Juris Secundum* or *American Jurisprudence*:
    a. Is information obtained from an individual's census report admissible in a lawsuit?
    b. What is the correct citation for your answer?
16. Using *Corpus Juris Secundum* or *American Jurisprudence*:
    a. Where an individual has been charged with criminal conspiracy, can the individual escape liability by proving that the individual was not at the scene of the crime when the crime was committed? Why or why not?
    b. What is the correct citation for your answer?
17. Using *Corpus Juris Secundum* or *American Jurisprudence*:
    a. What must be proved to hold someone liable for embezzlement?
    b. What is the correct citation for your answer?
18. Using *Corpus Juris Secundum* or *American Jurisprudence*:
    a. How does embezzlement differ from larceny?
    b. What is the correct citation for your answer?
19. Using *Corpus Juris Secundum* or *American Jurisprudence*:
    a. Is it permissible for the government to take real property under its eminent domain power where a private individual benefits from the taking?
    b. What is the correct citation for your answer?
20. Using *Corpus Juris Secundum* or *American Jurisprudence*:
    a. What differentiates libel from slander?
    b. What is the correct citation for your answer?
21. Using *Corpus Juris Secundum* or *American Jurisprudence*:
    a. What presumption is raised by the doctrine of *res ipsa loquitur*?
    b. What is the correct citation for your answer?
22. Using *Corpus Juris Secundum* or *American Jurisprudence*:
    a. What are the elements of perjury?
    b. What is the correct citation for your answer?
23. Using *Corpus Juris Secundum* or *American Jurisprudence*:
    a. What is the difference between a crime and a tort?
    b. What is the correct citation for your answer?
24. Using *Corpus Juris Secundum* or *American Jurisprudence*:
    a. What is an alibi, as used in criminal law?
    b. What is the correct citation for your answer?
25. Using *Corpus Juris Secundum* or *American Jurisprudence*:
    a. How was arson defined at common law?
    b. What is the correct citation for your answer?

26. Using *Corpus Juris Secundum* or *American Jurisprudence*:
    a. What effect does disbarment or suspension have on an attorney?
    b. What is the correct citation for your answer?
27. Using *Corpus Juris Secundum* or *American Jurisprudence*:
    a. What is the difference between "venue" and "jurisdiction"?
    b. What is the correct citation for your answer?
28. Using *Corpus Juris Secundum* or *American Jurisprudence*:
    a. What does Chapter 7 of the Bankruptcy Code deal with?
    b. What is the correct citation for your answer?
29. Using *Corpus Juris Secundum* or *American Jurisprudence*:
    a. What is the doctrine of *stare decisis*?
    b. What is the correct citation for your answer?
30. Using *Corpus Juris Secundum* or *American Jurisprudence*:
    a. What is an injunction?
    b. What is the correct citation for your answer?
31. Using *Corpus Juris Secundum* or *American Jurisprudence*:
    a. What is a quiet title action?
    b. What is the correct citation for your answer?
32. Using *Corpus Juris Secundum* or *American Jurisprudence*:
    a. Who owns wild animals?
    b. What is the correct citation for your answer?
33. Using *Corpus Juris Secundum* or *American Jurisprudence*:
    a. What is the judicial system in the District of Columbia?
    b. What is the correct citation for your answer?
34. Using *Corpus Juris Secundum* or *American Jurisprudence*:
    a. What is the general duty of a grand jury?
    b. What is the correct citation for your answer?
35. Using *Corpus Juris Secundum* or *American Jurisprudence*:
    a. What remedy does *habeas corpus* furnish?
    b. What is the correct citation for your answer?
36. Using *American Jurisprudence*:
    a. What are the reasons that the inscription "In God We Trust" on United States currency does not violate the First Amendment?
    b. What is the correct citation for your answer?
37. Using *Corpus Juris Secundum* or *American Jurisprudence*:
    a. What is the difference between a unilateral and a bilateral contract?
    b. What is the correct citation for your answer?
38. Using *American Jurisprudence*:
    a. How long is a passport valid?
    b. What is the correct citation for your answer?
39. Using your state's legal encyclopedia:
    a. What are the ways in which your state constitution may be amended?
    b. What is the correct citation for your answer?
40. Using your state's legal encyclopedia:
    a. What are the names of your state's trial and intermediate appellate courts and court of last resort?
    b. What is the correct citation for your answer?
41. Using your state's legal encyclopedia:
    a. How many years must a person have been a member of the state bar to be a justice on your state's highest court?
    b. What is the correct citation for your answer?
42. Using your state's legal encyclopedia:
    a. How many legislators comprise your state's legislature?
    b. What is the correct citation for your answer?
43. Using your state's legal encyclopedia:
    a. How long is the term for which someone can be elected as a legislator to your state's legislature?
    b. What is the correct citation for your answer?

LEGAL RESEARCH ASSIGNMENT—AMERICAN LAW REPORTS

1. a. What is the citation to the annotation located at 34 A.L.R.6th 1?
   b. What is the citation to the case on which the annotation was based? (Cite to regional reporter only.)
   c. As stated in the case, what statement did Lopez make to the officer?
   d. In that case, was Lopez subjected to custodial interrogation prior to making his statement and why or why not?

2. a. What is the citation to the annotation located at 34 A.L.R.6th 171?
   b. What is the citation to the case on which the annotation was based? (Cite to regional reporter only.)
   c. In that case, what did the court hold?
3. a. What is the citation to the annotation located at 34 A.L.R.6th 253?
   b. What is the citation to the case on which the annotation was based? (Cite to regional reporter only.)
   c. What does "authentication" of a document mean?
   d. What are several ways of authenticating an email message?
4. a. What is the citation to the annotation located at 120 A.L.R.5th 195?
   b. What is the citation to the case on which the annotation was based?
   c. In that case, what did the court hold?
5. a. What is the citation to the annotation located at 120 A.L.R.5th 337?
   b. What is the scope of this annotation?
   c. What is the citation to a related annotation discussing the constitutionality of secret video surveillance?
6. a. What is the citation to the annotation located at 120 A.L.R.5th 483?
   b. Can a dentist hold an individual liable for defamation if the individual expresses dissatisfaction with the dentist's treatment or states that the dentist made one mistake?
   c. What are seven types of comments that have been the basis of a defamation lawsuit brought by a dentist?
7. a. What is the citation of the annotation located at 119 A.L.R.5th 1?
   b. What three rights have courts recognized with respect to prisoners in private prisons?
8. a. What is the citation to the annotation discussing whether a court can consider the amount or packaging of money to determine if the money is forfeitable because it was connected to illegal drugs?
   b. What is the connection between the amount of money and illegal drugs?
   c. What is the citation to the case on which the annotation was based? (Cite to the regional reporter only.)
   d. In that case, how was the money packaged and why did the packaging of the money indicate that it had been connected to illegal drugs?
9. a. What is the citation to the annotation discussing the basis for closing the courtroom or excluding certain individuals during a criminal trial to protect a witness other than an undercover police officer?
   b. What are the four prongs of the *Waller* test?
   c. What are four reasons to close the courtroom or exclude individuals?
   d. What should the defense attorney do when the prosecution moves to exclude individuals or close the courtroom?
10. a. What is the citation to the annotation discussing the proof, alternatives, and scope of the court's determination to close the courtroom or exclude certain individuals during a criminal trial to protect a witness other than an undercover police officer?
    b. What are five basises for closing the courtroom or excluding certain individuals?
    c. What is the citation to the case on which the annotation was based? (Cite to regional reporter only.)
    d. In the case, who was excluded from the trial and why did the appellate court find that the standard for exclusion had not been met?
11. a. What is the citation to the annotations discussing whether the court may be closed to the public during a criminal trial to protect a witness who is an undercover police officer?
    b. What role does the undercover police officer play with respect to an investigation that would justify closing the courtroom to protect the safety of the officer?
    c. What is the citation to the case on which the annotation was based? (Cite to regional reporter only.)
    d. In that case, what was the nature of the testimony of the officer during the *Hinton* hearing that justified the court in closing the courtroom during the officer's testimony at trial?
12. a. What is the citation to the annotation discussing whether a bystander may recover for emotional distress where the bystander witnessed a product cause another person's injury?
    b. What are the three theories under which the bystander has recovered?
    c. What are six reasons courts have used for rejecting a bystander's claim?
13. a. What is the citation to the annotation discussing whether a municipality must provide police protection against crime?
    b. Generally, must a municipality provide police protection against crime to a particular individual?

c. What are four ways in which a "special relationship" may arise?
d. In what two ways may a "special relationship" arise due to the victim's status?

14. a. What is the citation to the annotation discussing whether a tower or antenna constitutes a nuisance?
b. What must be shown for a tower or antenna to constitute a nuisance?
c. What four types of towers have courts considered in nuisance lawsuits?

15. a. What is the citation to the annotation discussing whether a successor judge has the power to decide a civil case?
b. What generally is the power of the successor judge?
c. What are three exceptions to the general prohibition on the successor judge deciding the case where the predecessor judge had heard evidence but had not made findings of fact or conclusions of law?

16. a. What is the citation to the annotation discussing whether a doctor is liable for a patient's suicide?
b. Does tort law impose a duty to prevent someone from committing suicide, and what is the basis for imposing liability on a doctor?
c. What are the two circumstances in which a doctor may be held liable?

17. a. What is the citation to the annotation discussing whether police reports are admissible as business records in state court?
b. What is the common law rule concerning the admissibility of business records?
c. What five problems with trustworthiness have courts found concerning police reports?

18. a. What is the citation to the annotation discussing tolling of the statute of limitations in legal malpractice actions?
b. What is the most common occurrence that tolls the statute of limitations?
c. What is the continuous representation doctrine?

19. a. What is the citation to the annotation discussing expert testimony as to the cause of a fire?
b. What were the reasons for disallowing the testimony of an expert in the older cases?
c. Once the expert has been qualified in the modern cases, what are the three bases for challenging the expert's opinion as to the cause of the fire?

20. a. What is the title of the annotation located at 62 A.L.R.5th 219?
b. What is the citation to the case on which the annotation was based?
c. In that case, what did the court hold?

21. a. What is the title of the annotation located at 62 A.L.R.5th 1?
b. What is the scope of this annotation?
c. What is the citation to a related annotation discussing surveillance of a fitting room as an invasion of privacy?

22. a. What is the title of the annotation located at 62 A.L.R.5th 475?
b. What are four grounds on which the owner has been held liable?
c. What are two affirmative defenses to the owner's liability?

23. a. What is the citation to the annotation discussing the tort liability of public schools and institutions of higher learning for accidents occurring during school athletic events?
b. What is the scope of the annotation?
c. What are the citations to two related annotations discussing tort liability of schools for accidents occurring in physical education classes and during cheerleading activities?

24. a. What is the citation to the annotation discussing the defense of an inconsequential violation in criminal prosecution?
b. What does *de minimus non curat lex* mean?
c. What factors have courts looked to in applying the principle?

25. a. What is the citation to the annotation discussing the regulation of exposure of female, but not male, breasts?
b. What is the basis in the United States Constitution for challenging this type of regulation?
c. What is the reasoning for concluding that this type of regulation does not violate the Constitution?

26. a. What is the citation to the annotation discussing a custodial parent's homosexual or lesbian relationship with a third person as justifying modification of child custody order?
b. What is the ground for modifying an original custody order?
c. Who bears the burden of proof in a proceeding to modify custody?

27. a. What is the citation to the annotation discussing whether an individual has a reasonable expectation of privacy in a tent or campsite?

b. What two factors have courts considered in determining whether a person has a reasonable expectation of privacy?

28. a. What is the citation to the annotation discussing the validity and construction of a statute or ordinance requiring installation of automatic sprinklers?
    b. Have the provisions generally been upheld?
    c. What did the court hold in *Third & Catalina Assocs. v. City of Phoenix*?

29. a. What is the citation to the annotation discussing homicide based on the killing of an unborn child?
    b. Is this the first annotation discussing this topic?
    c. What is the common law rule concerning this topic?

30. a. What is the citation to the annotation discussing the liability of a vendor for food or beverage spilled on the customer?
    b. What happened to the customer in the vast majority of lawsuits concerning this topic?
    c. In the McDonald's coffee case, how much did the jury award in compensatory and punitive damages?

31. a. What is the citation to the annotation discussing the liability of an owner or operator of self-service filling station for injury or death of a patron?
    b. What is the key for imposing liability upon an owner or operator?

32. a. What is the citation to the annotation discussing the conveyance of real property with reference to a tree or similar monument as giving title to the center thereof?
    b. Why is the issue a serious one?

33. a. What is the citation to the annotation discussing liability for injury inflicted by a horse, dog, or other domestic animal exhibited at show?
    b. What is the citation to the case on which the annotation was based?
    c. What were the facts in the case, and what did the court decide?

34. a. What is the citation to the annotation discussing when the statute of limitations begins to run upon an action against an attorney for legal malpractice where there were deliberate wrongful acts or omissions?
    b. On what theories does a client's lawsuit against the attorney to turn over money sound either in contract or tort?
    c. Why is the distinction between a contract action and a tort action significant?

35. a. What is the citation to the annotation discussing the police surveillance privilege?
    b. What is the privilege, and what are the reasons for the privilege?
    c. What are the interests in favor of nondisclosure, and what are the interests in favor of disclosure?

36. a. What is the citation to the annotation discussing the propriety of a probation condition exposing the defendant to public shame or ridicule?
    b. What provisions of the United States Constitution have been used to challenge this type of probation condition?
    c. What are four particular probation conditions that have been the subject of examination?

37. a. What is the citation to the annotation discussing what constitutes obstructing or resisting an officer, in the absence of actual force?
    b. What is the citation of the case that is the basis for the annotation?
    c. What were the facts in the case, and what did the court decide?

38. a. What is the citation of the annotation discussing insurance coverage for sexual contact with patients by physicians?
    b. Using the annotation from (a), what is the scope of the annotation?

LEGAL RESEARCH ASSIGNMENT—DIGESTS

For questions 2 through 34, use West's *Federal Practice Digest Fourth Series*.

Note: Because proper case citation form is not covered until the next chapter, where a question calls for a citation, write the citation as you find it in the digest.

1. Answer the following questions concerning digests:
    a. What is the name of the most current West digest you would use to research cases from federal courts?
    b. What is the name of the most current digest you would use to research cases from state courts of your state?

2. Give the *citation* to the 2008 case from the United States District Court for the Northern District of California in which the court found that the Humane Methods Slaughter Act did not cover poultry as livestock.
3. Give the *citation* to the 2008 case from the United States District Court for the District of Maine in which a customer operating a motorized cart was injured when turkey boxes fell from pallet.
4. Give the *citation* to the 2008 case from the United States Court of Appeals for the Second Circuit in which the court determined whether the Interstate Commerce Act preempted New York City's requirement that all tow trucks be licensed.
5. Give the *citation* to the 2008 case from the United States District Court for the Western District of New York in which the court found that a tractor lessee's negligence action against the lessor was barred by the Graves Amendment because the brakes were operating within acceptable limits and the trailor was grossly overloaded.
6. Give the *citation* to the 2008 case from the United States Court of Appeals for the Eleventh Circuit in which the court determined that under Georgia law a suspect could not recover for injuries sustained when the officer in pursuit applied the patrol car's push bumper to the suspect's vehicle.
7. Give the *citation* to the 2008 case from the United States District Court for the District of Maryland in which the court determined whether an employee was operating within the scope of her dutied while shopping after hours on the way to a conference.
8. Give the *citation* to the 2008 case from the United States District Court for the Southern District of Florida in which the court determined that the cruise ship operator did not have a duty to warn passengers who had disembarked from the cruise ship of the danger of riding dune buggies.
9. Give the *citation* to the 2008 case from the United States District Court for the Middle District of Georgia in which the court determined that it was a "perjury trap" for the government to call a witness to testify before a grand jury with the intention of prosecuting the witness later for perjury.
10. Give the *citation* to the 2008 case from the United States District Court for the District of Massachusetts in which the court determined that the post office could ban someone collecting signatures to put his name on the ballot from doing so on the paved area leading from the public sidewalk to the post office.
11. Give the *citation* to the 2008 case from the United States Court of Appeals for the Seventh Circuit in which the court determined that forner government employees who engineered the hiring of political cronies to civil service positions could be prosecuted for mail fraud.
12. Give the *citation* to the 2008 case from the United States Court of Appeals for the Fourth Circuit in which the court determined that a mail carrier could be convicted of desertion of the mail where the carrier left a tub of mail on a stoop and a quantity of undelivered mail was found in the carrier's locker.
13. Give the *citation* to the 2008 case from the United States Court of Appeals for the Tenth Circuit in which the court determined that a railroad line in an industrial park services businesses within the park was a spur line not subject to the Surface Transportation Board.
14. Give the *citation* to the 2008 case from the United States District Court for the Eastern District of New York in which the court found that a tug boat could recover a salvage fee where the tug boat operator witnessed a Staten Island ferry collide at fourteen to sixteen knots per hour, killing eleven people and injuring others.
15. Give the *citation* to the 2002 case from the United States District Court for the Southern District of Texas in which the court found that it had jurisdiction over a longshoreman's admiralty lawsuit based on injuries he allegedly received when concrete fell on his head and neck while unloading a barge.
16. Give the *citation* to the 2000 case from the United States District Court for the Southern District of New York in which the court found that the fact that one party to a contract mutilated the contract had the effect of terminating the party's right of performance by the other party but did not terminate the contract.
17. Give the *citation* to the 2003 United States Court of Appeals for the Seventh Circuit case in which the

court refused to allow state legislative leaders and the telecommunications union to file *amicus curiae* briefs because the briefs would cover the same materials covered by the parties in their briefs and the parties were adequately represented.

18. Give the *citation* to the 2004 United States Court of Appeals for the Eighth Circuit case in which the court found that the defendant could be convicted under the Church Arson Prevention Act, where defendant's calls to synagogues, in which he threatened to burn them, did affect interstate commerce.
19. Give the *citation* to the 2004 United States Court of Appeals for the Fourth Circuit case in which government employees could be convicted of solicitation of bribery where the condition of hiring the contractor was that the contractor hire one of the employees at a $125,000 salary.
20. Give the *citation* to the 2000 United States Court of Appeals for the Ninth Circuit case in which the court decided that the evidence of one fingerprint from the inside of a windowpane from a window six feet from the ground and located in a gated yard was sufficient for defendant's burglary conviction.
21. Give the *citation* to the 2003 United States Court of Appeals for the Eleventh Circuit case in which the court found that the court clerk's seal, which contained an outline of stone tablets representing the ten commandments, did not violate the Establishment Clause.
22. Give the *citation* to the 2000 case from the United States District Court for the Middle District of Pennsylvania in which the court granted the inmate's request that the coroner not perform an autopsy following the inmate's execution, where the inmate's religious beliefs precluded an autopsy.
23. Give the *citation* to the 1997 United States District Court case from the Northern District of California in which the court found that a forty-eight-hour search by hospital and coroner for next of kin of a Danish tourist who had suffered fatal injuries, before harvesting organs of the tourist, was reasonable and did not give rise to a negligent search claim on part of the tourist's parents.
24. Give the *citation* to the 1992 United States District Court case from the District of South Carolina in which the court found that there was no violation of South Carolina blue law in service station leases requiring dealers to operate twenty-four hours a day, where dealers did not oppose working on Sunday but, rather, opposed being forced to operate during unprofitable hours.
25. Give the *citation* to the 1998 United States Court of Appeals for the Seventh Circuit case in which the court found that the common law rule that Sunday is dies non juridicus means only that judicial acts performed on Sunday are void; the rule has nothing to do with the validity of contracts or the deadlines for performing them, unless the performance required by the contract is the commencement of legal proceedings on a day on which the relevant court is not open.
26. Give the *citation* to the 1992 United States District Court case from the Southern District of New York in which the court found that the section of the New York Penal Law directed at vagrants, providing that a person is guilty of loitering when he loiters, remains, or wanders about in a public place with a purpose of begging violates the First Amendment.
27. Give the *citation* to the 1994 United States District Court case from the Northern District of Texas in which the court found that ordinances directed at vagrants that criminalized removal of waste from receptacles and coercive solicitation did not impermissibly punish homeless persons for mere status of homelessness, rather than conduct.
28. Give the *citation* to the 1994 United States Ninth Court of Appeals case in which the court found that aircraft owners' refusal to hand over log books that had been removed from seized aircraft did not constitute offense of "forcible rescue" where log books were not in the government's possession during the refusal.
29. Give the *citation* to the 1994 United States District Court case from the Eastern District of California in which the court found that "Presidential Skill Contests," requiring listing of presidents in order of date of service, answering essay questions, and wordfind were contests, not illegal lotteries under California law.
30. Give the *citation* to the 1992 United States district court case from the Southern District of New York in which the court found that a television sweepstakes was not an "unlawful gambling scheme" or "lottery" under New Jersey law; although the contest

could be entered by calling a "900" number, for which there was $2 charge, there were alternative cost-free methods of entering, and thus, the sweepstakes did not require that participants risk "something of value" necessary to the gambling claim.

31. Give the *citation* to the 1997 United States First Circuit Court of Appeals case in which the court found that the hotel did not "control" the rabid mongoose that emerged from the nearby swamp and bit the hotel guest in the hotel's pool area, thus precluding hotel's liability to the guest under the Puerto Rico statute that imposes strict liability on a possessor or user of the animal for any damages that the animal causes.

32. Give the *citation* to the 1996 United States District Court case from the Southern District of Indiana in which the court found that, under Indiana law, the fact that the horse was blind in its left eye was not, in and of itself, a "dangerous propensity" or tendency of the horse that would potentially allow the owner of the horse or the premises at which horse was kept to be held liable for injuries suffered by an invitee who was thrown while attempting to mount the horse.

33. Give the *citation* to the 1998 United States Seventh Circuit Court of Appeals case in which the court found that the landowner failed to prove a claim that an adjoining landowner had contaminated the landowner's property through spilled diesel fuel, given that the district court judge disbelieved the testimony that the landowner offered to show how fuel flowed on the surface onto the landowner's property.

34. Give the *citation* to the 1990 United States Seventh Circuit Court of Appeals case in which the court found that an adjoining landowner has no duty to avoid building on property in such a way as to cut off a neighbor's natural light.

35. Using the Table of Cases volumes from the digest for United States Supreme Court cases, look up the following cases and give the citation to them:
    a. The 2007 United States Supreme Court case, *Bowles v. Russell*.
    b. The 2007 United States Supreme Court case, *Watson v. United States*.
    c. The 2007 United States Supreme Court case, *Kimbrough v. United States*.
    d. The 2007 United States Supreme Court case, *Gall v. United States*.
    e. The 2003 United States Supreme Court case, *Maryland v. Pringle*.
    f. The 1998 United States Supreme Court case, *Minnesota v. Carter*.
    g. The 1998 United States Supreme Court case, *New Jersey v. New York*.
    h. The 1996 United States Supreme Court case, *Whren v. United States*.
    i. The 1999 United States Supreme Court case, *Florida v. White*.

36. Using the Table of Cases volumes from the appropriate series of the Federal Practice Digest, look up the following cases and give the citation to them:
    a. The 2006 Tenth Circuit Court of Appeals case, *Alva v. Teen Help*.
    b. The 2007 Sixth Circuit Court of Appeals case, *Walls v. Konteh*.
    c. The 2007 District of Rhode Island case, *Uniloc USA, Inc. v. Microsoft Corp*.
    d. The 2006 Eighth Circuit Court of Appeals case, *United States v. Washington*.
    e. The 1998 Northern District of California case, *Apollomedia Corporation v. Reno*.
    f. The 1994 Ninth Circuit Court of Appeals case, *Kano v. National Consumer Cooperative Bank*.
    g. The 1997 Ninth Circuit Court of Appeals case, *N/S Corporation v. Liberty Insurance Company*.
    h. The 1996 Ninth Circuit Court of Appeals case, *Oregon Natural Desert Ass'n v. Bible*s.

37. a. Using the *Words and Phrases* index in *Federal Practice Digest Fourth Series*, give the citation to the case defining "perjury trap doctrine," and give the definition of perjury trap doctrine stated in the case.
    b. Using the *Words and Phrases* index in *Federal Practice Digest Fourth Series*, give the citation to the case defining "Aunt Jemima doctrine," and give the definition of Aunt Jemima doctrine stated in the case.
    c. Using the *Words and Phrases* index in *Federal Practice Digest Fourth Series*, give the citation to the case defining the "doctrine of scrivener's error," and give the definition of doctrine of scrivener's error stated in the case.
    d. Using the *Words and Phrases* index in *Federal Practice Digest Fourth Series*, give the citation to the case defining the "dual sovereignty doctrine," and give the definition of doctrine of dual sovereignty doctrine stated in the case.

e. Using the *Words and Phrases* index in *Federal Practice Digest Fourth Series*, give the citation to the case defining the "equal dignities rule," and give the definition of doctrine of equal dignities rule stated in the case.
f. Using the *Words and Phrases* index in *Federal Practice Digest Fourth Series*, give the citation to the case defining the "silver platter doctrine," and give the definition of doctrine of silver platter doctrine stated in the case.
g. Using the *Words and Phrases* index in *Federal Practice Digest Fourth Series*, give the citation to the case defining the "firefighter's rule," and give the definition of doctrine of firefighter's rule stated in the case.

DISCUSSION POINTS

1. How does the material in legal encyclopedias differ from the material in *American Law Reports*?
2. When would it be wise to research articles in legal periodicals?
3. How would you explain the use of digests to someone unfamiliar with the law?

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For additional materials, please go to the CD in this book.

Online Companion™
For additional resources, please go to http://www.paralegal.delmar.cengage.com.

CHAPTER 4

The Judicial Branch and Cases

INTRODUCTION

As identified by the chapter title, this chapter provides information on the judicial branch and on cases. The first portion of the chapter on the judicial branch discusses:

- jurisdiction,
- trial courts,
- appellate courts,
- federal courts, and
- state courts.

The balance of the chapter discusses how to:

- read a case, and
- brief a case.

For more information on cases, please refer to Appendix A, which discusses how to:

- locate cases in the law library, and
- cite to cases.

THE JUDICIAL BRANCH*

The judicial branch comprises the various levels of courts. The United States has a federal court system and a court system for each state and the District of Columbia. The courts in each system are arranged in a hierarchy, typically with a number of levels, or tiers, of courts. The federal courts are arranged in three tiers; many state court systems are arranged in three or four tiers. The lowest tier in a three-tier system is usually comprised of **trial courts**. In those systems with four tiers, the lower two tiers are usually trial courts. The next higher tier generally contains **intermediate appellate courts**. The highest tier usually contains one court, referred to as the **court of last resort**.

trial courts
In our adversary system, the two parties present their evidence at the trial level. The evidence may be testimony, documents, or tangible evidence. The role of a trial court is to determine the facts and to apply the applicable law to the facts.

intermediate appellate court
An appellate court that is subject to judicial review by a higher appellate court.

court of last resort
The highest tier in the federal court system and the state court system, which usually contains one court. In a court of last resort, such as the United States Supreme Court or a state supreme court, all members of the court participate in deciding a case.

*Grateful thanks to Daniel E. Hall, Ed. D., J.D., who authored portions of this section. (Hall, Daniel, E.: Feldmeir, John. *Constitutional Values: Governmental Power and Individual Freedoms*, First Edition. © 2007, Pgs. 44, 96. Reprinted by permission of Pearson Education, Inc., Upper Saddle River, NJ.).

JURISDICTION

jurisdiction
The right and power of a court to make legally binding decisions in a particular geographical area over particular persons and subject matters.

A court's **jurisdiction** is the power of the court to decide a particular case. To decide a case, a court must have geographical jurisdiction, subject matter jurisdiction, and hierarchical jurisdiction. **Geographical jurisdiction** refers to the geographical area within which cases arise. A court is restricted to deciding cases arising within a certain geographical area. For example, the United States District Court for the Middle District of Illinois (a trial-level court) is restricted to hearing cases arising within the district covering the middle of the state (Exhibit 4-1). A party appealing a case from that court would appeal to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit is restricted to hearing cases arising in Illinois, Indiana, or Wisconsin. Exhibit 4-1 shows the geographical arrangement of the federal circuits.

geographical jurisdiction
Geographical jurisdiction refers to the geographical area within which a court has the right and power to make decisions that are legally binding.

subject matter jurisdiction
The person about whom and the subject matters about which a court has the right and power to make decisions that are legally binding.

Subject matter jurisdiction refers to the type of case a court may hear. A court is a court of **general jurisdiction** or a court of **limited jurisdiction**. As the names imply, a court of limited jurisdiction is limited to hearing certain types of cases, and a court of general jurisdiction may hear all other types of cases. For example, United States Bankruptcy Courts are restricted to hearing bankruptcy cases; therefore, they are courts of limited jurisdiction. United States district courts are considered courts of general jurisdiction, hearing civil and criminal cases not heard by specialized trial-level federal courts. Exhibit 4-2 shows an organizational chart of the federal courts.

general jurisdiction
The power of a court to hear and decide any of a wide range of cases that arise within its geographic area.

limited jurisdiction
A court of limited jurisdiction is limited to hearing certain types of cases.

In addition, the court must have the authority to determine the rights of the defendant, referred to as **in personam jurisdiction**, or the status of property, referred to as **in rem jurisdiction**.

in personam jurisdiction
The authority of a court to determine the rights of the defendant.

in rem jurisdiction
The authority of a court to determine the status of property.

Hierarchical jurisdiction refers to the level of court deciding a case. A case begins in a court of **original jurisdiction**. The court of original jurisdiction initially hears and decides a case. When a court decision is appealed, the case is heard by a court with **appellate jurisdiction**. The court with appellate jurisdiction decides a case appealed from a lower court.

hierarchical jurisdiction
Hierarchical jurisdiction refers to the level of court deciding a case. The court of original jurisdiction initially hears and decides a case. On appeal, the case is heard by a court with appellate jurisdiction.

Trial courts usually are courts of original jurisdiction. However, in a state with a four-tier court system, the lower trial-level court may have original jurisdiction of a case and the upper-level trial court may have appellate jurisdiction of the case. Original jurisdiction is not restricted wholly to trial-level courts. For example, Article III, section 2 of the United States Constitution provides: "In all Cases affecting Ambassadors, other public Ministers and consuls, and those in which a State shall be a Party, the supreme Court shall have original jurisdiction."

original jurisdiction
The power of a court to take a case, try it, and decide it (as opposed to appellate jurisdiction, the power of a court to hear and decide an appeal).

The following sections consider the roles of a court of original jurisdiction (for simplicity referred to as a "trial court") and a court of appellate jurisdiction.

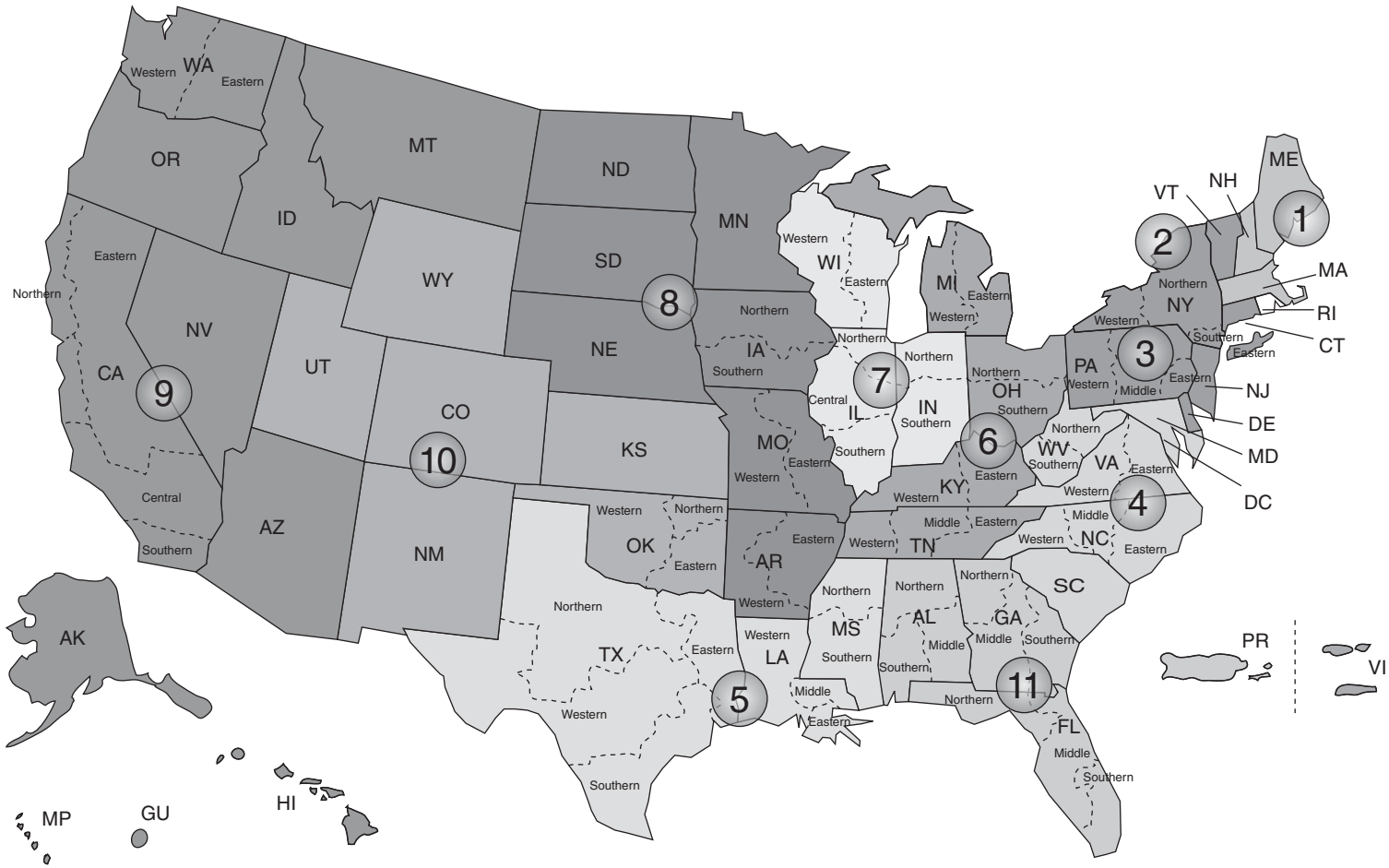
appellate jurisdiction
The power and authority of a higher court to take up cases that have already been in a lower court and the power to make decisions about these cases.

TRIAL COURT

In our adversary system, the two parties present their evidence at the trial level. The two parties may have different versions of the facts, and the attorneys representing them may be relying on differing legal theories. An attorney tries to present the facts in the light most favorable to the client, and the attorney will argue the law in the light most favorable to the client. The evidence may be **testimony**, documents, or tangible evidence. The role of a trial court is to determine the facts and to apply the applicable law to the facts. Usually, a single judge presides over the trial court. If there is a jury, the jury hears oral testimony and reviews documentary and tangible evidence. After considering the evidence, the jury determines the facts and applies the law to the facts, all in accordance with the judge's **charge** (instructions to the jury). The judge decides **questions of law**, such as the **admissibility** of evidence, the law to be applied, and whether a **motion**, such as a

EXHIBIT 4-1

Map of United States Courts of Appeals and United States District Courts. *(Reprinted from http://www.uscourts.gov/images/CircuitMap.pdf.)*



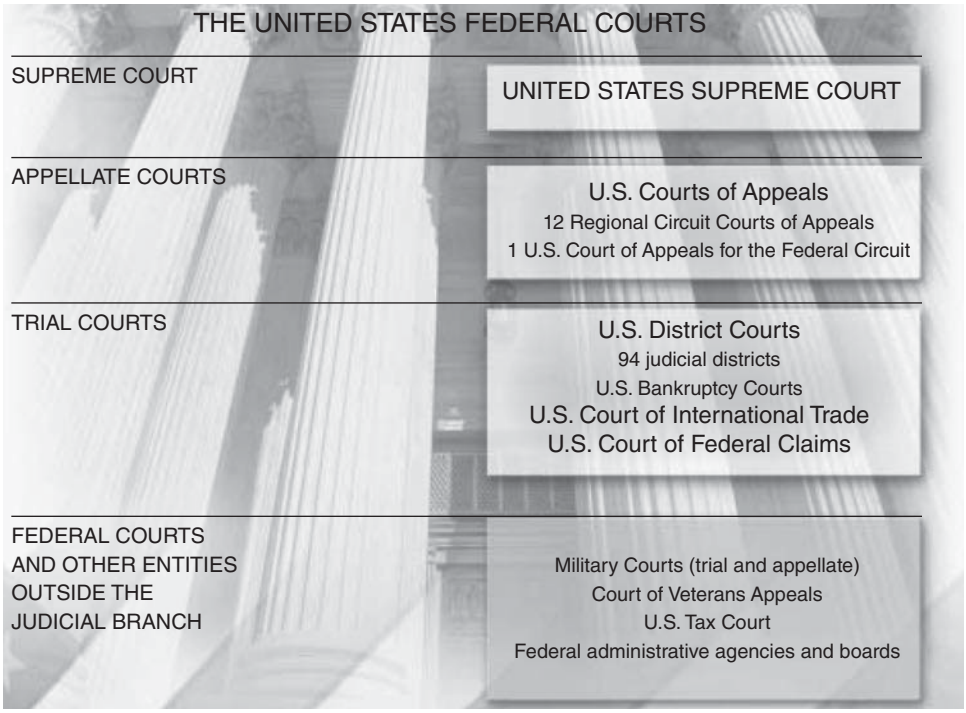


EXHIBIT 4-2
Structure of the Federal Courts. *(Reprinted from http://www.uscourts.gov/understand03/media/UFC03.pdf.)*

testimony
Evidence given by a witness under oath. This evidence is "testimonial" and is different from demonstrative evidence.

charge
The judge's final summary of a case and instructions to the jury.

questions of law
A point in dispute in a lawsuit; an issue for decision by the judge.

admissibility
A judge must decide whether a piece of evidence may be considered by the factfinder in deciding a case.

motion
A request that a judge make a ruling or take some other action. Motions are either granted or denied by the judge.

motion for a directed verdict
A request that the judge take the decision out of the jury's hands. The judge does this by telling jurors what the jury must decide or by actually making the decision. The judge might do this when the person suing has presented facts that, even if believed by a jury, cannot add up to a successful case.

motion for a summary judgment
A request that the judge enter a final judgment (victory) for one side in a lawsuit (or in one part of a lawsuit), without trial, when the judge finds that there is no genuine factual issue in the lawsuit (or in part of the lawsuit).

bench trial
A case tried without a jury; in a bench trial, the judge determines the facts and decides questions of law.

discretionary jurisdiction
A court with discretionary jurisdiction over a case can decide if the court should hear the case.

motion for a directed verdict or a **motion for a summary judgment**, should be granted. The fact finder (the jury in a jury trial or the judge in a **bench trial**) determines the facts, and the judge applies the law to the facts. If there is no jury (called a bench trial), the judge determines the facts and decides questions of law.

APPELLATE COURT

Generally, the losing party has the right to one appeal, from the trial court to an intermediate appellate court. Generally, review by the intermediate appellate court is mandatory, meaning that if a case is appealed to the intermediate appellate court, the court must hear the appeal.

The losing party in the intermediate appellate court may request that a higher court review the case. If in state court, the higher court may be the state court of last resort (referred to in many states as the state supreme court). If in federal court, the higher court may be the United States Supreme Court. Usually, jurisdiction of the state court and the United States Supreme Court is discretionary. **Discretionary jurisdiction** means that those courts can decide which cases they will review and typically review only a small percentage of the cases.

The role of the **appellate court** is to determine whether the lower court applied the law correctly. Appellate courts correct any errors made by lower courts. The appellate court defers to the trial court on **questions of fact** and may not substitute its judgment for that of the finder of fact unless the trial court's finding of fact was not supported by competent evidence. The appellate court may reverse a discretionary act of the trial court (e.g., admitting certain evidence) if the trial court abused its discretion. An appellate court will affirm a lower court ruling if the lower court ruling was correct or if any error was harmless. An appellate court will reverse the lower court if the lower court erred. Sometimes the appellate court reverses the lower court decision and **remands** the decision to the trial court for further proceedings. If several issues went up on appeal, the appellate court may affirm in part, as to those issues on which the court agrees with the lower court, and may reverse the lower court, as to those issues on which the appellate court disagrees with the lower court ruling.

At the intermediate appellate level, three judges are impaneled to decide an appeal. The three judges on the **panel** are randomly selected from the intermediate appellate court judges who are members of the court. The appellate court does not take testimony or consider evidence not introduced at trial. The appellate court may decide the appeal on the basis of the **appellate briefs** and the record alone. The record includes materials designated by the attorneys to be included, commonly including documents and exhibits from the trial and a transcript of a portion or all of the trial activities. Often, the court first hears **oral argument** from the attorneys representing the parties to the appeal. During the oral argument, each attorney has an allotted time period to present his or her case to the court and to answer questions from the judges.

The judges at the intermediate appellate level may decide to hear or rehear a case *en banc*. As explained in Chapter 2, this means that all the members of the court sit to hear the case rather than the case being heard by a three-judge panel. For example, if the Seventh Circuit Court of Appeals decides to hear a case *en banc* and there are eleven judges who are members of the Seventh Circuit, all eleven judges would hear the case. Because very few cases are heard *en banc* and cases heard *en banc* deal with important legal issues, special attention should be paid to an *en banc* decision.

In a court of last resort, such as the United States Supreme Court or a state supreme court, all members of the court participate in deciding a case. The vast majority of opinions are written by appellate judges. Trial court judges, especially state trial court judges, write few opinions. In an intermediate appellate court, the three-judge panel assigns one judge in the **majority** to write the court opinion. A judge disagreeing with the majority may write a **dissenting opinion**, explicitly explaining the judge's reasons for disagreeing with the majority. In the United States Supreme Court, the Chief Justice, if in the majority, or, if the Chief Justice is not in the majority, the most senior justice in the majority assigns someone to write the opinion.

FEDERAL COURTS

Article III, section 1 of the United States Constitution provides: "the judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The federal court system is hierarchical in structure (Exhibit 4-2). The Supreme Court of the United States is the highest court. The thirteen United States Courts of Appeals and the U.S. Court of Appeals for the Armed Forces are intermediate appellate courts. The United States District Courts are trial-level courts. The Tax Court, the Court of Federal Claims, the Court of Veterans Appeals, and the Court of International Trade are specialized federal courts at the same level as the United States District Courts.

Some federal courts are constitutional courts and some are legislative courts. Whether a court is legislative or constitutional largely depends on the status of the judges who sit on the court. If the judges are empowered under Article III of the Constitution—and therefore must undergo the nomination and confirmation process, are assured lifetime tenure, and cannot have their pay reduced—the court is constitutional. District, court of appeals, and United States Supreme Court judges are all constitutional judges.

In contrast, if the judges do not have these characteristics, they are empowered by Congress and not the Constitution. The Tax Court, the Court of Federal Claims, the Court of International Trade, and administrative law tribunals are examples of non-Article III courts. The judges of these courts are federal judicial officers, but they are not empowered by the Constitution; rather, their positions are created by Congress and are not formally part of the judicial branch. For this reason, they are commonly referred to as Article I judges.

appellate court
Refers to a higher court that can hear appeals from a lower court.

questions of fact
A point in dispute in a lawsuit; an issue for decision by judge or jury.

remands
Sends back. For example, a higher court may remand (send back) a case to a lower court, directing the lower court to take some action.

panel
A group of judges (smaller than the entire court) that decides a case.

appellate brief
Written statement submitted to an appellate court to persuade the court of the correctness of one's position. An appellate brief argues the facts of the case, supported by specific page references to the record, and the applicable law, supported by citations of authority.

oral argument
The presentation of each side of a case before an appeals court. The presentation typically involves oral statements by a lawyer, interrupted by questions from the judges.

majority
Greater than half of the judges hearing the case. A majority opinion is an opinion agreed upon by greater than half of the judges hearing the case.

dissenting opinion
A judge's formal disagreement with the decision of the majority of the judges in a lawsuit. If the judge puts it in writing, it is called a dissenting opinion.

Federal Trial-Level Courts

United States district courts
The U.S. trial courts.

Most federal cases are initially tried and decided in the **United States district courts**, the federal courts of general trial jurisdiction. There are 94 district courts in the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, and the territories of Guam, the United States Virgin Islands, and the Northern Mariana Islands. Each state has at least one district court. A district may itself be divided into divisions and may have several places where the court hears cases. Each district also has a bankruptcy unit. With the exception of the three territorial courts, all district court judges are appointed for life by the president with the advice and consent of the Senate.

federal question jurisdiction
A legal issue directly involving the U.S. Constitution, statutes, or treaties. Federal courts have jurisdiction in cases involving a federal question.

diversity jurisdiction
Federal courts have diversity jurisdiction as long as the amount in controversy is more than $75,000 and the parties have the requisite diversity of citizenship with the parties citizens from different states or one party a citizen of a state and the other party a citizen of a foreign country. No plaintiff may be a citizen of the same state as any defendant.

The two bases of federal jurisdiction in United States district courts are **federal question jurisdiction** and **diversity jurisdiction** (Exhibit 4-3). Federal courts have federal question jurisdiction over cases concerning the United States Constitution, a federal law, or any treaty to which the United States is a party. Federal courts have diversity jurisdiction as long as the amount in controversy is more than $75,000 and the parties have the requisite diversity of citizenship. Diversity is met so long as the parties are citizens from different states or so long as one party is a citizen of a state and the other party is a citizen of a foreign country. Diversity must be complete. If there are multiple plaintiffs or multiple defendants, no plaintiff may be a citizen of the same state as any defendant.

United States Magistrate Judges
A judge, usually within limited functions and powers. U.S. magistrates conduct pretrial prceedings, try minor criminal matters, etc.

District judges usually sit individually; however, Congress has provided for three-judge district courts in particular cases. Even when a three-judge court is statutorily mandated, one judge may be designated as the chief of the panel and be delegated the authority to make some decisions alone, such as whether preliminary injunctions or stays should be ordered. All three judges must sit, however, at trial. In most three-judge district court trials, appeal is taken directly to the United States Supreme Court.

Congress created the position of **United States Magistrate Judges**, which are Article I judgeships. The system of magistrates was created in an effort to reduce the burden on district judges without establishing new Article III judgeships. Under the Federal Magistrates Act, certain responsibilities are delegated to magistrates (although their actions are reviewable by district judges) and district judges are empowered to delegate further responsibilities. However, the United States Supreme Court has ruled that a magistrate may not preside over the critical stages of a criminal trial over the objection of one of the parties. Because Congress carefully drafted the Magistrates Act, however, magistrates may preside over nearly all other pretrial and trial proceedings, subject to review by a district judge.

EXHIBIT 4-3
Federal Judiciary—Jurisdiction. *(Hall, Daniel, E.: Feldmeir, John.* Constitutional Values; Governmental Power and Individual Freedoms, *First Edition. © 2007, Pg. 87. Reprinted by permission of Pearson Education, Inc., Upper Saddle River, NJ.)*

FEDERAL JUDICIARY—JURISDICTION

Two forms of federal judicial jurisdiction are authorized by Article III of the Constitution. Both have been implemented by Congress via statute.

Federal Question	*Diversity of Citizenship*
Law: 28 U.S.C. § 1331	Law: 28 U.S.C. § 1332
Jurisdiction: Cases arising under the federal Constitution or other federal law	Jurisdiction: Cases in which all plaintiffs are from different states from all defendants (complete diversity) and there is a minimum amount in controversy ($75,000)

Removal: Cases originally filed in state court, but for which federal jurisdiction exists, may be removed to federal court by the defendant. 28 U.S.C. § 1441.

Remand: Improperly removed cases (no federal jurisdiction) may be returned to the state courts from which they were removed. 28 U.S.C. § 1447.

Sometimes a plaintiff has a case that may be litigated in state or federal court. In that situation, the plaintiff would have to decide which is the more favorable forum. Certain types of cases, such as bankruptcy, copyright, and patent may only be litigated in federal court.

Federal Appellate Courts

The intermediate appellate courts in the federal judicial system are the courts of appeals (Exhibit 4-2). Twelve of these courts have jurisdiction over cases from certain geographical areas. The First through the Eleventh Circuits each hear cases arising in the three or more states comprising the circuit. The United States Court of Appeals for the District of Columbia hears cases arising in the District of Columbia and has appellate jurisdiction assigned by Congress in legislation concerning many departments of the federal government.

The **United States Court of Appeals** for the Federal Circuit and the twelve regional courts of appeals are often referred to as circuit courts. That is because early in the nation's history, the judges of the first courts of appeals visited each of the courts in one region in a particular sequence, traveling by horseback and riding "circuit." These thirteen courts of appeals review matters from the district courts of their geographical regions, from the United States Tax Court, and from certain federal administrative agencies. A disappointed party in a district court case usually has the right to have the case reviewed in the court of appeals for the circuit.

United States Courts of Appeals
Hear appeals from lower federal courts and administrative agencies; there is one court for each of twelve geographical circuits plus the Federal Circuit, which hears appeals nationwide from specialized federal courts and other appeals such as patent cases.

The judges on the courts of appeals are appointed for life by the president with the advice and consent of the Senate.

United States Supreme Court

The **Supreme Court of the United States** consists of nine **justices** appointed for life by the president with the advice and consent of the Senate. One justice is appointed as the **chief justice** and has additional administrative duties related both to the Supreme Court and to the entire federal court system.

Supreme Court of the United States
The highest of the United States courts.

justice
A judge, especially an appellate judge such as a justice of the U.S. Supreme Court.

chief justice
The presiding justice, usually of a court of last resort. The chief justice of the United States Supreme Court presides over the Court and has additional administrative duties related both to the Supreme Court and to the entire federal court system.

Review by the United States Supreme Court is discretionary for most cases. This means that it is within the discretion of the United States Supreme Court whether it will hear and decide a case. Only a very small percentage of the cases that are filed in the United States Supreme Court are heard. A case from the United States Court of Appeals would go to the United States Supreme Court by appeal or by **petition for writ of certiorari**, as set forth in federal statutes. Cases from the highest state courts reach the United States Supreme Court on petition for writ of certiorari (see Exhibit 4-4). The petition is granted if at least four justices vote to grant the writ, commonly known as the rule of four.

petition for writ of certiorari
(Latin) "To make sure." A request for cretiorari (or "cert." for short) is like an appeal, but one which the higher court is not required to take for decision. It is literally a writ from the higher court asking the lower court for the record of the case.

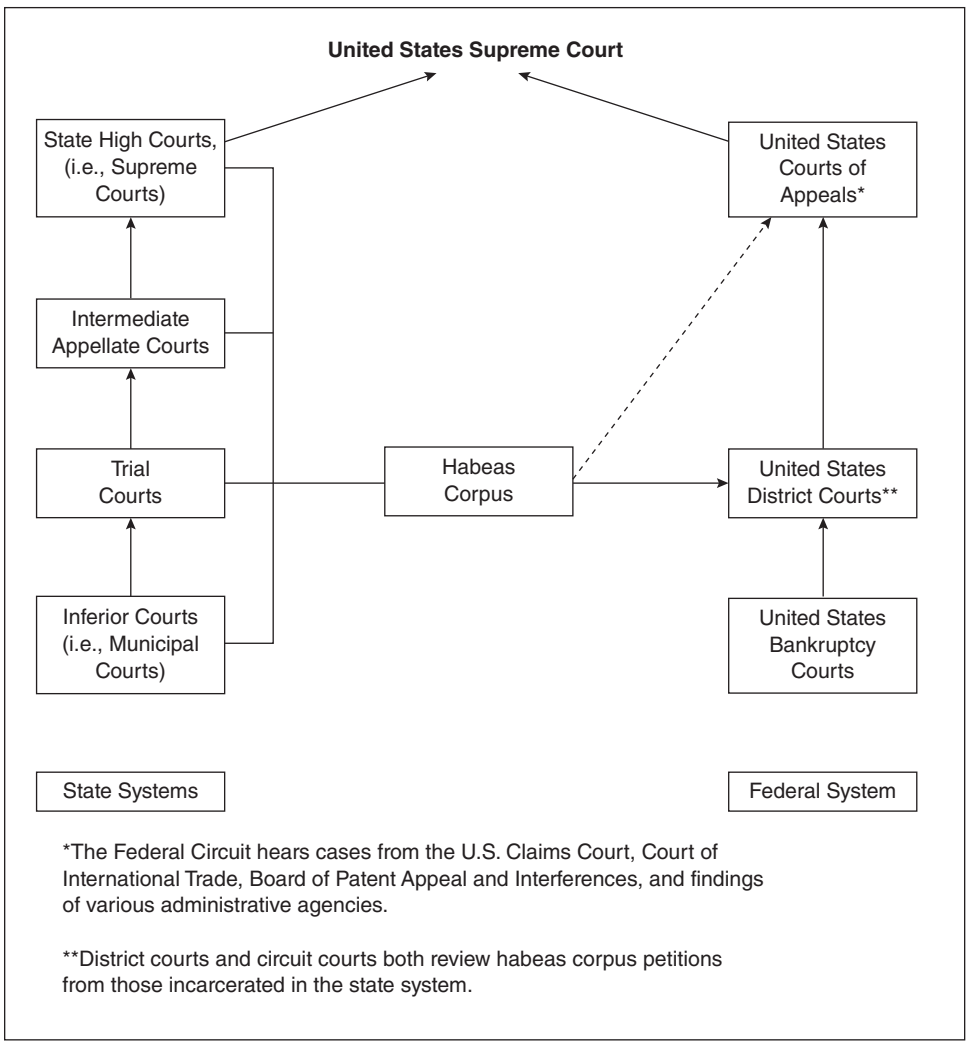
The Supreme Court meets on the first Monday of October each year and usually continues in session through June. The Court term is referenced by the year in which the term begins. Thus, the October 2007 through June 2008 term is referred to as the October Term 2007. The Supreme Court receives and disposes of approximately 5,000 cases each year, most by a brief decision that the subject matter is either not proper or not of sufficient importance to warrant review by the full court. Cases are heard *en banc*—that is, by all of the justices sitting together in open court. Each year, the court decides approximately 150 cases of great national importance and interest, with approximately two-thirds announced in full published opinions. The Court typically issues a number of opinions in June before it recesses for the summer.

STATE COURTS

The state court system varies from state to state. Some states have a simplified court structure (also called a **unified court structure**) with three or four tiers; the court structure of other states is more complex. A number of the four-tier state courts systems have two levels of trial courts; they are trial courts of limited jurisdiction, also called lower courts,

unified court structure
A simplified state court structure with three or four tiers; the court structure of other states that do not have a unified court structure is more complex.

EXHIBIT 4-4
State and Federal Court Structures. *(Hall.* Criminal Law and Procedure, *© 2004 Delmar Learning, a part of Cengage Learning, Inc. Reproduced by permission. www.cengage.com/permissions.)*



and trial courts of general jurisdiction. The trial courts of limited jurisdiction typically are delegated certain specific matters, and the trial courts of general jurisdiction have jurisdiction over matters not delegated to the trial courts of limited jurisdiction. The state court structure in other states is more complex, with numerous courts, some with overlapping jurisdiction.

California and Illinois are examples of states with unified court structures. Illinois has a three-tier structure, with a single trial-level court, a single intermediate appellate court, and a single court of last resort. California's court of last resort is the Supreme Court of California. The court has one chief justice and six associate justices. California's intermediate appellate court, the court of appeal, has six appellate districts. Until 1998, California had two trial-level courts (the municipal court and the superior court), an intermediate appellate court (the court of appeal), and the court of last resort (the Supreme Court of California). California voters approved a constitutional amendment to the California Constitution that allows the superior courts and the municipal courts to be merged into a single "unified" superior court. In a unified superior court, all matters previously within the jurisdiction of the municipal and superior courts are within the jurisdiction of the unified superior court. An appellate division of the superior court hears cases that formerly would have been heard within the appellate jurisdiction of the superior court.

New York is an example of a state with a very complex court structure. New York has a single court of last resort, the court of appeals, and two intermediate appellate courts, the Appellate Division of Supreme Court and the Appellate Term of Supreme Court, generally divided along territorial lines. The trial-level courts include the supreme court, the county court, the court of claims, the family court, the surrogate's court, the district court, the city court, the civil court of the city of New York, and the town and village justice court. Some trial courts have jurisdiction only in a certain geographical area, such as New York City or upstate New York; some are courts of special jurisdiction, having jurisdiction over specific types of cases; some have overlapping jurisdiction. Recent proposals for court simplification have suggested implementing a two-tier trial-court system, the higher tier with unlimited jurisdiction and the lower tier with limited jurisdiction.

The method for selecting state court judges varies from state to state and may differ for trial and appellate judges within a state. Three common methods for selecting judges are election, appointment (by the governor or the state legislature), and merit selection. Merit selection may involve the nomination of three candidates by an attorney and non-attorney judicial nominating committee, appointment of one of the three candidates by the governor, and a vote in the general election one to several years later whether the judge should be retained.

READING CASES*

Reported judicial decisions have a style and format all their own. The following discussion is designed to acquaint readers with the form and the nature of judicial decisions. While judges have considerable freedom in how they write opinions, some uniformity of pattern comes from the similarity of purpose for decisions, especially decisions of appellate courts, which frequently serve as authority for later cases. Similarity is also a product of custom and the influence of West, which publishes the regional **reporter** series as well as many of the federal reporters.

reporter
Set of books containing published court decisions.

FOR WHOM ARE JUDICIAL OPINIONS WRITTEN?

In evaluating any written material, the reader should assess the audience the writer is addressing and the writer's goals. Judges write decisions for two reasons. The first is to inform the parties to the dispute who won and who lost, giving the rules and reasoning the judge applied to the facts. The second is to inform the legal profession, attorneys and judges, of the rules applied to a given set of facts and the reasons for the decision.

ATTORNEYS AND JUDGES READ JUDICIAL OPINIONS

Very few laypersons ever enter a law library to find and read cases. The people found in the county law library are usually lawyers, paralegals, and judges. Cases are rarely intended to be entertaining, and judges are not motivated to make their cases "reader-friendly." Their tasks are quite specific. Because any case may serve as precedent, or at least form a basis for subsequent legal arguments, judges are especially concerned with conveying a precise meaning by carefully framing the rules and providing the reasoning behind them. The higher the court, the greater this concern will be. Imagine writing an opinion for a highly skilled, highly intelligent readership that critically analyzes every word and phrase, an opinion that may very well affect important rights of citizens in the future.

*Grateful thanks to Ransford C. Pyle, Ph.D., J.D., who authored this portion of the chapter. From PYLE/BAST. *Foundations of Law*, 4E. © 2007. Delmar Learning, a part of Cengage Learning, Inc. Reproduced by permission. www.cengage.com/permissions.

Judicial writing is different from most other kinds of writing in that its goal is neither simply to pass on information nor persuade the reader of the author's point of view. Persuasion is past; the judge is stating the law, making a final judgment, but must do so with caution so that the statements are not misinterpreted or misused. An appreciation of the judge's dilemma is essential to critical evaluation of cases.

THE EFFECT OF SETTING PRECEDENT

The cost of litigation is great, and appeal of a decision incurs significant additional cost. It makes sense to appeal if the losing party legitimately concludes that the lower court was incorrect in its application of the law. It would be quite foolish to spend large sums of money to go to the higher court if the chances of winning were slim and the stakes were small. This means that the cases we read from appellate courts, and especially from the highest courts, generally involve questions that have strong arguments on both sides. The judges of these cases are faced with difficult decisions and must respect the reasonable arguments of both sides in deciding which side prevails.

THE FORMAT FOR A REPORTED DECISION

The cases found in the reporters generally follow a uniform format with which researchers must become familiar. The first part of the case has no official authority. Authoritative statements begin with the actual text of the opinion.

FORMAT PRECEDING THE OPINION

West (formerly West Publishing Company), publisher of the regional reporters and many of the federal reporters, has established a quite uniform format. LexisNexis, publisher of *United States Supreme Court Reports, Lawyers' Edition* and other important law books, uses a similar format. To illustrate the West format, the pages of *Brendlin v. California*, 127 S. Ct. 2400 (2007) provide all the elements necessary. As you read the following explanation, it would be helpful to reference Exhibit 4-5. After you understand the West format, look up *Brendlin*, starting on page 132 of volume 168 of *United States Supreme Court Reports, Lawyers' Edition, Second Series*. You will notice that the text of the opinion itself is exactly the same. However, the material prepared by the publisher and that precedes the opinion is different in format and longer than the West-prepared material preceding the same case in *Supreme Court Reporter*.

THE CITATION

The heading (also called the running head) of the page for *Brendlin* indicates the citation "**BRENDLIN v. CALIFORNIA**" and "cite as 127 S.Ct. 2400 (2007)." This is the name of the case and where it can be found, namely on page 2400 in volume 127 of the *Supreme Court Reporter*. Cases from some courts are printed in more than one reporter with one of the reporters being designated as the "official reporter" because it is published by the government. Opinions of the United States Supreme Court are printed in *United States Reports* (abbreviated "U.S."), the official reporter, and in *Supreme Court Reporter* and *United States Supreme Court Reports, Lawyers' Edition*, two unofficial sources published by private publishers. The official citation for *Brendlin* to *United States Reports* was unavailable in 2007 when this book was being written. Typically, the publication of a case in *United States Reports* lags considerably behind publication of the case in *Supreme Court Reporter* and *United States Supreme Court Reports, Lawyers' Edition*.

THE CAPTION

The caption of *Brendlin* shows the parties as "BRENDLIN, Petitioner, v. CALIFORNIA." Note that the citation names only one party for each side and uses only the individual's surname, while the caption gives the petitioner's first and middle names "Bruce Edward."

EXHIBIT 4-5
Brendlin v. California.
(Reprinted with permission of Thomson Reuters/West.)

[PQ]

Bruce Edward BRENDLIN, Petitioner
v.
CALIFORNIA.
No. 06–8120.
Argued April 23, 2007.
Decided June 18, 2007.

Caption
Docket number
Date of oral argument
Date of the decision

Background: Defendant entered a negotiated plea of guilty to manufacturing methamphetamine, after the Superior Court, Sutter County, No. CRF012703, Christopher R. Chandler, J., denied defendant's motion to suppress evidence found in the automobile in which he was riding following a traffic stop. The Court of Appeal reversed. The California Supreme Court 38 Cal.4th 1107, 136 P.3d 845, 45 Cal Rptr.3d 50, granted review and reversed, holding that defendant, as passenger, could not challenge traffic stop. Certiorari was granted.

Holding: The United States Supreme Court held that defendant, as passenger, was seized and was entitled to challenge stop, abrogating *People v. Jackson*, 39 P.3d 1174, and *State v. Mendez*, 137 Wash.2d 208, 970 P.2d 722.

Vacated and remanded.

Syllabus prepared by the publisher

1. Arrest 68(4)

A person is "seized" by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, by means of physical force or show of authority, terminates or restrains his freedom of movement through means intentionally applied. U.S.C.A. Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

2. Arrest 68(4)

An unintended person may be the object of detention by a police officer, for purposes of the Fourth Amendment, so long as the detention is willful and not merely the consequence of an unknowing act. U.S.C.A. Const.Amend. 4.

3. Arrest 68(4)

A police officer may make a seizure by a show of authority and without the use of physical force, but there is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned. U.S.C.A. Const.Amend. 4.

4. Automobiles 349(10)

In Fourth Amendment terms, a traffic stop entails a "seizure" of the driver even though the purpose of the stop is limited and the resulting detention quite brief. U.S.C.A. Const.Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

Indexing topic
Key number

5. Automobiles 349(10)

Passenger of automobile that was pulled over by police officer for traffic stop was "seized" under the Fourth Amendment from moment automobile came to halt on roadside and, therefore, was entitled to challenge constitutionality of traffic stop; any reasonable passenger would have understood police officers to be exercising control to point that no one in the automobile was free to depart without police permission; abrogating *People v. Jackson*, 39 P.3d 1174; *State v. Mendez*, 137 Wash.2d 208, 970 P.2d 722. U.S.C.A. Const.Amend. 4.

Headnote 1

6. Arrest 68(4)

For purposes of determining whether a person is "seized" by an officer under the Fourth Amendment, relevant intent is that conveyed to the person confronted. U.S.C.A. Const.Amend. 4.

*Syllabus**

After officers stopped a car to check its registration without reason to believe it was being operated unlawfully, one of them recognized petitioner Brendlin, a passenger in the car. Upon verifying that Brendlin was a

*The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

(continues)

EXHIBIT 4-5
(Continued)

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parole violator, the officers formally arrested him and searched him, the driver, and the car, finding, among other things, methamphetamine paraphernalia. Charged with possession and manufacture of that substance, Brendlin moved to suppress the evidence obtained in searching his person and the car, arguing that the officers lacked probable cause or reasonable suspicion to make the traffic stop, which was an unconstitutional seizure of his person. The trial court denied the motion, but the California Court of Appeal reversed, holding that Brendlin was seized by the traffic stop, which was unlawful. Reversing, the State Supreme Court held that suppression was unwarranted because a passenger is not seized as a constitutional matter absent additional circumstances that would indicate to a reasonable person that he was the subject of the officer's investigation or show of authority.

Held: When police make a traffic stop, a passenger in the car, like the driver, is seized for Fourth Amendment purposes and so may challenge the stop's constitutionality. Pp. 2405–2410.

(a) A person is seized and thus entitled to challenge the government's action when officers, by physical force or a show of authority, terminate or restrain the person's freedom of movement through means intentionally applied. *Florida v. Bostick*, 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389; *Brower v. County of Inyo*, 489 U.S. 593, 597, 109 S.Ct. 1378, 103 L.Ed.2d 628. There is no seizure without that person's actual submission. See, *e.g., California v. Hodari D.*, 499 U.S. 621, 626, n. 2, 111 S.Ct. 1547, 113 L.Ed.2d 690. When police actions do not show an unambiguous intent to restrain or when an individual's submission takes the form of passive acquiescence, the test for telling when a seizure occurs is whether, in light of all the surrounding circumstances, a reasonable person would have believed he was not free to leave. *E.g., United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (principal opinion). But when a person "has no desire to leave" for reasons unrelated to the police presence, the "coercive effect of the encounter" can be measured better by asking whether "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Bostick*, *supra*, at 435–436, 111 S.Ct. 2382. Pp. 2405–2407.

(b) Brendlin was seized because no reasonable person in his position when the car was stopped would have believed himself free to "terminate the encounter" between the police and himself. *Bostick*, *supra*, at 436, 111 S.Ct. 2382. Any reasonable passenger would have understood the officers to be exercising control to the point that no one in the car was free to depart without police permission. A traffic stop necessarily curtails a passenger's travel just as much as it halts the driver diverting both from the stream of traffic to the side of the road, and the police activity that normally amounts to intrusion on "privacy and personal security" does not normally (and did not here) distinguish between passenger and driver. *United States v. Martinez–Fuerte*, 428 U.S. 543, 554, 96 S.Ct. 3074, 49 L.Ed.2d 1116. An officer who orders a particular car to pull over acts with an implicit claim of right based on fault of some sort, and a sensible person would not expect the officer to allow people to come and go freely from the physical focal point of an investigation into faulty behavior or wrongdoing. If the likely wrongdoing is not the driving, the passenger will reasonably feel subject to suspicion owing to close association; but even when the wrongdoing is only bad driving, the passenger will expect to be subject to some scrutiny, and his attempt to leave would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place. It is also reasonable for passengers to expect that an officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety. See, *e.g., Maryland v. Wilson*, 519 U.S. 408, 414–415, 117 S.Ct. 882, 137 L.Ed.2d 41. The Court's conclusion comports with the views of all nine Federal Courts of Appeals, and nearly every state court, to have ruled on the question. Pp. 2406–2408.

(c) The State Supreme Court's contrary conclusion reflects three premises with

EXHIBIT 4-5
(Continued)

which this Court respectfully disagrees. First, the view that the police only intended to investigate the car's driver and did not direct a show of authority toward Brendlin impermissibly shifts the issue from the intent of the police as objectively manifested to the motive of the police for taking the intentional action to stop the car. Applying the objective *Mendenhall* test resolves any ambiguity by showing that a reasonable passenger would understand that he was subject to the police display of authority. Second, the state court's assumption that Brendlin, as the passenger, had no ability to submit to the police show of authority because only the driver was in control of the moving car is unavailing. Brendlin had no effective way to signal submission while the car was moving, but once it came to a stop he could, and apparently did, submit by staying inside. Third, there is no basis for the state court's fear that adopting the rule this Court applies would encompass even those motorists whose movement has been impeded due to the traffic stop of another car. An occupant of a car who knows he is stuck in traffic because another car has been pulled over by police would not perceive the show of authority as directed at him or his car. Pp. 2408–2410.

(d) The state courts are left to consider in the first instance whether suppression turns on any other issue. P. 2410.

38 Cal.4th 1107, 45 Cal.Rptr.3d 50, 136 P.3d 845, vacated and remanded.

SOUTER, J., delivered the opinion for a unanimous Court.

Elizabeth M. Campbell, appointed by this Court, Sacramento, CA, for the petitioner.

Clifford E. Zall, for the respondent.

Jeffrey T. Green, Richard A. Kaplan, Sidley Austin LLP, Washington, D.C., Sarah O'Rourke Schrup, Northwestern University, Supreme Court Practicum, Chicago, IL, Elizabeth Campbell, Counsel of Record, Sacramento, CA, Counsel for Petitioner.

Edmund G. Brown Jr., Attorney General of California, Manuel M. Medeiros, State Solicitor General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Donald E. De Nicola, Deputy State Solicitor, Michael A. Canzoneri, Supervising Deputy Attorney General, Doris A. Calandra, Deputy Attorney General, Clifford E. Zall, Deputy Attorney General, Counsel of Record, Sacramento, CA, Counsel for Respondent.

Justice who authored the opinion

For U.S. Supreme Court briefs, see:
2007 WL 832182 (Pet.Brief)
2007 WL 1090397 (Resp.Brief)
2007 WL 1141507 (Reply.Brief)

Justice SOUTER delivered the opinion of the Court.

Opinion begins

When a police officer makes a traffic stop, the driver of the car is seized within the meaning of the Fourth Amendment. The question in this case is whether the same is true of a passenger. We hold that a passenger is seized as well and so may challenge the constitutionality of the stop.

Issue

Holding

Attorney for Brendlin
Attorney for California

I

Early in the morning of November 27, 2001, Deputy Sheriff Robert Brokenbrough and his partner saw a parked Buick with expired registration tags. In his ensuing conversation with the police dispatcher, Brokenbrough learned that an application for renewal of registration was being processed. The officers saw the car again on the road, and this time Brokenbrough noticed its display of a temporary operating permit with the number "11," indicating it was legal to drive the car through November. App. 115. The officers decided to pull the Buick over to verify that the permit matched the vehicle, even though, as Brokenbrough admitted later, there was nothing unusual about the permit or the way it was affixed. Brokenbrough asked the driver, Karen Simeroth, for her license and saw a passenger in the front seat, petitioner Bruce Brendlin, whom he recognized as "one of the Brendlin brothers." *Id.*, at 65. He recalled that either Scott or Bruce Brendlin had dropped out of parole supervision and asked Brendlin to identify himself.[1] Brokenbrough returned to his cruiser, called for backup, and verified that Brendlin was a parole violator with an outstanding

Attorneys for Brendlin
Attorneys for California

[1] The parties dispute the accuracy of the transcript of the suppression hearing and disagree as to whether Brendlin gave his name or the false name "Bruce Brown." App. 115.

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(Continued)

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nobail warrant for his arrest. While he was in the patrol car, Brokenbrough saw Brendlin briefly open and then close the passenger door of the Buick. Once reinforcements arrived, Brokenbrough went to the passenger side of the Buick, ordered him out of the car at gunpoint, and declared him under arrest. When the police searched Brendlin incident to arrest, they found an orange syringe cap on his person. A patdown search of Simeroth revealed syringes and a plastic bag of a green leafy substance, and she was also formally arrested. Officers then searched the car and found tubing, a scale, and other things used to produce methamphetamine.

Brendlin was charged with possession and manufacture of methamphetamine, and he moved to suppress the evidence obtained in the searches of his person and the car as fruits of an unconstitutional seizure, arguing that the officers lacked probable cause or reasonable suspicion to make the traffic stop. He did not assert that his Fourth Amendment rights were violated by the search of Simeroth's vehicle, cf. *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), but claimed only that the traffic stop was an unlawful seizure of his person. The trial court denied the suppression motion after finding that the stop was lawful and Brendlin was not seized until Brokenbrough ordered him out of the car and formally arrested him. Brendlin pleaded guilty, subject to appeal on the suppression issue, and was sentenced to four years in prison.

Case history

The California Court of Appeal reversed the denial of the suppression motion, holding that Brendlin was seized by the traffic stop, which they held unlawful. 8 Cal. Rptr.3d 882 (2004) (officially depublished). By a narrow majority, the Supreme Court of California reversed. The State Supreme Court noted California's concession that the officers had no reasonable basis to suspect unlawful operation of the car, 38 Cal.4th 1107, 1114, 45 Cal.Rptr.3d 50, 136 P.3d 845, 848 (2006),[2] but still held suppression unwarranted because a passenger "is not seized as a constitutional matter in the absence of additional circumstances that would indicate to a reasonable person that he or she was the subject of the peace officer's investigation or show of authority," *id.*, at 1111, 45 Cal. Rptr.3d 50, 136 P.3d, at 846. The court reasoned that Brendlin was not seized by the traffic stop because Simeroth was its exclusive target, *id.*, at 1118, 45 Cal.Rptr.3d 50, 136 P.3d, at 851, that a passenger cannot submit to an officer's show of authority while the driver controls the car, *id.*, at 1118–1119, 45 Cal. Rptr.3d 50, 136 P.3d, at 851–852, and that once a car has been pulled off the road, a passenger "would feel free to depart or otherwise to conduct his or her affairs as though the police were not present," *id.*, at 1119, 45 Cal.Rptr.3d 50, 136 P.3d, at 852. In dissent, Justice Corrigan said that a traffic stop entails the seizure of a passenger even when the driver is the sole target of police investigation because a passenger is detained for the purpose of ensuring an officer's safety and would not feel free to leave the car without the officer's permission. *Id.*, at 1125, 45 Cal.Rptr.3d 50, 136 P.3d, at 856.

We granted certiorari to decide whether a traffic stop subjects a passenger, as well as the driver, to Fourth Amendment seizure, 549 U.S. ——, 127 S.Ct. 1145, 166 L.Ed.2d 910 (2007). We now vacate.

II

A

[1–3] A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, "'by means of physical force or show of authority,'" terminates or restrains his freedom of movement, *Florida v. Bostick*, 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991) (quoting *Terry v. Ohio*, 392 U.S. 1, 19, n. 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)), "*through means intentionally applied*," *Brower v. County of Inyo*, 489 U.S. 593, 597, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989) (emphasis in original). Thus, an

Reference indicating that headnotes 1 through 3 were based on this paragraph

[2]California conceded that the police officers lacked reasonable suspicion to justify the traffic stop because a "'vehicle with an application for renewal of expired registration would be expected to have a temporary operating permit.'" 38 Cal.4th, at 1114, 45 Cal. Rptr.3d 50, 136 P.3d, at 848 (quoting Brief for Respondent California in No. S123133 (Sup.Ct. Cal.), p. 24).

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(Continued)

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"unintended person . . . [may be] the object of the detention," so long as the detention is "willful" and not merely the consequence of "an unknowing act." *Id.*, at 596, 109 S.Ct. 1378; cf. *County of Sacramento v. Lewis*, 523 U.S. 833, 844, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (no seizure where a police officer accidentally struck and killed a motorcycle passenger during a high-speed pursuit). A police officer may make a seizure by a show of authority and without the use of physical force, but there is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned. See *California v. Hodari D.*, 499 U.S. 621, 626, n. 2, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991); *Lewis*, *supra*, at 844, 845, n. 7, 118 S.Ct. 1708.

When the actions of the police do not show an unambiguous intent to restrain or when an individual's submission to a show of governmental authority takes the form of passive acquiescence, there needs to be some test for telling when a seizure occurs in response to authority, and when it does not. The test was devised by Justice Stewart in *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980), who wrote that a seizure occurs if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave," *id.*, at 554, 100 S.Ct. 1870 (principal opinion). Later on, the Court adopted Justice Stewart's touchstone, see, *e.g.*, *Hodari D.*, *supra*, at 627, 111 S.Ct. 1547; *Michigan v. Chesternut*, 486 U.S. 567, 573, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988); *INS v. Delgado*, 466 U.S. 210, 215, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984), but added that when a person "has no desire to leave" for reasons unrelated to the police presence, the "coercive effect of the encounter" can be measured better by asking whether "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter," *Bostick*, *supra*, at 435–436, 111 S.Ct. 2382; see also *United States v. Drayton*, 536 U.S. 194, 202, 122 S.Ct. 2105, 153 L.Ed.2d 242 (2002).

[4] The law is settled that in Fourth Amendment terms a traffic stop entails a seizure of the driver "even though the purpose of the stop is limited and the resulting detention quite brief." *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); see also *Whren v. United States*, 517 U.S. 806, 809–810, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). And although we have not, until today, squarely answered the question whether a passenger is also seized, we have said over and over in dicta that during a traffic stop an officer seizes everyone in the vehicle, not just the driver. See, *e.g.*, *Prouse*, *supra*, at 653, 99 S.Ct. 1391 ("[S]topping an automobile and detaining its occupants constitute a 'seizure' within the meaning of [the Fourth and Fourteenth] Amendments"); *Colorado v. Bannister*, 449 U.S. 1, 4, n. 3, 101 S.Ct. 42, 66 L.Ed.2d 1 (1980) (*percuriam*) ("There can be no question that the stopping of a vehicle and the detention of its occupants constitute a 'seizure' within the meaning of the Fourth Amendment"); *Berkemer v. McCarty*, 468 U.S. 420, 436–437, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) ("[W]e have long acknowledged that stopping an automobile and detaining its occupants constitute a seizure" (internal quotation marks omitted)); *United States v. Hensley*, 469 U.S. 221, 226, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985) ("[S]topping a car and detaining its occupants constitute a seizure"); *Whren*, *supra*, at 809–810, 116 S.Ct. 1769 ("'Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]").

Test to determine whether a person is seized by the police

We have come closest to the question here in two cases dealing with unlawful seizure of a passenger, and neither time did we indicate any distinction between driver and passenger that would affect the Fourth Amendment analysis. *Delaware v. Prouse* considered grounds for stopping a car on the road and held that Prouse's suppression motion was properly granted. We spoke of the arresting officer's testimony that Prouse was in the back seat when the car was pulled over, see 440 U.S., at 650, n. 1, 99 S.Ct. 1391, described Prouse as an occupant, not as the driver, and referred to the car's "occupants" as being seized, *id.*, at 653, 99 S.Ct. 1391. Justification for stopping a car was the issue again in *Whren v. United States*, where we passed upon a Fourth Amendment challenge

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(Continued)

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by two petitioners who moved to suppress drug evidence found during the course of a traffic stop. See 517 U.S., at 809, 116 S.Ct. 1769. Both driver and passenger claimed to have been seized illegally when the police stopped the car; we agreed and held suppression unwarranted only because the stop rested on probable cause. *Id.*, at 809–810, 819, 116 S.Ct. 1769.

B

[5] The State concedes that the police had no adequate justification to pull the car over, see n. 2, *supra*, but argues that the passenger was not seized and thus cannot claim that the evidence was tainted by an unconstitutional stop. We resolve this question by asking whether a reasonable person in Brendlin's position when the car stopped would have believed himself free to "terminate the encounter" between the police and himself. *Bostick*, *supra*, at 436, 111 S.Ct. 2382. We think that in these circumstances any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission.

A traffic stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver, diverting both from the stream of traffic to the side of the road, and the police activity that normally amounts to intrusion on "privacy and personal security" does not normally (and did not here) distinguish between passenger and driver. *United States v. Martinez-Fuerte*, 428 U.S. 543, 554, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976). An officer who orders one particular car to pull over acts with an implicit claim of right based on fault of some sort, and a sensible person would not expect a police officer to allow people to come and go freely from the physical focal point of an investigation into faulty behavior or wrongdoing. If the likely wrongdoing is not the driving, the passenger will reasonably feel subject to suspicion owing to close association; but even when the wrongdoing is only bad driving, the passenger will expect to be subject to some scrutiny, and his attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place. Cf. *Drayton*, *supra*, at 197–199, 203–204, 122 S.Ct. 2105 (finding no seizure when police officers boarded a stationary bus and asked passengers for permission to search for drugs).[3]

It is also reasonable for passengers to expect that a police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety. In *Maryland v. Wilson*, 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997), we held that during a lawful traffic stop an officer may order a passenger out of the car as a precautionary measure, without reasonable suspicion that the passenger poses a safety risk. *Id.*, at 414–415, 117 S.Ct. 882; cf. *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) (*per curiam*) (driver may be ordered out of the car as a matter of course). In fashioning this rule, we invoked our earlier statement that "'[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.'" *Wilson*, *supra*, at 414, 117 S.Ct. 882 (quoting *Michigan v. Summers*, 452 U.S. 692, 702–703, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981)). What we have said in these opinions probably reflects a societal expectation of "'unquestioned [police] command'" at odds with any notion that a passenger would feel free to leave, or to terminate the personal encounter any other way, without advance permission. *Wilson*, *supra*, at 414, 117 S.Ct. 882.[4]

[3]Of course, police may also stop a car solely to investigate a passenger's conduct. See, *e.g.*, *United States v. Rodriguez-Diaz*, 161 F.Supp.2d 627, 629, n. 1 (D.Md.2001) (passenger's violation of local seatbelt law); *People v. Roth*, 85 P.3d 571, 573 (Colo.App.2003) (passenger's violation of littering ordinance). Accordingly, a passenger cannot assume, merely from the fact of a traffic stop, that the driver's conduct is the cause of the stop.

[4]Although the State Supreme Court inferred from Brendlin's decision to open and close the passenger door during the traffic stop that he was "awar[e] of the available options." 38 Cal.4th 1107, 1120, 45 Cal.Rptr.3d 50, 136 P.3d 845, 852 (2006), this conduct could equally be taken to indicate that Brendlin felt compelled to remain inside the car. In any event, the test is not what Brendlin felt but what a reasonable passenger would have understood.

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(Continued)

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Our conclusion comports with the views of all nine Federal Courts of Appeals, and nearly every state court, to have ruled on the question. See *United States v. Kimball*, 25 F.3d 1, 5 (C.A.1 1994); *United States v. Mosley*, 454 F.3d 249, 253 (C.A.3 2006); *United States v. Rusher*, 966 F.2d 868, 874, n. 4 (C.A.4 1992); *United States v. Grant*, 349 F.3d 192, 196 (C.A.5 2003); *United States v. Perez*, 440 F.3d 363, 369 (C.A.6 2006); *United States v. Powell*, 929 F.2d 1190, 1195 (C.A.7 1991); *United States v. Ameling*, 328 F.3d 443, 446–447, n. 3 (C.A.8 2003); *United States v. Twilley*, 222 F.3d 1092, 1095 (C.A.9 2000); *United States v. Eylicio–Montoya*, 70 F.3d 1158, 1163–1164 (C.A.10 1995); *State v. Bowers*, 334 Ark. 447, 451–452, 976 S.W.2d 379, 381–382 (1998); *State v. Haworth*, 106 Idaho 405, 405–406, 679 P.2d 1123, 1123–1124 (1984); *People v. Bunch*, 207 Ill.2d 7, 13, 277 Ill.Dec. 658, 796 N.E.2d 1024, 1029 (2003); *State v. Eis*, 348 N.W.2d 224, 226 (Iowa 1984); *State v. Hodges*, 252 Kan. 989, 1002–1005, 851 P.2d 352, 361–362 (1993); *State v. Carter*, 69 Ohio St.3d 57, 63, 630 N.E.2d 355, 360 (1994) *(per curiam)*; *State v. Harris*, 206 Wis.2d 243, 253–258, 557 N.W.2d 245, 249–251 (1996). And the treatise writers share this prevailing judicial view that a passenger may bring a Fourth Amendment challenge to the legality of a traffic stop. See, *e.g.*, 6 W. LaFave, Search and Seizure § 11.3(e), pp. 194, 195, and n. 277 (4th ed.2004 and Supp.2007) ("If either the stopping of the car, the length of the passenger's detention thereafter, or the passenger's removal from it are unreasonable in a Fourth Amendment sense, then surely the passenger has standing to object to those constitutional violations and to have suppressed any evidence found in the car which is their fruit" (footnote omitted)); 1 W. Ringel, Searches & Seizures, Arrests and Confessions § 11:20, pp. 11–98 (2d ed. 2007) ("[A] law enforcement officer's stop of an automobile results in a seizure of both the driver and the passenger").[5]

C

The contrary conclusion drawn by the Supreme Court of California, that seizure came only with formal arrest, reflects three premises as to which we respectfully disagree. First, the State Supreme Court reasoned that Brendlin was not seized by the stop because Deputy Sheriff Brokenbrough only intended to investigate Simeroth and did not direct a show of authority toward Brendlin. The court saw Brokenbrough's "flashing lights [as] directed at the driver," and pointed to the lack of record evidence that Brokenbrough "was even aware [Brendlin] was in the car prior to the vehicle stop." 38 Cal.4th, at 1118, 45 Cal.Rptr.3d 50, 136 P.3d, at 851. But that view of the facts ignores the objective *Mendenhall* test of what a reasonable passenger would understand. To the extent that there is anything ambiguous in the show of force (was it fairly seen as directed only at the driver or at the car and its occupants?), the test resolves the ambiguity, and here it leads to the intuitive conclusion that all the occupants were subject to like control by the successful display of authority. The State Supreme Court's approach, on the contrary, shifts the issue from the intent of the police as objectively manifested to the motive of the police for taking the intentional action to stop the car, and we have repeatedly rejected attempts to introduce this kind of subjectivity into Fourth Amendment analysis. See, *e.g.*, *Whren*, 517 U.S., at 813, 116 S.Ct. 1769 ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis"); *Chesternut*, 486 U.S., at 575, n. 7, 108 S.Ct. 1975 ("[T]he subjective intent of the officers is relevant to an assessment of the Fourth Amendment implications of police conduct only to the extent that that intent has been conveyed to the person confronted"); *Mendenhall*, 446 U.S., at 554, n. 6, 100 S.Ct. 1870 (principal opinion) (disregarding a Government agent's subjective

Citations to federal and state court opinions that allowed a passenger to challenge the constitutionality of a traffic stop

Citations to treatises

[5]Only two State Supreme Courts, other than California's, have stood against this tide of authority. See *People v. Jackson*, 39 P.3d 1174, 1184–1186 (Colo.2002) (en banc); *State v. Mendez*, 137 Wash.2d 208, 222–223, 970 P.2d 722, 729 (1999) (en banc).

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EXHIBIT 4-5
(Continued)

BRENDLIN v. CALIFORNIA
Cite as 127 S.Ct. 2400 (2007)

intent to detain Mendenhall); cf. *Rakas*, 439 U.S., at 132–135, 99 S.Ct. 421 (rejecting the "target theory" of Fourth Amendment standing, which would have allowed "any criminal defendant at whom a search was directed" to challenge the legality of the search (internal quotation marks omitted)).

[6] California defends the State Supreme Court's ruling on this point by citing our cases holding that seizure requires a purposeful, deliberate act of detention. See Brief for Respondent 9–14. But *Chesternut*, *supra*, answers that argument. The intent that counts under the Fourth Amendment is the "intent [that] has been conveyed to the person confronted," *id.*, at 575, n. 7, 108 S.Ct. 1975, and the criterion of willful restriction on freedom of movement is no invitation to look to subjective intent when determining who is seized. Our most recent cases are in accord on this point. In *Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043, we considered whether a seizure occurred when an officer accidentally ran over a passenger who had fallen off a motorcycle during a high-speed chase, and in holding that no seizure took place, we stressed that the officer stopped Lewis's movement by accidentally crashing into him, not "through means intentionally applied." *Id.*, at 844, 118 S.Ct. 1708 (emphasis deleted). We did not even consider, let alone emphasize, the possibility that the officer had meant to detain the driver only and not the passenger. Nor is *Brower*, 489 U.S. 593, 109 S.Ct. 1378, 103 L.Ed.2d 628, to the contrary, where it was dispositive that "Brower was meant to be stopped by the physical obstacle of the roadblock—and that he was so stopped." *Id.*, at 599, 109 S.Ct. 1378. California reads this language to suggest that for a specific occupant of the car to be seized he must be the motivating target of an officer's show of authority, see Brief for Respondent 12, as if the thrust of our observation were that Brower, and not someone else, was "meant to be stopped." But our point was not that Brower alone was the target but that officers detained him "through means intentionally applied"; if the car had had another occupant, it would have made sense to hold that he too had been seized when the car collided with the roadblock. Neither case, then, is at odds with our holding that the issue is whether a reasonable passenger would have perceived that the show of authority was at least partly directed at him, and that he was thus not free to ignore the police presence and go about his business.

Second, the Supreme Court of California assumed that Brendlin, "as the passenger, had no ability to submit to the deputy's show of authority" because only the driver was in control of the moving vehicle. 38 Cal.4th, at 1118, 1119, 45 Cal.Rptr.3d 50, 136 P.3d, at 852. But what may amount to submission depends on what a person was doing before the show of authority: a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away. Here, Brendlin had no effective way to signal submission while the car was still moving on the roadway, but once it came to a stop he could, and apparently did, submit by staying inside.

Third, the State Supreme Court shied away from the rule we apply today for fear that it "would encompass even those motorists following the vehicle subject to the traffic stop who, by virtue of the original detention, are forced to slow down and perhaps even come to a halt in order to accommodate that vehicle's submission to police authority." *Id.*, at 1120, 45 Cal.Rptr.3d 50, 136 P.3d, at 853. But an occupant of a car who knows that he is stuck in traffic because another car has been pulled over (like the motorist who can't even make out why the road is suddenly clogged) would not perceive a show of authority as directed at him or his car. Such incidental restrictions on freedom of movement would not tend to affect an individual's "sense of security and privacy in traveling in an automobile." *Prouse*, 440 U.S., at 662, 99 S.Ct. 1391. Nor would the consequential blockage call for a precautionary rule to avoid the kind of "arbitrary and oppressive interference by [law] enforcement officials with the privacy and personal security of individuals"

EXHIBIT 4-5
(Continued)

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that the Fourth Amendment was intended to limit. *Martinez–Fuerte*, 428 U.S., at 554, 96 S.Ct. 3074.[6]

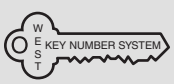
Indeed, the consequence to worry about would not flow from our conclusion, but from the rule that almost all courts have rejected. Holding that the passenger in a private car is not (without more) seized in a traffic stop would invite police officers to stop cars with passengers regardless of probable cause or reasonable suspicion of anything illegal.[7] The fact that evidence uncovered as a result of an arbitrary traffic stop would still be admissible against any passengers would be a powerful incentive to run the kind of "roving patrols" that would still violate the driver's Fourth Amendment right. See, *e.g.*, *Almeida–Sanchez v. United States*, 413 U.S. 266, 273, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973) (stop and search by Border Patrol agents without a warrant or probable cause violated the Fourth Amendment); *Prouse, supra*, at 663, 99 S.Ct. 1391 (police spot check of driver's license and registration without reasonable suspicion violated the Fourth Amendment).

* * *

Brendlin was seized from the moment Simeroth's car came to a halt on the side of the road, and it was error to deny his suppression motion on the ground that seizure occurred only at the formal arrest. It will be for the state courts to consider in the first instance whether suppression turns on any other issue. The judgment of the Supreme Court of California is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Disposition



[6]California claims that, under today's rule, "all taxi cab and bus passengers would be 'seized' under the Fourth Amendment when the cab or bus driver is pulled over by the police for running a red light." Brief for Respondent 23. But the relationship between driver and passenger is not the same in a common carrier as it is in a private vehicle, and the expectations of police officers and passengers differ accordingly. In those cases, as here, the crucial question would be whether a reasonable person in the passenger's position would feel free to take steps to terminate the encounter.

[7]Compare *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) (requiring "at least articulable and reasonable suspicion" to support random, investigative traffic stops), and *United States v. Brignoni–Ponce*, 422 U.S. 873, 880–884, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975) (same), with *Whren v. United States*. 517 U.S. 806, 810, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) ("[T]he decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred"), and *Atwater v. Lago Vista*, 532 U.S. 318, 354, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender").

The caption also indicates the status of *Brendlin* as "Petitioner." We can surmise from this that Brendlin lost in the lower court and filed a petition for certiorari for the case to be heard by the United States Supreme Court. Even though not stated, we know that California is the "respondent" because that is the name given by the Court to the party who won in the lower court.

Because the caption for *Brendlin* does not indicate, the reader must discover from the text who was the **plaintiff** and who was the **defendant** originally. It is important to note who is the respondent because the opinion sometimes refers to California by that term.

plaintiff
A person who brings (starts) a lawsuit against another person.

defendant
The person against whom a legal action is brought. This legal action may be civil or criminal.

Below the parties we find "No. 06-8120," as the docket number for *Brendlin*. The docket number is a number assigned to the case upon initial filing with the clerk of the court and by which it is identified prior to assigning it a volume and page number in the reporter series. The docket number usually indicates the year in which the case was filed with the court and the sequence in which the case was filed. Thus, *Brendlin* was case

number 8120 filed with the United States Supreme Court in 2006. The docket number is important when attempting to research the case prior to its official publication. Below the docket number is the date of the oral argument and the date of the decision for *Brendlin*.

THE SYLLABUS

Following the caption is a brief summary of the case called the *syllabus*. In *Brendlin*, there is another, more detailed, syllabus following the headnotes. In regional reporters, *Federal Supplement*, and *Federal Reporter*, cases usually include the first syllabus prepared by West but not the second. While the syllabi are sometimes written by the court or a reporter appointed by the Court, as indicated by the footnote to the second syllabus in *Brendlin*, a syllabus is a narrow condensation of the court's ruling and cannot be relied upon as the precise holding of the court. The syllabus can be useful in obtaining a quick idea of what the case concerns—a summary of the issue and the holding of the court. Frequently, legal researchers follow leads to cases, which upon reading prove to be unrelated to the issue of the research. Reading the syllabus may make reading the entire opinion unnecessary. On the other hand, if the syllabus suggests the case may be important, a careful reading of the entire text of the opinion is usually necessary.

LEGAL ANALYSIS TIP

Plaintiff and Defendant

plaintiff:
the party who originally filed the lawsuit at the trial level

defendant:
the party against whom the lawsuit was brought

HEADNOTES

There are six *headnotes* to *Brendlin*. They are located on the first or first few pages of the case and are numbered consecutively, one through six in *Brendlin*. The headnotes are statements of the major points of law discussed in the case. With limited editing, the headnotes tend to be nearly verbatim statements lifted from the opinion. The headnotes are listed in numerical order, starting at the beginning of the opinion, so that the reader may look quickly for the context of a point expressed by a headnote. For example, the part of the text that deals with a particular point made in the headnote will have the number of the headnote in brackets (e.g., [3]) at the beginning of the paragraph or section in which it is discussed. This is very helpful when researching lengthy cases in which only one issue is of concern to the researcher.

To the right of the headnote number is a generic heading, such as "Automobiles" and a *key* number. Because *Supreme Court Reporter* is published by West, the reporter uses an indexing title and number that can be used throughout the many West indexes, reporters, and encyclopedias. LexisNexis uses a similar indexing title and number that can be used throughout the many LexisNexis publications.

AUTHORSHIP OF THE OPINION[S] AND ATTORNEYS FOR THE PARTIES

In *Brendlin*, the roles of the justices are identified following both syllabi. This was a unanimous decision, and Justice Souter wrote the opinion. The attorneys of the parties are listed just above the beginning of the opinion. In *Brendlin*, the petitioner had four attorneys and the respondent had a number of government attorneys. One of the attorneys for each of the parties was designated the "counsel of record," which means that that attorney was the one to receive all of the official documents in the case from the Court and from the

opposing counsel. The first attorney named as attorney for Brendlin was a court-appointed attorney, meaning that Brendlin was indigent. Two of Brendlin's other attorneys were from the Washington, D.C. office of a large international law firm and were likely providing pro bono services to Brendlin in the case. The law firm's Web site indicates that the firm has a substantial commitment to pro bono service and has won awards for its pro bono service. The other attorney is a law school professor with an expertise in federal criminal appellate practice who probably involved some of her students in the case. The listing of respondent's attorneys included the attorney general and the solicitor general of California, as well as a number of attorneys in their offices. It is unclear from the case how substantial a role each of the attorneys listed played in representing respondent. Oftentimes in a United States Supreme Court, there is an attorney named as ***amicus curiae***. *Amicus curiae* means "friend of the court." This is a person, although not a party to the case, who is granted permission to file a brief in the case. Usually, the person wants to present to the court a point of view that otherwise may not be represented in the case.

amicus curiae
(Latin) "Friend of the court." A person allowed to give argument or appear in a lawsuit (usually to file a brief, but sometimes to take an active part) who is not a party to the lawsuit.

FORMAT OF THE OPINION

Following the names of the attorneys, the formal opinion (i.e., the official discussion of the case) begins. In *Brendlin*, the opinion states "Justice SOUTER delivered the opinion of the Court." The author of the opinion has considerable freedom in presentation. Some opinions are written mechanically, while a few are almost poetic. The peculiarities of any particular case may dictate a special logical order of its own. Nevertheless, the majority of opinions follow a standard format. When this format is followed, reading and understanding are simplified, but no judge is required to make an opinion easy reading. The following format is the one most frequently used.

As far as opinions of the United States Supreme Court are concerned, *Brendlin* is fairly brief, well organized, and easy to understand.

THE FACTS

Most of the text of an opinion in appellate decisions is concerned with a discussion of the law, but because a case revolves around a dispute concerning events that occurred between the parties, no opinion is complete without some discussion of the events that led to the trial. Trials generally explore these events in great detail and judge or jury settles the facts; appellate opinions, however, usually narrow the fact statement to the most relevant facts. In an interesting case, the reader is often left wanting to know more about what happened; but the judge is not writing a story. The important element in the opinion concerns the application of law.

PROCEDURE

Near or at the beginning of the opinion is a reference to the outcome of the trial in the lower court and the basis for appeal. In *Brendlin*, the opinion states that the trial court denied Brendlin's motion to suppress the evidence obtained from the officer's search of the car in which Brendlin was a passenger and he pleaded guilty, reserving his right to appeal the denial of his motion to suppress. The California Court of Appeal reversed and the Supreme Court of California reversed.

Often, the remarks about procedure are brief and confusing, especially if the reader is not familiar with the procedural rules. An understanding of the relevant state or federal court system and jurisdiction will help unravel procedural steps leading to the appellate decision. If the procedure is important to the opinion, a more elaborate discussion is usually found in the body of the opinion. Many things in the opinion become clear only upon further reading; and many opinions must be read at least twice for a full understanding. An opinion is like a jigsaw puzzle—the reader must put the parts together to see the full picture.

THE ISSUE

Many writers describe the questions of law that must be decided either at the beginning of the opinion or following the relevant facts. In *Brendlin*, Justice Souter states the issue very clearly on page 2403. "When a police officer makes a traffic stop, the driver of the car is seized within the meaning of the Fourth Amendment. The question in this case is whether the same is true of a passenger."

Unfortunately, few writers pinpoint the issue in this fashion, so the reader must search the text for the issue. At this point, it is appropriate to introduce a favorite term used by attorneys: caveat. This means "warning" or, literally, "Let him beware."

Caveat: The issue is the most important element in an opinion. If the issue is not understood, the significance of the rule laid down by the court can easily be misunderstood. This point cannot be emphasized too strongly. Law students study cases for three years with one primary goal: "Identify the issues." Anyone can fill out forms, but a competently trained person can go right to the heart of a case and recognize its strengths and weaknesses.

THE DISCUSSION

The main body of the text of an opinion, often ninety percent of it, discusses the meaning of the issue(s) and offers a line of reasoning that leads to a disposition of the case and explains why a certain rule or rules must apply to the dispute. This part of the opinion is the most difficult to follow. The writer has a goal, but the goal is often not clear to the reader until the end. For this reason, it is usually helpful to look at the final paragraph in the case to see whether the appellate court affirmed (agreed with the lower court) or reversed (disagreed with the lower court).

The final paragraph of *Brendlin* states that the Court vacated the decision of the Supreme Court of California and remanded the case. "Vacate" means that the Court set aside the California court's decision as no longer having any effect; the Court remanded, or sent the case back to the lower court, for the further action of the trial court judge reconsidering whether *Brendlin*'s motion to suppress should have been granted.

Many judges seem to like to hold the reader in suspense, but there is no reason the reader needs to play this game. By finding out the outcome of the decision, the reader can see how the writer of an opinion is building the conclusion. By recognizing the issue and knowing the rule applied, the reader can see the structure of the argument. The discussion section is the writer's justification of the holding.

THE HOLDING

The holding states the rule of the case—that is, the rule the court applies to conclude whether or not the lower court was correct. The rule is the law, meaning that it determines the rights of the parties until reversed by a higher court. It binds lower courts faced with a similar dispute in future cases. It is best to think of the holding as an answer to the issue.

The *Brendlin* holding is located in the first paragraph of the opinion, directly following the issue, on page 2403. "We hold that a passenger is seized as well and so may challenge the constitutionality of the stop." A restatement of the same holding is located at the beginning of the last full paragraph of the opinion. "Brendlin was seized from the moment Simeroth's car came to a halt on the side of the road, and it was error to deny his suppression motion on the ground that seizure occurred only at the formal arrest."

FINDING THE LAW

Research of cases is done for a number of reasons. The principles that apply to a dispute may be unknown, unfamiliar, or forgotten. With experience, legal professionals come to develop a knack for guessing how a dispute will be decided and can even predict what rules

will be applied. Once the issues of a case are recognized, a reasonable prediction of a fair outcome can be made. This is, however, merely tentative; the researchers must check their knowledge and memory against definitive statements of the law. In some instances, a statute will clearly define the rights and duties that pertain to the case at hand; in others, the elaboration of the law in the cases will leave little room for doubt. Frequently, however, the issue in a client's case will be complex or unique, and no case can be found that is directly "on point." Ideally, research will result in finding a case that contains a fact situation so similar to that of the client that an assumption can be made that the same rule will apply.

EVALUATING CASES

Once the purpose, style, and structure of appellate decisions are grasped, mastering the content is a matter of concentration and experience. Researching cases generally has one or more of the following three goals:

1. Finding the statements of the law.
2. Assessing the law in relation to the client's case.
3. Building an argument.

These three goals can be illustrated using the *Weiss* facts found in Chapter 2. A researcher might look for cases stating what the law is concerning whether a passenger can challenge the constitutionality of a traffic stop made by a police officer. *Brendlin* appears to be a good case to evaluate because it deals with this issue and is a very recent United States Supreme Court opinion.

Now, the researcher would assess *Brendlin* in relation to *Weiss*. *Brendlin* and *Weiss* contain similar facts and both consider the issue of whether the suspect's Fourth Amendment rights were violated when the officer stopped the car in which the suspect was a passenger. In both cases, the officer arrested a passenger after finding drugs in the car.

Although the issue and many of the facts in the two cases are similar, a number of facts are different, which may or may not be crucial. In some instances, the facts of a dispute are used to *distinguish* it from similar cases. For example, the *Brendlin* facts concerning whether the passenger felt free to leave may be distinguished from the *Weiss* facts.

In *Brendlin*, the officer stopped the car on the road, spoke briefly with the driver and the passenger, returned to the patrol car, ascertained that there was an outstanding arrest warrant for the passenger, and arrested the passenger after backup officers arrived. While the officer was in the patrol car, the passenger briefly opened and closed the passenger door. In *Weiss*, Wanda was driving Jennifer home and stopped the vehicle in an upscale residential area almost in front of Jennifer's house. Jennifer opened the passenger car door and got out, intending to walk to her house, take her medicine, and lie down. Wanda and Jennifer were talking when the officer pulled up behind Wanda's car. Wanda seemed to think that Jennifer was free to leave but Wanda asked Jennifer to stay to keep Wanda company. Jennifer sat back down in Wanda's car but left her door open while the officer talked to Wanda briefly as he examined her driver's license and registration. The officer walked toward the patrol car before turning back, asking permission to search Wanda's car, and suggesting that Wanda and Jennifer sit in the back seat of the patrol car for their "safety and comfort." The officer did not call for help from other officers.

Jennifer can challenge the constitutionality of the stop only if the officer seized her. A passenger is seized if "a reasonable person in [the passenger's] position when the car stopped would have believed himself free to 'terminate the encounter' between the police and himself." Jennifer would argue that her case is similar to *Brendlin* because she submitted to the officer's authority by sitting back down in Wanda's car and willingly took a seat in the back of the patrol car when the officer requested her to do so. The government can argue that *Weiss* should be distinguished from *Brendlin* because a reasonable person would

have felt free to leave the car. The car was already stopped when the officer pulled up behind it and Jennifer had already exited. When Jennifer sat back down in Wanda's car, Jennifer kept her door wide open, she was within a very short walking distance of her home, and the officer did not indicate to Jennifer in any way that she was not free to leave.

The *Weiss* facts do not as clearly indicate as do the *Brendlin* facts that the passenger did not feel free to leave. Brendlin opened the passenger's door briefly and closed it, remaining in the car until the officer arrested Brendlin at gunpoint. Until she sat in the patrol car, Jennifer's actions indicated that she felt free to leave and the police officer did not say anything to indicate otherwise. However, the reasonable person approached by a uniformed police officer probably would not feel free to leave without the officer giving the passenger permission, and Jennifer willingly took a seat in the back of the patrol car at the officer's request. Although the government has sufficient facts to support its argument that the officer did not seize Jennifer, a court probably would decide that Jennifer can challenge the constitutionality of the traffic stop because she was seized.

LEGAL ANALYSIS TIP

A Brief

When attorneys refer to a "brief," they may be referring to a case brief, but more likely than not, they are referring to an "appellate brief." An appellate brief is the document containing the arguments of a party to a case that is usually prepared by the party's attorney and is submitted to the appellate court when a case is appealed.

Only experience and knowledge of the law will develop the keen sense it takes to separate cases that are on point from those that are distinguishable. It is often the advocate's job to persuade on the basis of threading a way through a host of seemingly conflicting cases (Exhibit 4-6).

BRIEFING A CASE

"Briefing a case" means taking notes of the most important parts of a case so that you can later refer to your "case brief" to quickly refresh your memory rather than have to read the case over again. When you write out a case brief, you have engaged in active learning as you write a summary in your own words. This leads to better understanding of the case than underlining or rereading. Professors may require you to brief cases, with class time spent discussing the cases and "synthesizing" them. Synthesizing involves analyzing how cases deal with a particular subject matter and extracting a "rule of law" from them.

A second reason to brief cases is as a research and writing tool. When researching a problem you should brief the cases found, synthesize them to determine the rule of law, and apply the rule of law to the problem.

Although some professors may require you to turn in your first few case briefs when you are learning how to brief a case, case briefs are generally read only by you. The format description that follows is a fairly standard one, but there is no one right way to brief a case. You may find yourself developing your own format for those case briefs you know you will not be required to turn in.

If a professor asks you to brief cases, it may be a good idea to ask the professor if he or she prefers a particular format. The desired format may vary from professor to professor, with some requiring a longer brief of three to four pages.

As the name suggests, a case brief should be fairly concise. If your case brief is as long as or longer than the case, you might just as well reread the entire case rather than refer

NAME OF CASE		
Facts that Are Similar	**Facts that Are Different**	**Rule of Law and Conclusion**
The officer stopped a car, even though there was no traffic violation, and arrested the passenger.	The location of the car stop and the actions of the passenger were different. In *Brendlin*, the officer stopped the car on the road, discovered that there was an outstanding warrant for Brendlin, and called for backup officers. Brendlin briefly opened and closed his door and then remained in the car until arrested at gunpoint. In *Weiss*, Wanda stopped her car in front of Jennifer's house and Jennifer got out of the car. As the officer approached the car, Jennifer sat back down. After the questioning seemed to be over, the officer requested permission to search the car, and asked Wanda and Jennifer to wait in the patrol car. Jennifer kept her door open and Wanda confirmed Jennifer's belief that Jennifer was free to leave. Jennifer willingly sat in the back seat of the patrol car. The officer did not call for backup officers.	The test to determine whether a passenger is seized is if "a reasonable person in [the passenger's] position when the car stopped would have believed himself free to 'terminate the encounter' between the police and himself." Although this is a closer call than *Brendlin*, a court would probably hold that Jennifer was seized because a reasonable person in Jennifer's circumstances would not have felt free to leave.

EXHIBIT 4-6
Case Law Analysis Chart.

to the case brief. For most cases, a good length is a page or less. Some portions of the case brief, such as the issue(s) and holding(s) may be taken directly from the case, while the case brief may summarize the facts. To avoid being accused of plagiarism, you should make a practice of placing any borrowed language in quotation marks.

The case brief format is explained in the following section.

CASE BRIEF FORMAT

A standard format for briefing a case is the following:

Correct case citation—Your professor will probably ask you to cite cases, as in the examples provided in Appendix B or by the citation rule for your state.

Facts—This section should only contain the significant facts in light of the legal question asked, but it may state what facts are not known if the absence of facts is significant.

History—State briefly what happened at trial and at each level before the case reached the court whose opinion you are briefing.

Issue(s)—State the issue or issues considered by the court. Each issue should be one sentence in length, and the issues should be numbered if there is more than one. An issue is easier to understand if it is stated in the form of a question, rather than beginning with the word "whether," and it should end with a question mark.

Holding(s)—Generally, you will have the same number of holdings as you do issues, with each holding containing the answer to the corresponding issue. Sometimes you

correct case citation
When a citation to a case is given, the citation format must conform to the applicable citation rule.

facts
The occurrences on which a case is based.

history
What happened at trial and at each level before the case reached the court whose opinion you are briefing.

issue
A question that a judge or a jury must decide in a case.

holding
The core of a judge's decision in a case. That part of the judge's written opinion that applies the law to the facts of the case and about which can be said "the case means no more and no less than this." When later cases rely on a case as precedent, it is only the holding that should be used to establish the precedent.

may have one issue and more than one holding if the issue is a broad one and there is more than one answer to it. Each holding should be one sentence. Even if the court does not explicitly state the holding or gives a simple "yes" or "no" answer to an issue, reread the case until you can write a one-sentence holding.

reasoning
The main body of the text of a court opinon, which discusses the meaning of the issue(s), offers a discussion that leads to a disposition of the case, and explains why a certain rule or rules must apply to the dispute.

Reasoning—State the court's reasoning for reaching the holding from the issue considered. Your professor may require you to summarize the majority opinion.

disposition
The court's final ruling with respect to the lower court's decision, for example affirmed, reversed, vacated, etc.

Disposition—State what the court did with the lower court's decision: affirmed, reversed, vacated, etc.

CASE BRIEF FOR *BRENDLIN*

The following is a suggested case brief for *Brendlin*. It would be good practice for you to try to brief *Brendlin* yourself and compare your case brief with the following case brief.

Brendlin v. California, 127 S. Ct. 2400 (2007).

Facts—A police officer noticed a car with expired registration tags, but with a temporary operating permit and stopped the car to determine whether the permit was for the car. While examining the driver's license, the officer recognized the passenger, Brendlin, and suspected that either Brendlin or his brother had violated parole. The officer returned to the patrol car, discovered that Brendlin had an outstanding arrest warrant, and called for assistance from other officers. While in the patrol car, the officer saw Brendlin open and quickly close the passenger door. When other officers arrived, the officer arrested Brendlin at gunpoint. A search of Brendlin, the driver, and the car found that Brendlin had a syringe cap, the driver had syringes and a "green leafy substance," and items used to make methamphetamine were in the car. Brendlin was charged with possession and manufacture of methamphetamine.

History—Brendlin filed a motion to suppress the evidence found on him and in the car, claiming that his seizure was unconstitutional because there was no traffic violation. The trial court denied his motion to suppress, he pleaded guilty, reserving his right to appeal the denial of his motion to suppress, and the judge sentenced him to a four-year prison term. On appeal, the California Court of Appeal reversed and the Supreme Court of California reversed.

Issue—"When a police officer makes a traffic stop, the driver of the car is seized within the meaning of the Fourth Amendment. The question in this case is whether the same is true of a passenger."

Holding—"We hold that a passenger is seized as well and so may challenge the constitutionality of the stop."

Reasoning—The Court announced the test for determining whether an officer seized the passenger in a traffic stop, which is if "a reasonable person in [the passenger's] position when the car stopped would have believed himself free to 'terminate the encounter' between the police and himself." The reasonable passenger in a car stopped by an officer would not feel free to leave either because the passenger would feel subject to police inquiry, or the officer would want control over the passenger as a safety measure, or both.

Disposition—The Court vacated and remanded the case.

SUMMARY

- A court's jurisdiction is the power of the court to decide cases. To decide a case, a court must have geographical jurisdiction, subject matter jurisdiction, and hierarchical jurisdiction.
- The Supreme Court of the United States is the highest federal court. The thirteen United States Courts of Appeals are federal intermediate appellate courts. The United States District Courts are federal trial-level courts.
- The state court system varies from state to state. Some states have a simplified court structure (also called a unified court structure) with three or four tiers; the court structure of other states is more complex.
- Cases are easier to read and understand once you are familiar with typical case style and format.
- The syllabus (case summary) and the headnotes (summaries of important legal principles contained in the case) that precede the opinion were prepared by the publisher and have no official authority.
- The main parts of a typical opinion are the facts, the procedural history of the case before it reached the court writing the opinion, the issue(s) (legal questions considered by the court), the holding(s) (the rules of the case), and the court's explanation of why it reached the particular holding(s).
- "Briefing a case" means taking notes of the most important parts of a case so that you can later refer to your "case brief" to quickly refresh your memory.
- A standard format for briefing a case contains:
  - correct case citation
  - facts
  - history
  - issue(s)
  - holding(s)
  - reasoning
  - disposition

KEY TERMS

admissibility
amicus curiae
appellate briefs
appellate court
appellate jurisdiction
bench trial
charge
chief justice
correct case citation
court of last resort
defendant
discretionary jurisdiction
disposition
dissenting opinion
diversity jurisdiction
facts
federal question jurisdiction
general jurisdiction
geographical jurisdiction
hierarchical jurisdiction
history
holding
in personam jurisdiction
in rem jurisdiction
intermediate appellate court
issue
jurisdiction
justices
limited jurisdiction
majority
motion
motion for a directed verdict
motion for a summary judgment
oral argument
original jurisdiction
panel
petition for writ of certiorari
plaintiff
questions of fact
questions of law
reasoning
remand
reporter
subject matter jurisdiction
Supreme Court of the United States
testimony
trial courts
unified court structure
United States Court of Appeals
United States district courts
United States Magistrate Judges

CYBERLAW EXERCISES

1. The official Web site of the United States Supreme Court is <http://www.supremecourtus.gov>. Use this Web site to access *Brendlin v. California*. Explain the process you followed to locate the case at the Web site. Compare the format of the case on the Web site with the format in which the case appears in this chapter. List four material differences.
2. The Legal Information Institute, hosted by Cornell University Law School, is located at <http://www.law.cornell.edu>. Use this Web site to find the last three cases decided by the United States Supreme Court. Explain the process you followed to locate the information at the Web site. Give the name of the three cases.
3. The Legal Information Institute, hosted by Cornell University Law School, is located at <http://www.law.cornell.edu>. Use this Web site to find cases decided by the United States court of appeals having jurisdiction over the state in which you are located. Name that court. Give the years for which opinions of that court are accessible at the Web site.
4. The Legal Information Institute, hosted by Cornell University Law School, is located at <http://www.law.cornell.edu>. Use this Web site to find cases decided by the United States district court having jurisdiction over the part of the state in which you are located. Name that district court. Give the years for which opinions of that court are accessible at the Web site.
5. The Administrative Office of the U.S. Courts maintains the Web site located at <http://www.uscourts.gov>. This site explains some of the differences in structure of the federal and state courts. What provisions of law establish the federal courts and what provisions of law establish the state courts?
6. Findlaw is located at <http://findlaw.com/>. Use this Web site to find the last three cases decided by the United States Supreme Court. Explain the process you followed to locate the information at the Web site. Give the name of the three cases.
7. Findlaw is located at <http://findlaw.com/>. Use this Web site to find cases decided by the United States court of appeals having jurisdiction over the state in which you are located. Name that court. Give the years for which opinions of that court are accessible at the Web site.
8. Findlaw is located at <http://findlaw.com/>. Use this Web site to find cases decided by the United States district court having jurisdiction over the part of the state in which you are located. Name that district court. Give the years for which opinions of that court are accessible at the Web site.
9. The Federal Court Locator, maintained by the Villanova University School of Law, gives the researcher links to federal court opinions and Web sites for federal courts. Search the Internet to find the Federal Court Locator and give the URL for the Web site. Use the Web site to locate Web sites providing information on the United States Supreme Court other than the official Web site for the Court. List the names of four of these Web sites.
10. Courthouse News (<http://www.courthousenews.com>), an online newsletter, provides summaries of recently-decided cases. Review a few of these cases and summarize three of them.
11. The Oyez Project (<http://www.oyez.org>) is a United States Supreme Court database. The site includes a virtual tour of the United States Supreme Court building and audiotapes of oral arguments before the United States Supreme Court. Take the tour and listen to one oral argument. Give the correct citation for the case and list three items you learned from listening to the oral argument.
12. The National Center for State Courts Web site (<http://www.ncsconline.org>) provides links to state court Web sites. Many states have one Web site for the highest court in the state and another Web site for lower courts in the state. Use the National Center for State Courts Web site to find Web sites for the courts of your state. Give the URL for the Web site of the highest court in your state. Give the URL for the Web site of lower courts in your state.

LEGAL RESEARCH ASSIGNMENT—BRIEFING CASES

1. Brief the 2003 United States Supreme Court case *Maryland v. Pringle*.
2. Brief the 1996 United States Supreme Court case *Whren v. United States*.
3. Brief the 1991 United States Supreme Court case *Florida v. Jimeno*.

LEGAL RESEARCH ASSIGNMENT—CASE LAW

1. What are the names of the three reporters containing current decisions of the United States Supreme Court?
2. What is the name of the looseleaf service containing current decisions of the United States Supreme Court?
3. What are the names of the two reporters containing current decisions of the United States circuit courts of appeals?
4. What is the name of the reporter containing current decisions of the United States district courts?
5. What is the name of the highest court in your state and what is the name of the reporter containing current decisions of that court?
6. What is the name of your state's intermediate appellate court and what is the name of the reporter containing current decisions of that court?
7. What is the name of the looseleaf service containing decisions of your state's courts?
8. What is the name of your state's trial level courts? (Name all trial level courts, if more than one.) What is the name of the reporter containing current decisions of those courts?
9. Answer the following questions regarding the case found at 82 F.3d 11:
   a. What is the correct citation for this case?
   b. Who was the plaintiff, who did she sue, and why did she sue?
   c. What was the result at the trial level?
   d. Who appealed and what were the problems with the appellate documents?
   e. According to the court, what are the two "overarching" reasons for compliance with rules of procedure?
   f. What did the court hold?
   g. What was the other question the court considered?
   h. What are the two reasons that sanctions might be appropriate?
10. Answer the following questions regarding the case found at 151 P.3d 962:
    a. What is the proper citation for this case?
    b. What did the court consider scandalous about the petitioners' briefs?
    c. What was the penalty for including scandalous material in the briefs?
    d. Why did the court say that its affirmance of the lower court decisions would not have precedential effect?
11. Answer the following questions regarding the case found at 469 F.3d 946:
    a. What is the proper citation for this case?
    b. What was the result in the trial court?
    c. What was the deadline for filing the appeal?
    d. Where was the appeal filed and how was a record made of the time it was filed?
    e. What could the appellant's attorney have done to correct the six minute discrepancy?
12. Answer the following questions regarding the case found at 872 N.E.2d 848:
    a. What is the proper citation for this case?
    b. What were the facts in this case?
    c. What was the issue in the case?
    d. What did the court hold?
13. Answer the following questions regarding the case found at 127 S. Ct. 2360:
    a. What is the proper citation for this case?
    b. What were the facts in this case?
    c. What was the issue?
    d. What did the court hold?
    e. What is the basis of the distinction between claims-processing rules and jurisdictional rules?
    f. What doctrine did the Court recognize in *Harris Truck Lines* and what did the doctrine allow?
    g. What did the court do with *Harris Truck Lines*?
    h. What were the court's reasons for taking this action?
14. Answer the following questions regarding the case found at 868 N.E.2d 738:
    a. What is the correct citation for this case? (Note: Use "Ohio Ct. App." as the name of the court in the citation.)
    b. How did Pupco seek to expand its business?
    c. What did the trial court hold and what action did the court take on Pupco's building permit?
    d. Why did the appellate court hold that the trial court's decision was unreasonable?
    e. Did the appellate court find that the proposed addition was an indoor or outdoor area and why?
15. Answer the following questions regarding the case found at 206 Fed. App'x. 756:
    a. What is the correct citation for this case?
    b. Were the plaintiffs represented by attorneys?
    c. Who were the defendants?
    d. Why did the trial court dismiss the complaint for failure to comply with Rule 8 of the Federal Rules of Civil Procedure?
    e. How did the appellate court dispose of the case?

16. Answer the following questions regarding the case found at 490 F.3d 432:
    a. What is the correct citation for this case?
    b. What were the facts in Walls' state court case?
    c. What was the issue before the United States Court of Appeals for the Sixth Circuit?
    d. What was the holding?
17. Answer the following questions regarding the case found at 492 F. Supp. 2d 47:
    a. What is the correct citation for this case?
    b. Why did Uniloc file a motion to recuse the judge?
    c. Did the judge grant the motion?
    d. Why does the judge say that there is a "risk of injustice" were the judge to recuse himself?
18. Answer the following questions regarding the case found at 164 P.3d 454:
    a. What is the correct citation for this case?
    b. What were the facts in this case?
    c. How did the court differentiate the duty to defend from the duty to indemnify?
    d. What was the overall conclusion (the holding with respect to all issues and the disposition)?
    e. How many justices jointed in the majority decision and how many justices dissented?
19. Answer the following questions regarding the case found at 137 P.3d 914:
    a. What is the proper citation for this case?
    b. What is the law in California and Georgia concerning the secret taping of a telephone conversation?
    c. What were the facts?
    d. What type of analysis does the court use in deciding a case involving a conflict of law between states?
    e. Does California or Georgia law apply and why?
    f. What was the result and why did the court treat the requested injunctive relief different from damages?
20. Answer the following questions regarding the case found at 448 F. Supp. 2d 657:
    a. What is the correct citation for this case?
    b. What were the facts?
    c. Why did the magistrate deny the hospital's request for a new trial?
    d. Why did the court refuse to lower the statutory damages amounts?
21. Answer the following questions regarding the case found at 453 F.3d 958:
    a. What is the correct citation for this case?
    b. What are the facts of the case?
    c. What was the issue?
    d. What was the holding?
    e. Did McDonald violate a traffic ordinance and why or why not?
    f. Should the trial court have granted the motion to suppress?
22. Answer the following questions regarding the case found at 455 F.3d 824:
    a. What is the correct citation for this case?
    b. What were the facts?
    c. In the Eighth Circuit, can a traffic stop be constitutional even though there was no traffic violation?
    d. Was the officer's belief that a cracked windshield violates a traffic ordinance objectively reasonable?
    e. How did the court dispose of the case?
23. Answer the following questions regarding the case found at 209 F.3d 1198:
    a. What is the correct citation for this case?
    b. What were the facts in this case?
    c. What was the issue?
    d. What was the holding?
    e. What was the reasoning?
24. Answer the following questions regarding the case found at 128 S. Ct. 579:
    a. What is the correct citation for this case?
    b. What was the issue before the court?
    c. What effect would application of § 924(c)(1)(A) have on Watson's sentence?
    d. What did the court decide in two prior cases involving the statute?
    e. What was the reason that the court granted certiorari?
    f. What did the court hold?
    g. What was Justice Ginsburg's point in her concurring opinion?
25. Answer the following questions regarding the case found at 128 S. Ct. 558:
    a. What is the correct citation for the case?
    b. What was the issue in the case?
    c. What did the court hold?
    d. What was the 100 to 1 ratio contained in the 1986 Anti-Drug Abuse Act?
    e. Why did the United States Sentencing Commission state that the much more serious penalty for crack cocaine than powder cocaine "fosters disrespect for and lack of confidence in the criminal justice system" and many contend that the difference in penalty "promotes unwarranted disparity based on race"?

26. Answer the following questions regarding the case found at 128 S. Ct. 586:
    a. What is the correct citation for the case?
    b. What was the issue?
    c. What was the holding?
    d. What was the sentence recommended in the presentence report, what sentence did Gall receive, and why?
    e. What practical considerations support the appellate court's duty to defer to the trial court's determination to vary from the sentencing guidelines?
27. Answer the following questions regarding the case found at 164 F.3d 110:
    a. What is the correct citation for this case?
    b. What was the result in the trial court?
    c. What does Rule 28 require and why did the appellant's main brief fail to comply with the rule?
    d. Why did the court refuse to consider the appellant's reply brief?
    e. What did the appellee recover under Rule 38 and why?
28. Answer the following questions regarding the case found at 127 F.3d 1145:
    a. What is the correct citation for this case?
    b. What was wrong with N/S's brief?
    c. What was wrong with N/S's reply brief?
    d. What was the result?
    e. Why did the court feel that it had to enforce Rule 28?
29. Answer the following questions regarding the case found at 918 F. Supp. 905:
    a. What is the correct citation for this case?
    b. What was the matter before the court?
    c. Why did the court rule that *Kopf* was controlling?
30. Answer the following questions regarding the case found at 710 F.2d 1542:
    a. What is the correct citation for this case?
    b. Why did the plaintiffs file this case?
    c. Did the Augusta business ordinance apply to *Blackie*?
31. Answer the following questions regarding the case found at 283 U.S. 25:
    a. What is the correct citation for this case?
    b. What was the issue before the court?
    c. What did the court hold?
32. Answer the following questions regarding the case found at 247 N.W.2d 673:
    a. What is the correct citation for this case?
    b. How did the treatment of the inventory search of petitioner's vehicle differ under the United States Constitution and the state constitution?
    c. What did the state constitution require concerning inventory searches?
33. Answer the following questions regarding the case found at 674 A.2d 1273:
    a. What is the correct citation for this case?
    b. What was the issue?
    c. What was the quality of attorney Shepperson's writing between 1985 and 1992?
    d. How did the court punish Shepperson?
34. Answer the following questions regarding the case found at 602 F.2d 743:
    a. What is the correct citation to the case?
    b. What was the issue before the court?
    c. What do subsections (a) and (e) of Rule 8 of the Federal Rules of Civil Procedure require?
    d. What did the appellate court order the district court to do?

DISCUSSION POINTS

1. Some have proposed splitting the Court of Appeals for the Ninth Circuit into a number of circuits. What are the advantages and disadvantages of splitting the circuit?
2. How does the court system in your state compare to the California and Illinois systems?
3. Would it be appropriate to cite to a lower court opinion, once the case has been decided by a higher court?
4. What is the relationship between the state courts of your state and federal courts?
5. What are the purposes of case citations?

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Online Companion™
For additional resources, please go to http://www.paralegal.delmar.cengage.com.

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CHAPTER 5

Primary Sources: Constitutions, Statutes, Court Rules, and Administrative Law

INTRODUCTION

As identified by the chapter title, this chapter introduces:

- constitutions,
- statutes,
- court rules, and
- administrative law.

The chapter provides information on each of the four primary sources, explains their correct citation form, and includes sample pages for statutes, court rules, and administrative law. The second portion of the chapter, on statutes, is the longest and most complex. In addition to including sample pages for statutes and discussing citation form, the statutes portion provides information concerning:

- the legislative branch,
- Congress,
- state legislatures,
- publication of statutes,
- the process of statutory research, and
- local law.

CONSTITUTIONS

Because there is a United States Constitution and each state has its own **constitution**, constitutional law research may be done at the federal and the state level. As explained in Chapter 1, Article VI of the United States Constitution contains the **supremacy clause**. The supremacy clause makes the Constitution prevail over any federal statute or state constitutional provision or statute in conflict with the Constitution. Congress is given certain **enumerated powers** in Article I, section 8 of the Constitution. Sections 9 and 10 of Article I prohibit the federal and state governments from taking certain actions (e.g., passing any **ex post facto law**). The Tenth Amendment to the Constitution reserves all other powers to the states.

constitution
1. A document that sets out the basic principles and most general laws of a country, state, or organization.
2. The U.S. Constitution is the basic law of the country on which most other laws are based, and to which all other laws must yield.

supremacy clause
The provision in Article VI of the U.S. Constitution that the U.S. Constitution, laws, and treaties take precedence over conflicting state constitutions or laws.

enumerated powers
The powers specifically granted to a branch of government in a constitution.

ex post facto law
(Latin) "After the fact." An ex post facto law is one that retroactively attempts to make an action a crime that was not a crime at the time it was done, or a law that attempts to reduce a person's rights based on a past act that was not subject to the law when it was done.

A written constitution is the document setting forth the fundamental principles of governance. For example, Article I of the United States Constitution deals with the legislative branch, Article II deals with the executive branch, and Article III deals with the judicial branch of the federal government. A state constitution sets forth the basic framework of state government in a similar fashion.

living constitution
The written United States Constitution, including all amendments to it, is less than twenty pages in length. The living constitution would include those pages and all case law interpretations of the Constitution.

Some people differentiate between the written and the **living constitution**. The written United States Constitution, including all amendments to it, is less than twenty pages in length. The living constitution would include those pages and all case law interpretations of the Constitution. If printed, the living constitution would require numerous volumes. Scholars and laypersons alike have hotly debated constitutional interpretation. Some believe that any interpretation should be based on the plain language of the Constitution and should not stray far from it. Others believe that the broad language of the Constitution should be interpreted as needed to deal with legal questions never dreamed of when the Constitution was first enacted.

The language of the United States Constitution is very broad, setting up a framework of government, often without much detail. For example, Article III of the Constitution establishes the United States Supreme Court with the establishment of other federal courts left to Congress. State constitutions may be much longer than the United States Constitution and may deal with many subjects that are dealt with on the federal level by statute. The only limit on state constitutions is that they may not conflict with the United States Constitution or any federal statute concerning a matter given exclusively to the federal government.

Constitutions generally have the same basic format. A constitution usually begins with a preamble. A preamble is a paragraph or clause explaining the reason for the enactment of the constitution and the object or objects it seeks to accomplish. The body of the document is divided into various parts (called "articles" in the United States Constitution and many state constitutions) corresponding to the various subjects dealt with in the constitution and the parts into subparts (called "sections" and "clauses" in the United States Constitution). Near the end of the constitution is a provision describing the procedure for amending it. Any amendments to a constitution are either printed at the end of the constitution (the procedure followed for the United States Constitution) or the new language is simply incorporated into the body of the document (the procedure followed for the Florida Constitution and the constitutions of many other states).

The United States Constitution is unique in that it was adopted in 1787 and has been the fundamental document of American government ever since. There are twenty-six amendments to it, with the first ten amendments known as the Bill of Rights. The Fourteenth Amendment, adopted in 1868, has been interpreted to make most of the provisions of the Bill of Rights applicable to the states. In contrast, many states have been governed under more than one constitution. For example, Illinois has had four constitutions since it became a state in 1818; the present Constitution of the State of Illinois is dated 1970 and is a revision of the constitution of 1870. The Illinois Constitution has been amended a number of times since 1970.

LOCATING CONSTITUTIONS

The text of constitutions may be found in many reference books in the law library. If you just want to read the United States Constitution, you could read it from a constitutional law textbook or other source. (Even many dictionaries contain a copy of the United States Constitution.) The text of your state's constitution may be printed in the set of books containing the official version of your state's statutory code.

An annotated version of the United States Constitution is found in the sets of books containing the annotated United States Code. If you want to know how the first amendment

to the United States Constitution has been interpreted concerning restrictions on prayers in public schools, you would look at the case summaries of cases interpreting the first amendment. The case summaries are found in *United States Code Service* or *United States Code Annotated* following the text of the first amendment. You would follow a similar procedure to research your state's constitution. Often, codes and annotated codes contain a separate index located at the end of a constitution. The index is designed to help you locate a particular provision within the constitution.

Don't forget to update your research. Hardbound volumes of the annotated codes are updated by pocket parts. The pocket parts are updated by quarterly supplements. Because of the lag time between the announcement of an important United States Supreme Court decision interpreting the Constitution and the printing of the annual pocket part to the annotated code, the annotated code may be as much as two years behind current case law. Update your research by using **citators** and **computer-assisted legal research**.

citators
A set of books or database that lists relevant legal events subsequent to a given case, statute, or other authority.

computer-assisted legal research
Legal research performed on a computer.

When researching, you may find it helpful to consult one or more of the various treatises dealing with constitutional law in addition to reading the annotations in the annotated codes.

CITATION TIP

Check for Correct Citation

Do not assume that the legal citations found when researching are in correct citation form. Citations, even those included in cases, may or may not comply with the citation rules your professor has asked you to use. Always check your citations against the appropriate citation rule for correct form.

CITATIONS FOR CONSTITUTIONS

The clause prohibiting ex post facto laws and section 1 of the Fourteenth Amendment to the Constitution may be cited as follows:

U.S. Const. art. I, § 9, cl. 3.	(abbreviation for United States Constitution, Article I, section 9, clause 3)
U.S. Const. amend. XIV, § 1.	(abbreviation for United States Constitution, fourteenth amendment, section 1)

Give the section number when the Constitution specifically identifies a portion of an article as a section. When a section, such as section nine of article I, is long and contains a number of paragraphs, you can reference a particular paragraph as a "clause." Some copies of the United States Constitution identify the amendments as "articles" instead of "amendments." This is because the amendments are technically articles in amendment of the Constitution. To avoid confusion, cite the amendments to the Constitution as "amendments" rather than as "articles." State constitutions can be cited using the same citation form given or using your state's citation rules.

INITIATION OF CONSTITUTIONAL AMENDMENTS

Article V of the Constitution states, in part:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress. . . .

Accordingly, there are two methods of initiating a constitutional amendment. Congressional resolution is the first. Two-thirds majorities in both houses of Congress are required. The President does not play a role in this process. Second, with two-thirds of the state legislatures or more, a convention can be convened to propose amendments. To date, initiation by Congress is the only method that has been successfully used to initiate amendments.

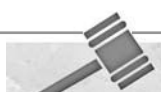
Regardless of which method of proposal is employed, Congress is empowered to decide the method of ratification. There are two methods: by concurrence of three-fourths of the state legislatures or by conventions in three-fourths of the states.

Congress holds considerable authority in the amendment process. It may establish a time limit for ratification of a proposal, regardless of the method of proposal, and it is empowered to decide whether an amendment has been ratified.

STATE CONSTITUTIONALISM AND THE NEW FEDERALISM

Every state has its own constitution. Like the federal Constitution, state constitutions contain declarations or bills of individual rights. In fact, many clauses in state bills of rights are worded identically or nearly so, to the federal Constitution.

State constitutional law may not decrease or limit federally secured rights, but a state may extend civil rights beyond what the federal Constitution secures. In some cases, this may occur expressly. For example, both the Florida and Alaska constitutions expressly protect privacy, whereas the federal constitution does not. Rather, a national right to privacy was only recently declared by the United States Supreme Court (as a penumbra or implied protection), and it is somewhat controversial because of the absence of express language in the Constitution establishing the right. The Washington state constitution protects "private affairs," which has been interpreted more broadly than privacy under the Fourth Amendment. Many states provide for a right to education through their constitutions, although the federal Constitution does not contain a right to education. In addition to protecting freedom of religion, as does the First Amendment of the federal Constitution, the Georgia Constitution protects freedom of "conscience."



YOU BE THE **JUDGE**

Can a search and seizure provision from a state constitution, worded identically to the search and seizure provision from the United States Constitution, be interpreted differently by a state court?

In reaching your decision, consider the following information:

The prosecution argues that the state court has no power to interpret the state provision differently from the way in which the United States Supreme Court interprets the Fourth Amendment to the United States Constitution.

To see how a state court answered the question, see *State v. Opperman*, 247 N.W.2d 673 (S.D. 1976) in Appendix K.

STATUTES

THE LEGISLATIVE BRANCH

The United States Constitution gives Congress the power to pass legislation. Article I, section 1 of the United States Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article I, section 7, clause 2 of the United States Constitution provides:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Similarly, state constitutions give state legislatures power to pass legislation. Nebraska's legislature is unique among all state legislatures in the United States because it has a **unicameral** (single-house) system. All other states and the federal government have **bicameral** legislatures.

unicameral
A legislature with a single-house system.

bicameral
Having two chambers. A two-part legislature, such as the U.S. Congress is bicameral: composed of the Senate (the "upper house" or "upper chamber") and the House of Representatives (the "lower house" or "lower chamber").

The process of **legislation** and its effect differs significantly from **adjudication** (judges deciding cases). Adjudication resolves a dispute between particular parties based on the facts presented to the court and the law applied by the judge. The judge's opinion is directly binding only on the parties before the court. In the future, other courts may look to the judge's opinion as authority in deciding future cases.

In contrast, legislation is expected to have universal application. Universal application means that the legislation applies to all individuals subject to the legislation. The legislation applies as of its effective date and into the future unless amended, repealed, or held to be unconstitutional. Ex post facto laws are forbidden under the United States Constitution. (See Exhibit 1-3 for the wording of this provision.) Ex post facto laws are criminal statutes with retroactive effect. Civil statutes are usually interpreted to be **prospective** rather than **retrospective** in effect.

legislation
1. The process of thinking about and passing or refusing to pass bills into law (statutes, ordinances, etc.).
2. Statutes, ordinances, etc.

adjudication
The formal giving, pronouncing, or recording of a judgment for one side or another in a lawsuit

prospective
Looking forward; concerning the future; likely or possible. A prospective law is one that applies to situations that arise after it is enacted. Most laws are prospective only.

retrospective
A retrospective or retroactive law is one that changes the legal status of things already done or that applies to past actions.

CONGRESS

The Constitution creates the Senate and the House of Representatives as the two houses of Congress. The Senate comprises 100 senators, two from each state, and the House of Representatives comprises 435 representatives, with at least one from each state and otherwise apportioned among the states according to population. Exhibits 5-1 and 5-2 depict the organization of the two houses of Congress. In 2008, the salary of senators and representatives was $169,300.

A term in Congress lasts for two years, beginning in January of the year following the biennial election of members. Each Congress is divided into two one-year sessions. For example, the first session of the 110th Congress began on January 1, 2007, and the second session of the 110th Congress began on January 1, 2008. The 111th Congress began on January 1, 2009, and lasts through calendar year 2010.

During the 109th Congress (2005–2006), 6,436 bills and 102 joint resolutions were introduced in the House, and 4,122 bills and 41 joint resolutions were introduced in the Senate. The concept for the proposed legislation originates from many sources, among which are members of Congress, congressional constituents, state legislatures, the president, executive departments, and administrative agencies.

EXHIBIT 5-1
United States Senate.

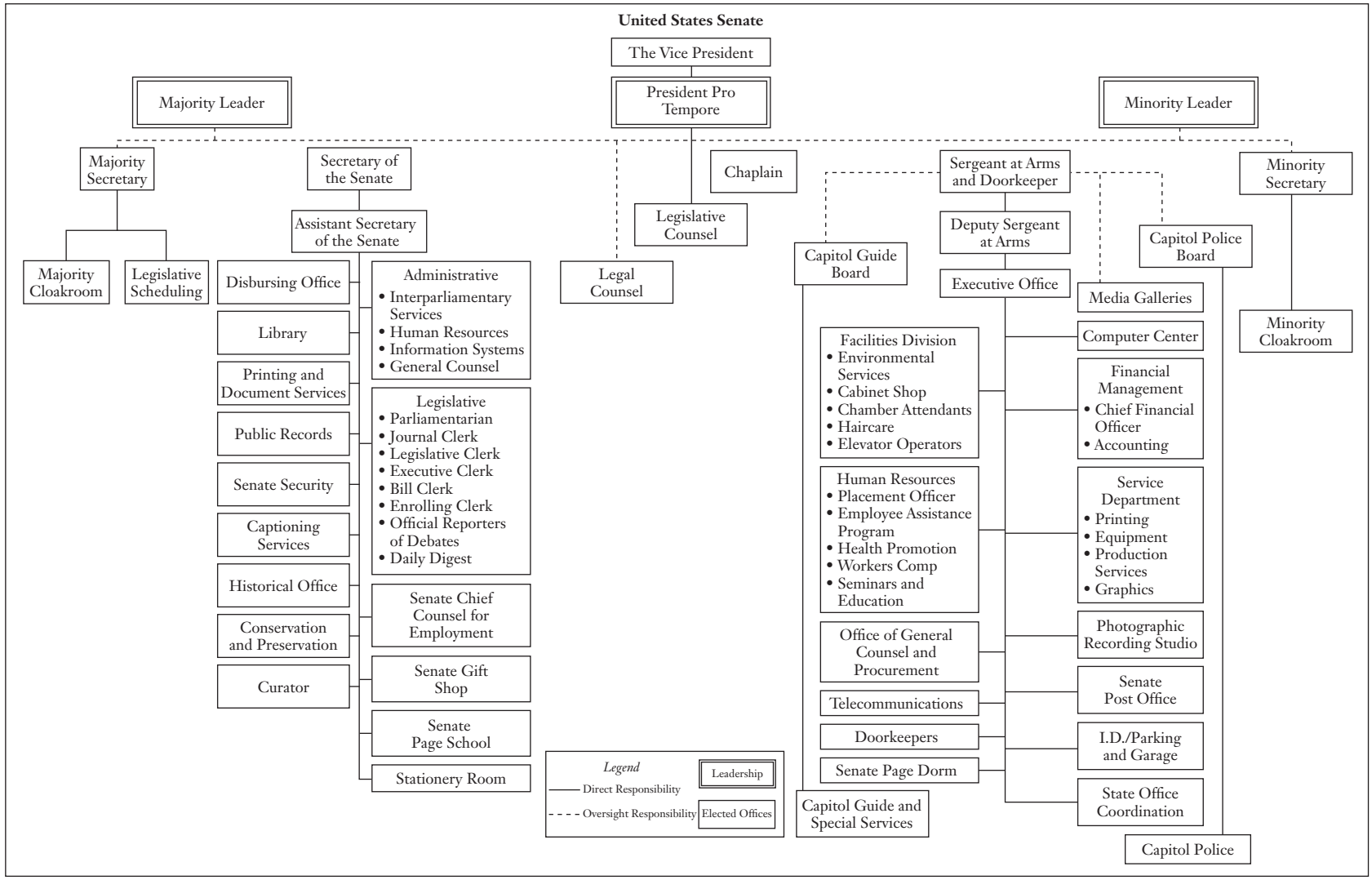
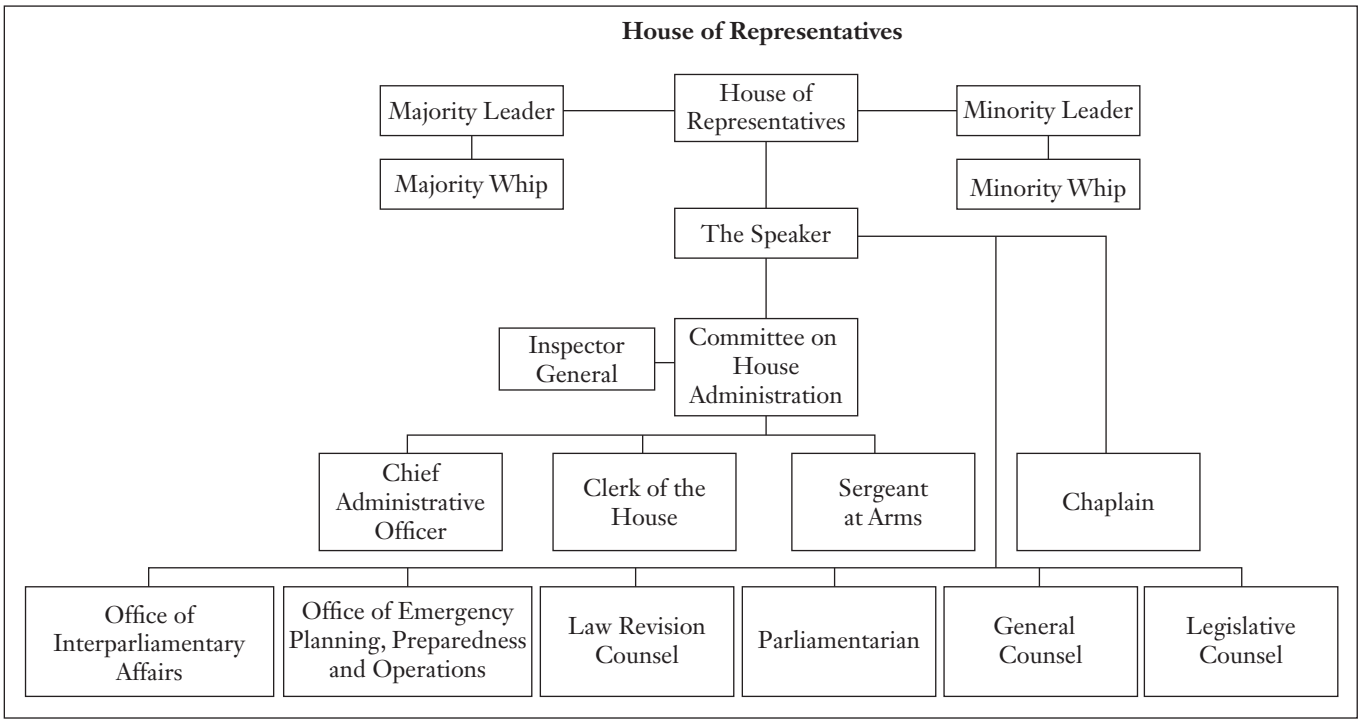


EXHIBIT 5-2
House of Representatives.



Bills are public bills or private bills. A public bill applies to the general public. Sometimes, Congress authorizes relief to a named individual or an organization pursuant to a private bill. Common subjects of private bills are claims against the United States and immigration and naturalization matters. For example, a private bill may authorize the federal government to pay an individual's claim against the United States; a private bill is needed where the individual's claim would ordinarily be barred under sovereign immunity.

Bills in each house are identified by "H.R." (House of Representatives) or "S." (Senate), followed by sequential numbers identifying the order in which they are introduced in the house. Any member of either house may introduce a bill. The member introducing the bill is the "sponsor"; the bill may have an unlimited number of cosponsors. A member of the House of Representatives introduces a bill by signing and placing it in the "hopper," a wooden box located at the side of the House rostrum. A Senator introduces a bill by signing it and delivering it to one of the clerks at the Presiding Officer's desk; in the alternative, a Senator may orally introduce the bill from the Senate floor.

After being introduced, a bill is referred to the appropriate committee and copies of the bill are made available to the committee members and to the public. The House has 20 standing committees, the Senate has 16 standing committees, and four standing joint committees have oversight responsibilities. In addition, a house may form select committees and task forces as needed. Each committee has jurisdiction over certain matters; the committee may have a number of subcommittees to deal with particular issues within the jurisdiction of the committee. Committee members are assisted in their committee work by a professional staff.

A committee or a subcommittee may hold meetings or public hearings on a bill. After hearings have been held, a committee or subcommittee considers the bill in a "markup" session. A markup session is the committee or subcommittee members' opportunity to comment and then vote on a bill. A subcommittee may vote to report the bill favorably, with or without

recommendation, unfavorably, or without recommendation to the committee. A bill would not leave the subcommittee if the vote were to table or postpone action on the bill. Similarly, a committee may vote to report a bill to the floor of the chamber, or may table or postpone action on the bill.

A committee staff member prepares the committee report once a committee has voted favorably to report the bill to the chamber floor. The committee report usually outlines the purpose and scope of the bill and provides a detailed explanation of each section of the bill.

After leaving a committee, a bill may be debated on the chamber floor; during the debate, the bill may be amended numerous times. Once a chamber passes a bill, the bill technically is transformed from a bill to an "act," signifying that it is the act of one chamber of Congress. Although it is technically an act, it is still commonly called a bill. The enrolling clerk prepares a copy of the bill, including all amendments adopted. The final copy of the bill is often referred to as the "**engrossed**" copy because it contains the definitive text approved by the chamber. If passed by the House of Representatives, the engrossed bill is printed on blue paper and the Clerk of the House signs it. If passed by the Senate, the engrossed bill is printed on white paper and is attested to by the Secretary of the Senate.

engrossed
The final copy of the bill is often referred to as the "engrossed" copy because it contains the definitive text approved by the chamber.

A bill approved by one chamber is delivered to the other chamber. There it is referred to the appropriate committee for study and public hearings. The second chamber may pass the bill, with or without amendments. If there were no amendments, the bill is enrolled for presentation to the president.

If the second chamber passes the bill with amendments, it is returned to the chamber in which it originated. The first chamber may approve the amendments. If the amendments are substantial, differing provisions may be resolved in a conference committee comprised of members from both chambers. The conference committee prepares a report containing the recommendations of the committee. A bill is considered approved by Congress if both chambers agree to the conference report.

An **enrolled** bill approved by both chambers in identical form is prepared for the president. The term enroll means to prepare the final perfect copy of the bill approved by both chambers in perfect final form. The enrolled bill is printed on parchment paper and is signed by the authorized member of each chamber.

enrolled
Registered or recorded a formal document in the proper office or file.

The president may approve the bill by signing it, may veto the bill, or may take no action on the bill. If the president takes no action while Congress is in session, the bill becomes law ten days (Sundays excepted) after it was presented to him. If the president takes no action but Congress is not in session, the bill does not become law. This is commonly referred to as the "pocket veto." The president's veto can be overridden by the vote of two-thirds of each chamber.

STATE LEGISLATURES

Except for Nebraska, which has a unicameral legislature, all states have bicameral legislatures. The upper house in the state legislatures is called the Senate; the lower house is called the House of Representatives, General Assembly, or House of Delegates.

A primary role of state legislatures is enacting statutes. The legislative procedure followed to enact statutes differs from state to state but many states follow a procedure similar to that followed in Congress and described previously.

As in Congress, the idea for a new statute may come from a variety of sources, including a constituent, a legislator, or an organization. A legislator introduces the bill, and it is referred to a committee. After committee hearings and discussion, the bill is considered on the floor of the chamber. There it is debated and amended. If the bill passes in that chamber, it is transmitted to the other chamber for consideration. A similar procedure is

followed in the second chamber. Once both chambers pass a bill, it may go to a conference committee to clear up any differences in wording. If both chambers passed the bill in identical form, it is transmitted to the governor. The governor may sign or veto the act. A veto may be overridden by the vote of two-thirds of each house.

For example, the Illinois Constitution provides for the governor's approval or veto and in Illinois the governor has line-item veto and can return a bill with recommendations instead of vetoing it:

> (a) Every bill passed by the General Assembly shall be presented to the Governor within 30 calendar days after its passage. The foregoing requirement shall be judicially enforceable. If the Governor approves the bill, he shall sign it and it shall become law.
>
> (b) If the Governor does not approve the bill, he shall veto it by returning it with his objections to the house in which it originated. Any bill not so returned by the Governor within 60 calendar days after it is presented to him shall become law. If recess or adjournment of the General Assembly prevents the return of a bill, the bill and the Governor's objections shall be filed with the Secretary of State within such 60 calendar days. The Secretary of State shall return the bill and objections to the originating house promptly upon the next meeting of the same General Assembly at which the bill can be considered.
>
> (c) The house to which a bill is returned shall immediately enter the Governor's objections upon its journal. If within 15 calendar days after such entry that house by a record vote of three-fifths of the members elected passes the bill, it shall be delivered immediately to the second house. If within 15 calendar days after such delivery the second house by a record vote of three-fifths of the members elected passes the bill, it shall become law.
>
> (d) The Governor may reduce or veto any item of appropriations in a bill presented to him. Portions of a bill not reduced or vetoed shall become law. An item vetoed shall be returned to the house in which it originated and may become law in the same manner as a vetoed bill. An item reduced in amount shall be returned to the house in which it originated and may be restored to its original amount in the same manner as a vetoed bill except that the required record vote shall be a majority of the members elected to each house. If a reduced item is not so restored, it shall become law in the reduced amount.
>
> (e) The Governor may return a bill together with specific recommendations for change to the house in which it originated. The bill shall be considered in the same manner as a vetoed bill but the specific recommendations may be accepted by a record vote of a majority of the members elected to each house. Such bill shall be presented again to the Governor and if he certifies that such acceptance conforms to his specific recommendations, the bill shall become law. If he does not so certify, he shall return it as a vetoed bill to the house in which it originated.

A newly-passed statute is effective as of a certain date. The state legislature may have stated an effective date or, if the legislature did not, the state constitution or state statutes specify the effective date. Illinois statutes set forth the effective date of January 1 of the following calendar year if the statute was passed prior to June 1:

> (a) A bill passed prior to June 1 of a calendar year that does not provide for an effective date in the terms of the bill shall become effective on January 1 of the following year, or upon its becoming a law, whichever is later.

> (b) A bill passed prior to June 1 of a calendar year that does provide for an effective date in the terms of the bill shall become effective on that date if that date is the same as or subsequent to the date the bill becomes a law; provided that if the effective date provided in the terms of the bill is prior to the date the bill becomes a law then the date the bill becomes a law shall be the effective date.

Illinois statutes set forth the effective date of June 1 of the following calendar year if the statute was passed after May 31:

> A bill passed after May 31 of a calendar year shall become effective on June 1 of the next calendar year unless the General Assembly by a vote of three-fifths of the members elected to each house provides for an earlier effective date in the terms of the bill or unless the General Assembly provides for a later effective date in the terms of the bill; provided that if the effective date provided in the terms of the bill is prior to the date the bill becomes a law then the date the bill becomes a law shall be the effective date.

YOU BE THE JUDGE

In Illinois, what is the effective date of a bill passed on June 2, 2009?

In reaching your decision, consider the following information:
The effective date in the bill, which was passed by four-fifths of the members of each house was, June 1, 2009.

What if the bill had been passed by slightly less than three-fifths of each house?

PUBLICATION OF STATUTES

Although federal and state statutes are published in a number of different formats, there is a general pattern to the order in which the formats are used. The general names for the formats of statutory publication, in chronological order, are as follows:

slip law

advance session law service

session laws

code

annotated code

Exhibit 5-3 lists the types of reference materials and the names of the reference materials containing the law made by Congress. Exhibit 5-4 lists the types of reference materials produced by a state legislature, with room for you to add the names of the reference materials for your state. Once completed, use Exhibit 5-4 as a quick and handy guide for the legislative reference materials for your state.

SLIP LAW

slip law
A printed copy of a bill passed by Congress that is distributed immediately once signed by the president.

A new statute is first published as a **slip law**. In this form, a single statute is printed in an unbound pamphlet, with each pamphlet individually paginated. Although the slip law is the first official form of publication, distribution of the slip law form of statutes is generally limited to law school libraries and libraries designated as official government depositories. A researcher would find researching slip laws cumbersome; they are unindexed and individual slip law pamphlets may easily be misshelved or misplaced.

Federal statutes are first published in slip law form. Each federal statute is numbered with a public law or a private law number, which contains the session number of Congress and is separated by a hyphen from the number corresponding to the statute's sequence.

Senate
House of Representatives

slip laws

advance session law service

United States Code Congressional and Administrative News

session laws

United States Statutes at Large

code

United States Code

annotated codes

United States Code Annotated

United States Code Service

EXHIBIT 5-3
Federal Government Legislative Branch Reference Materials.

slip laws

advance session law service

session laws

code

annotated code

EXHIBIT 5-4
State Government Legislative Branch Reference Materials.

For example, the first public law in the 111th session of Congress would be "Public Law 111-1" and the first private law in that session would be "Private Law 111-1." Each slip law pamphlet is identified by a public or private law number, the approval date (or an explanatory notation if it became law without presidential approval), and the bill number.

States may follow a similar procedure for state statutes. For example, the Illinois legislature passes public acts. These laws are first published in slip law form. Each statute is numbered with a public act number, which identifies which Illinois General Assembly passed the statute and is separated by a hyphen from the number corresponding to the statute's sequence. For example, the first public act passed by the 96th Illinois General Assembly (2009–2010) was "P.A. 96-1."

SESSION LAWS

The next publishing format is called **session laws**. Session law format involves the publication of slip laws produced in a legislative session, with the laws published in chronological order. Each state and the federal government publish session laws, generally in hardbound volumes. As typical of a government publication, the session laws published by a state or the federal government appear some time after the end of the legislative session. In most states, commercial publishers produce **advance session law services** to fill the gap between the passage of the statutes and the appearance of the government-published session laws. The format for advance session law services for one legislative session may be a number of paperbound volumes, each volume with a numerical and subject index. The numerical index typically indexes the existing statute numbers, as codified, and indicates if the statutes have been amended or repealed.

session laws
Statutes printed in the order that they were passed in each session of legislature.

advance session law services
Are publications that contain the text of recently-passed statutes and statutory amendments produced by commercial publishers to fill the gap between the passage of the statutes and the appearance of the government-published session laws.

United States Code Congressional and Administrative News
An advance session law service for federal statutes.

The ***United States Code Congressional and Administrative News*** is an advance session law service for federal statutes. This publication contains the text of new statutes as well as selected legislative history information, such as House and Senate reports. Paperbound pamphlets (often referred to as advance pamphlets) produced to supplement *United States Code Service* and *United States Code Annotated* also contain the text of newly-passed federal legislation.

United States Statutes at Large
A collection of all statutes passed by the U.S. Congress, printed in full and in the order of their passage.

The ***United States Statutes at Large*** is the session law publication for federal statutes. The *United States Statutes at Large* contains the statutes, as enacted, arranged in chronological order. The *United States Statutes at Large* is the legal evidence of the laws contained in the publication; however, the legal researcher might find it difficult to determine the text of a statute currently in effect. The material in them is not arranged by subject matter and statutes are not consolidated with later amendments. Typically, publication lags two to three years behind passage of the statutes.

Illinois is an example of a state with an advance session law service publication and a session law publication produced by the state. The advance session law service publication is West's *Illinois Legislative Service*, and the session law publication is *Laws of the State of Illinois*. West's *Illinois Legislative Service* for a legislative session typically is comprised of a number of paperbound pamphlets, with the first several pamphlets published during or at the end of the legislative session. Each pamphlet contains a numerical and subject index at the end of the volume. The indexes are cumulative through the pamphlet in which the indexes appear, but do not index information contained in later pamphlets. Thus it is best to consult the indexes of the last pamphlet published.

STATUTORY CODE

code
1. A collection of laws.
2. A complete, interrelated, and exclusive set of laws.

A **code** is the compilation of the existing statutes of a jurisdiction, with the statutes arranged by subject. The code is generally recompiled at regular intervals into a multivolume hardbound set; the recompilation incorporates statutes still in effect, statutory amendments, and newly passed statutes, while omitting statutes that have been repealed and portions of statutes amended by deletion. Codes generally contain the text of the statutes, brief historical notes, and subject index volumes at the end of the set.

United States Code
The official law books containing federal laws organized by subject. They are recompiled every six years, and supplements are published when needed.

title
The United States Code presents the federal laws currently in effect organized according to subject matter into 50 "titles." A title is one of the major organizational divisions of the *United States Code*.

The official code containing federal statutes is the ***United States Code***. The *United States Code* presents the laws in effect in a much more concise and usable form than the *United States Statutes at Large*. The *United States Code* presents the federal laws currently in effect organized according to subject matter under 50 "titles." The title headings are largely arranged in alphabetical order. Each **title** is divided into chapters and the chapters into sections. A new edition of the *United States Code* is published every six years. The edition contains the current text of the statutes, including all amendments and omitting all text previously amended. Cumulative supplements to the *United States Code* are published following each regular session of Congress. A cumulative supplement contains any statutory amendments and any new statutes passed since the last edition of the *United States Code*. As typical of a government publication, production of the volumes can lag eight months to two years behind the passage of legislation.

Look at your state's statutory code and determine the major subject groupings and what these groupings are called. For example, Illinois statutes were reorganized into Illinois Compiled Statutes ("ILCS") effective January 1, 1993, a vast improvement over Illinois Revised Statutes, the organizational scheme adopted in 1874. ILCS are divided into 67 "chapters," instead of into titles as is the United States Code, with the chapters organized into nine major topics. Each chapter of ILCS is further divided into acts, with the acts divided into sections. A statute within ILCS is cited by chapter, act, and section number with the number preceding ILCS identifying the chapter number and the

numbers following ILCS identifying the act and section number. The act and section number are separated by a forward slash. For example, the Illinois eavesdropping statutes are located at 720 Ill. Comp. Stat. Ann. 5/14-1–14-9 (2008). The title of Chapter 720 is Criminal Offenses, the title of Act 5 is Criminal Code of 1961, various statutes concerning eavesdropping are found in sections 14-1 through 14-9. If you had the citation to the statutes and wanted to read them, you would look at sections 14-1 through 14-9 of Act 5 of Chapter 720.

To be current when researching in print volumes, you must consult the hardbound volume and the pocket part. You may still have to check session laws if the pocket part does not contain statutes from the most current legislative session. The first few pages of the pocket part will tell the latest legislation covered in the pocket part.

STATUTES PASSED AS AN "ACT"

The legislature may either pass statutes singly or as part of an **act**. Single statutes are passed when the legislative provision is short. When the new statute is codified, it will be inserted into the statutory code with statutes concerning the same or related subject matter. Where the new statutory language is longer and, often, where it concerns matters not previously dealt with by statute, the legislature may pass an "act" comprised of several consecutively numbered statutes.

An act often is identified by a name given it by the legislature and for easy reference is often referred to by that name. This **short title** or **popular name** is usually found in one of the first sections of an act, at the beginning of a table of contents preceding the act, or, in annotated codes, in the historical references following each provision of the act. For example, 42 U.S.C. § 1983, which prohibits a state from depriving persons of their constitutional rights was passed as part of the Civil Rights Act of 1871. Other common provisions of an act are a **preamble**, which identifies the objective or the objectives of the act, and a **definitional section**, which defines terms used in the act.

ANNOTATED CODE

The publication often used for statutory research is the **annotated code**. The annotated code is a commercial publication and often appears on a more timely basis than a code published by the federal or a state government; the annotated code is generally supplemented frequently by pocket parts and supplementary pamphlets. The annotated code contains the text of existing statutes, in language identical to that contained in the code for the jurisdiction. It is referred to as an annotated code because it contains annotated material after each statutory section. An **annotation** is a paragraph summary of a relevant court opinion, attorney general opinion, or administrative decision interpreting the preceding statutory section. The paragraph ends with a citation to the opinion or decision. A newly-passed statutory section may have no annotated material following it because the statute has not yet been interpreted in a published decision. Other research references following a statutory section may include citations to relevant administrative code sections, legal encyclopedia sections, law reviews, and treatises and references to digest sections and on-line services. There may be references to the legislative history of the statutory section and the text of the section prior to amendment or the text of amendments.

United States Code Annotated *(U.S.C.A.)* (published by West) and ***United States Code Service*** *(U.S.C.S.)* (published by LexisNexis) are the two annotated codes for federal statutes. Volumes of *U.S.C.A.* and *U.S.C.S.* contain the text of the United States Constitution, the Federal Rules of Civil, Criminal, Bankruptcy, and Appellate Procedure, and the Federal Rules of Evidence. A volume in each set contains a popular name table, allowing the researcher to use the name under which a statute is popularly known to locate

act
A law passed by one or both houses of a legislature.

short title
A legislative act often is identified by a name given it by the legislature and for easy reference is often referred to by that name. This is the "short title" or "popular name" of the act.

popular name
See short title.

preamble
An introduction (usually saying why a document, such as a statute, was written).

definitional section
A common provision of a legislative act that defines terms used in the act.

annotated code
The annotated code contains the text of existing statutes, in language identical to that contained in the code for the jurisdiction, together with annotated material after each statutory section.

annotation
An annotation is a paragraph summary of a relevant court opinion, attorney general opinion, or administrative decision interpreting the preceding statutory section.

United States Code Annotated
A multivolume commercial publication containing annotated codes for federal statutes, the United States Constitution, court rules, and other materials to aid the legal researcher.

United States Code Service
See United States Code Annotated.

the statute's session law and code citations. The researcher may access the two sets by searching for key terms in the multivolume general index (located at the end of the set) or volume-specific indexes located at the end of the volumes.

Each volume of an annotated code is annually updated with a cumulative pamphlet, generally referred to as a "pocket part." The pocket part is inserted inside the back cover of the volume for easy reference and the pamphlet from the prior year is discarded; the pocket part contains textual material and citations, new since the copyright date of the hardbound volume. Over time, the information for the annual pocket part supplement becomes too voluminous to be easily stored inside the volume's back cover; the information is printed in a separate paperbound volume, shelved next to the hardbound volume. The researcher should consult both the hardbound volume and the supplement.

The copyright date of the hardbound volumes varies greatly. Volumes are recompiled and reprinted from time to time when the supplementary material becomes unwieldy. A recompiled volume incorporates new material and eliminates out-of-date information; volumes relating to more rapidly changing areas of the law are reprinted more frequently than other volumes.

Commercial publishers publish annotated versions of statutory codes. To research case law interpretations of the *United States Code*, consult *United States Code Service* or *United States Code Annotated*. Look in your law library and identify the session law, codified and annotated code versions of your state's statutes. Then fill in that information on the chart in Exhibit 5-4 so you have a record of it.

STATUTORY RESEARCH

The first step in statutory research is to read the statute carefully and read any other statute or material cross-referenced in the first statute. Generally, statutes are drafted in broad language to set forth a legal principle rather than to deal with a specific problem. Great care must be taken in drafting statutory language so that the language is neither underinclusive nor overinclusive. A statute that is underinclusive may leave loopholes allowing practices that the statute was intended to preclude. A statute that sweeps too broadly may be held to be unconstitutionally vague.

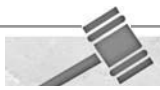
As described more fully in Chapter 2, a court faced with statutory interpretation will look first to the language of the statute itself and its context. A statute that is part of an act should be interpreted by the way it fits into the scheme of the act. Another tool for statutory interpretation is legislative history. Committee reports and other legislative documents may shed light on the meaning of a statute. A source of Congressional legislative history available in many law libraries is *United States Code Congressional and Administrative News*. This publication contains the text of federal acts and selected committee reports. *United States Code Congressional and Administrative News* was described more fully earlier in this chapter. A court will also look to prior case law interpretation of the statute. An interpretation by the same or a higher court would be mandatory authority, while an interpretation by a lower court or the courts of another jurisdiction would be persuasive.

RESEARCH TIP

Use of Hardbound Volume and Pocket Part

When researching in-print sources, the researcher must make it a practice to check both the hardbound volume and the pocket part to obtain complete information.

Remember to update your research. Once passed, a statute may be amended, repealed, or held to be unconstitutional. Pocket parts update hardbound volumes of the annotated codes. The pocket parts of *United States Code Service* and *United States Code Annotated* are updated by quarterly supplements. You can further update your research by Shepardizing or KeyCiting and using computer assisted legal research. (Shepardizing and KeyCiting are discussed in Chapter 6.) If you are researching state statutes, update the annotated code by researching session laws.



YOU BE THE **JUDGE**

Would you consider an attorney's research adequate where the attorney read the statute and the relevant annotations?

In reaching your decision, consider the following information:

The attorney also conferred with other attorneys in the office regarding the application of the statute.

You are considering whether to discipline the attorney for inadequate research because the attorney failed to follow the proper procedure in sealing tapes made in a wiretap surveillance.

To see whether the court determined the attorney's research to be adequate, see *United States v. Vastola*, 25 F.3d 164 (3d Cir. 1994) in Appendix K.

LEGISLATIVE HISTORY

The legislative history of a statute may aid in its interpretation. Various textual versions of the statute prior to passage, transcripts of committee hearings, committee reports, debates, and other legislative documents may shed light on the meaning of a statute.

An annotated code gives you information you can begin with in researching the legislative history of a statute. For example, look at Exhibit 5-6 containing a portion of the text of 18 U.S.C.A. § 2520. Following the statutory text, you see:

> (Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 223, and amended Pub.L. 91-358, Title II, § 211(c), July 29, 1970, 84 Stat. 654; Pub.L. 99-508, Title I, § 103, Oct. 21, 1986, 100 Stat. 1853; Pub.L. 107-56, Title II, § 223(a), Oct. 26, 2001, 115 Stat. 293; Pub.L. 107-296, Title II, § 225(e), Nov. 25, 2002, 116 Stat. 2157.)

The first portion of the information provided states that section 2520 was passed as public law 90-351 on June 19, 1968, and its text is available in volume 82 of *United States Statutes at Large* beginning on page 223. The public law information means that section 2520 was the 351st bill passed in the 90th Congress. This information also shows that the statute was amended in 1970, 1986, 2001, and 2002.

SAMPLE PAGES OF WIRETAPPING AND EAVESDROPPING STATUTES

As described previously, the United States Code is divided into fifty broad subject categories called titles. For example, the federal wiretapping and eavesdropping statutes, 18 U.S.C. §§ 2510–2521, a portion of which are reprinted in this chapter, are part of title 18. (Also see Appendix L of this textbook.) Title 18 deals with crimes.

The federal wiretapping and eavesdropping statutes are in title 18 because the purposes of the statutes are to prohibit law enforcement officers and private individuals from intercepting certain types of conversations and to prohibit the use of devices capable of interception. The protected conversations include private face-to-face conversations and telephone conversations, whether made on landline, cellular, or cordless telephones. A law

court order
An order issued by the court requiring a party to do or not do a specific act.

civil damages
Money that a court orders paid to a person who has suffered damage (a loss or harm) by the person who caused the injury.

enforcement officer may intercept communications if the officer is a party to the conversation or obtains a **court order** authorizing the taping of a conversation of private individuals. Conversations intercepted in violation of the statutes may not be used as evidence in court. An individual who illegally intercepts a conversation may be subject to a fine and up to five years imprisonment. Someone whose conversation has been illegally intercepted may sue and collect **civil damages**, attorneys' fees, and costs.

Federal statutes are further grouped by subject matter into chapters within a title of the *United States Code*. For example, the federal eavesdropping and wiretapping statutes are found in chapter 119 of title 18. Chapter 119 is entitled "Wire and Electronic Communications Interception and Interception of Oral Communications." Although the federal statutes are grouped into chapters within a title, the citation to the statutes references the title and section numbers; the citation does not reference the chapter. Notice in the *United States Code* that several statutes will appear numbered consecutively and then there may be a break in numbering before the next group of statutes; there is also a break in numbering between chapter numbers. The break in numbering allows new statutes to be inserted in the middle of a title without having to renumber existing statutes or chapters. For example, the federal wiretapping and eavesdropping statutes, comprising chapter 119, are numbered consecutively 2510 through 2522; they are preceded by chapter 118, "War Crimes," which contains section 2441 and are followed by chapter 121, "Stored Wire and Electronic Communications and Transactional Records Access," which contains sections 2701 through 2712. Often, a table of contents precedes a group of consecutively numbered statutes. Exhibit 5-5 contains the table of contents for the federal wiretapping and eavesdropping statutes. These tables of contents are helpful because they allow you to overview a series of statutes and to ascertain at a glance the general scope of those statutes. By examining Exhibit 5-5, you see that section 2510 contains definitions; section 2511 prohibits the interception and disclosure of certain types of conversations; section 2512 prohibits the manufacture, distribution, possession, and advertising of intercepting devices; section 2515 prohibits the use of intercepted conversations as evidence; and section 2520 authorizes civil damages. The complete text of sections 2510, 2511, 2515, and 2520 are located in Appendix L of this book, should you need to consult those sections.

Section 2510 (1) defines "wire communication." Although the definition is complex, a wire communication is a telephone conversation. Section 2510(2) contains the definition of an "oral communication":

> "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation. . . .

This definition means that a face-to-face conversation is an "oral communication," so long as the conversants expect that the conversation is private and the expectation is reasonable.

Section 2511(1) prohibits the intentional interception (tape recording) of telephone and face-to-face conversations:

> Except as otherwise specifically provided . . . any person who . . . intentionally intercepts . . . any wire [or] oral . . . communication . . . shall be punished as provided in subsection (4). . . .

Section 2511 (4) provides that "whoever violates subsection (1) of this section shall be fined under this title or imprisoned not more than five years, or both."

There are certain exceptions to the prohibition against tape recording conversations. Those exceptions are found in section 2511(2). Section 2511(2)(c) allows a law enforcement

officer ("a **person acting under color of law**") to intercept a conversation if the law enforcement officer is a party to the conversation. Section 2511(2)(d) allows a private individual to intercept a conversation if the individual is a party to the conversation.

person acting under color of law
One taking an action that looks official or appears to be backed by law.

SAMPLE PAGES OF WIRETAPPING AND EAVESDROPPING STATUTES

United States Code Annotated contains the text of the statutes and various research tools, including annotated material. Because of page constraints, you have been given selected pages from *United States Code Annotated*. Look at the sample pages of the federal wiretapping and eavesdropping statutes printed in Exhibits 5-5, 5-6, and 5-7. Exhibit 5-5 shows the table of contents for the federal wiretapping and eavesdropping statutes. Exhibit 5-6 contains the text of section 2520 together with some of the material accompanying section 2520, as taken from the 2000 hardbound volume of *United States Code Annotated*. Exhibit 5-7 shows amendments to section 2520, as contained in the 2008 pocket part supplement to *United States Code Annotated*.

First, focus on the sample pages of Exhibit 5-6. This exhibit appears to contain the entire text of section 2520, but notice that the pages are from the hardbound volume of *United States Code Annotated*, copyright 2000. Because they are from the hardbound volume dated 2000, these pages do not show any amendments to section 2520 made after 2000 and the statute was amended in 2001 and 2002. The 2001 and 2002 amendments to section 2520 appear in the pocket part (see Exhibit 5-7). When researching in-print sources, the researcher must make it a practice to check both the hardbound volume and the pocket part to obtain complete information.

As discussed above, the material in parentheses following the text of section 2520 is legislative history. Because the statute was amended, the statutory text is followed by a section "Historical and Statutory Notes." This section contains references to the 1970 and 1986 amendments.

CHAPTER 119. WIRE AND ELECTRONIC COMMUNICATIONS INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

Sec.

EXHIBIT 5-5
Page from *United States Code Service* Annotated Title 18, Chapter 119. *(Reprinted with permission of Thomson/Reuters/west.)*

EXHIBIT 5-6
Pages from United Sates Code Annotated 18 U.S.C.A 2520. *(Reprinted with permission of Thomson Reuters/West.)*

1978 Amendments. Par. (3). Pub.L. 95–511 added "pursuant to this chapter" following "wire or oral communications" and "pursuant to this chapter" following "granted or denied".

Effective and Applicability Provisions

1986 Acts. Except as otherwise provided in section 111 of Pub.L. 99–508, amendment by Pub.L. 99–508 effective 90 days after Oct. 21, 1986, see section 111 of Pub.L. 99–508 set out as a note under section 2510 of this title.

1978 Acts. Amendment by Pub.L. 95–511 effective Oct. 25, 1978, except as spe-cifically provided, see section 301 of Pub.L. 95–511, set out as an Effective Date note under section 1801 of Title 50, War and National Defense.

Encryption Reporting Requirements

Pub.L. 106–197, § 2(b), May 2, 2000, 114 Stat. 247, provided that: "The encryption reporting requirement in subsection (a) [amending par. (2) (b) of this section] shall be effective for the report transmitted by the Director of the Administrative Office of the Courts for calendar year 2000 and in subsequent reports."

LIBRARY REFERENCES

American Digest System

Telecommunications 527.
Key Number System Topic No. 372.

Encyclopedias

Telegraphs, Telephones, Radio and Television, see C.J.S. §§ 287, 288.

Law Review and Journal Commentaries

Electronic surveillance in New Jersey 1977–1983. Wayne S. Fisher and Judy Wheat (1985) 8 Crim.Just.Q. 136.

Texts and Treatises

Business and Commercial Litigation in Federal Courts § 4.13 (Robert L. Haig ed.) (West Group & ABA 1998).
Evidence, admissibility of, see LaFave and Israel § 4.1 et seq.
Wiretapping, eavesdropping, use of recorders or transmitters by undercover agents, see Wright: Criminal 2d § 665.
Criminal Procedure, 8 Fed Proc L Ed §§ 22:231, 287.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

Notes of Decisions

Failure to file 1

1. Failure to file

Failure to file reports with Administrative Office of United States Court was not ground for suppression of evidence obtained by court-authorized wiretaps. U. S. v. Kohne, W.D.Pa.1973, 358 F.Supp. 1053, affirmed 485 F.2d 679, certiorari denied 94 S.Ct. 2624, 417 U.S. 918, 41 L.Ed.2d 224, affirmed 485 F.2d 681, affirmed 485 F.2d 682, affirmed 487 F.2d 1394, affirmed 487 F.2d 1395, affirmed 487 F.2d 1396.

§ 2520. Recovery of civil damages authorized

(a) In general.—Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

(b) Relief.—In an action under this section, appropriate relief includes—

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases; and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

EXHIBIT 5-6
(Continued)

Ch. 119 INTERCEPTION OF COMMUNICATIONS 18 § 2520

(c) **Computation of damages.**—(1) In an action under this section, if the conduct in violation of this chapter is the private viewing of a private satellite video communication that is not scrambled or encrypted or if the communication is a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the court shall assess damages as follows:

(A) If the person who engaged in that conduct has not previously been enjoined under section 2511(5) and has not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $50 and not more than $500.

(B) If, on one prior occasion, the person who engaged in that conduct has been enjoined under section 2511(5) or has been found liable in a civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $100 and not more than $1000.

(2) In any other action under this section, the court may assess as damages whichever is the greater of—

(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

(d) **Defense**.—A good faith reliance on—

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) of this title permitted the conduct complained of;

This a complete defense against any civil or criminal action brought under this chapter or any other law.

(e) **Limitation**.—A civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

(Added Pub.L. 90–351, Title III, § 802, June 19, 1968, 82 Stat. 223, and amended Pub.L. 91–358, Title II, § 211(c), July 29, 1970, 84 Stat. 654; Pub.L. 99–508, Title I, § 103, Oct. 21,. 1986, 100 Stat. 1853.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1968 Acts. Senate Report No. 1097, see 1968 U.S. Code Cong. and Adm. News, p. 2112.

1986 Acts. Senate Report No. 99–541, see 1986 U.S. Code Cong. and Adm. News, p. 3555.

Amendments

1986 Amendments. Pub.L. 99–508, § 103, rewrote the section, which formerly read:

"Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

"(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

"(b) punitive damages; and

"(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

"A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal

(continues)

EXHIBIT 5-6
(Continued)

action brought under this chapter or under any other law."

1970 Amendments. Pub.L. 91–358 substituted provisions that a good faith reliance on a court order or legislative authorization constitute a complete defense to any civil or criminal action brought under this chapter or under any other law, for provisions that a good faith reliance on a court order or on the provisions of section 2518(7) of this chapter constitute a complete defense to any civil or criminal action brought under this chapter.

Effective and Applicability Provisions

1986 Acts. Except as otherwise provided in section 111 of pub.L. 99–508, amendment by Pub.L. 99–508 effective 90 days after Oct. 21, 1986, see section 111 of Pub.L. 99–508 set out as a note under section 2510 of this title.

1970 Acts. Section 901(a) of Pub.L. 91–358 provided in part that the amendment of this section by Pub.L. 91–358 shall take effect on the first day of the seventh calendar month which begins after July 29, 1970.

AMERICAN LAW REPORTS

Construction and application of provision of Omnibus Crime Control and Safe Streets Act of 1968 (18 USCA § 2520) authorizing civil cause of action by person whose wire or oral communication is intercepted, disclosed, or used in violation of Act. 25 ALR Fed 759.

LIBRARY REFERENCES

American Digest System

Telecommunications 498.
Key Number System Topic No. 372.

Encyclopedias

Telegraphs, Telephone, Radio, and television, see C.J.S. §§ 287, 288.
Searches and Seizures, 68 Am Jur 2d §§ 324, 327–329, 331–334, 338–341.
Electronic Eavesdropping by Concealed Microphone or Microphone-Transmitter 30 Am Jur Proof of Facts, p. 113.
Police Misconduct Litigation—Plaintiff's Remedies, 15 Am Jur Trials, p. 555.

Law Review and Journal Commentaries

Domestic relations and eighth circuit court of appeals. Robert E. Oliphant and Susan Elizabeth Oliphant, 16 Wm.Mitchell L.Rev. 645 (1990).
Interspousal wiretapping: should state law or federal statute govern? Note, 10 Hamline L.Rev. 255 (1987).
Seeking privacy in wireless communications: Balancing the right of individual privacy with the need for effective law enforcement. Charlene L. Lu, 17 Hastings Comm. & Ent.L.J. 529 (1995).
What victims of computer crime should know and do. Stephen Fishbein, 210 N.Y.L.J. 1 (Nov. 12, 1993).

Texts and Treatises

Business and Commercial Litigation in Federal Courts § 4.13 (Robert L. Haig ed.) (West Group & ABA 1998).
Evidence, admissibility of, see LaFave and Israel § 4.1 et seq.
Existence of genuine issues of material fact concerning defendants' good faith affirmative defense as precluding summary judgment, see Wright, Miller & Kane: Civil 2d § 2734.
Wiretapping, eavesdropping, use of recorders or transmitters by undercover agents, see Wright: Criminal 2d § 665.
Criminal Procedure, 8 Fed Proc L Ed § 22:231.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

EXHIBIT 5-6
(Continued)

Ch. 119 INTERCEPTION OF COMMUNICATIONS 18 § 2520

Notes of Decisions

1. Expectation of privacy

Where boisterous comments made by defendant while in jail were not uttered with an expectation that they would be kept in private and were not uttered under circumstances which would have justified any such expectation, recording of those comments by a radio station reporter did not amount to an unlawful interception of an oral communication. Holman v. Central Arkansas Broadcasting Co., Inc., C.A.8 (Ark.) 1979, 610 F.2d 542.

EXHIBIT 5-7
Pages from United Sates Code Annotated 18 U.S.C.A 2520. *(Reprinted with permission of Thomson Reuters/West.)*

CRIMES AND CRIMINAL PROCEDURE 18 § 2520

sentencing hearing 189 Fed.Appx. 556, 2006 WL 2089199. Telecommunications 1468

Although Court of Appeals examines de novo whether a full and complete statement was submitted meeting requirements of statute governing authorization of wiretap, it reviews the conclusion that the wiretap was necessary in each situation for an abuse of discretion; overruling *United States v. Castillo–Garcia*, 117 F.3d 1179. U.S. v. Ramirez-Encarnacion, C.A.10 (Colo.) 2002, 291 F.3d 1219. Telecommunications 1479

§ 2519. Reports concerning intercepted wire, oral, or electronic communications

HISTORICAL AND STATUTORY NOTES

Termination of Reporting Requirements

Reporting requirement of par. (3) of this section excepted from termination under Pub.L. 104–66, § 3003(a)(1), as amended, set out in a note under 31 U.S.C.A. § 1113, see Pub.L. 106–197, § 1, set out as a note under 31 U.S.C.A. § 1113.

Report on Use of DCS 1000 (Carnivore) to Implement Orders Under 18 U.S.C. 2518

Pub.L. 107–273, Div. A, Title III, § 305(b), Nov. 2, 2002, 116 Stat. 1782, provided that: "At the same time that the Attorney General, or Assistant Attorney General specially designated by the Attorney

(continues)

EXHIBIT 5-7
(Continued)

General, submits to the Administrative Office of the United States Courts the annual report required by section 2519(2) of title 18, United States Code [18 U.S.C.A. § 2519(2)], that is respectively next due after the end of each of the fiscal years 2002 and 2003, the Attorney General shall also submit to the Chairmen and ranking minority members of the Committees on the Judiciary of the Senate and of the House of Representatives a report, covering the same respective time period, that contains the following information with respect to those orders described in that annual report that were applied for by law enforcement agencies of the Department of Justice and whose implementation involved the use of the DCS 1000 program (or any subsequent version of such program)—

"(1) the kind of order or extension applied for (including whether or not the order was an order with respect to which the requirements of sections 2518(1)(b)(ii) and 2518(3)(d) of title 18, United States Code, did not apply by reason of section 2518(11) of title 18 [18 U.S.C.A. § 2518]);

"(2) the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

"(3) the offense specified in the order or application, or extension of an order;

"(4) the identity of the applying investigative or law enforcement officer and agency making the application and the person authorizing the application;

"(5) the nature of the facilities from which or place where communications were to be intercepted;

"(6) A general description of the interceptions made under such order or extension, including—

"(**A**) the approximate nature and frequency of incriminating communications intercepted;

"(**B**) the approximate nature and frequency of other communications intercepted;

"(**C**) the approximate number of persons whose communications were intercepted;

"(**D**) the number of orders in which encryption was encountered and whether such encryption prevented law enforcement from obtaining the plain text of communications intercepted pursuant to such order; and

"(**E**) the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;

"(7) the number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made;

"(8) the number of trials resulting from such interceptions;

"(9) the number of motions to suppress made with respect to such interceptions, and the number granted or denied;

"(10) the number of convictions resulting from such interceptions and the offenses for which the convictions were obtained and a general assessment of the importance of the interceptions; and

"(11) the specific persons authorizing the use of the DCS 1000 program (or any subsequent version of such program) in the implementation of such order."

§ 2520. Recovery of civil damages authorized

(a) In general.—Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.

[See main volume for text of (b) and (c)]

(d) Defense.—A good faith reliance on—

[See main volume for text of (1) and (2)]

(3) a good faith determination that section 2511(3) or 2511(2)(i) of this title permitted the conduct complained of; is a complete defense against any civil or criminal action brought under this chapter or any other law.

[See main volume for text of (e)]

EXHIBIT 5-7
(Continued)

(f) Administrative discipline.—If a court or appropriate department or agency determines that the United States or any of its departments or agencies has violated any provision of this chapter, and the court or appropriate department or agency finds that the circumstances surrounding the violation raise serious questions about whether or not an officer or employee of the United States acted willfully or intentionally with respect to the violation, the department or agency shall, upon receipt of a true and correct copy of the decision and findings of the court or appropriate department or agency promptly initiate a proceeding to determine whether disciplinary action against the officer or employee is warranted. If the head of the department or agency involved determines that disciplinary action is not warranted, he or she shall notify the Inspector General with jurisdiction over the department or agency concerned and shall provide the Inspector General with the reasons for such determination.

(g) Improper disclosure is violation.—Any willful disclosure or use by an investigative or law enforcement officer or governmental entity of information beyond the extent permitted by section 2517 is a violation of this chapter for purposes of section 2520(a).

(Added Pub.L. 90–351, Title III, § 802, June 19, 1968, 82 Stat. 223, and amended Pub.L. 91–358, Title II, § 211(c), July 29, 1970, 84 Stat. 654; Pub.L. 99–508, Title I, § 103, Oct. 21, 1986, 100 Stat. 1853; Pub.L. 107–56, Title II, § 223(a), Oct. 26, 2001, 115 Stat. 293; Pub.L. 107–296, Title II, § 225(e), Nov. 25, 2002, 116 Stat. 2157.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2002 Acts. House Report No. 107–609 (Part I) and Statement by President, see 2002 U.S. Code Cong. and Adm. News, p. 1352.

Amendments

2002 Amendments. Subsec. (d)(3). Pub.L. 107–296, § 225(e), inserted "or 2511(2)(i)" after "2511(3)".

2001 Amendments. Subsec. (a). Pub.L. 107–56, § 223(a)(1), temporarily inserted "other than the United States," after "entity". See Sunset Provisions note set out under this section.

Subsec. (f). Pub.L. 107–56, § 223(a)(2), temporarily added subsec. (f). See Sunset Provisions note set out under this section.

Subsec. (g). Pub.L. 107–56, § 223(a)(3), temporarily added subsec. (g). See Sunset Provisions note set out under this section.

Effective and Applicability Provisions

2002 Acts. Amendment to this section by Pub.L. 107–296 effective 60 days after Nov. 25, 2002, see Pub.L. 107–296, § 4, set out as a note under 6 U.S.C.A. § 101.

Sunset Provisions

Provision that amendments by Pub.L. 107–56, Title II, Oct. 26, 2001, 115 Stat. 278, with certain exclusions, shall cease to have effect on March 10, 2006, except with respect to any particular foreign intelligence investigation that began before that date, or with respect to any particular offense or potential offense that began or occurred before that, such provisions to continue in effect, was repealed by Pub.L. 109–177, § 102(a), see Pub.L. 107–56, § 224, as amended, set out as a note under 18 U.S.C.A. § 2510.

LAW REVIEW AND JOURNAL COMMENTARIES

Domestic relations and eighth circuit court of appeals. Robert E. Oliphant and Susan Elizabeth Oliphant, 16 Wm.Mitchell L.Rev. 645 (1990).

Interspousal wiretapping: Should state law or federal statute govern? Note, 10 Hamline L.Rev. 255 (1987).

Seeking privacy in wireless communications: Balancing the right of individual privacy with the need for effective law enforcement. Charlene L. Lu, 17 Hastings Comm. & Ent.L.J. 529 (1995).

Should it take a thief?: Rethinking the admission of illegally obtained evidence in civil cases. David H. Taylor, 22 Rev. Litig. 625 (2003).

What victims of computer crime should know and do. Stephen Fishbein, 210 N.Y.L.J. 1 (Nov. 12, 1993).

(continues)

EXHIBIT 5-7
(Continued)

18 § 2520 **CRIMES AND CRIMINAL PROCEDURE**

LIBRARY REFERENCES

American Digest System

Telecommunications 498.
Key Number System Topic No. 372.

Corpus Juris Secundum

CJS Telecommunications § 237, Actions.
CJS Telecommunications § 238, Good-Faith Defenses.

Research References

ALR Library

7 ALR, Fed. 2nd Series 1, Validity, Construction, and Application of Federal Enactments Proscribing Obscenity and Child Pornography or Access Thereto on the Internet.

195 ALR, Fed. 565, Applicability of 47 U.S.C.A. § 605, Prohibiting Unauthorized Interception of Radio Communications, to Sale and Use of Cable Decoding Equipment.

181 ALR, Fed. 419, What Constitutes Compliance by Government Agents With Requirement of 18 U.S.C.A. § 2518(5) that Wire Tapping and Electronic Surveillance be Conducted in Such Manner as to Minimize Interception of Communications Not . . .

179 ALR, Fed. 1, Construction and Application of Freedom of Information Act Provision (5 U.S.C.A. § 552(A)(4)(E)) Concerning Award of Attorney's Fees and Other Litigation Costs.

178 ALR, Fed. 1, Qualified Immunity as Defense in Suit Under Federal Wiretap Act (18 U.S.C.A. §§ 2510 et seq.).

176 ALR, Fed. 333, Application of "Fugitive Disentitlement Doctrine" in Federal Civil Actions.

2001 ALR, Fed. 7, Qualified Immunity as Defense in Suit Under Federal Wiretap Act (18 U.S.C.A. § 2510 et seq.).

166 ALR, Fed. 297, Who is "Person Acting Under" Officer of United States or Any Agency Thereof for Purposes of Availability of Right to Remove State Action to Federal Court Under 28 U.S.C.A. § 1442(A)(1).

164 ALR, Fed. 139, Construction and Application of Provision of Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C.A. § 2520) Authorizing Civil Cause of Action by Person Whose Wire, Oral, or Electronic Communication Is . . .

139 ALR, Fed. 517, Applicability, in Civil Action, of Provisions of Omnibus Crime Control and Safe Streets Act of 1968, Prohibiting Interception of, Communications (18 U.S.C.A. § 2511(1)), to Interceptions by Spouse, or Spouse's Agent . . .

129 ALR, Fed. 549, What Constitutes "Device Which is Primarily Useful for the Surreptitious Interception of Wire, Oral, or Electronic Communications," Under 18 U.S.C.A. § 2512(1)(B), Prohibiting Manufacture, Possession, Assembly, Sale . . .

122 ALR, Fed. 597, Construction and Application of 18 U.S.C.A. § 2511(1)(A) and (B), Providing Criminal Penalty for Intercepting, Endeavoring to Intercept, or Procuring Another to Intercept Wire, Oral, or Electronic . . .

103 ALR, Fed. 422, Propriety, Under 18 U.S.C.A. § 2517(5), of Interception or Use of Communications Relating to Federal Offenses Which Were Not Specified in Original Wiretap Order.

81 ALR, Fed. 700, Construction and Application of Communications Act Statute of Limitations (47 U.S.C.A. § 415(B)) Relating to Recovery from Carrier of Damages Not Based on Overcharges.

80 ALR, Fed. 168, Recoverability of Cost of Computerized Legal Research Under 28 U.S.C.A. § 1920 or Rule 54(D), Federal Rules of Civil Procedure.

67 ALR, Fed. 429, Interception of Telecommunication by or With Consent of Party as Exception, Under 18 U.S.C.A. § 2511(2)(C) and (D), to Federal Proscription of Such Interceptions.

68 ALR, Fed. 953, When Do Facts Shown as Probable Cause for Wiretap Authorization Under 18 U.S.C.A. § 2518(3) Become "Stale".

70 ALR, Fed. 67, What Claims Are Sufficient to Require Government, Pursuant to 18 U.S.C.A. § 3504, to Affirm or Deny Use of Unlawful Electronic Surveillance.

61 ALR, Fed. 825, Propriety of Monitoring of Telephone Calls to or from Prison Inmates Under Title III of Omnibus Crime Control and Safe Streets Act (18 U.S.C.A. §§ 2510 et seq.) Prohibiting Judicially Unauthorized Interception Of . . .

EXHIBIT 5-7
(Continued)

62 ALR, Fed. 636, Delay in Sealing or Failure to Seal Tape or Wire Recording as Required by 18 U.S.C.A. § 2518(8)(A) as Ground for Suppression of Such Recording at Trial.

63 ALR, Fed. 744, Immunity of Public Officials from Personal Liability in Civil Rights Actions Brought by Public Employees Under 42 U.S.C.A. § 1983.

58 ALR, Fed. 594, Application to Extension Telephones of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C.A. §§ 2510 et seq.), Pertaining to Interception of Wire Communications.

60 ALR, Fed. 706, Right of Immune Jury Witness to Obtain Access to Government Affidavits and Other Supporting Materials in Order to Challenge Legality of Court-Ordered Wiretap or Electronic Surveillance Which Provided Basis For . . .

52 ALR, Fed. 181, What Constitutes "Unwarranted Invasion of Personal Pri-vacy" for Purposes of Law Enforcement Investigatory Records Exemption of Freedom of Information Act (5 U.S.C.A. § 552 (B) (7)(C)).

54 ALR, Fed. 599, Under What Circumstances is Suppression of Wiretap Evidence Required When Person Overheard in Wiretap But Not Mentioned in Order Therefor is Not Served With In-ventory Notice Provided for by 18 U.S.C.A. Sec . . .

47 ALR, Fed. 439, What Statutes Specifically Exempt Agency Records from Disclosure, Under 5 U.S.C.A. § 552(B)(3).

34 ALR, Fed. 278, Federal Criminal Prosecutions Under Wire Fraud Statute (18 U.S.C.A. § 1343) for Use of "Blue Box" or Similar Device Permitting User to Make Long-Distance Telephone Calls Not Reflected on Company's Billing . . .

34 ALR, Fed. 785, Validity, Construction, and Application of 18 U.S.C.A. § 875(C), Prohibiting Transmission in Interstate Commerce of Any Communication Containing Any Threat to Kidnap Any Person or Any Threat to Injure the Person Of . . .

22 ALR, Fed. 765, Who Must be Joined in Action as Person "Needed for Just Adjudication" Under Rule 19(A) of Federal Rules of Civil Procedure.

21 ALR, Fed. 708, Validity, Construction, and Application of 18 U.S.C.A. § 1955 Prohibiting Illegal Gambling Businesses.

4 ALR, Fed. 881, Elements of Offense Proscribed by the Hobbs Act (18 U.S.C.A. § 1951) Against Racketeering in Interstate or Foreign Commerce.

5 ALR, Fed. 166, Validity and Construction of Federal Statute (18 U.S.C.A. § 1084(A)) Making Transmission of Wagering Information a Criminal Offense.

91 ALR 5th 585, Constitutionality of Secret Video-Surveillance.

84 ALR 5th 169, Liability of Internet Service Provider for Internet or E-Mail Defamation.

12 ALR 5th 195, Excessiveness or Inadequacy of Punitive Damages Awarded in Personal Injury or Death Cases.

44 ALR 4th 841, Propriety of Governmental Eavesdropping on Communications Between Accused and His Attorney.

49 ALR 4th 430, Eavesdropping on Extension Telephone as Invasion of Privacy.

27 ALR 4th 449, Permissible Warrantless Surveillance, Under State Communications Interception Statute, by State or Local Law Enforcement Officer or One Acting in Concert With Officer.

33 ALR 4th 506, Construction and Application of State Statutes Authorizing Civil Cause of Action by Person Whose Wire or Oral Communication is Intercepted, Disclosed, or Used in Violation of Statutes.

24 ALR 4th 1208, Permissible Surveillance, Under State Communications Interception Statute, by Person Other Than State or Local Law Enforcement Officer or One Acting in Concert With Officer.

92 ALR 3rd 901, Modern Status of Interspousal Tort Immunity in Personal Injury and Wrongful Death Actions.

78 ALR 3rd 449, Criminal Prosecutions for Use of "Blue Box" or Similar Device Permitting User to Make Long-Distance Telephone Calls Without Incurring Charges.

57 ALR 3rd 172, Admissibility, in Criminal Prosecution, of Evidence Obtained by Electronic Surveillance of Prisoner.

11 ALR 3rd 1296, Eavesdropping as Violating Right of Privacy.

97 ALR 2nd 1283, Admissibility, in Criminal Prosecution, of Evidence Secured by Mechanical or Electronic Eavesdropping Device.

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EXHIBIT 5-7
(Continued)

74 ALR 2nd 855, Validity, Construction, and Effect of State Legislation Making Wiretapping a Criminal Offense.

58 ALR 2nd 1024, Admissibility of Sound Recordings in Evidence.

28 ALR 2nd 1055, Mode of Establishing that Information Obtained by Illegal Wire Tapping Has or Has Not Led to Evidence Introduced by Prosecution.

175 ALR 438, Jurisdiction of Equity to Protect Personal Rights; Modern View.

165 ALR 1302, Constitutionality, Construction, and Effect of Statute or Regulation Relating Specifically to Divulgence of Information Acquired by Public Officers or Employees.

134 ALR 614, Admissibility of Evidence Obtained by Government or Other Public Officer by Intercepting Letter or Telegraph or Telephone Message.

105 ALR 326, Admissibility of Telephone Conversations in Evidence.

45 ALR 605, Civil Liability for Improper Issuance of Search Warrant or Proceedings Thereunder.

Encyclopedias

49 Am. Jur. Proof of Facts 3d 277, Proof of Adultery as Grounds for Dissolution of Marriage.

15 Am. Jur. Trials 555, Police Misconduct Litigation–Plaintiff's Remedies.

27 Am. Jur. Trials 1, Representing the Mentally Disabled Criminal Defendant.

62 Am. Jur. Trials 547, Obtaining Damages in Federal Court for State and Local Police Misconduct.

86 Am. Jur. Trials 111, Arbitration Highways to the Courthouse–A Litigator's Roadmap.

Am. Jur. 2d Evidence § 613, Interception by Private Party; Interspousal Interception.

Am. Jur. 2d Searches and Seizures § 328, Federal Statutes; Federal Wiretap Act.

Am. Jur. 2d Searches and Seizures § 343, Pen Registers–Prohibition on Use by Federal Law.

Am. Jur. 2d Searches and Seizures § 365, Sealing of Warrant.

Am. Jur. 2d Searches and Seizures § 375, Specifying Crimes and Describing Communications.

Am. Jur. 2d Searches and Seizures § 436, Generally; Federal Law.

Am. Jur. 2d Searches and Seizures § 443, Who May be Liable.

Am. Jur. 2d Searches and Seizures § 446, Good-Faith Reliance on Court Order.

Am. Jur. 2d Searches and Seizures § 448, Limitations Period.

Am. Jur. 2d Searches and Seizures § 453, Statutory Provisions; Compensatory Damages.

Am. Jur. 2d Searches and Seizures § 456, Punitive Damages.

Am. Jur. 2d Searches and Seizures § 457, Attorneys' Fees.

Am. Jur. 2d Searches and Seizures § 458, Equitable Relief.

Am. Jur. 2d Securities Regulation-Federal § 1, Historical Background.**Forms**

Federal Procedural Forms § 62:392.50, Complaint–by Subscriber–Against Internet Service Provider–Termination of Service–Violation of Electronic Communications Privacy Act [18 U.S.C.A. §§ 2510 to 2712; 28 U.S.C.A. § 1331, 1332.

2B West's Federal Forms § 1832, Employer's Recording Telephone Conversations.

Am. Jur. Pl. & Pr. Forms Privacy § 58, Complaint in Federal Court–Violation of Federal Wiretapping Act–Violation of State Wiretapping Statute–Invasion of Privacy.

Am. Jur. Pl. & Pr. Forms Privacy § 59, Complaint in Federal Court–Violation of Federal Wiretapping Act–By Employee Against Employer.

Am.Jur.Pl.&Pr.Forms Tele-communications § 71, Complaint in Federal Court–By Television Cable Company–Against Private Individual–For Injunctive Relief and Damages–For "Stealing." Cable Television Signals.

Am. Jur. Pl. & Pr. Forms Telecommunications § 110, Complaint in Federal Court–By Subscriber–Against Internet Service Provider–Breach of Contract–Termination of Service–Violation of Electronic Communications Privacy Act.

Am. Jur. Pl. & Pr. Forms Tele-communications § 135, Complaint, Petition or Declaration–By Telephone Company Employee–To Recover Damages for Unlawful Interception and Disclosure of Telephone Call.

Am. Jur. Pl. & Pr. Forms Telecommunications § 71.30, Complaint in Federal Court–By Digital Satellite Television Broadcaster–Against Manufacturer of Pirate Access Devises and Purchaser-User of Such Devices–Violation of Federal Laws&mdash.

EXHIBIT 5-7
(Continued)

CRIMES AND CRIMINAL PROCEDURE **18 § 2520**

Treatises and Practice Aids

Federal Evidence § 4:10, Relevant Evidence Generally Admissible.

Federal Evidence § 9:14, Tape Recordings.

Federal Procedure, Lawyers Edition § 33:706, Title III of the Omnibus Crime Control and Safe Streets Act.

Federal Procedure, Lawyers Edition § 33:711, Interception by Private Party; Inter-spousal Interception.

Federal Procedure, Lawyers Edition § 72:995, Limitation of Actions.

Federal Procedure, Lawyers Edition § 72:998, Evidence; Prima Facie Case of Violation–Burden of Proof as to Defense of Good-Faith Reliance.

Federal Procedure, Lawyers Edition § 72:1000, Remedies.

Federal Procedure, Lawyers Edition § 72:1001, Remedies–Damages.

Federal Procedure, Lawyers Edition § 72:1002, Remedies–Award of Attorney's Fee and Costs.

Federal Procedure, Lawyers Edition § 72:1046, Obtaining Evidence of Telecommunications Crimes.

Handbook of Federal Evidence § 901:5, Rule 901(B)(5): Voice Identification; Sound Recordings.

Securities and Federal Corporate Law § 19:26, Use of vs. Possession of Material Information–View from the Ninth Circuit–United States v. Smith–Rule 10b-5.

1 Wright & Miller: Federal Prac. & Proc. § 4, Amendments to the Criminal Rules.

3A Wright & Miller: Federal Prac. & Proc. R 41, Search and Seizure.

3A Wright & Miller: Federal Prac. & Proc. § 665, Wiretapping and Eavesdropping–The Background.

3A Wright & Miller: Federal Prac. & Proc. § 665.1, Wiretapping and Eavesdropping–The 1968 Statute.

3C Wright & Miller: Federal Prac. & Proc. App. C, Advisory Committee Notes for the Federal Rules of Criminal Procedure for the United States District Courts.

Notes of Decisions

Persons entitled to maintain action 11a

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2. Violation of statute

Computer hacker's acquisition of information implicating defendant in sexual exploitation of children and possession of child pornography through use of virus that enabled him to access and download information stored on defendant's personal computer did not violate Wiretap Act, since there was nothing to suggest that any information was obtained by hacker through contemporaneous acquisition of electronic communications while in flight. U.S. v. Steiger, C.A.11 (Ala.) 2003, 318 F.3d 1039, certiorari denied 123 S.Ct. 2120, 538 U.S. 1051, 155 L.Ed.2d 1095, post-conviction relief denied 2006 WL 3450140. Telecommunications 1439

Defense attorneys satisfied requirement for stating cause of action for Wiretap Action violation, that their conversations with inmate clients were actually recorded on videotape, by Bureau of Prisons (BOP) personnel, even though there was no specific identification of attorneys whose clients were being recorded; it was sufficient that attorneys alleged they met with clients 30 times during period in question, and that there were 40 recorded conversations, giving rise to assumption that some conversations involving suing attorneys were involved. Lonegan v. Hasty, E.D.N.Y.2006, 436 F.Supp.2d 419. Telecommunications 1447

3. Constitutional cause of action

Satellite television service provider was not entitled to summary judgment on its unauthorized interception claims against alleged purchaser of pirate access device based solely on adverse inferences potentially arising from alleged purchaser's assertion of Fifth Amendment privilege against self-incrimination; provider had alternate means of proving its claims. DirecTV, Inc. v. Lovejoy, D.Me.2005, 366 F.Supp.2d 182; Federal Civil Procedure 2519; Witnesses 309

4. Offenses within section

Even if telecommunications provider's customers were required to plead affirmatively that provider did not receive a certification from government authorizing it to conduct electronic surveillance in support of

(continues)

EXHIBIT 5-7
(Continued)

18 § 2520 **CRIMES AND CRIMINAL PROCEDURE**

their action based on provider's alleged participation in alleged warrantless surveillance programs, customers sufficiently alleged that provider acted outside scope of any government certification it might have received, where they alleged that communications were intercepted without judicial or other lawful authorization. Hepting v. AT & T Corp., N.D.Cal.2006, 439 F.Supp.2d 974. Telecommunications 1447

Satellite television service provider was entitled to default judgment on its claim that purchaser of pirate access devices had engaged in unauthorized interception of encrypted signals; it was reasonably inferable that devices had been used for their intended purpose. Directv, Inc. v. Agee, D.D.C.2005, 405 F.Supp.2d 6. Telecommunications 1298

Federal criminal code section providing civil relief for any person whose wire, oral or elec-

The following sections, "American Law Reports" and "Library References," cross-reference you to related secondary sources, including law review articles, *American Law Reports* annotations, sections in legal encyclopedias, and sections in treatises. For many statutes, this section cross-references you to primary sources, such as administrative law and other federal statutes.

The following section is entitled "Notes of Decisions." Because of page constraints, Exhibit 5-6 omits all but the first page of this section. Attorneys commonly refer to "Notes of Decisions" as annotated material. In the hardbound volume, this section is preceded by a table of contents for the annotations to § 2520, with the numbers referencing numbered sections of the annotations. Similar to digest annotated material, each paragraph of annotated material following a statute gives a summary of a legal principle contained in a case interpreting § 2520 and the citation to the case. If you would like to know how § 2520 has been interpreted, you can read through the annotations and use the citation to pull and read the case. Although the citations are usually to cases, sometimes they can be to other legal authority. When you are researching statutes, make sure to check the pocket part for later annotations. Also, do not assume that an annotated code contains the most recent cases interpreting a statute. Use the cases you find from the annotated materials to find more recent cases through the digests or citators.

Now, focus on the text of section 2520 in Exhibit 5-7. The text of section 2520 is broken up by bracketed material. In legal documents, brackets ([ ]) generally enclose material not written by the original author, but added by an editor or publisher. Here, the publisher added "[See main volume for text of (b) and (c)]" before sub-subsection (d), "[See main volume for text of (1) and (2)]" after the first line of subsection (d), and "[See main volume for text of (e)]" before subsection (f). This shows that (b), (c), (d)(1), (d)(2), and (e) were not amended.

As discussed above, the material in parentheses following the text of section 2520 is legislative history. Because the statute was amended, the statutory text is followed by a section "Historical and Statutory Notes." This section contains references to the 2001 and 2002 amendments. The information under the heading "Revision Notes and Legislative Reports" states that a report from a House of Representatives committee and a statement from the President are available in *United States Code Congressional and Administrative News*. *United States Code Congressional and Administrative News* is a source of Congressional legislative history available in many law libraries and contains the text of federal acts and selected committee reports. *United States Code Congressional and Administrative News* was described more fully earlier in this chapter.

The following sections, "Law Review and Journal Commentaries" and "Library References," cross-reference you to related secondary sources, including law review articles, *American Law Reports* annotations, sections in legal encyclopedias, and sections in treatises. For many statutes, this section cross-references you to primary sources, such as administrative law and other federal statutes. Because of page constraints, all but the first page of these sections was omitted from Exhibit 5-7.

Normally, the following section would be entitled "Notes of Decisions." Because of page constraints, the many pages comprising this section, commonly referenced as annotations, were omitted from Exhibit 5-7. If you would like to know how § 2515 has been interpreted, you can read through the annotations and use the citation at the end of annotation to pull and read the case. Although the citations are usually to cases, sometimes they can be to other legal authority. Do not assume that an annotated code contains the most recent cases interpreting a statute. Use the cases you find from the annotated materials to find more recent cases through the digests or citators.

CITATION TIP

Check for Correct Citation Form

Do not assume that the legal citations found when researching are in correct citation form. Citations, even those included in cases, may or may not comply with the citation rules your professor has asked you to use. Always check your citations against the appropriate citation rule for correct form.

CITATIONS FOR STATUTES

A citation to the *United States Code* is the preferred citation because the *United States Code* is the official code. Title 18 U.S.C. § 2515 may be cited as follows:

18 U.S.C. § 2520 (2000).	(2000 is the date of the latest version of the Code containing the statute.)

However, publication of the *United States Code* (every six years) and its annual supplements lag behind recent amendments to federal statutes. When this book was being written in 2008, the 2000 *United States Code* had been published but none of the supplements were available. If the *United States Code* is unavailable or does not contain the cited statute, you may use the following citations to either *United States Code Annotated* or *United States Code Service*:

18 U.S.C.A. § 2520(a)-(b) (West 2000 & Supp. 2008).	(West publishes *United States Code Annotated;* part of the cited statute is in the 2000 hardbound volume and part is in the 2008 pocket part.)
18 U.S.C.S. § 2520(a)-(b) (LexisNexis 1993 & Supp. 2008).	(*United States Code Service* is published by LexisNexis; part of the cited statute is in the 1993 hardbound volume and part is in the 2008 pocket part.)

CITATION TIP

Symbols for Sections

The symbol § means "section." Use two section symbols (§§) when citing to two or more sections.

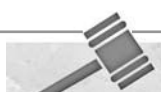
If you are referring to a portion of the statute rather than to the entire statute, pinpoint the portion by subsection. If you do give the subsection in your citation, be sure the subsection is designated just as it is in the statute, including whether letters are lower- or uppercase, whether numbers are Arabic or roman, and whether numbers and letters are enclosed in parentheses or not. For example, "18 U.S.C.A. § 2511(2)(c) (West 2000)" refers to subsubsection (c) of subsection (2) of section 2511 of title 18 of the *United States Code*.

The parenthesis at the end of the citation gives the name or an abbreviation of the commercial publisher's name and the location of the statute. In the two citations, "LexisNexis" indicates that it publishes *United States Code Service* and "West" indicates that it publishes *United States Code Annotated*. At the time this chapter was written, the hardbound volume of *United States Code Service* containing the statutes was copyrighted "1993," and the pocket part supplement was dated "2008." Similarly, the hardbound volume of *United States Code Annotated* was copyrighted "2000," and the pocket part supplement was dated "2008." Include as much parenthetical information as needed to locate the statutory language. In "18 U.S.C.A. § 2512(1)-(2) (West 2000 & Supp. 2008)," information was given for the hardbound volume and the pocket part supplement. In "18 U.S.C.S. § 2512(1)-(2) (LexisNexis Supp. 2008)," information was included only for the pocket part supplement. If the statutory language is found entirely in the hardbound volume, you need only include information on the hardbound volume in the parenthesis. Conversely, if the statutory language is found entirely in the pocket part supplement, you need only include information on the pocket part supplement in the parenthesis.

LOCAL LAW

The many smaller units of government include counties, cities, and villages. Local laws passed by these units govern many areas of day-to-day concern. Matters regulated by local law include zoning, traffic, education, health, occupational licensing, and housing. Courts interpret these local laws, sometimes called **ordinances**, in a manner similar to statutes.

ordinances
A local or city law, rule, or regulation.



YOU BE THE JUDGE

Does a city ordinance prohibiting livestock allow a resident to have a pet rooster?

In reaching your decision, consider the following questions:

- What argument might the resident make to support the conclusion that the pet rooster is not livestock?
- What argument might the city make to support the conclusion that the pet rooster is livestock?
- Would it make any difference if someone violating the statute is subject to $700 in fines and ninety days in jail?

To see how a court answered the questions, see *State v. Nelson*, 499 N.W.2d 512 (Minn. Ct. App. 1993) in Appendix K.

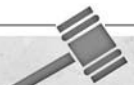
In Chapter 2, the court deciding *Blackie the Talking Cat* determined whether the cat's owners were running a for-profit business. If so, the local ordinance required the owners to obtain an occupational license.

COURT RULES

Court rules govern the procedure of beginning a lawsuit and handling a case before a court. The rules cover such mundane matters as the size paper on which documents are to be submitted to the courts and the format for appellate briefs. They also set forth

court rules
Govern the procedure of beginning a lawsuit and handling a case before a court.

important time limitations such as the time period within which the defendant has to answer a complaint and the time period within which a party may appeal a decision.



YOU BE THE JUDGE

Should an appeal be allowed where the statute allowed a fourteen-day extension in the filing deadline but where the notice of appeal was filed sixteen days after the judge extended the filing deadline?

In reaching your decision, would it make any difference that the judge's order incorrectly stated the deadline date for filing the notice of appeal as the seventeenth day instead of the fourteenth day after the order?

- What argument might be made to support the conclusion that the filing was timely?
- What argument might be made to support the conclusion that the filing was not timely?

To see how a court answered the questions, see *Bowles v. Russell*, 127 S. Ct. 2360 (2007) in Appendix K.

Generally, each jurisdiction has a number of sets of court rules. **Rules of civil procedure** govern the conduct of civil cases at the trial level. **Rules of evidence** govern the gathering of information for use at trial and admission of information as evidence at trial. **Rules of criminal procedure** govern the conduct of criminal cases at the trial level. **Rules of appellate procedure** govern the conduct of cases before an appellate court. Courts of limited jurisdiction and specialized courts may have their own sets of court rules. In addition, a court may have promulgated **local court rules** that govern procedure in that court and supplement other court rules.

rules of civil procedure
Court rules that govern the conduct of civil cases at the trial level.

rules of evidence
Court rules that govern whether information may be considered by the factfinder.

rules of criminal procedure
Court rules that govern the conduct of criminal cases at the trial level.

rules of appellate procedure
Court rules that govern the conduct of cases before an appellate court.

local court rules
Court rules that govern procedure in a particular local court and supplement other court rules.

Each jurisdiction has its own procedures for promulgating court rules. In some jurisdictions, the legislature creates the court rules; in other jurisdictions, such as the federal courts, the highest court is responsible for creating court rules; and in other jurisdictions, the creation of court rules requires legislative and judicial action. In many jurisdictions, the judicial branch promulgates court rules under the statutory authority given to it by the legislative branch.

Congress has delegated the power to make court rules to the federal courts. The United States Supreme Court promulgates the rules for the Court and the rules for the lower federal courts. The United States Supreme Court is required to submit any proposed court rule to Congress by May 1 of the year in which the court rule is to take effect. Congress has until December 1 to review any proposed court rule. Congress must take action before a rule concerning an evidentiary privilege is effective. For any other proposed court rule, the proposed court rule becomes effective if Congress fails to act by December 1.

For federal courts, the basic court rules used at the trial level are the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Federal Rules of Evidence. At the appellate level, the Federal Rules of Appellate Procedure are used in the United States Courts of Appeals, and the Revised Rules of the Supreme Court of the United States are used in the United States Supreme Court. In addition, each federal court may promulgate its own supplementary local rules so long as the local rules do not conflict with the rules promulgated by the United States Supreme Court.

SAMPLE PAGE OF COURT RULES

Exhibit 5-8 shows the text of rule 11 of the Federal Rules of Civil Procedure. Each federal court rule is followed by Advisory Committee notes from the committee that drafted the rules or an amendment to the rule. The notes may discuss the history and purpose of the rule.

EXHIBIT 5-8
Rule 11 of the Federal Rules of Civil Procedure.

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.

(1) *In General*. If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) *Motion for Sanctions*. A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) *On the Court's Initiative*. On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) *Nature of a Sanction*. A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) *Limitations on Monetary Sanctions*. The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) *Requirements for an Order*. An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

Notice that rule 11 requires the attorney to sign any document filed in court and makes the attorney subject to sanctions if the representations of section (b) are untrue. Subsection (b)(2) requires that, in documents filed with the court, a claim is "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law"; subsection (b)(3) requires that a factual contention has "evidentiary support."

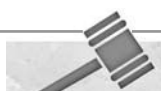
YOU BE THE JUDGE

Should you sanction the defense attorney under rule 11 for so selectively quoting from cases that you are mislead about the meaning of the term "forthwith"?

In reaching your decision, consider the following information:

- Even though you ordered the defendant to file its response to the plaintiff's motion forthwith, the defendant filed its response twelve days later.
- To determine whether you should strike the defendant's response, you requested the defendant to explain the term "forthwith."
- The defense attorney's response quoted a sentence from a United States Supreme Court case defining "forthwith" but the response omitted the next sentence specifying that "forthwith" typically means twenty-four hours.

To see whether a court sanctioned the attorney, see *Precision Specialty Metals, Inc. v. United States*, 315 F.3d 1346 (Fed. Cir. 2003) in Appendix K.



YOU BE THE JUDGE

Should you sanction the defendant's law firm under rule 11 for producing no evidence in support of the defendant's $890,000 counterclaim in a contract dispute?

In reaching your decision, consider the following information:

- If the defendant had not asserted the counterclaim, the lawsuit probably would have been settled and the cost to plaintiff of dealing with the counterclaim was at least $20,000.
- You are wondering whether rule 11 allows you to order the defendant's law firm to pay the plaintiff money and, if so, what amount you should order the law firm to pay.

To see whether the court ordered the defendant's law firm to pay the plaintiff money, see *United Stars Industries, Inc. v. Plastech Engineered Products, Inc.*, 525 F.3d 605 (7th Cir. 2008) in Appendix K.

RESEARCHING COURT RULES

Your state probably has similar sets of rules and may have sets of rules for courts of limited jurisdiction such as traffic court and small claims court. You will become familiar with some of your state's court rules by completing the legal research assignment on court rules.

Court rules may be researched by using citators (see Chapter 6) to determine how the court rules have been interpreted. *Federal Rules Decisions* is a reporter containing cases concerning the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure.

LOCATING COURT RULES

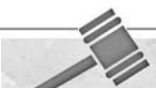
All the federal rules identified, except for the local rules of the United States District Courts, may be found in *United States Code Service* or in *United States Code Annotated*. West also

publishes paperbound volumes of certain of the federal court rules, including certain of the United States District Court local rules and the court rules for certain states. The paperbound volumes have the virtue of being fairly inexpensive and easily transportable and contain an index following each set of rules. The paperbound volumes are not annotated, however. The paperbound volumes are printed annually. Be sure you are researching in the most current version available.

Besides being printed in a publication containing just court rules, you may find your state's court rules in volumes of the publication containing your state's annotated code. Court rules may be in separate volumes, or, if enacted by the legislature, they may be part of the statutory code. For example, the Florida Rules of Evidence comprise Chapter 90 of the *Florida Statutes*, while the balance of the state's court rules are printed in volumes at the end of *Florida Statutes Annotated*.

LOCAL COURT RULES

Most courts have local rules that must be followed, in addition to or in lieu of, federal or state rules. Some local court rules may be found in *United States Code Service* or in *United States Code Annotated*. Many are available on the Internet or for purchase from the clerk of the court. The attorney has a duty to research and be familiar with local rules.



YOU BE THE JUDGE

Was the trial court correct in dismissing a complaint because the plaintiffs' attorney submitted $203 as the filing fee for the complaint instead of $206?

In reaching your decision, consider the following information:

- The attorney attempted to file the complaint one day prior to the end of the statute of limitations period and did not discover that the court clerk had refused to accept the complaint until after the end of the statute of limitations.
- The attorney's secretary had consulted the court website and had incorrectly noted the filing fee as $203 (the amount for an initial document filed by someone other than a plaintiff) rather than $206 (the filing fee for a complaint).

To see whether the appellate court affirmed the trial court dismissal, see *Duran v. St. Luke's Hospital*, 8 Cal.Rptr.3d 1 (Cal. Ct. App. 2003) in Appendix K.

CITATION TIP

Check for Corrrect Citation Form

Do not assume that the legal citations found when researching are in correct citation form. Citations, even those included in cases, may or may not comply with the citation rules your professor has asked you to use. Always check your citations against the appropriate citation rule for correct form.

CITATIONS FOR COURT RULES

The following are sample citations to the most important types of court rules identified previously:

Fed. R. Civ. P. 23. (Rule 23 of the Federal Rules of Civil Procedure)

Fed. R. Crim. P. 1. (Rule 1 of the Federal Rules of Criminal Procedure)

Fed. R. App. P. 5. (Rule 5 of the Federal Rules of Appellate Procedure)

Fed. R. Evid. 610. (Rule 610 of the Federal Rules of Evidence)

Sup. Ct. R. 1. (Rule 1 of the Rules of the United States Supreme Court)

ADMINISTRATIVE LAW*

Since the beginning of this nation, administrative agencies have continuously increased in number, size, and power. The daily lives of all citizens are affected by administrative agencies. Consider these examples: the processing, manufacturing, packing, labeling, advertising, and sale of nearly all products in the United States is regulated by agencies such as the Food and Drug Administration and the Department of Agriculture; the Internal Revenue Service oversees the collection of taxes from all citizens; the Federal Aviation Administration regulates commercial air transportation; the distribution of public welfare benefits (Aid to Dependent Children and food stamps) is regulated by the Department of Health and Human Services and the Department of Agriculture. These are only a few illustrations of the extent to which federal administrative agencies play a role in the daily lives of citizens. To get a complete picture, it is necessary to add state and local agencies. State departments of motor vehicles issue drivers' licenses, register cars, and issue automobile tags; doctors, lawyers, barbers, plumbers, and electricians are among the many whose professions and trades are regulated by state agencies; state departments of revenue collect taxes; state and local governments regulate building and construction; and federal, state, and local agencies regulate the environment.

Why do we need agencies at all? Why have they become so numerous and powerful? The answer to both questions is twofold. First, the job of governing has become too large for Congress, the courts, and the President to handle. There were four million citizens when the Constitution was adopted (1789). There are now over 260 million people in the United States. People are more mobile, technology is changing at unprecedented speed, and other social changes have increased the demands on government. Congress does not have the time to make all the laws, the President to enforce all the laws, or the courts to adjudicate all the cases.

Second, agencies possess expertise. Every year Congress must deal with a large and diverse number of issues. Discrimination, environmental concerns, military and national security matters, and funding for science and art are but a few examples. Congress is too small to be expert in every subject. Agencies, however, specialize and, as a result, they possess technical knowledge and experience in their subject areas. They can hire specialists and benefit from continuous contact with the same subjects.

There is no constitutional provision establishing administrative agencies, nor is the role of agencies in the United States governmental structure defined. Regardless, agencies have been part of the federal government since the beginning. Agencies have been analogized to a "fourth branch" of government. This is not accurate, as the Constitution establishes only three branches and does not permit the creation of a fourth. Even more, as you will learn, agencies are accountable to the three constitutional branches. Regardless, agencies are vital components of government. They are also unique. Though they are not a branch of government, they do perform the functions of all three branches of government, creating separation of powers problems.

Nearly every agency is created by Congress through its lawmaking power. Congress, the President, and constitutional courts are not "agencies." Legislation that created an agency and defines its powers is known as **enabling legislation**. Once created, agencies

enabling legislation
Legislation that created an agency and defines its powers is known as enabling legislation.

*Grateful thanks to Daniel E. Hall, Ed.D., J.D., who authored portions of this section. (Hall, Daniel, E.: Feldmeir, John. *Constitutional Values: Governmental Power and Individual Freedoms*, First Edition. © 2007, Pgs. 213–215. Reprinted by permission of Pearson Education, Inc., Upper Saddle River, NJ.).

fall into the executive branch. An agency whose head cannot be terminated by the President without cause is known as an independent agency. The Interstate Commerce Commission, established in 1887, was the nation's first independent agency. An agency whose head serves at the pleasure of the President is known as an executive agency. There are many executive and independent agencies (see Exhibit 1-6).

As executive branch entities, administrative agencies perform executive functions. Also, agencies may perform quasilegislative and quasijudicial functions. For example, administrative agencies are empowered to create rules (a quasilegislative function) and to adjudicate cases (a quasijudicial function). The act of granting quasijudicial and quasilegislative authority to an agency is referred to as **delegation**.

delegation
The giving of authority by one person to another. Delegation of powers is the constitutional division of authority between branches of government and also the handing down of authority from the president to administrative agencies.

To govern the procedures used by administrative agencies, Congress enacted the **Administrative Procedure Act** (APA) in 1946. The APA was intended to curb the growing power of agencies. Administrative regulations usually go through a **notice** and **hearing** procedure before being adopted. After they are adopted, administrative regulations have the force of law.

Administrative Procedure Act
(5 U.S.C. 500) A law that describes how U.S. agencies must do business (hearings, procedures, etc.) and how disputes go from these federal agencies into court. Some states also have administrative procedure acts.

notice
Formal receipt of the knowledge of certain facts.

hearing
A court proceeding.

PUBLICATION OF ADMINISTRATIVE REGULATIONS

Administrative regulations are published chronologically as they are adopted and they are later codified. Federal administrative regulations are published chronologically in the ***Federal Register***, and they are codified in the ***Code of Federal Regulations***. The *Federal Register* is published each business day. The *Code of Federal Regulations* is divided into 50 titles, with the regulations contained within most of the titles roughly related to the same subject matter as contained in the same number title within the *United States Code*. For example, title 26 of both the *United States Code* and the *Code of Federal Regulations* concern the Internal Revenue Service. The regulations within a particular title are arranged by the agencies responsible for them rather than by subject matter. Regulations governing a particular topic are grouped in the same "part," with the parts divided into sections. As in the *United States Code*, where each section is considered a separate statute, one section of the *Code of Federal Regulations* contains one administrative regulation.

administrative regulations
Rules and regulations written by administrative agencies.

Federal Register
A federal government source published each business day that contains federal administrative regulations arranged chronologically.

Code of Federal Regulations
A multivolume set of books containing federal administrative regulations arranged by federal agencies and by topic.

The *Code of Federal Regulations* is printed in hundreds of colorful paperbound volumes, with one-fourth of the Code titles reissued quarterly and each year's reissue bound in a different color from that of the preceding year. The spine of each volume gives you the year of publication. Look at the front cover of the volume to determine the effective date within the year.

If you are looking for a regulation covering a particular subject matter, look in the index to the *Code*. Once you have located the regulation in the *Code*, note the effective date of the volume containing the regulation. The regulation must be updated with any amendments to the regulation contained in the *Federal Register*. The first step in updating is to check "LSA: List of CFR Section Affected," published monthly. Because the LSA is cumulative, you need only check the latest LSA. When you check the LSA, note the end of the period covered by the LSA. For the period between the latest date covered by the LSA and the latest *Federal Register*, check the last issue of the *Federal Register* for each month since the LSA. Each issue of the *Federal Register* contains a "List of CFR Parts Affected in [the name of the month of the particular Federal Register]." To find case law interpretations of administrative regulations, check "Shepard's Code of Federal Regulations Citations." See Chapter 6 for an explanation of the use of citators.

SAMPLE PAGES OF ADMINISTRATIVE LAW

As explained earlier in this chapter, the federal wiretapping statutes prohibit interception of cellular telephone conversations. Exhibit 5-9 contains the text of 47 C.F.R. § 15.121 (2006)

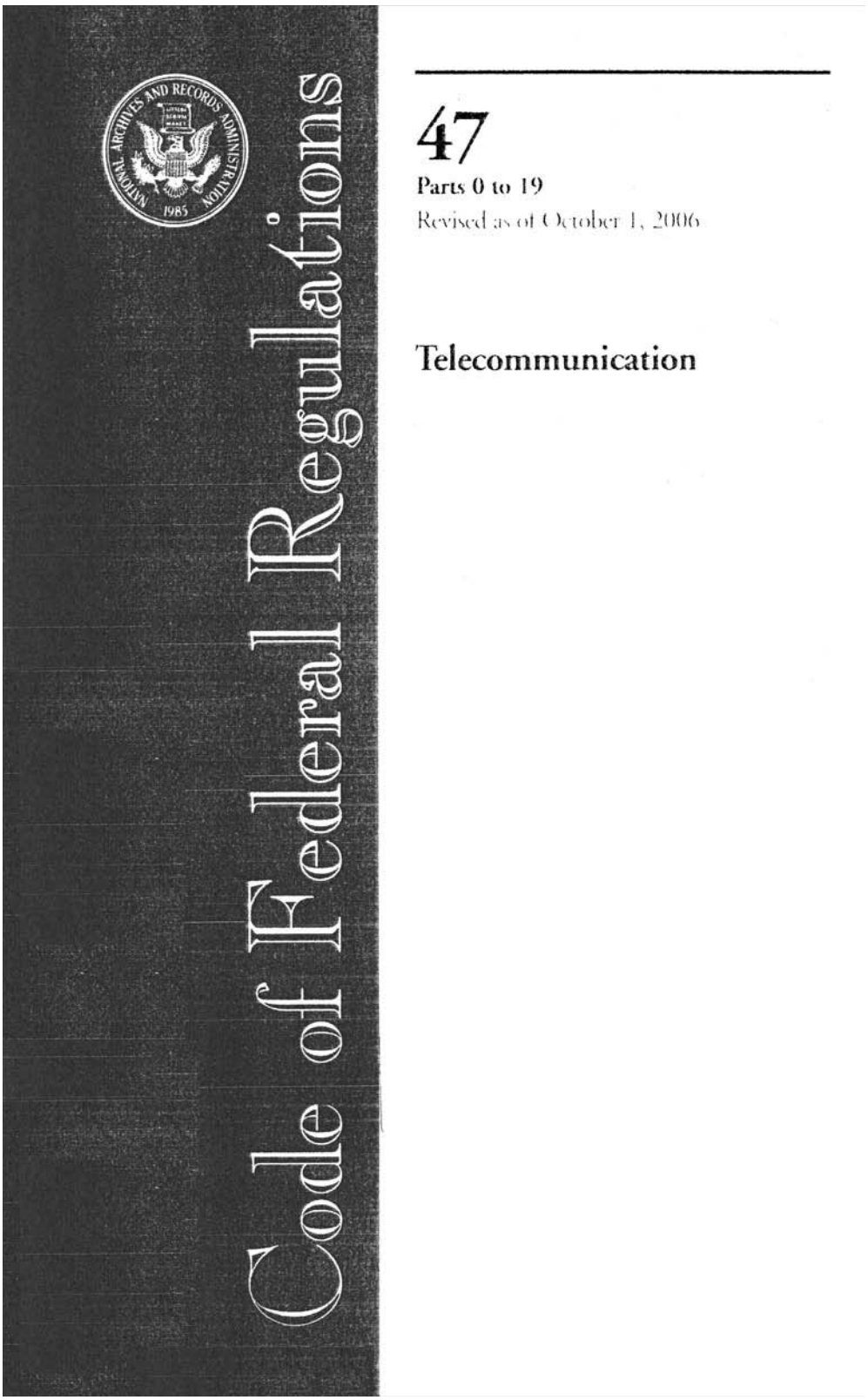


EXHIBIT 5-9
Pages from *Code of Federal Regulations*.

(continues)

EXHIBIT 5-9
(Continued)

(4) *Selection of Ratings*. Each television receiver, in accordance with user input, shall block programming based on the age based ratings, the content based ratings, or a combination of the two.

(i) If the user chooses to block programming according to its age based rating level, the receiver must have the ability to automatically block programs with a more restrictive age based rating. For example, if all shows with an age-based rating of TV-PG have been selected for blocking, the user should be able to automatically block programs with the more restrictive ratings of TV–14 and TV-MA.

(ii) If the user chooses to block programming according to a combination of age based and content based ratings the receiver must have the ability to automatically block programming with a more restrictive age rating but a similar content rating. For example, if all shows rated TV-PG-V have been selected for blocking, the user should be able to block automatically shows with the more restrictive ratings of TV–14–V and TV-MA-V.

(iii) The user should have the capability of overriding the automatic blocking described in paragraphs (e)(4)(i) and (4)(ii) of this section.

[63 FR 20133, Apr. 23, 1998, as amended at 68 FR 68546, Dec. 9, 2003; 69 FR 2849, Jan. 21, 2004; 69 FR 59534, Oct. 4, 2004]

§ 15.121 Scanning receivers and frequency converters used with scanning receivers.

(a) Except as provided in paragraph (c) of this section, scanning receivers and frequency converters designed or marketed for use with scanning receivers, shall:

(1) Be incapable of operating (tuning), or readily being altered by the user to operate, within the frequency bands allocated to the Cellular Radio-telephone Service in part 22 of this chapter (cellular telephone bands). Scanning receivers capable of "readily being altered by the user" include, but are not limited to, those for which the ability to receive transmissions in the cellular telephone bands can be added by clipping the leads of, or installing, a simple component such as a diode, resistor or jumper wire; replacing a plug-in semiconductor chip; or programming a semiconductor chip using special access codes or an external device, such as a personal computer. Scanning receivers, and frequency converters designed for use with scanning receivers, also shall be incapable of converting digital cellular communication transmissions to analog voice audio.

(2) Be designed so that the tuning, control and filtering circuitry is inaccessible. The design must be such that any attempts to modify the equipment to receive transmissions from the Cellular Radiotelephone Service likely will render the receiver inoperable.

(b) Except as provided in paragraph (c) of this section, scanning receivers shall reject any signals from the Cellular Radiotelephone Service frequency bands that are 38 dB or lower based upon a 12 dB SINAD measurement, which is considered the threshold where a signal can be clearly discerned from any interference that may be present.

(c) Scanning receivers and frequency converters designed or marketed for use with scanning receivers, are not subject to the requirements of paragraphs (a) and (b) of this section provided that they are manufactured exclusively for, and marketed exclusively to, entities described in 18 U.S.C. 2512(2), or are marketed exclusively as test equipment pursuant to § 15.3(dd).

(d) Modification of a scanning receiver to receive transmissions from Cellular Radiotelephone Service frequency bands will be considered to constitute manufacture of such equipment. This includes any individual, individuals, entity or organization that modifies one or more scanners. Any modification to a scanning receiver to receive transmissions from the Cellular Radiotelephone Service frequency bands voids the certification of the scanning receiver, regardless of the date of manufacture of the original unit. In

EXHIBIT 5-9
(Continued)

addition, the provisions of § 15.23 shall not be interpreted as permitting modification of a scanning receiver to receiver Cellular Radio-telephone Service transmissions.

(e) Scanning receivers and frequency converters designed for use with scanning receivers shall not be assembled from kits or marketed in kit form unless they comply with the requirements in paragraph (a) through (c) of this section.

(f) Scanning receivers shall have a label permanently affixed to the product, and this label shall be readily visible to the purchaser at the time of purchase. The label shall read as follows: WARNING: MODIFICATION OF THIS DEVICE TO RECEIVE CELLULAR RADIOTELEPHONE SERVICE SIGNALS IS PROHIBITED UNDER FCC RULES AND FEDERAL LAW.

(1) "Permanently affixed" means that the label is etched, engraved, stamped, silkscreened, indelible printed or otherwise permanently marked on a permanently attached part of the equipment or on a nameplate of metal, plastic or other material fastened to the equipment by welding, riveting, or permanent adhesive. The label shall be designed to last the expected lifetime of the equipment in the environment in which the equipment may be operated and must not be readily detachable. The label shall not be a stick-on, paper label.

(2) When the device is so small that it is not practicable to place the warning label on it, the information required by this paragraph shall be placed in a prominent location in the instruction manual or pamphlet supplied to the user and shall also be placed on the container in which the device is marketed. However, the FCC identifier must be displayed on the device.

[64 FR 22561, Apr. 27, 1999, as amended at 66 FR 32582, June 15, 2001]

§ 15.122 Closed caption decoder requirements for digital television receivers and converter boxes.

(a) (1) Effective July 1, 2002, all digital television receivers with picture screens in the 4:3 aspect ratio with picture screens measuring 13 inches or larger diagonally, all digital television receivers with picture screens in the 16:9 aspect ratio measuring 7.8 inches or larger vertically and all separately sold DTV tuners shipped in interstate commerce or manufactured in the United States shall comply with the provisions of this section.

NOTE TO PARAGRAPH (a)(1): This paragraph places no restrictions on the shipping or sale of digital television receivers that were manufactured before July 1, 2002.

(2) Effective July 1, 2002, DTV converter boxes that allow digitally transmitted television signals to be displayed on analog receivers shall pass available analog caption information to the attached receiver in a form recognizable by that receiver's built-in caption decoder circuitry.

NOTE TO PARAGRAPH (a)(2): This paragraph places no restrictions on the shipping or sale of DTV converter boxes that were manufactured before July 1, 2002.

(b) Digital television receivers and tuners must be capable of decoding closed captioning information that is delivered pursuant to EIA–708–B: "Digital Television (DTV) Closed Captioning" (incorporated by reference, *see* § 15.38).

(c) *Services*. (1) Decoders must be capable of decoding and processing data for the six standard services. Caption Service #1 through Caption Service #6.

(2) Decoders that rely on Program and System Information Protocol data to implement closed captioning functions must be capable of decoding and processing the Caption Service Directory data. Such decoders must be capable of decoding all Caption Channel Block Headers consisting of Standard Service Headers. Extended Service Block Headers, and Null Block headers. However, decoding of the data is required only for Standard Service Blocks (Service IDs <-6), and then only if the characters for the corresponding language are supported. The decoders must be able to display the directory for services 1 through 6.

(d) *Code space organization*. (1) Decoders must support Code Space C0, G0, C1, and G1 in their entirety.

and the cover of the volume containing the regulation shows that the effective date of material in the volume is October 1, 2006. This regulation supplements the statutes by prohibiting the design or marketing of scanners capable of intercepting the radio frequencies allocated to cellular telephone signals. A notation at the end of 47 C.F.R. § 15.121 (2006) shows that the regulation was adopted on April 27, 1999 and was amended on June 15, 2001. The notation "66 FR 32582" indicates the volume and page in the June 15, 2001 issue of the *Federal Register* on which the amended text of 47 C.F.R. § 15.121 begins.

SAMPLE PAGES OF LSA AND *FEDERAL REGISTER*

The following Exhibits show how you would update 47 C.F.R. § 15.121 (2006). You would first look at the latest LSA. The latest LSA available when this book was being written was September 2007 (Exhibit 5-10). The September 2007 issue of the LSA shows that 47 C.F.R. § 15.121 (2006) had not been revised since October 1, 2006.

Because the coverage of the September 2007 LSA ends with September 30, 2007, 47 C.F.R. § 15.121 must be researched to determine if there were any further revisions after September 30, 2007. The latest *Federal Register* available at the time this author was researching was November 9, 2007. Because the tables in the back of the *Federal Register* are cumulative for the month, you would only need to check the table in the October 31, 2007 issue and the November 9, 2007 issue of the *Federal Register*.

CITATION TIP

Check for Correct Citation Form

Do not assume that the legal citations found when researching are in correct citation form. Citations, even those included in cases, may or may not comply with the citation rules your professor has asked you to use. Always check your citations against the appropriate citation rule for correct form.

The tables from the October 31, 2007 issue (Exhibit 5-11) and the June 2, 2004 issue (Exhibit 5-12) show that there were no amendments nor proposed amendments to 47 C.F.R. §§ 15.121 from October 1, 2007 through November 9, 2007.

CITATIONS FOR ADMINISTRATIVE LAW

The following are sample citations to the *Federal Register* and the *Code of Federal Regulations*:

66 Fed. Reg. 32582 (June 15, 2001).	(page 32582 of volume 66 of the *Federal Register,* published in the June 15, 2001 issue)
47 C.F.R. § 15.121 (2006).	(section 121 of part 15 of volume 47 of the *Code of Federal Regulations*, 2006 version)

In the citation for the *Federal Register*, "66" is the volume, "32582" is the page number, and June 15, 2001 is the date of publication. In the citation for the *Code of Federal Regulations*, "47" is the title, "15" is the part, "121" is the section, and the year 2006 is the year of publication.

EXHIBIT 5-10
Pages from LSA.

Code of Federal Regulations

LSA

List of CFR Sections Affected

September 2007

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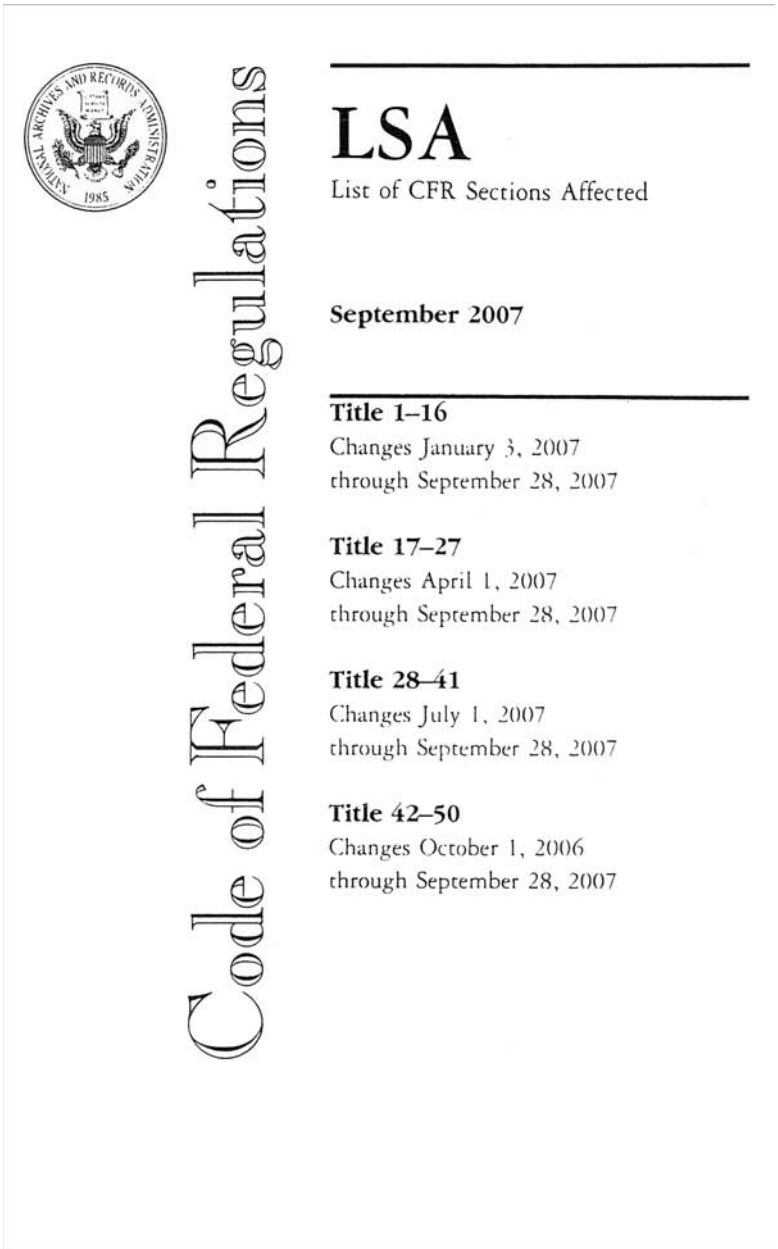
EXHIBIT 5-10
(Continued)



Code of Federal Regulations

LSA

List of CFR Sections Affected

September 2007

Title 1–16
Changes January 3, 2007
through September 28, 2007

Title 17–27
Changes April 1, 2007
through September 28, 2007

Title 28–41
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through September 28, 2007

Title 42–50
Changes October 1, 2006
through September 28, 2007

LSA—LIST OF CFR SECTIONS AFFECTED

CHANGES OCTOBER 1, 2006 THROUGH SEPTEMBER 28, 2007

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1.1154 Revised 45936
1.1155 Revised 45936
1.1156 Revised 45937
1.2105 (c)(6) revised; eff. 10–23–07 48843
1.9005 (gg) and (hh) revised; (ii) added 27708
(k) revised; eff. 10–23–07 48843
1.20004 Regulation at 71 FR 38109 confirmed **77625**
1.20005 Regulation at 71 FR 38109 confirmed **77625**
2 Actions on petitions **60075**
Actions on petitions 41937

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(Continued)

2.1 (c) amended 31192
2.103 (a) introductory text and (b) introductory text revised; (c) added: eff. 10–23–07 48843
2.106 Table amended **60072, 66461, 69046, 70673**
Table amended 50025
2.815 (b) revised; (c), (d) and (e) removed **66461**
2.1060 (e) removed: (d) redesignated as new (e) and revised **66461**
4.11 Revised **69037**
6 Authority citation revised 43558
6.1 (b) and (c) revised; (d) and (e) added: eff. 10 5 07 43558
6.3 (e) through (k) redesignated as (f) through (l); new (e) added; (c) and new (j) and (k) revised; eff. 10–5–07 43558
6.11 (a) Note and (b) Note added: eff. 10–5–07 (OMB number pending) 43558
6.18 (b) Note added: eff. 10–5–07 (OMB number pending..... 43559
6.19 Note added: eff. 10–5–07 (OMB number pending) 43559
11.15 Regulation at 70 FR 71033 confirmed **76220**
11.21 Introductory text revised **69037**
Regulation at 70 FR 71033 confirmed..... **76220**
11.35 Regulation at 70 FR 71034 confirmed **76220**
11.43 Revised **69038**
11.47 (b) revised **69038**
11.51 Regulation at 70 FR 71035 confirmed **76220**
11.52 Regulation at 70 FR 71036 confirmed **76220**
11.55 Regulation at 70 FR 71037 confirmed **76220**
11.61 Regulation at 70 FR 71038 confirmed **76220**
12 Added 37673
12.2 Regulation at 72 FR 37673 eff. date delayed to 10–9–07..... 44978
12.3 OMB number pendin 37673
15 Policy statement **66876**
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15.117 (k) added (OMB number pending)..... 26560
Regulation at 72 FR 26560 confirmed..... 28894
15.212 Added (OMB number pending) 28893
15.247 (b)(5) correctly removed: (e) correctly revised: (i) correctly added.....5632
15.525 Regulation at 68 FR 19751 confirmed 8132
20.3 Amended: eff. 10 29 07 50073
20.9 (b) introductory text and (1) revised..... 31194
20.12 (a) and (c) revised: (d) added: eff. 10 29 07 50074
20.18 (a) revised (OMB number pending) 27708
20.19 (a) and (b) introductory text revised 27709
22 Policy statement 20439, 41940
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22.879 (c)(3)(v) revised **69038**
22.972 (c)(3)(v) revised **69038**
25.114 (d)(7) revised: (d)(15) and (16) added 50027
25.115 (g) added 50027
25.121 (a) revised 50027
25.132 (b)(3) revised 50028
25.140 (b)(2) revised: (b)(3) and (c) added 50028
25.201 Amended 50028
25.202 (a)(1) table revised: (a)(9) added 50028
25.203 (l) added 50029
25.204 (g) revised 50029
25.208 (c) revised: (w) added 50029
25.209 (c) revised 50029
25.210 (f) and (j) revised 50029
25.212 (f) added 50030
25.220 (a)(1) introductory text revised..... 50030
25.223 Added..... 50030
25.224 Added 50031
25.225 Added 50033
25.262 Added 50033

NOTE: **Boldface page numbers indicate 2006 changes.**

EXHIBIT 5-11
Pages from Federal Register.

Federal Register

10–31–07 Vol. 72 No. 210 Wednesday Oct. 31, 2007

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Federal Register/Vol. 72, No. 210/Wednesday, October 31, 2007/Reader Aids

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261 59979

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Federal Register

United States
Government
Printing Office
SUPERINTENDENT
OF DOCUMENTS
Washington, DC 20402

OFFICIAL BUSINESS
Penalty for Private Use, $300

PERIODICALS
Postage and Fees Paid
U.S. Government Printing Office
(ISSN 0097-6326)

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Federal Register

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Friday, November 9, 2007

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SUMMARY

- Constitutions, statutes, court rules, and administrative law, like cases, are primary authority.
- The United States Constitution sets forth the fundamental principles of governance for the country; state constitutions set forth the fundamental principles of governance for the states.
- To find how a provision of a constitution has been interpreted by the courts, you would consult an "annotated" version of the constitution.
- Federal and state statutes first appear as slip law, then as "session laws" (arranged chronologically), and later are "codified" (grouped by subject matter).
- To understand a statute, you must read the text of the statute and any annotations summarizing how the statute has been interpreted by the courts.
- The Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Federal Rules of Evidence govern litigation procedure in federal trial courts.
- Similar sets of rules govern litigation procedure in state trial courts.
- Separate sets of rules govern litigation procedure in federal and state appellate courts.
- Administrative agencies promulgate administrative regulations that have the force of law.
- Federal administrative regulations are published chronologically in the *Federal Register* and are later codified in the *Code of Federal Regulations*.
- State administrative regulations are generally published in similar fashion.

KEY TERMS

act
adjudication
Administrative Procedure Act
administrative regulations
advance session law services
annotated code
annotation
bicameral
citators
civil damages
code
Code of Federal Regulations
computer-assisted legal research
constitution
court order
court rules
definitional section
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enabling legislation
engrossed
enrolled
enumerated powers
ex post facto law
Federal Register
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person acting under color of law
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title
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United States Code
United States Code Annotated
United States Code Congressional and Administrative News
United States Code Service
United States Statutes at Large

CYBERLAW EXERCISES

1. From Washburn School of law's home page, you can access state government and legislative information. The home page is located at <http://www.washlaw.edu>. Using the home page, locate information on your state's government and legislature.
2. The Louisiana State University libraries index (<http://www.lib.lsu.edu/index.html>) provides links to government information. Under "research tools" click on "government information." Compare the information available there to the information available at other sites.
3. The Law Guru (<http://www.lawguru.com>) is one of the hosts of the Internet Law Library and provides links to other legal research sites. Included are links to constitutions, codes, and statutes. Research one of the questions at the end of this chapter using this site.
4. The Internet Legal Resource Group (<http://ilrg.com>) is a comprehensive legal research site for accessing federal and state resources. Research one of the questions at the end of this chapter using this site.
5. The *United States Code* is accessible via the home page of the United States House of Representatives. The home page is located at <http://www.house.gov/>. Locate the page that allows you to search the United States Code and research one of the legal research questions at the end of this chapter using the page.
6. A number of municipal codes are accessible via the Municipal Code Corporation home page (<http://www.municode.com/>). Use this site to locate city codes for cities in your state.
7. Some old statutes, rarely enforced, remain a part of a state's body of statutes. A collection of these statutes may be accessed at <http://www.dumblaws.com>. Review several of these statutes.
8. The *United States Code* is also available through the Cornell Law School Web site. Go to <http://www.law.cornell.edu>, point to "Constitutions & codes" and click on "US Code (Acts of Congress)." Research one of the questions at the end of this chapter using this site.
9. LLRX—ResearchWire: Litigator's Internet Resource Guide, located at <http://www.llrx.com>, offers access to federal and state court rules at <http://www.llrx.com/courtrules/>. See if you can access the various court rules for your state. Find local federal and state court rules that apply to the area in which you are located.
10. GPO Access home page ("GPO" stands for government printing office) is located at <http://www.access.gpo.gov>. Using GPO, discover how you would access the *Code of Federal Regulations* and the *Federal Register.*
11. The *Code of Federal Regulations* is also available through the Cornell Law School Web site. Go to <http://www.law.cornell.edu>, point to "Constitutions & codes" and click on "Code of Federal Regulations." Research one of the questions at the end of this chapter using this site.

LEGAL RESEARCH ASSIGNMENT—CONSTITUTIONS

1. What do the following articles of the United States Constitution deal with?
   a. Article I.
   b. Article II.
   c. Article III.
2. What is the citation to that portion of your state's constitution dealing with the following matters?
   a. The executive branch.
   b. The legislative branch.
   c. The judicial branch.
3. Which provision of the United States Constitution contains the "enumerated powers" of Congress?
4. Which provision of the United States Constitution is commonly known as the "supremacy clause"?
5. a. Which provision of the United States Constitution is frequently cited as giving people the right to own handguns?
   b. If your state constitution guarantees the same right, give the citation to that provision.
6. a. Which provision of the United States Constitution guarantees the right to a speedy and public trial?
   b. If your state constitution guarantees the same right, give the citation to that provision.
7. a. Which provision of the United States Constitution deals with freedom of the press?
   b. Which provision of your state constitution deals with freedom of the press?

8. What 1868 change to the United States Constitution made much of the Bill of Rights applicable to state governments as well as the federal government?
9. a. In what set of books would you be able to research how case law has interpreted the United States Constitution?
   b. In what set of books would you be able to research how case law has interpreted your state's constitution?
10. a. Which provision of the United States Constitution specifically guarantees a "right to privacy"?
    b. If your state constitution guarantees the right to privacy, give the citation to that provision.
11. a. Which provision of the United States Constitution guarantees "the right of the people to be secure in their persons, houses, papers and effects"?
    b. If your state constitution guarantees the same right, give the citation to that provision.
12. a. Which provision of the United States Constitution guarantees free speech?
    b. If your state constitution guarantees the same right, give the citation to that provision.
13. a. Which provision of the United States Constitution prohibits laws "establishing" religion?
    b. If your state constitution guarantees the same right, give the citation to that provision.
14. a. Which provision of the United States Constitution prohibits cruel and unusual punishment?
    b. If your state constitution contains a similar prohibition, give the citation to that provision.

LEGAL RESEARCH ASSIGNMENT—STATUTES

Note: You may research questions 9 through 40 in *United States Code Service* or *United States Code Annotated* instead of *United States Code*.

1. Name the advance session law service containing federal statutes.
2. Name the set of books containing federal statutes arranged in chronological order.
3. Name the set of books containing the official codified version of federal statutes.
4. Name two sets of books containing the codified version of federal statutes and annotations to those statutes.
5. Name the advance session law service for your state.
6. Name the set of books for your state containing state statutes arranged in chronological order.
7. Name the set of books for your state containing the official codified version of state statutes.
8. Name the set of books for your state containing the codified version of state statutes and annotations to those statutes.
9. What is the permanent seat of the United States government? State the correct citation for your answer.
10. Name the fifteen departments within the executive branch of the United States government. State the correct citation for your answer.
11. Name the three military departments of the United States government. State the correct citation for your answer.
12. What is the effective date of the next United States census of population? State the correct citation for your answer.
13. Can a driver be required to pay a toll for the use of an interstate highway? State the correct citation for your answer.
14. Over what type of controversy does the United States Supreme Court have original and exclusive jurisdiction? State the correct citation for your answer.
15. Over what type of controversy does the United States Supreme Court have original but not exclusive jurisdiction? State the correct citation for your answer.
16. What statute gives the United States district courts jurisdiction over civil lawsuits concerning United States statutes and the United States Constitution? What is this type of jurisdiction commonly called?
17. What is the minimum amount in controversy required to file a diversity of citizenship case in United States district court? State the correct citation for your answer.
18. What is the federal minimum hourly wage? State the correct citation for your answer.

19. What is the national floral emblem? State the correct citation for your answer.
20. What is the national march? State the correct citation for your answer.
21. What is the national tree? State the correct citation for your answer.
22. What does Title 11 of the *United States Code* deal with?
23. What does Title 28 of the *United States Code* deal with?
24. What does Title 42 of the *United States Code* deal with?
25. What is the citation of the federal statute that establishes the Department of Homeland Security?
26. What is the citation of the federal statute that establishes the District of Columbia as the permanent seat of government of the United States?
27. What is the citation of the federal statute that provides that one loses his or her nationality as a United States citizen by becoming a citizen of another country?
28. What is the citation of the federal statute that authorizes issuance of quarters in commemoration of each of the fifty states?
29. What is the citation for the federal statute that established the Federal Trade Commission?
30. What is the citation of the federal statute that allows final judgments of the highest court of a state to be reviewed by the United States Supreme Court on petition for writ of certiorari?
31. What is the citation of the federal statute allowing final judgments of the courts of appeals to be reviewed by the United States Supreme Court on petition for writ of certiorari or on a certified question?
32. What is the citation for the federal statute that prohibits production of a biological weapon?
33. What is the citation for the federal statute that makes it a crime to bribe a public official?
34. What is the citation for the federal statute that makes it a crime to use a weapon of mass destruction?
35. What is the penalty for distributing a switchblade knife? State the correct citation for your answer.
36. What is the composition of the Joint Chiefs of Staff, and what is the function of the Chairman of the Joint Chiefs of Staff? State the correct citation for your answer.
37. What is the President's annual compensation, and what is his expense allowance? State the correct citation for your answer.
38. What is the duration of a copyright created after January 1, 1978? State the correct citation for your answer.
39. What is the prison term for placing a bomb aboard an airplane that results in someone's death? State the correct citation for your answer.
40. What is the term of a patent? State the correct citation for your answer.
41. Under the law of your state, what is the minimum age to purchase beer? State the correct citation for your answer.
42. Under the law of your state, is there a specific penalty for driving under the influence for one less than 21 years of age? State the correct citation for your answer.
43. Under the law of your state, what are the provisions for safely abandoing a newborn? State the correct citation for your answer.
44. Under the law of your state, is it a crime to stalk someone via e-mail? State the correct citation for your answer.
45. Under the law of your state, is there a death penalty and, if so, what is the minimum age for imposing the death penalty? State the correct citation for your answer.
46. Under the law of your state, what are the penalties for driving more than 50 miles over the speed limit? State the correct citation for your answer.
47. Under the law of your state, what is the minimum age to marry without parental consent? State the correct citation for your answer.
48. Under the law of your state, what is the penalty for knowingly driving with a suspended, revoked, or cancelled driver's license? State the correct citation for your answer.
49. Under the law of your state, what is the minimum age for obtaining a tattoo without parental consent? State the correct citation for your answer.
50. Under the law of your state, is it a traffic violation to talk on a cellular telephone while driving? State the correct citation for your answer.
51. Under the law of your state, what type of crime is the unauthorized practice of law? State the correct citation for your answer.

52. Under the law of your state, what is the statute of limitations for an action on a contract? State the correct citation for your answer.
53. Under the law of your state, what is the statute of limitations for an action based on negligence? State the correct citation for your answer.
54. Under the law of your state, what is the penalty for operating a boat while under the influence? State the correct citation for your answer.
55. Under the law of your state, what is the minimum age for obtaining a learner's driver's license? State the correct citation for your answer.
56. Under the law of your state, what is the minimum age for consuming alcoholic beverages? State the correct citation for your answer.
57. What is the wording of your state's statute of frauds? State the correct citation for your answer.
58. Does your state allow same-sex marriages? State the correct citation for your answer.
59. Under the law of your state, what is the residence requirement for obtaining a divorce? State the correct citation for your answer.
60. Under the law of your state, is a dog owner liable if the dog bites someone? State the correct citation for your answer.
61. Does your state recognize breach of a contract to marry? State the correct citation for your answer.
62. Under the law of your state, what type of crime is it to access someone's computer without authorization? State the correct citation for your answer.

LEGAL RESEARCH ASSIGNMENT—COURT RULES

1. Using the Federal Rules of Civil Procedure, answer questions a through c:
   a. Which courts are governed by the Federal Rules of Civil Procedure?
   b. What is the purpose of the rules?
   c. What is your correct citation? (Give the full citation to the rule.)
   d. Using your state's rules of civil procedure, what are the answers to a through c?
2. Using the Federal Rules of Civil Procedure, answer questions a and b:
   a. How does one begin a civil lawsuit?
   b. What is your correct citation?
   c. Using your state's rules of civil procedure, what are the answers to a and b?
3. Using the Federal Rules of Civil Procedure, answer questions a and b:
   a. Who may serve the summons?
   b. What is your correct citation?
   c. Using your state's rules of civil procedure, what are the answers to a and b?
4. Using the Federal Rules of Civil Procedure, answer questions a and b:
   a. What pleadings are allowed?
   b. What is your correct citation?
   c. Using your state's rules of civil procedure, what are the answers to a and b?
5. Using the Federal Rules of Civil Procedure, answer questions a and b:
   a. What are the prerequisites to a class action?
   b. What is your correct citation?
   c. Using your state's rules of civil procedure, what are the answers to a and b?
6. Using the Federal Rules of Civil Procedure, answer questions a and b:
   a. What is the maximum number of interrogatories a party must answer and how long does a party have to answer the interrogatories?
   b. What is your correct citation?
   c. Using your state's rules of civil procedure, what are the answers to a and b?
7. Using the Federal Rules of Civil Procedure, answer questions a and b:
   a. What is the effect of a party's failure to respond to a written request to admit?
   b. What is your correct citation?
   c. Using your state's rules of civil procedure, what are the answers to a and b?
8. Using the Federal Rules of Civil Procedure, answer questions a and b:
   a. What is the number of jurors in a civil lawsuit?
   b. What is your correct citation?
   c. Using your state's rules of civil procedure, what are the answers to a and b?

9. Using the Federal Rules of Civil Procedure, answer questions a and b:
   a. What are the grounds for entering a default judgment?
   b. What is your correct citation?
   c. Using your state's rules of civil procedure, what are the answers to a and b?
10. Using the Federal Rules of Civil Procedure, answer questions a and b:
   a. What are the grounds for entering a temporary restraining order?
   b. What is your correct citation?
   c. Using your state's rules of civil procedure, what are the answers to a and b?
11. Using the Federal Rules of Evidence, answer questions a and b:
   a. What is the purpose of the rules?
   b. What is your correct citation?
   c. Using your state's rules of evidence, what are the answers to a and b?
12. Using the Federal Rules of Evidence, answer questions a and b:
   a. What type of fact may be judicially noticed?
   b. What is your correct citation?
   c. Using your state's rules of evidence, what are the answers to a and b?
13. Using the Federal Rules of Evidence, answer questions a and b:
   a. On what ground may relevant evidence be excluded?
   b. What is your correct citation?
   c. Using your state's rules of evidence, what are the answers to a and b?
14. Using the Federal Rules of Evidence, answer questions a and b:
   a. What is hearsay?
   b. What is your correct citation?
   c. Using your state's rules of evidence, what are the answers to a and b?
15. Using the Federal Rules of Criminal Procedure, answer questions a and b:
   a. What is the scope of the rules?
   b. What is your correct citation?
   c. Using your state's rules of criminal procedure, what are the answers to a and b?
16. Using the Federal Rules of Criminal Procedure, answer questions a and b:
   a. What is the purpose of the rules, and how are they to be construed?
   b. What is your correct citation?
   c. Using your state's rules of criminal procedure, what are the answers to a and b?
17. Using the Federal Rules of Criminal Procedure, answer questions a through c:
   a. How many members does a grand jury have?
   b. Who may be present when the grand jury is in session?
   c. What is your correct citation?
   d. Using your state's rules of criminal procedure, what are the answers to a through c?
18. Using the Federal Rules of Criminal Procedure, answer questions a and b:
   a. What happens during an arraignment?
   b. What is your correct citation?
   c. Using your state's rules of criminal procedure, what are the answers to a and b?
19. Using the Federal Rules of Criminal Procedure, answer questions a and b:
   a. What are the reasons that allow trial in a district other than the one in which the offense was committed?
   b. What is your correct citation?
   c. Using your state's rules of criminal procedure, what are the answers to a and b?
20. Using the Federal Rules of Criminal Procedure, answer questions a and b:
   a. How many members does a trial jury have?
   b. What is the minimum number of jurors to return a valid verdict?
   c. What is your correct citation?
   d. Using your state's rules of criminal procedure, what are the answers to a through c?
21. Using the Federal Rules of Criminal Procedure, answer questions a and b:
   a. What happens during closing argument?
   b. What is your correct citation?
   c. Using your state's rules of criminal procedure, what are the answers to a and b?
22. Using the Federal Rules of Appellate Procedure, answer questions a and b:
   a. What courts are governed by these rules?
   b. What is your correct citation?
   c. Using your state's rules of appellate procedure, what are the answers to a and b?
23. Using the Federal Rules of Appellate Procedure, answer questions a and b:
   a. What items constitute the record on appeal?
   b. What is your correct citation?

c. Using your state's rules of appellate procedure, what are the answers to a and b?

24. Using the Federal Rules of Appellate Procedure, answer questions a and b:
    a. How may service of papers be made?
    b. What is your correct citation?
    c. Using your state's rules of appellate procedure, what are the answers to a and b?
25. Using the Federal Rules of Appellate Procedure, answer questions a and b:
    a. When must the appellant's brief be filed?
    b. What is your correct citation?
    c. Using your state's rules of appellate procedure, what are the answers to a and b?
26. Using the Federal Rules of Appellate Procedure, answer questions a and b:
    a. When may an en banc hearing be ordered?
    b. What is your correct citation?
    c. Using your state's rules of appellate procedure, what are the answers to a and b?
27. Using the Rules of the Supreme Court of the United States, answer questions a and b:
    a. When does the annual term of the Court begin and end?
    b. What is your correct citation?
28. Using the Rules of the Supreme Court of the United States, answer questions a and b:
    a. How many members of the Court constitute a quorum?
    b. What is your correct citation?
29. Using the Rules of the Supreme Court of the United States, answer questions a and b:
    a. Is review on writ of certiorari discretionary or mandatory?
    b. What is your correct citation?
30. Using the Rules of the Supreme Court of the United States, answer questions a and b:
    a. When must a petition for writ of certiorari be filed with the Court?
    b. What is your correct citation?
31. Using the Rules of the Supreme Court of the United States, answer questions a and b:
    a. How long does each side have for oral argument?
    b. What is your correct citation?
32. Using the Rules of the Supreme Court of the United States, answer questions a and b:
    a. What is the filing fee for a petition for writ of certiorari?
    b. What is your correct citation?

LEGAL RESEARCH ASSIGNMENT—ADMINISTRATIVE LAW

1. a. What is the name of the set of books containing the codified version of federal administrative rules?
   b. What is the name of the publication containing new administrative rules not found in the code?
2. a. What is the name of the set of books containing the codified version of your state's administrative rules?
   b. What is the name of the publication containing new administrative rules not found in the code?
3. a. What federal government agency is the subject of title 17 of the *Code of Federal Regulations*?
   b. What federal government agency is the subject of title 26 of the *Code of Federal Regulations*?
   c. What federal government agency is the subject of title 50 of the *Code of Federal Regulations*?
4. a. What is the purpose of the Note at 16 C.F.R. Part 17?
   b. What is the purpose of 16 C.F.R. §§ 1615.1–1616.65?
   c. What is the purpose of 16 C.F.R. §§ 1501.1–1501.5?
   d. What is the purpose of 16 C.F.R. §§ 238.0–238.4?
   e. What is the purpose of 16 C.F.R. §§ 233.1–233.5?
5. a. What is the citation to the rules promulgated under the Magnuson-Moss Warranty Act?
   b. What is the citation to the rules requiring care labels (stating whether the item is recommended to be machine washed or dry cleaned) in clothing?
   c. What is the citation to the rules requiring clothing labels to state the fabric content and the country of origin?
6. What is the definition in the *Code of Federal Regulations* for the following terms, and what is the correct citation for your answer?
   a. "beer"
   b. "wine"

c. "milk"
d. "cream"

7. Locate the federal regulations concerning the *Code of Federal Regulations* and the *Federal Register* and answer the following questions:
   a. How often is each volume of the Code of Federal Regulations updated?
   b. What is the correct citation for a?
   c. What are the categories of documents published in the Federal Register?
   d. How often is the Federal Register published?
   e. What is the correct citation for c and d?
8. Locate the federal regulations in the *Code of Federal Regulations* concerning chewing tobacco and answer the following questions:
   a. What is the name of the federal act authorizing the enactment of the regulations?
   b. What is the wording for the three warnings, one of which is required to be placed on advertisements and packages of chewing tobacco?
   c. What is your correct citation for a and b?
9. Locate the federal regulations in the Code of Federal Regulations concerning labeling of alcoholic beverages and answer the following questions:
   a. What is the wording for the warning required to be placed on alcoholic beverages?
   b. What is the effective date of the labeling regulation?
   c. What is your correct citation for a and b?
10. Locate the federal regulations in the Code of Federal Regulations concerning inspection of meat and poultry and answer the following questions:
    a. What is the wording on the official inspection legend for beef carcasses?
    b. What is the wording on the official inspection legend for chicken?
    c. What is your correct citation for a and b?
11. Locate the federal regulations in the Code of Federal Regulations concerning grading of Florida oranges and answer the following questions:
    a. What types of fruit are covered by the regulations?
    b. What are the names of the various grades of oranges?
    c. What is the correct citation for a and b?
12. Answer the following questions and state the correct citation for your answers:
    a. When may a petition for pardon be filed by someone seeking executive clemency?
    b. Is a federal prisoner eligible for parole?
    c. In whose name must a patent application be made?
    d. May lawn darts be sold?
13. Answer the following questions and state the correct citation for your answer:
    a. What is the maximum distance allowed between slats on full-size baby cribs?
    b. What must a seller of mail order merchandise do when unable to ship merchandise within the applicable time period?
    c. How long does a consumer who purchased a consumer item in a "door-to-door" sale have to cancel the purchase, and how long after receiving buyer's cancellation notice does the seller have to refund any money paid?
    d. May someone operate a brewery in his or her home?

DISCUSSION POINTS

1. What are the relationships between constitutions and statutes?
2. Are the statutes for your state published as slip law, in an advance session law service, as session laws, in a code, in an annotated code? What are the names of the publications?
3. Review one of your state statutes in an annotated code. What information follows the text of the statute? How would that information be helpful if researching the statute?
4. How has a court rule had a major impact on a case in the news?
5. What is an administrative rule that has affected you lately?

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Online Companion™
For additional resources, please go to ‹http://www.paralegal.delmar.cengage.com›.

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CHAPTER 6

Citators

INTRODUCTION

Although **citators** are one of the last sources to be studied in a legal research class, they are one of the most important tools in legal research. Citators are important because they allow the legal researcher to ascertain the history of a case and which cases and other legal sources have cited to the case. Citators allow similar research on other legal sources as well. Shepard's produces a number of different print sets of ***Shepard's Citations***. In addition, *Shepard's Citations* are available online on LexisNexis. **KeyCite**, found on WESTLAW, is another citator. This chapter discusses:

- citators,
- Shepardizing procedure,
- use of citators with statutes, and
- KeyCite.

The chapter includes sample pages from *Shepard's Citations* and screen cam shots of KeyCite. The procedure for using *Shepard's* print citators is explained first in this chapter, followed by an explanation of KeyCite.

citators
A set of books or database that lists relevant legal events subsequent to a given case, statute, or other authority. Two leading citators are Shepard's and KeyCite.

Shepard's Citations
A leading citator.

KeyCite
A leading citator.

The attorney's failure to use citators will be quickly criticized by the court, as shown in the following judicial comments. The comments from *Meadowbrook, LLC v. Flower*, 959 P.2d 115, 120 n.11 (Utah 1998) refer to the attorney's failure to "Shepardize" or use *Shepard's Citations*. The court stated:

> One of those cases upon which defendants rely, *Downs v. Stockman*, was quashed by *Stockman v. Downs*. The Utah Rules of Appellate Procedure require that "[a]ll briefs [under rule 24] be concise, presented with accuracy . . . and free from burdensome, irrelevant, immaterial or scandalous matters." Utah R.App. P. 24(j). The process of "Shepardizing" a case is fundamental to legal research and can be completed in a manner of minutes, especially when done with the aid of a computer. Though we do not consider counsel's actions to be egregious in this case, we admonish all attorneys to ensure the validity of all cases presented before this court.

NOTE ON COMPUTER-ASSISTED CITATORS

Although many law libraries have print volumes of *Shepard's Citations* on their shelves, most individuals performing legal research use online citators, either *Shepard's Citations*, available online on LexisNexis, or KeyCite, found on WESTLAW. Using one of these

computer-assisted legal research (CALR) services to cite check is much faster than manually checking all applicable issues of *Shepard's*, and there is probably less chance of error. Cite checking online using *Shepard's* or KeyCite will yield the most up-to-date information.

A comparison of the difference in cost to the client between Shepardizing using a CALR service and using the print *Shepard's* could be made by comparing the costs involved and the accuracy of the results obtained. The costs of the CALR service include the cost of the service and the amount of billable time expended. The costs of Shepardizing manually include the cost of the subscription and the amount of attorney time expended. The timeliness of Shepardizing using a CALR service may outweigh any additional cost over Shepardizing using the print version. In addition, the researcher Shepardizing using CALR can print out a copy of the Shepardizing request and the results. The printout could be kept in the appropriate file and referred to if there were a question later whether a particular authority had been Shepardized. Some attorneys now consider it legal malpractice to have missed a recent authority available on WESTLAW or LexisNexis, but not yet available in the print *Shepard's*.

It is still a good idea to have some familiarity with *Shepard's* print citators, should you not have access to online citators.

CITATORS

As explained in Chapter 2, the doctrine of stare decisis requires judges to rely on past cases to decide controversies in front of them. Attorneys research case law to advise clients and to predict the outcome of a lawsuit. Judges and attorneys look for authoritative case law; however, there is nothing to indicate the subsequent history of a promising-looking case found in a reporter. Thus, the researcher cannot determine whether the case is still good law (is still authoritative) without consulting a citator.

A case, once authoritative, may no longer be good law for a number of reasons. It may have been reversed or overruled. A case may no longer be authoritative because subsequent decisions have created so many exceptions or so limited its effect that the legal principle announced in the case is no longer viable. There is a difference between a court reversing a decision and a court overruling a decision. You might think of reversal as vertical in effect. A higher court reverses a case decided by a lower court; the result is that a higher court nullifies the decision of a lower court. Overruling a case is horizontal in effect. A case is overruled by the same court that originally decided the case. The result is that a court nullifies one of its past decisions. The court may decide, because of the passage of time or changes in society, that case law should be changed. The court accomplishes this, by stating in a case presently before it, that it is overruling a prior case.

A case may have been appealed, with the case subsequently decided by a higher court. Even if the higher court affirmed the lower court, it is important to know that a higher court reached a decision in the case. If the lower court decided an issue and the higher court subsequently decided the same issue, the holding and reasoning of the higher court, rather than the lower court, is authoritative. One might want to cite to the lower court opinion for an issue not considered by the higher court or for facts or procedural history of the case not described in the higher court opinion. Even so, citation rules require the citation to the lower court opinion to include information informing the reader that the case was later decided by a higher court.

The consequences of not using citators can be quite serious. One court made the following written comment when faced with an attorney who had failed to Shepardize. "It is really inexcusable for any lawyer to fail, as a matter of routine, to Shepardize all cited cases (a process that has been made much simpler today than it was in the past . . .).

Shepardization would of course have revealed that the 'precedent' no longer qualified as such," *Gosnell v. Rentokil, Inc.*, 175 F.R.D. 508, 510 n.1 (N.D. Ill. 1997).

Without correctly using a citator, one may fail to ascertain that a case upon which he or she is relying has been reversed or overruled. This may result in an attorney giving a client incorrect legal advice, being admonished by a judge, or even losing a case. For a judge, it may mean being reversed on appeal and being chastised by the higher court. At the very worst, it may be the ground for a legal malpractice lawsuit against the attorney or disciplinary proceedings against the attorney or the judge. If this happened because the paralegal forgot to use the citator and the attorney relied on the paralegal's research, the paralegal can lose his or her job. In short, do not forget to use citators!

The researcher uses the citator to verify the status of a case and update it. Frank Shepard founded Shepard's Company in 1873 in Illinois and the company published citators for many years. Shepard's is now a part of LexisNexis, which continues to publish a separate set of citators for each jurisdiction. *Shepard's Citators* are sets of indexes that enable you to look up cases, statutes, administrative regulations, and some secondary sources to discover if they have been cited. Thus the citator allows the researcher to verify the status of primary sources and ascertain whether and where sources were cited. A statute or administrative regulation may no longer be good law for a number of reasons; it may have been amended, repealed, or held to be unconstitutional.

Shepard's Citators have been such an indispensable tool to the researcher for so long that the process of case verification and updating is commonly referred to as "Shepardizing." Over ten years ago, attorneys began to talk of "KeyCiting," to verify and update primary sources. KeyCite is the online citator introduced into WESTLAW a number of years ago and became the exclusive citator on WESTLAW in June 1999. The explanation of citators in this chapter will be limited to the procedure used for cases and statutes. Once you understand the procedure for those sources, the same procedure can be used for other materials. *Shepard's* is available online on LexisNexis, as is KeyCite on WESTLAW. KeyCite is discussed later in this chapter.

The scheme of the citator is quite simple. The citator lists each instance in which the case being Shepardized has been cited, with the information given as citations to the pages on which the case being Shepardized is cited. For example, imagine a case was later decided by a higher court in a published opinion and, in addition, the case was cited twice, once in another published opinion and once in a law review article. Shepardizing would yield three citations; one citation is to the higher court opinion, one is to the other case, and the third is to the law review article. The citations found by Shepardizing yield the page on which the Shepardized case was cited, which may not necessarily be the first page of the source.

The citator has two primary uses. It is used to determine the current status of a case, whether the case is still authoritative. The citator is also used as a case finding tool. You may have found an older case that is of interest because it contains facts and issues similar to those in the problem you are researching. If newer cases with similar facts and issues cited the case you are Shepardizing, Shepardizing will enable you to locate those cases.

The following are three important sets of *Shepard's Citators*:

1. *Shepard's United States Citations*—used to Shepardize decisions of the United States Supreme Court in *United States Reports*, *Supreme Court Reporter*, and *United States Supreme Court Reports, Lawyers' Edition*;
2. *Shepard's Federal Citations*—used to Shepardize decisions of the United States district court and the United States courts of appeals; and
3. The appropriate state or regional *Shepard's Citations*—used to Shepardize decisions of the state courts in your state.

The *Shepard's* sample pages contained in Exhibits 6-1 through 6-5 are ones you would find if you were to Shepardize *Brendlin v. California*. Shepardizing tells you the location of every subsequent citation to *Brendlin v. California*. As will be explained, Shepardizing even allows you to locate subsequent cases discussing the same legal principle contained in particular headnotes from *Brendlin v. California*.

SHEPARDIZING PROCEDURE

Although some students find the Shepardizing procedure difficult at first, you will gain confidence in your ability to Shepardize as you do it a few times. Sample pages from *Shepard's United States Citations* have been reprinted in Exhibits 6-1 through 6-5. These are the pages you would find if you were to Shepardize *Brendlin v. California*, 127 S. Ct. 2400 (2007).

The explanation of the Shepardizing procedure was designed to walk you through Shepardizing *Brendlin* step by step. You will probably find yourself reading the procedure several times before you understand the concept. First, read the procedure step by step as you follow along, looking at the sample pages. Then read the procedure again by itself and test yourself by "Shepardizing" *Brendlin* using the sample pages. After you have mastered the procedure, follow up by doing some of the Shepardizing exercises at the end of this chapter.

GETTING ORGANIZED

The first thing to do is become organized. If you do not Shepardize systematically, you may miss something.

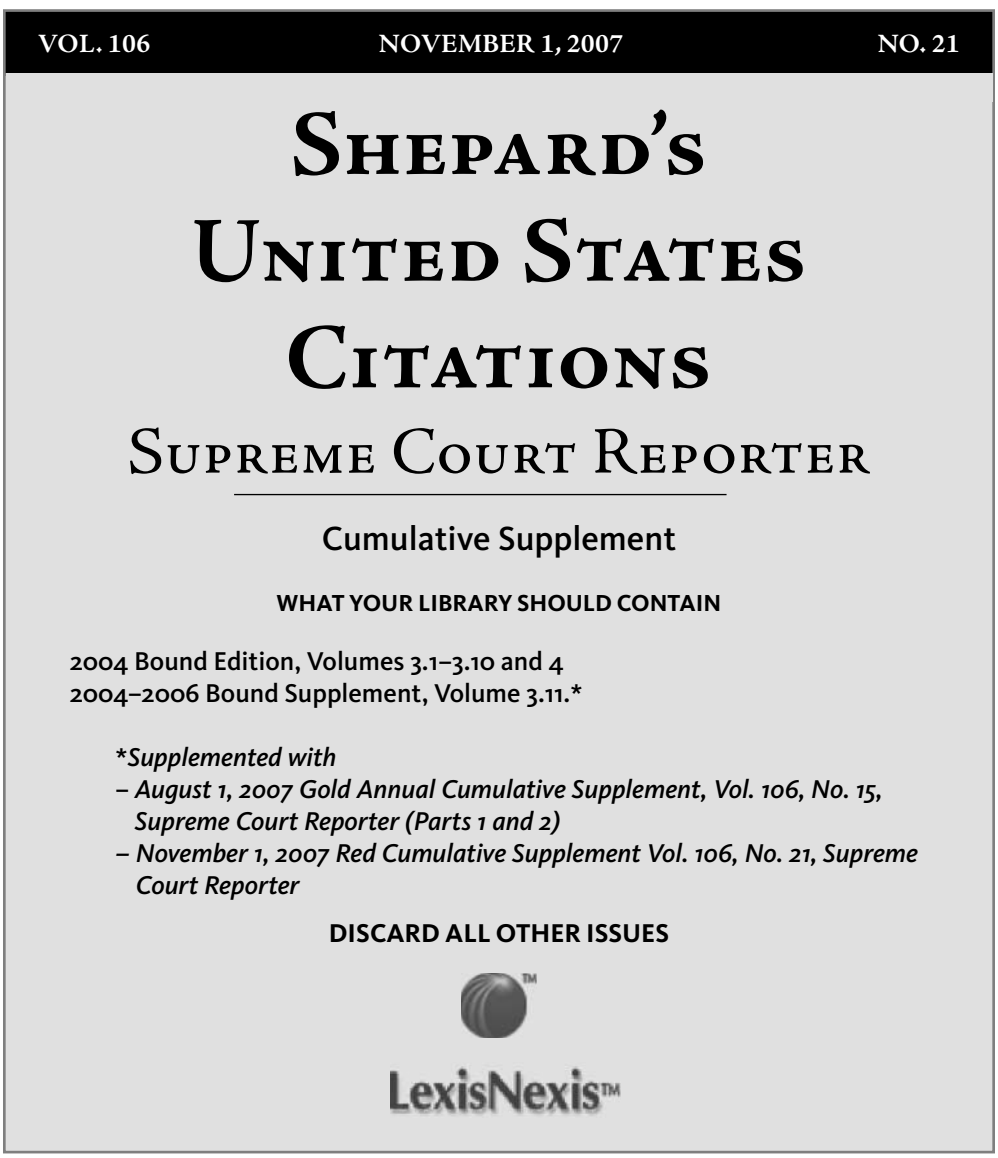
STEP ONE: LOCATE THE CORRECT SET OF *SHEPARD'S* AND BE READY TO RECORD THE RESULTS

You must locate the correct set of *Shepard's* to use and be ready to record the results of your Shepardizing. The *Shepard's* set you will need is customarily located near the reporters containing cases Shepardized in that *Shepard's* set. The citators used to Shepardize United States Supreme Court decisions is *Shepard's United States Citations*. *Shepard's United States Citations* is subdivided into *United States Citations: United States Reports*; *United States Citations: Supreme Court Reporter*; and *United States Citations: United States Supreme Court Reports, Lawyers' Edition*. The *Shepard's* for *Federal Reporter* and *Federal Supplement* is *Shepard's Federal Citations*. There are *Shepard's* for all the regional reporters, as well. For example, the *Shepard's* for *North Eastern Reporter* is *Shepard's Northeastern Reporter Citations*. Shepard's even publishes a *Shepard's* allowing you to Shepardize the cases from only one state, even though the state cases are printed in a regional reporter. For example, *North Eastern Reporter* contains cases from Illinois, Indiana, Ohio, New York, and Massachusetts. *Shepard's Northeastern Reporter Citations* allows you to Shepardize cases from all five states, but *Shepard's Illinois Citations* limits you to Shepardizing Illinois cases. Some libraries carry the state-specific *Shepard's* rather than the *Shepard's* for the regional reporter because that is all that is usually needed for that state.

Now look at the Shepardizing information for *Brendlin v. California*. *Brendlin* was decided on June 18, 2007. The case is published in *United States Supreme Court Reports, Lawyers' Edition*, beginning on page 132 of volume 168, and *Supreme Court Reporter*, beginning on page 2400 of volume 127, within a few weeks of the case being decided. Although *United States Reports* is the official reporter for decisions of the United States Supreme Court, publication of cases in *United States Reports* lags considerably behind publication in *United States Supreme Court Reports, Lawyers' Edition* and *Supreme Court Reporter*. A United States Supreme Court decision can be Shepardized using either of the two parallel citations. Thus, *Brendlin* could be Shepardized using

the citation from *Supreme Court Reporter* or *United States Supreme Court Reports, Lawyers' Edition*.

Use the citation for *Brendlin* in *Supreme Court Reporter*, which means that you will be Shepardizing in *United States Citations: Supreme Court Reporter.* (The version of the case included in Chapter 4 is from *Supreme Court Reporter.*) Once you find the correct *Shepard's* set, line up the volumes you will need to use. The set usually contains burgundy-colored hardbound volumes. It also may contain gold, red, and blue paperbound volumes. At the time this book was being written, the most recent paperbound *Shepard's United States Citations: Supreme Court Reporter* was dated November 1, 2007. Because *Shepard's* is fairly current, you should be looking for a paperbound *Shepard's* that is within three months of the month in which you are doing your research. Exhibit 6-1 shows the cover of the paperbound November 1, 2007 *Shepard's United States Citations: Supreme Court Reporter.* Notice that the date is centered at the top of the page and the legend "**WHAT YOUR LIBRARY SHOULD CONTAIN**" is two-thirds of the way down the page. Beneath the legend, the cover lists the 2004 hardbound volume and the 2004–2006 supplement volume. Then it lists the August 1, 2007 gold annual cumulative supplement and the November 1, 2007 red cumulative supplement.


VOL. 106 NOVEMBER 1, 2007 NO. 21

SHEPARD'S
UNITED STATES
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SUPREME COURT REPORTER

Cumulative Supplement

WHAT YOUR LIBRARY SHOULD CONTAIN

2004 Bound Edition, Volumes 3.1–3.10 and 4
2004–2006 Bound Supplement, Volume 3.11.*

**Supplemented with*
– August 1, 2007 Gold Annual Cumulative Supplement, Vol. 106, No. 15, Supreme Court Reporter (Parts 1 and 2)
– November 1, 2007 Red Cumulative Supplement Vol. 106, No. 21, Supreme Court Reporter

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EXHIBIT 6-1
Cover from the November 1, 2007, issue of *Shepard's United States Citations: Supreme Court Reporter*. (*Reprinted with permission from Shepard's United States Citations. Copyright 2007. LexisNexis, a division of Reed Elsevier, Inc.*)

STEP TWO: DETERMINE WHICH *SHEPARD'S* VOLUME TO USE

The next step is to determine which volumes of the ones listed on the front cover of the November 1, 2007 issue you will need to use. The hardbound volumes need not be consulted because they date from before 2007 and *Brendlin* was decided in 2007. The August 1, 2007 and the November 1, 2007 issues are the only issues of *Shepard's* to contain information on *Brendlin*.

STEP THREE: CHECK EACH *SHEPARD'S* VOLUME IDENTIFIED

It is important that you check each of the volumes (hardbound and paperbound) you have identified because they are not cumulative. This means that each of the *Shepard's* volumes listed on the front of the latest *Shepard's* issue contains different information from any other volumes. If you miss checking one of the *Shepard's* volumes, you may be missing information telling you that the case was reversed or affirmed on appeal. An easy way to make sure you do not miss checking any of the volumes is to make a chart like the one that follows. Along one edge of the chart, write the citation of the case you are Shepardizing and identify the *Shepard's* volumes to be checked along an adjoining side of the chart. As you check a particular issue, place a check mark next to it to show that you have checked that volume. A chart is especially helpful if you are Shepardizing a number of cases at the same time or you are not able to Shepardize the volumes in order because someone else is using the other volumes.

	8/1/07	11/1/07
127 S. Ct. 2400	X	X

Sometimes a *Shepard's* volume contains no references for the case you are Shepardizing. This simply means that no case or other authority cited the case you are Shepardizing during the time period covered by the volume. As indicated in the following case excerpt, the lack of references may have some significance, in that the case being Shepardized may not be considered to carry great weight.

> This Court does not find the case to be persuasive as applied to the facts of this case. First, the case is a 1923 case that has not been cited by one other court. See Shepard's North Carolina Citations.
>
> *Medoil Corp. v. Clark*, 751 F.Supp. 88, 89 (W.D. N.C. 1990).

ABBREVIATIONS

The first few pages of each *Shepard's* volume contain useful information that you will be referring to often when you are learning how to Shepardize. There are several pages entitled "Tables of Abbreviations" (Exhibit 6-2). If you are not sure what an abbreviation used in *Shepard's* stands for, you should consult this table. For example, "A2d" is the abbreviation for "Atlantic Reporter, Second Series." Another page is entitled "Case Analysis—Abbreviations" (Exhibit 6-3). This page contains abbreviations dealing with the history of the case. For example, "r" stands for reversed, "s" stands for same case, and "v" stands for vacated. An important abbreviation for a lower court case is "a," which stands for affirmed. Notice that this abbreviation is not shown in Exhibit 6-3 because this page is from *Shepard's United States Citations: Supreme Court Reporter* and a United States Supreme Court case is not subject to being affirmed. Other abbreviations on this page deal with the treatment of the case. For example, "e" means that the case cited explained the case you are Shepardizing, "f" means that the case cited the case you are Shepardizing as controlling the later court's decision, "j" means that the case you are Shepardizing was cited in the dissenting opinion of the case cited, and "o" means that the cited case expressly overruled the case you are Shepardizing. If you are Shepardizing statutes, refer to the page that contains abbreviations for statutes.

TABLES OF ABBREVIATIONS

A2d—Atlantic Reporter, Second Series
ADC—Appeal Cases, District of Columbia Reports
AkA—Arkansas Appellate Reports
AL[5]—American Law Reports, Fifth Series
ALRF—American Law Reports, Federal
ALRF2d—American Law Reports Federal, Second Series
ALR6—American Law Reports, Sixth Series
ApDC—Court of Appeals for the District of Columbia Reports
Ark—Arkansas Reports
Az—Arizona Reports
Bankr LX—United States Bankruptcy Court & United States District Court Bankruptcy Cases LEXIS
BRW—Bankruptcy Reporter
CAAF LX—U.S. Court of Appeals for the Armed Forces LEXIS
C4th—California Supreme Court Reports, Fourth Series
CA4th—California Appellate Reports, Fourth Series
CA4S—California Appellate Reports, Fourth Series, Supplement
CaL—California Law Review
CaR2d—California Reporter, Second Series
CaR3d—California Reporter, Third Series
CCA LX—U.S. Military Courts of Criminal Appeals LEXIS
ChL—University of Chicago Law Review
CIT—United States Court of International Trade
CLA—University of California at Los Angeles Law Review
Cor—Cornell Law Review
CR—Columbia Law Review
CS—Connecticut Supplement
Ct—Connecticut Reports
CtA—Connecticut Appellate Reports
DC4d—Pennsylvania District and County Reports, Fourth Series
DPR—Decisiones de Puerto Rico
F2d—Federal Reporter, Second Series
F3d—Federal Reporter, Third Series
FCCR—Federal Communications Commission Record
Fed Appx—Federal Appendix
FedCl—Federal Claims Reporter
FRD—Federal Rules Decisions
FS—Federal Supplement
FS2d—Federal Supplement, Second Series
Ga—Georgia Reports
GaA—Georgia Appeals Reports
Geo—Georgetown Law Journal
Haw—Hawaii Reports
HLR—Harvard Law Review
Ida—Idaho Reports
Il2d—Illinois Supreme Court Reports Second Series
IlA—Illinois Appellate Court Reports, Third Series
IlCCl—Illinois Court of Claims Reports
IlLR—University of Illinois Law Review
JTS—Jurisprudencia del Tribunal Supremo de Puerto Rico
KA2d—Kansas Court of Appeals Reports, Second Series
Kan—Kansas Reports
LCP—Law and Contemporary Problems
LE—United States Supreme Court Reports, Lawyer's Edition, Second Series
MaA—Massachusetts Appeals Court Reports
MADR—Massachusetts Appellate Division Reports
Mas—Massachusetts Reports
MC—American Maritime Cases
McA—Michigan Court of Appeals Reports
Mch—Michigan Reports
McL—Michigan Law Review
Md—Maryland Reports
MdA—Maryland Appellate Reports
MJ—Military Justice Reporter
MnL—Minnesota Law Review
Mt—Montana Reports
NC—North Carolina Reports
NCA—North Carolina Court of Appeals Reports
NE—Northeastern Reporter, Second Series
Neb—Nebraska Reports
NebA—Nebraska Advance Reports
Nev—Nevada Reports
NH—New Hampshire Reports
NJ—New Jersey Reports
NJS—New Jersey Superior Court Reports
NJT—New Jersey Tax Court Reports
NM—New Mexico Reports
NW—Northwestern Reporter, Second Series
NwL—Northwestern University Law Review

(continues)

EXHIBIT 6-2
Tables of Abbreviations from a *Shepard's* volume. (*Reprinted with permission from Shepard's United States Citations. Copyright 2007. LexisNexis, a division of Reed Elsevier, Inc.*)

EXHIBIT 6-2
(Continued)

NY2d—New York Court of Appeals Reports, Second Series
NY3d—New York Court of Appeals Reports, Third Series
NYAD2d—New York Appellate Division Reports, Second Series
NYAD3d—New York Appellate Division Reports, Third Series
NYL—New York University Law Review
NYM2d—New York Miscellaneous Reports, Second Series
NYM3d—New York Miscellaneous Reports, Third Series
NYS2d—New York Supplement, Second Series
OA3d—Ohio Appellate Reports, Third Series
OhM2d—Ohio Miscellaneous Reports, Second Series
OrA—Oregon Court of Appeals Reports
Ore—Oregon Reports
OS3d—Ohio State Reports, Third Series
P2d—Pacific Reporter, Second Series
P3d—Pacific Reporter, Third Series
Pa—Pennsylvania State Reports
PaC—Pennsylvania Commonwealth Court Reports
PaL—University of Pennsylvania Law Review
PaS—Pennsylvania Superior Court Reports
PQ2d—United States Patents Quarterly, Second Series
SC—Supreme Court Reporter
SE—Southeastern Reporter, Second Series
So2d—Southern Reporter, Second Series
SoC—South Carolina Reports
StnL—Stanford Law Review
SW—Southwestern Reporter, Second Series
SW—Southwestern Reporter, Third Series
TCM—Tax Court Memorandum Decisions
TCt—Tax Court of the United States Reports; United States Tax Court Reports
TPR—Official Translations of the Opinions of the Supreme Court of Puerto Rico
TxL—Texas Law Review
UCR2d—Uniform Commercial Code Reporting Service, Second Series
US—United States Reports
USApp LX—United States Court of Appeals LEXIS
USClaims LX—United States Court of Federal Claims LEXIS
USDist LX—United States District Court LEXIS
US LX—United States Supreme Court LEXIS
Va—Virginia Reports
VaA—Virginia Court of Appeals Reports
VaL—Virginia Law Review
VCO—Virginia Circuit Court Opinions
Vt—Vermont Reports
WAp—Washington Appellate Reports
Wis2d—Wisconsin Reports, Second Series
WLR—Wisconsin Law Review
Wsh2d—Washington Reports, Second Series
WV—West Virginia Reports
YLJ—Yale Law Journal

COURT ABBREVIATIONS

Cir. (number)—United States Court of Appeals, United States District Court Circuit (number)
Cir. DC—United States Court of Appeals, United States District Court, DC Circuit
Cir. Fed.—United States Court of Appeals, Federal Circuit
ClCt—United States Claims Court and United States Court of Federal Claims
CuCt—United States Customs Court
CIT—United States Court of International Trade
CCPA—Court of Customs and Patent Appeals
ECA—Temporary Emergency Court of Appeals
ML—Judicial Panel on Multidistrict Litigation
RRR—Special Court Regional Rail Reorganization Act of 1973

CASE ANALYSIS–ABBREVIATIONS

History of Cases

cc	(Connected Case)	The citing case is related to the case you are *Shepardizing*, arising out of the same subject matter or involving the same parties.
m	(Modified)	On appeal, reconsideration or rehearing, the citing case modifies or changes in some way, including affirmance in part and reversal in part, the case you are *Shepardizing*.
r	(Reversed)	On appeal, reconsideration or rehearing, the citing case reverses the case you are *Shepardizing*.
S	(Superseded)	On appeal, reconsideration or rehearing, the citing case supersedes or is substituted for the case you are *Shepardizing*.
s	(Same Case)	The citing case involves the same litigation as the case you are *Shepardizing*, but at a different stage of the proceedings.
US reh den	(Rehearing Denied)	The citing order by the United States Supreme Court denies rehearing in the case you are *Shepardizing*.
US reh dis	(Rehearing Dismissed)	The citing order by the United States Supreme Court dismisses rehearing in the case you are *Shepardizing*.
v	(Vacated)	The citing case vacates or withdraws the case you are *Shepardizing*.

Treatment of Cases

c	(Criticized)	The citing opinion disagrees with the reasoning/result of the case you are *Shepardizing*, although the citing court may not have the authority to materially affect its precedential value.
ca	(Conflicting Authorities)	Among conflicting authorities as noted in cited case.
d	(Distinguished)	The citing case differs from the case you are *Shepardizing*, either involving dissimilar facts or requiring a different application of the law.
e	(Explained)	The citing opinion interprets or clarifies the case you are *Shepardizing* in a significant way.
f	(Followed)	The citing opinion relies on the case you are *Shepardizing* as controlling or persuasive authority.
h	(Harmonized)	The citing case differs from the case you are *Shepardizing*, but the citing court reconciles the difference or inconsistency in reaching its decision.
j	(Dissenting Opinion)	A dissenting opinion cites the case you are *Shepardizing*.
~	(Concurring Opinion)	A concurring opinion cites the case you are *Shepardizing*.
L	(Limited)	The citing opinion restricts the application of the case you are *Shepardizing*, finding its reasoning applies only in specific limited circumstances.
o	(Overruled)	The citing case expressly overrules or disapproves the case you are *Shepardizing*.
op	(Overruled or in Part)	Ruling in the cited case overruled partially or on other grounds with other qualifications.
q	(Questioned)	The citing opinion questions the continuing validity or precedential value of the case you are *Shepardizing* because of intervening circumstances, including judicial or legislative overruling.

(continues)

EXHIBIT 6-3
Tables of Abbreviations from a *Shepard's* volume.
(*Reprinted with permission from Shepard's United States Citations. Copyright 2007. LexisNexis, a division of Reed Elsevier, Inc.*)

EXHIBIT 6-3
(Continued)

qab	(Abrogated as stated in)	The citing opinion states that the decision that you are *Shepardizing* has been reversed, vacated, abrogated or invalidated by an earlier decision.
qabp	(Abrogated in part as stated in)	The citing opinion states that the decision that you are *Shepardizing* has been reversed, vacated, abrogated or invalidated in part by an earlier decision.
qo	(Overruled as stated in)	The citing opinion notes that the continuing validity of an earlier opinion you are *Shepardizing* is in question because it has been overruled in an earlier decision.
qop	(Overruled in part as stated in)	The citing opinion notes that the continuing validity of an earlier opinion you are *Shepardizing* is in question because it has been overruled in part in an earlier decision.
su	(Superseded)	Superseded by statute as stated in cited case.
		Other
#		The citing case is of questionable precedential value because review or rehearing has been granted by the California Supreme Court and/or the citing case has been ordered depublished pursuant to Rule 976 of the California Rules of Court. (Publication status should be verified before use of the citing case in California.)

SHEPARDIZING

Look at a page from both the August 1, 2007 and November 1, 2007 *Shepard's* volumes that you would find if you were Shepardizing *Brendlin v. California* and determine what the information on those pages means.

First, look at the page from the August 1, 2007 volume (Exhibit 6-4). You know that you are looking at the right page because it says "Supreme Court Reporter" and "Vol. 127" at the top. Be sure that you have the correct series and volume for the reporter. Then look at the top of the column where you see "2400," the first page of the case. You know you are in the right place on the page because the name of the case is given with the year of the decision immediately below "2400." Everything after "2400" and before the next number in bold, "2411," has to do with *Brendlin*. It shows:

—**2400**—
Brendlin v
California
2007

Cir. 10
f) 2007USDist
[LX45335

Below "Cir. 10" the only citation is "2007USDistLX45335," meaning that a single court, a United States district court located within the United States tenth circuit, cited to Brendlin during the time period covered by the August 1, 2007 volume. The citations found in Shepard's are abbreviated and one unfamiliar with "USDistLX" would consult the table of abbreviations to determine the meaning of the abbreviation. Consulting the Shepard's table shows that "USDistLX" means that the abbreviation is to a United States district court, as found in the online LexisNexis database. The "f" to the left of the citation indicates that that case followed the reasoning of Brendlin. The citation runs to a second line to accommodate the necessary information. The bracket ([) at the beginning of the second line

EXHIBIT 6-4

Sample page from *Shepard's United States Citations: Supreme Court Reporter. (Reprinted with permission from Shepard's United States Citations. Copyright 2007. LexisNexis, a division of Reed Elsevier, Inc.)*

Vol. 127	SUPREME COURT REPORTER				
—2400— Brendlin v. California 2007 Cir. 10 f) 2007USDist [LX45335 **—2411—** Powerex Corp. v. Reliant Energy Servs. 2007 Cir. 7 2007USApp [LX15233					

indicates that the information is a continuation of the preceding line. A glance at a page from *Shepard's* would often show that some citations contain superscript numbers in the middle of the citations. The superscript numbers refer to the headnote numbers of the case being Shepardized. Because *Brendlin* is such a recent case, there are no superscript numbers on the page. If a citation on the page were "85Fed Appx1347," the superscript "1" would indicate that that case discusses the same legal principle discussed in headnote 1 of *Brendlin*.

Now, look at the page from the November 1, 2007 volume (Exhibit 6-5). You know that you are looking at the right page because it says "Supreme Court Reporter" and "Vol. 127" at the top. Be sure that you have the correct volume for the reporter. Then look down

EXHIBIT 6-5

Sample page from the November 1, 2007 issue of *Shepard's United States Citations: Supreme Court Reporter. (Reprinted with permission from Shepard's United States Citations. Copyright 2007. LexisNexis, a division of Reed Elsevier, Inc.)*

2007USDist [LX68951

—2360—

Bowles v Russell 2007 (168LE96)
s) 432F3d668
127SC2973
Cir. 1
494F3d233
Cir. 2
2007USApp [LX17166
e) 2007USApp [LX19846
f) 2007USApp [LX21248
2007USApp [LX22672
~) 2007USApp [LX22672
494F3d256
e) 494F3d258
Cir. 3
f) 2007USApp [LX21076
f) 2007USApp [LX22198
2007USDist [LX51296
d) 2007USDist [LX60772
2007Bankr LX [2544
Cir. 5
2007USApp [LX17695
2007USApp [LX18648
f) 2007USApp [LX18892
2007USApp [LX21524
f) 496F3d387
Cir. 6
d) 2007USApp [LX18601
~) 2007USApp [LX18601
2007USApp [LX21605
d) 489F3d298
d) 496F3d466
~) 496F3d466
d) 2007USDist [LX50487
Cir. 7
2007USApp [LX20183
Cir. 8
2007USApp [LX20187
2007USDist [LX48122
Cir. 9
2007USApp [LX17442
d) 2007USApp [LX17625
d) 2007USApp [LX18476
2007USApp [LX19532
2007USApp [LX20966
2007USApp [LX21464
494F3d1190
2007USDist [LX50618
2007USDist [LX58749
2007USDist [LX59022
2007USDist [LX63977
e) 2007USDist [LX67496
Cir. 10
f) 2007USApp [LX19045
2007USApp [LX19300
d) 2007USApp [LX19839
j) 2007USApp [LX19839
f) 2007USApp [LX22539
2007Bankr LX [2523
Cir. 11
2007USDist [LX49332
2007USDist [LX64831
2007USDist [LX65432
f) 2007USDist [LX69681
f) 495FS2d1298
Cir. DC
2007USApp [LX16873
2007USApp [LX18627
2007USDist [LX54617
496FS2d125
ClCt
2007USClaims [LX275
78FedC1157
Calif
42C4th101
64CaR3d131
164P3d563

—2372—

Davenport v Wash. Educ. Ass'n 2007 (168LE71)
s) 156Wsh2d [543
s) 130P3d352
Cir. 1
d) 2007USApp [LX18763
~) 2007USApp [LX18763
Cir. 2
2007USApp [LX18243

—2383—

Credit Suisse Sec. (USA) LLC v Billing 2007 (168LE145)
s) 426F3d130
s) 241FS2d281
s) 287FS2d497
Cir. 3
2007USDist [LX64767
Cir. 9
d) 2007USDist [LX51359

—2400—

Brendlin v California 2007 (168LE132)
s) 38C4th1107
s) 115CA4th206
s) 8CaR3d882
s) 45CaR3d50
s) 136P3d845
Cir. 1
2007USApp [LX20061
Cir. 2
2007USApp [LX17437
496F3d215
d) 2007USDist [LX56365
Cir. 3
2007USDist [LX54526
Cir. 4
f) 2007USApp [LX22436
492F3d500
f) 2007USDist [LX56907
f) 2007USDist [LX61715
f) 498FS2d847
Cir. 6
f) 2007USApp [LX18678
f) 2007USApp [LX18745
f) 496F3d495
d) 2007USDist [LX56236
d) 2007USDist [LX56386
e) 2007USDist [LX56386
Cir. 7
f) 2007USApp [LX19344
f) 2007USDist [LX66146
Cir. 8
2007USDist [LX49569
2007USDist [LX54779
2007USDist [LX63589
Cir. 9
2007USApp [LX17005
494F3d1146
2007USDist [LX64900
2007USDist [LX68461
Cir. 10
f) 2007USApp [LX18187
2007USDist [LX58490
2007USDist [LX67177
f) 2007USDist [LX70758
Calif
f) 41C4th894
f) 63CaR3d22
f) 162P3d546
Ga
286GaA282
648SE744
Ind
j) 868NE1121

—2411—

Powerex Corp. v Reliant Energy Servs. 2007 (168LE112)
s) 391F3d1011
Cir. 2
f) 493F3d57
Cir. 4
f) 2007USApp

EXHIBIT 6-5
(Continued)

[LX19475
d) 2007USApp
[LX19475
Cir. 6
2007USApp
[LX22819
Cir. 7
f) 2007USApp
[LX16763
f) 2007USApp
[LX19131
2007USApp
[LX22063
492F3d836
493F3d775
f) 495F3d366
f) 2007USDist
[LX61625
Cir. 9
2007USApp
[LX16640
Cir. 10

f) 2007USDist
[LX65989
Calif
153CA4th100
62CaR3d642

—2456—
Rita v. United States
2007
(168LE203)
s) 177Fed Appx
[357
Cir. 1
2007USApp
[LX18695
2007USApp
[LX19736
j) 2007USApp
[LX19819
2007USApp
[LX20749
496F3d95
f) 2007USDist
[LX51013

f) 2007USDist
[LX60969
e) 2007USDist
[LX60969
2007USDist
[LX61082
f) 493FS2d136
f) 493FS2d258
Cir. 2
2007USApp
[LX19606
2007USApp
[LX20738
2007USApp
[LX22311
2007USApp
[LX22511
2007USApp
[LX22903
229Fed Appx
[50
f) 2007USDist
[LX56232
d) 2007USDist

[LX62308
h) 2007USDist
[LX63245
Cir. 3
f) 2007USApp
[LX15858
f) 2007USApp
[LX16690
2007USApp
[LX16743
f) 2007USApp
[LX16960
f) 2007USApp
[LX18177
2007USApp
[LX18510
f) 2007USApp
[LX18767
2007USApp
[LX19364
2007USApp
[LX19755
j) 2007USApp
[LX19755

f) 2007USApp
[LX20946
f) 2007USApp
[LX21018
f) 2007USApp
[LX21087
f) 2007USApp
[LX21648
f) 2007USApp
[LX21649
~) 2007USApp
[LX21649
~f) 2007USApp
[LX21649
f) 2007USApp
[LX22431
2007USApp
[LX22843
494F3d399
f) 496F3d303
229Fed Appx.
[86
2007USDist
[LX50021

f) 2007USDist
[LX58096
Cir. 4
2007USApp
[LX16759
2007USApp
[LX16761
2007USApp
[LX16902
2007USApp
[LX17292
2007USApp
[LX17569
f) 2007USApp
[LX17831
2007USApp
[LX17970
f) 2007USApp
[LX18117
f) 2007USApp
[LX18126

the columns until you see "2400," the first page of the case, just past the middle of the third column. You know you are in the right place on the page because the name of the case is given with the year of the decision immediately below "2400." Everything after "2400" and before the next number in bold, "2411," has to do with *Brendlin*. It shows:

—2400—
Brendlin v
California
2007
(168LE132)
s) 38C4th1107
s) 115CA4th206
s) 8CaR3d882
s) 45CaR3d50
s) 136P3d845
Cir. 1
2007USApp
[LX20061
Cir. 2
2007USApp
[LX17437
496F3d215
d) 2007USDist
[LX56365
Cir. 3
2007USDist
[LX54526
Cir. 4
f) 2007USApp
[LX22436
492F3d500
f) 2007USDist
[LX56907
f) 2007USDist
[LX61715
f) 498FS2d847
Cir. 6
f) 2007USApp
[LX18678
f) 2007USApp
[LX18745
f) 496F3d495
d) 2007USDist
[LX56236
d) 2007USDist
[LX56386
e) 2007USDist
[LX56386

Cir. 7
f) 2007USApp
[LX19344
f) 2007USDist
[LX66146
Cir. 8
2007USDist
[LX49569
2007USDist
[LX54779
2007USDist
[LX63589
Cir. 9
2007USApp
[LX17005
494F3d1146
2007USDist
[LX64900
2007USDist
[LX68461
Cir. 10
f) 2007USApp
[LX18187
2007USDist
[LX58490
2007USDist
[LX67177
f) 2007USDist
[LX70758
Calif
f) 41C4th894
f) 63CaR3d22
f) 162P3d546
Ga
286GaA282
648SE744
Ind
j) 868NE1121

The parentheses around the first citation indicate that it is a parallel citation. Thus, the citation for *Brendlin* in *United States Supreme Court Reports, Lawyers' Edition* is 168 L. Ed. 2d 132. The letter "s" to the left of the next five citations indicates that they are citations to the same case. The citations are to actions taken by the California state courts before *Brendlin* went up to the United States Supreme Court. Glancing at the information shows headings indicating that courts within the first, second, third, fourth, sixth, seventh, eighth, ninth, and tenth circuits cited to *Brendlin*, as did state courts from California, Georgia, and Indiana. Many of the citations contain "LX," indicating that they are reported in LexisNexis. Presumably, the citations are to LexisNexis because no citation is yet available to a print source. The letter "f" preceding a citation means that the case followed *Brendlin*. The letter "e" preceding a citation means that the case explained *Brendlin*. The letter "j" preceding a citation means that the case cited *Brendlin* in the dissenting opinion. The letter "d" preceding a citation means that the case cited *Brendlin* but distinguished itself from *Brendlin*. A number of the courts followed *Brendlin*, three courts distinguished their decisions from *Brendlin*, one court offered an explanation of *Brendlin*, and another court cited to *Brendlin* in a dissenting opinion.

In summary, *Brendlin* is still good authority because the case has not been overruled, superceded, modified, or limited. Your next question may be how many cases you have to read of the cases you found through Shepardizing. That depends on the reason you are Shepardizing. If your goal is to find if *Brendlin* is still good authority, you have already done that. If you had found a case marked with "a" for affirmed, "m" for modified, "r" for reversed, "S" for superceded, "L" for limited, "o" for overruled, or "q" for questioned, you should read those cases. If you are using *Shepard's* as a case finder, to find similar cases, you might want to read as many of the cases as possible.

CASE NAMES CITATOR

What do you do if you have a case name, but not the corresponding citation? Chapter 3 explained that case names may be researched in the case names volumes of the applicable digest. Case names also may be researched in a print *Shepard's* case names citator, or online in either LexisNexis or WESTLAW. Online, perform a search by party name and the

court deciding the case. Especially with United States Supreme Court opinions, there may be multiple citations to the same case, with only one being the citation to the full opinion. The abbreviation "mem." stands for memorandum decision and usually indicates that the decision is other than the full opinion.

STATUTES

Once you know the Shepardizing procedure for cases, you can use the same procedure to Shepardize statutes, court rules, and administrative regulations. There are *Shepard's* for numerous federal and statute primary sources as well. The next few sections will show you the procedure to Shepardize primary sources other than cases, using a federal eavesdropping and wiretapping statute as an example.

Besides researching case law, attorneys research other primary sources, such as statutes, court rules, and administrative regulations, to advise clients and to predict the outcome of a lawsuit. Once the researcher locates an applicable statute, court rule, or administrative regulation, the researcher will perform further research to determine if the primary source is still good law (is still authoritative) and to determine how the primary source has been interpreted by the courts.

A primary source, once authoritative, may no longer be good law for a number of reasons. It may have been amended or held to be unconstitutional. A statute may have been repealed by the legislature. A primary source may have been interpreted in a unique way so as to make it inapplicable to the set of facts being researched.

The researcher can gather much information from consulting an annotated version of a statute or court rule. Often, the research material and the annotations indicate whether the primary source is good law and give information on case law interpretation of the primary source. Although informative, the annotated version may not contain as current information as *Shepard's* on the primary source; the *Code of Federal Regulations* is not annotated.

The consequences of not using citators to determine the status of an applicable statute, court rule, or administrative regulation can be as serious as failing to use citators with applicable cases.

The scheme of the citator for primary sources other than statutes is similar to the case citator. The citator lists each instance in which the primary source being Shepardized has been cited, with the information given as citations to the pages on which the primary source being Shepardized is cited. For example, Shepardizing would yield one citation for each instance in which the primary source being Shepardized was cited by a court. The citations found by Shepardizing yield the page on which the Shepardized primary source was cited, which may not necessarily be the first page of the source.

SHEPARDIZING STATUTES

This section discusses the process for Shepardizing statutes, which is similar to the process used to Shepardize cases.

STEP ONE: LOCATE THE CORRECT SET OF *SHEPARD'S* AND BE READY TO RECORD THE RESULTS

As with Shepardizing cases, the first step in Shepardizing statutes is to become organized. Locate the correct set of *Shepard's* to use to Shepardize a federal eavesdropping and wiretapping statute and be ready to record the results of your Shepardizing. The *Shepard's* set you will need is customarily located near *United States Code*, *United States Code Annotated*, or *United States Code Service*. The *Shepard's* used to Shepardize federal statutes is called *Shepard's Federal Statute Citations*.

Once you find the correct *Shepard's* set, line up the volumes you will need to use. At the time this book was being written, the most recent *Shepard's* issue was November 15, 2007 (Exhibit 6-6). Normally, you would consult the front cover of the most recent *Shepard's* for the legend "**WHAT YOUR LIBRARY SHOULD CONTAIN**." Instead, the November 15, 2007 issue has the legend "**IMPORTANT NOTICE**," which informs the researcher that the 2005–2007 hardbound supplement is scheduled to be published in November. The notice provides two lists of *Shepard's* you need to use to Shepardize, the first to be used prior to the 2005–2007 hardbound supplement becoming available and the second to be used after the 2005–2007 hardbound supplement is available. At the time this book was being written, the 2005–2007 hardbound supplement was not available, so the researcher would consult the first list. The November 15, 2007 issue of *Shepard's Federal Statute Citations* lists hardbound volumes for 1996, 1996–2001, 2001–2003, and 2003–2005. Then it lists the November 1, 2006 gold annual supplement, the November 1, 2007 red cumulative supplement and the November 15, 2007 blue express update.

STEP TWO: DETERMINE WHICH *SHEPARD'S* VOLUMES TO USE

The next step is to determine which volumes you will need to use of the ones listed on the front cover of the November 15, 2007 *Shepard's* to Shepardize 18 U.S.C. § 2515. That statute allows an illegally taped conversation to be suppressed. Look at the spines of the hardbound volumes. They will often give you the citations of the federal statutes Shepardized in them. Check each of the *Shepard's* volumes (hardbound and paperbound) you have identified because they are not cumulative. A chart like the one that follows can be used to ensure that all of the volumes have been reviewed. After checking a particular volume, place a check mark next to it.

	1996	96–01	01–03	03–05	11/1/06	11/1/07	11/15/07
18 U.S.C. § 2515	X	X	X	X	X	X	X

Sometimes a *Shepard's* volume contains no references for the statute you are Shepardizing. This simply means that no case or other authority cited to the statute you are Shepardizing during the time period covered by the volume.

STEP THREE: CHECK EACH *SHEPARD'S* VOLUME IDENTIFIED

Look at a page from each of the November 1, 2007 and November 15, 2007 issues of *Shepard's* that you would find if you were Shepardizing 18 U.S.C. § 2515 and determine what the information on those pages means.

First, look at the page from the November 1, 2007 issue (Exhibit 6-7). You know that you are looking at the right page because it says "UNITED STATES CODE" and "TITLE 18 § 2512" at the top. Then look down the columns until you see "§ 2515" in the first column. Everything after "§ 2515" and before the next statutory citation in bold, "§ 2516," has to do with 18 U.S.C. § 2515.

Exhibit 6-7 shows that the United States Supreme Court and courts in the District of Columbia, first, second, fifth, sixth, seventh, ninth, and tenth federal circuits cited to 18 U.S.C. § 2515 during the time period covered by the November 1, 2007 issue. It is common to find abbreviations, such as "f" and "i" to the left of citations, although on this page there are no abbreviations to the left of citations to 18 U.S.C. § 2515. If there were an "f" to the left of a citation, this would indicate that a court followed the statute as controlling authority. If there were an "i" to the left of a citation, this would indicate that a court interpreted the statute.

VOL. 106 NOVEMBER 15, 2007 NO. 22

Shepard's Federal Statute Citations

Express Update

United States Code,
United States Statutes at Large,
Federal Sentencing Guidelines, Federal Court Rules

IMPORTANT NOTICE

A 2005–2007 Hardbound Supplement for *Shepard's Federal Statute Citations* will be published in November.

***BEFORE* THE 2005–2007 HARDBOUND SUPPLEMENT IS SHELVED, RETAIN THE FOLLOWING:**
1996 Bound Edition, Volumes 1-7
1996–2001 Bound Supplement, Volumes 1-4
2001–2003 Bound Supplement, Volumes 1-2
2003–2005 Bound Supplement, Volumes 1-2*

**Supplemented with:*
– November 1, 2006 Gold Annual Cumulative Supplement (Vol. 105, No. 21 Parts 1–3)
– November 1, 2007 Red Cumulative Supplement (Vol. 106, No. 21 Parts 1 and 2)
– November 15, 2007 Blue Express Update (Vol. 106, No. 22)

***AFTER* THE 2005–2007 HARDBOUND SUPPLEMENT IS SHELVED, RETAIN THE FOLLOWING:**
1996 Bound Edition, Volumes 1-7
1996–2001 Bound Supplement, Volumes 1-4
2001–2003 Bound Supplement, Volumes 1-2
2003–2005 Bound Supplement, Volumes 1-2
2005–2007 Bound Supplement, Volumes 1-4*

**Supplemented with:*
– December 1, 2007 Red Cumulative Supplement (Vol. 106, No. 23)
– December 15, 2007 Blue Express Update (Vol. 106, No. 24)

LexisNexis™

EXHIBIT 6-6
Cover page from the November 15, 2007 issue of *Shepard's Federal Statute Citations*. (*Reprinted with permission from Shepard's Federal Statute Citations. Copyright 2007. LexisNexis, a division of Reed Elsevier, Inc.*)

EXHIBIT 6-7

Sample page from the November 1, 2007 issue of *Shepard's Federal Statute Citations.* (*Reprinted with permission from Shepard's Federal Statutes Citations. Copyright 2007. LexisNexis, a division of Reed Elsevier, Inc.*)

344BRW161 Δ2005

§ 2512(1)(c)

Cir. DC
514F2d266Δ1975

§ 2515

407US343Δ1972
32LE781Δ1972
165LE576Δ2006
92SC2150Δ1972
126SC2680Δ2006
Cir. DC
516F2d663Δ1975
449F3d1292Δ2006
416FS2d18Δ2006
451FS2d80Δ2006
Cir.1
460F2d329Δ1972
Cir. 2
2007USDist LX68957 [Δ2007
418FS2d251Δ2005
Cir. 5
452F3d386Δ2006
486F3d854Δ2007
Cir. 6
478F3d710Δ2007
Cir. 7
462F3d713Δ2006
Cir. 9
437F3d857Δ2006
Cir. 10
486FS2d1279Δ2007

§ 2516

A) 119St3123§1171(b)
407US302Δ1972
32LE757Δ1972
92SC2129Δ1972
Cir. DC
516F2d669Δ1975
408FS364Δ1976
Cir. 5
470F3d567Δ2006
124Fed Appx840Δ2005
Cir. 6
493F3d679Δ2007
j) 493F3d709Δ2007
Cir. 8
j) 393F3d784Δ2005
Cir. 9
437F3d912Δ2006
Cir. 11
444F3d1291Δ2006

§ 2516(1)

Cir. 1
447FS2d148Δ2006
Cir. 3
395F3d180Δ2005
2007USDist LX67655 [Δ2007
431FS2d547Δ2006
Cir. 7
492FS2d907Δ2007

§ 2516(1)(a to g)

Cir. 6
444F2d663Δ1971

§ 2516(1)(a)

407US321Δ1972
32LE768Δ1972
92SC2126Δ1972
Cir. DC
516F2d647Δ1975

§ 2516(1)(c)

407US321Δ1972
32LE768Δ1972
92SC2126Δ1972
Cir. DC
516F2d647Δ1975
Cir. 8
646F2d1264Δ1981

§ 2516(2)

Cir. 2
418FS2d248Δ2005
Cir. 5
124Fed Appx842Δ2005

§ 2517

Cir. 3
431FS2d546Δ2006
Cir. 7
532FS1137Δ1981

§ 2517(1)

Cir. 3
431FS2d546Δ2006
Cir. 7
446FS2d827Δ2006

§ 2517(2)

Cir. 3
431FS2d546Δ2006
Cir. 7
446FS2d827Δ2006

§ 2517(3)

Cir. 3
431FS2d546Δ2006
Cir. 5
452F3d387Δ2006
Cir. 7
446FS2d827Δ2006
Cir. 11
211Fed Appx907Δ2006

§ 2517(5)

Cir. 3
431FS2d546Δ2006
Cir. 9
207Fed Appx852Δ2006

§ 2518

407US302Δ1972
32LE757Δ1972
92SC2126Δ1972
Cir. DC
516F2d661Δ1975
449F3d1292Δ2006
408FS364Δ1976
451FS2d79Δ2006
Cir. 1
430F3d7Δ2005
Cir. 2
2007USDist LX68957 [Δ2007
451FS2d523Δ2006
452FS2d343Δ2006
462FS2d570Δ2006
493FS2d624Δ2006
Cir. 3
395F3d180Δ2005
220Fed Appx96Δ2007
Cir. 4
484F3d280Δ2007
Cir. 5
452F3d387Δ2006
470F3d567Δ2006
Cir. 6
444F2d662Δ1971
463F3d556Δ2006
438FS2d772Δ2006
Cir. 7
492FS2d907Δ2007
Cir. 8
j) 393F3d784Δ2005
Cir. 9
2007USApp LX15585 [Δ2007
221Fed Appx536Δ2007
230Fed Appx761Δ2007
445FS2d1129Δ2006

§ 2518(1)

407US304Δ1972
32LE759Δ1972
92SC2130Δ1972
Cir. DC
516F2d695Δ1975
449F3d1292Δ2006
451FS2d80Δ2006
Cir. 1
430F3d8Δ2005
447FS2d148Δ2006
Cir. 2
2007USDist LX68957 [Δ2007
Cir. 3
220Fed Appx97Δ2007
Cir. 6
478F3d714Δ2007
438FS2d772Δ2006
Cir. 10
183Fed Appx820Δ2006
Cir. 11
2007USApp LX22014 [Δ2007

§ 2518(1)(a)

Cir. 1
447FS2d148Δ2006

§ 2518(1)(b)

Cir. 1
447FS2d148Δ2006

§ 2518(1)(b)(1)

Cir. DC
516F2d669Δ1975
Cir. 2
2007USDist LX68957 [Δ2007

§ 2518(1)(b)(2)

Cir. DC
516F2d668Δ1975
Cir. 2
462FS2d568Δ2006

§ 2518(1)(b)(3)

Cir. DC
516F2d668Δ1975

§ 2518(1)(b)(4)

394US208Δ1969
22LE207Δ1969
89SC985Δ1969
Cir. DC
516F2d668Δ1975
Cir. 2
462FS2d571Δ2006
493FS2d626Δ2006

§ 2518(1)(c)

Cir. DC

EXHIBIT 6-7
(Continued)

516F2d599Δ1975 449F3d1293Δ2006 451FS2d82Δ2006 Cir. 1 430F3d6Δ2005 471F3d3Δ2006 447FS2d148Δ2006 479FS2d226Δ2007 Cir. 2 439FS2d248Δ2006	462FS2d570Δ2006 493FS2d630Δ2006 Cir. 3 2007USApp LX21019 [Δ2007 Cir. 4 2007USApp LX21222 [*2000 2007USApp LX21222 [Δ2007	204Fed Appx206 *2000 204Fed Appx207 Δ2006 Cir. 6 478F3d710Δ2007 j) 478F3d715Δ2007 Cir. 7 2007USApp LX17435 [Δ2007 496F3d636Δ2007 Cir. 9	2007USApp LX15585 [Δ2007 437F3d912Δ2006 456F3d1006Δ2006 221Fed Appx536Δ2007 470FS2d1209Δ2006 Cir. 10 479F3d1240Δ2007 220Fed Appx812Δ2007 230Fed Appx813Δ2007

Exhibit 6-8 contains citation analysis abbreviations. These pages give you important information, such as "C" means constitutional, "U" means unconstitutional, and "R" means repealed. They also explain the use of a delta or an asterisk.

Now, look at the page from the November 15, 2007 issue (Exhibit 6-9). It contains no reference for section 2515, indicating that no court cited to section 2515 during the time period covered by the November 15, 2007 issue.

The November 1, 2006 paperbound volume and the four hardbound volumes indicate that in the time period covered by those volumes, the statute was not amended, repealed, or ruled unconstitutional. In summary, Shepardizing shows that § 2515 is still good authority because the statute has not been amended, repealed, ruled unconstitutional, or otherwise questioned. It also shows that the statute was cited by a number of federal courts.

Your next question may be how many cases you have to read of the cases you found through Shepardizing. That depends on the reason you are Shepardizing. If your goal is to find if § 2515 is still good authority, you have not found anything to the contrary. If you had found case citations marked with "U" for unconstitutional, "Up" for unconstitutional in part, "V" for void or invalid, "Vp" for void or invalid in part, or "L" for limited, you should read those cases. If you are using *Shepard's* as a case finder, to find cases with facts similar to the facts you are researching, you might want to read as many of the cases as possible, especially those marked "C," "f," and "i." In addition, abbreviations indicating legislative action should be reviewed to determine if your research has located all legislative changes to the statute.

KEYCITE

USING KEYCITE FOR CASES

KeyCite serves the same function as *Shepard's*; it is used to determine if a case is still authoritative and it is used to find other cases that cited to the case you are cite checking. The information accessed through KeyCite is organized differently than the information in the print *Shepard's*. In the print *Shepard's*, citations concerning the history of the case are shown first and are followed by citations to cases that have cited the case being Shepardized, with those cases arranged by the court issuing the decision.

When viewing cases in WESTLAW, it is good practice to check the upper left-hand corner of the screen for case **status flags** (a red triangular warning flag or a yellow triangular warning flag), a blue uppercase "H" symbol, and a green uppercase "C" symbol. The red flag indicates that the case is no longer good law in some respect; the yellow flag indicates there is some negative history concerning the case, but the case has not been reversed or overruled; the "H" indicates some history exists concerning

status flags
In KeyCite, a red or yellow triangular status flag located in the upper-left-hand corner of a primary source warns you of any negative history. A red flag appearing on a case means that the case is no longer good law for at least one of the points it contains. A yellow flag appearing on a case means that the case has some negative history, but it has not been reversed or overruled.

EXHIBIT 6-8
Samples pages from *Shepard's Federal Statute Citations. (Reprinted with permission from* Shepard's Federal Statute Citations. *Copyright 2005. LexisNexis, a division of Reed Elsevier, Inc.*)

STATUTE ANALYSIS–ABBREVIATIONS

OPERATION OF STATUTE–LEGISLATIVE

A	(Amended)	The citing reference, typically a session law, amends or alters the statute you are *Shepardizing*.
Ad	(Added)	The citing reference, typically a session law, adds new matter to the statute you are *Shepardizing*.
E	(Extended)	The citing reference extends the scope of, or the time period specified in, the statute you are *Shepardizing*.
L	(Limited)	The citing reference refuses to extend the provisions of the statute you are *Shepardizing*.
R	(Repealed)	The citing reference, typically a session law, repeals or abrogates the statute you are *Shepardizing*.
Re-en	(Re-enacted)	The citing reference, typically a session law, re-enacts the statute you are *Shepardizing*.
Rn	(Renumbered)	The citing reference, typically a session law, renumbers the statute you are *Shepardizing*.
Rp	(Repealed in Part)	The citing reference, typically a session law, repeals or abrogates in part the statute you are *Shepardizing*.
Rs	(Repealed & Superseded)	The citing reference, typically a session law, repeals and supersedes the statute you are *Shepardizing*.
Rv	(Revised)	The citing reference, typically a session law, revises the statute you are *Shepardizing*.
S	(Superseded)	The citing reference, typically a session law, supersedes the statute you are *Shepardizing*.
Sd	(Suspended)	The citing reference, typically a session law, suspends the statute you are *Shepardizing*.
Sdp	(Suspended in Part)	The citing reference, typically a session law, suspends in part the statute you are *Shepardizing*.
Sg	(Supplementing)	The citing reference, typically a session law, supplements the statute you are *Shepardizing*.
Sp	(Superseded in Part)	The citing reference, typically a session law, supersedes in part the statute you are *Shepardizing*.
C	(Constitutional)	The citing case upholds the constitutionality of the statute, rule or regulation you are *Shepardizing*.
DG	(Decision for Gov't)	The citing decision holds for the Government in a dispute concerning the Code section you are *Shepardizing*.
DGp	(Decision for Gov't in Part)	The citing decision holds in part for the Government in a dispute concerning the Code section you are *Shepardizing*.
DT	(Decision for Taxpayer)	The citing decision holds for the taxpayer in a dispute concerning the code section you are *Shepardizing*.
DTp	(Decision for Taxpayer in Part)	The citing decision holds in part for the taxpayer in a dispute concerning the code section you are *Shepardizing*.
f	(Followed)	The citing opinion expressly relies on the statute, rule or regulation you are *Shepardizing* as controlling authority.
i	(Interpreted)	The citing opinion interprets the statute, rule or regulation you are *Shepardizing* in some significant way, often including a discussion of the statute's legislative history.

EXHIBIT 6-8
(Continued)

j	(Dissenting Opinion)	A dissenting opinion cites the statute, rule or regulation you are *Shepardizing*
na	(Not Applicable)	The citing opinion expressly finds the statute, rule or regulation you are *Shepardizing* inapplicable to the legal or factual circumstances of the citing case.
rt	(Retroactive/Prospective)	The citing opinion discusses retroactive or prospective application of the statute, rule or regulation you are *Shepardizing*.
U	(Unconstitutional)	The citing case declares unconstitutional the statute, rule or regulation you are *Shepardizing*.
Up	(Unconstitutional in Part)	The citing case declares unconstitutional in part the statute, rule or regulation you are *Shepardizing*.
V	(Void or Invalid)	The citing case declares void or invalid the statute, rule, regulation or order you are *Shepardizing* because it conflicts with an authority that takes priority.
Va	(Valid)	The citing case upholds the validity of the statute, rule, regulation or order you are *Shepardizing*.
Vp	(Void or Invalid in Part)	The citing case declares void or invalid part of the statute, rule, regulation, or order you are *Shepardizing* because it conflicts with an authority that takes priority.

SPECIAL SYMBOLS FOR DATES OF UNITED STATES CODE AND CFR PROVISIONS

*	followed by a year refers to the United States Code or CFR edition, if cited. If not cited,
Δ	followed by a year indicates the date of the citing reference.

the case, none of which is negative; the "C" identifies a case that has been cited but that has no direct or negative indirect history. Absence of status flags, H or C in the upper left hand corner of the case indicates that the case you are viewing has no direct or indirect history and it has not been cited. Clicking the status flag accesses KeyCite and brings you to a screen containing the history of the case, both direct and negative indirect. The **direct history** of the case includes prior and subsequent history of that case. The **negative indirect history** includes cases outside the direct appellate line of the case being KeyCited that may have a negative impact on the precedential weight of the case. For example, cases listed under negative indirect history are later cases that may have questioned the reasoning of the earlier case or distinguished themselves on their facts.

direct history
The direct history of the case includes prior and subsequent history of that case.

negative indirect history
The negative indirect history includes cases outside the direct appellate line of the case being KeyCited that may have a negative impact on the precedential weight of the case. Cases listed under negative indirect history are later cases that may have questioned the reasoning of the earlier case, distinguished themselves on their facts, or limited the effect of the earlier case.

Exhibit 6-10 shows the first screen of *Brendlin v. California* on Westlaw. The case has a yellow flag in the upper-left-hand corner. The status flag for the case was yellow because courts in later cases did not follow *Brendlin*.

From Exhibit 6-10, the first screen for *Brendlin*, the researcher can access KeyCite by clicking on the yellow status flag or by clicking on the "Full History" link or the "Citing References" link to the left of the case. Clicking on the History link automatically brings the researcher to the full history of the case, shown in Exhibit 6-11.

Exhibit 6-11 shows the history of *Brendlin* is divided into "Direct History,""Negative Citing References," "Related References," "Court Documents," and "Dockets." "Direct History" gives the citations to the case in the California state courts and in the United

EXHIBIT 6-9

Sample page from the November 15, 2007 issue of *Shepard's Federal Statute Citations*. (*Reprinted with permission from* Shepard's Federal Statute Citations. *Copyright 2007. LexisNexis, a division of Reed Elsevier, Inc.*)

TITLE 18 § 3005 **UNITED STATES CODE**

§ 2332b(b)(1)(C)
Cir. 5
2007USApp LX23065 [Δ2007

§ 2332b(g)(5)
Cir. 5
2007USApp LX23065 [Δ2007

§ 2332b(g)(5)(a)
Cir. 5
2007USApp LX23065 [Δ2007

§ 2339A
j) 542US547Δ2004
j) 159LE610Δ2004
j) 124SC2657Δ2004
Cir. 4
495FS2d554Δ2007
Cir. 6
498FS2d1051Δ2007
C) 498FS2d1059Δ2007

§ 2339A(b)
Cir. 4
495FS2d554Δ2007

§ 2339A(b)(1)
Cir. 4
495FS2d554Δ2007

§ 2339B
j) 542US548Δ2004
j) 159LE610Δ2004
j) 124SC2657Δ2004
Cir. 5
2007USApp LX23065 [Δ2007
Cir. 6
498FS2d1051Δ2007
498FS2d1061*2004
C) 498FS2d1063Δ2007

§ 2339B(a)(1)
Cir. 9
2007USApp LX23875 [Δ2007

§ 2339B(d)
Cir. 9
2007USApp LX23875 [Δ2007

§ 2339B(g)(4)
Cir. 6
498FS2d1057Δ2007

§ 2339B(g)(6)
Cir. 6
498FS2d1060Δ2007

§ 2339B(h)
Cir. 6
498FS2d1057Δ2007

§ 2339c
j) 542US548*2004
j) 159LE610*2004
j) 124SC2657*2004

§ 2340 et seq.
Cir. 6
124Fed Appx966Δ2005

§ 2341(2)
Cir. 2
2007USDist LX72656 [Δ2007

§ 2342
Cir. 2
2007USDist LX72656 [Δ2007

§ 2381
j) 542US560Δ2004
j) 159LE618Δ2004
j) 124SC2664Δ2004

§ 2382
j) 542US561Δ2004
j) 159LE618Δ2004
j) 124SC2664Δ2004

§ 2383
j) 542US561Δ2004
j) 159LE619Δ2004
j) 124SC2664Δ2004

§ 2384
j) 542US561Δ2004
j) 159LE619Δ2004
j) 124SC2664Δ2004

§ 2390
j) 542US561Δ2004
j) 159LE619Δ2004
j) 124SC2664Δ2004

§ 2421
Cir. 2
2007USDist LX73014 [Δ2007

§ 2422(b)
Cir. 6
2007USApp LX23727 [Δ2007
Cir. 7
2007USApp LX23631 [Δ2007
2007USApp LX23631 [*2006
C) 2007USApp LX23631 [Δ2007
Cir. 8
495F3d1013Δ2007
j) 495F3d1016Δ2007
Cir. 9
2007USApp LX23903 [Δ2007
Cir. 10
232Fed Appx833Δ2007
Cir. 11
233Fed Appx965Δ2007

§ 2423(a)
Cir. 4
496F3d354Δ2007
232Fed Appx337*2006

§ 2423(b)
Cir. 7
2007USApp LX23631 [Δ2007
Cir. 8
495F3d1013Δ2007

§ 2510 et seq.
Cir. 1
495FS2d261Δ2007
Cir. 2
451FS2d521Δ2006

§§ 2510 to 2521
Cir. 4
233Fed Appx252Δ2007
Cir. 11
371BRW529Δ2007

§ 2510
Cir. 1
495FS2d262Δ2007

§ 2510(4)
Cir. 1
495FS2d262Δ2007
Cir. 2
451FS2d527Δ2006

§ 2510(5)(a)(2)
Cir. 1
495FS2d261Δ2007

§ 2510(6)
Cir. 1
495FS2d265Δ2007

§ 2510(8)
Cir. 11
2007USDist LX72522 [Δ2007

§ 2510(11)
Cir. 2
451FS2d523Δ2006

§ 2511 et seq.
Cir. 1
495FS2d252Δ2007

§ 2511
Cir. 1
495FS2d248Δ2007
Cir. 4
233Fed Appx255Δ2007

§ 2511(1)(a)
Cir. 1
495FS2d261Δ2007
Cir. 4
233Fed Appx253Δ2007

§ 2511(1)(b)
Cir. 1
495FS2d271Δ2007

§ 2511(2)(c)
Cir. 1
495FS2d261Δ2007

§ 2511(3)(a)
Cir. 1
495FS2d266Δ2007

§ 2518
Cir. 2
451FS2d523Δ2006

§ 2518(1)
Cir. 11
2007USDist LX72522 [Δ2007

§ 2518(1)(b)
Cir. 11
2007USDist LX72522 [Δ2007

§ 2518(1)(c)
Cir. 7
496F3d640Δ2007

§ 2518(3)(c)
Cir. 2
451FS2d532Δ2006

§ 2518(5)
Cir. 2
451FS2d536Δ2006

§ 2518(8)(a)
Cir. 2
451FS2d538Δ2006
Cir. 11
484F3d1317Δ2007
2007USDist LX72522 [Δ2007

EXHIBIT 6-9
(Continued)

§ 2518(10)(a)	§ 2520	§ 2703	§ 3005
Cir. 2 451FS2d523Δ2006 Cir. 11 2007USDist LX72522 [Δ2007	Cir. 1 495FS2d261Δ2007 i) 495FS2d265Δ2007 **§ 2702(c)(4)** Cir. 1 497FS2d123Δ2007	Cir. 11 2007USDist LX72522 [Δ2007 **§ 2707(a)** Cir. 1 495FS2d266Δ2007	Cir. 6 2007USDist LX72993 [Δ2007

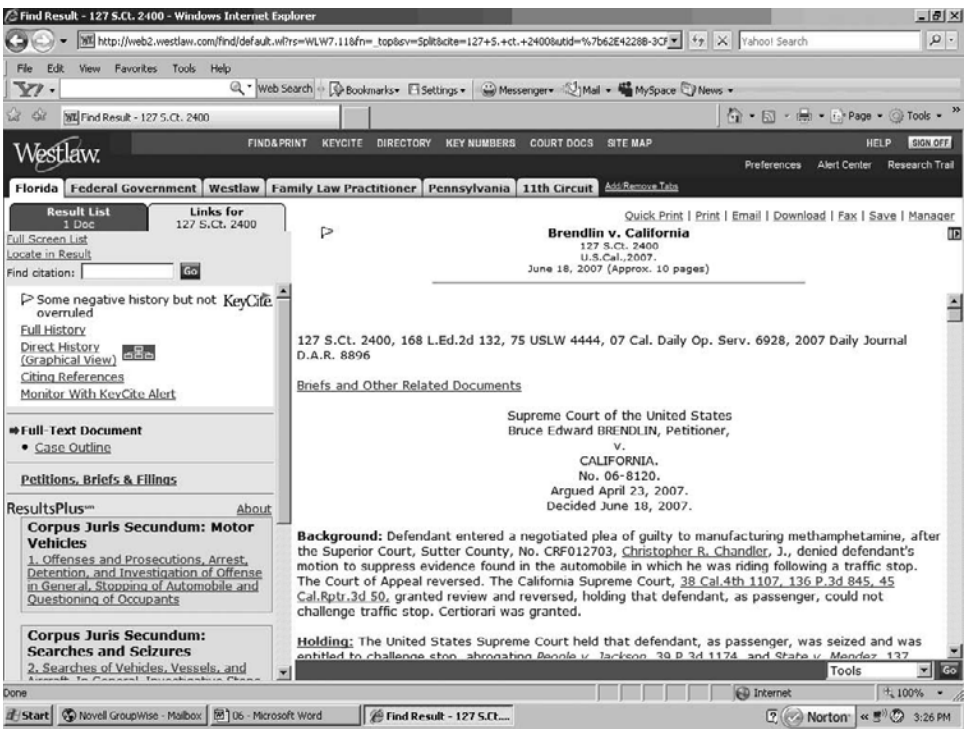


EXHIBIT 6-10
WESTLAW Screen of *Brendlin v. California. (Reprinted with permission of Thomson Reuters/West.)*

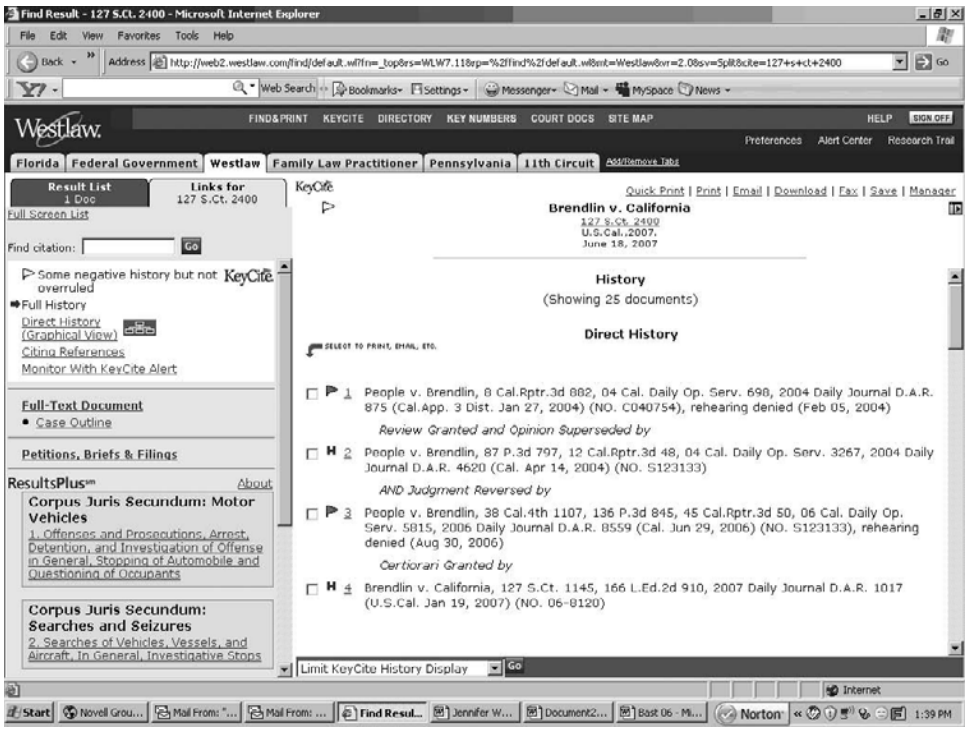
States Supreme Court. The trial court decision appears to be unreported, but the intermediate appellate opinion was reported. The screen shows that the Supreme Court of California granted review of *Brendlin* and then reversed, the United States Supreme Court granted certiorari and vacated. "Negative Indirect History" shows that a court in a later case distinguished the case from *Brendlin*.

Depth of treatment stars follow the "Negative Indirect History" case citation; the four depth of treatment stars indicate that the discussion of *Brendlin* was extensive, typically more than a page, and the case discussed headnotes 1, 4, and 5 of *Brendlin*.

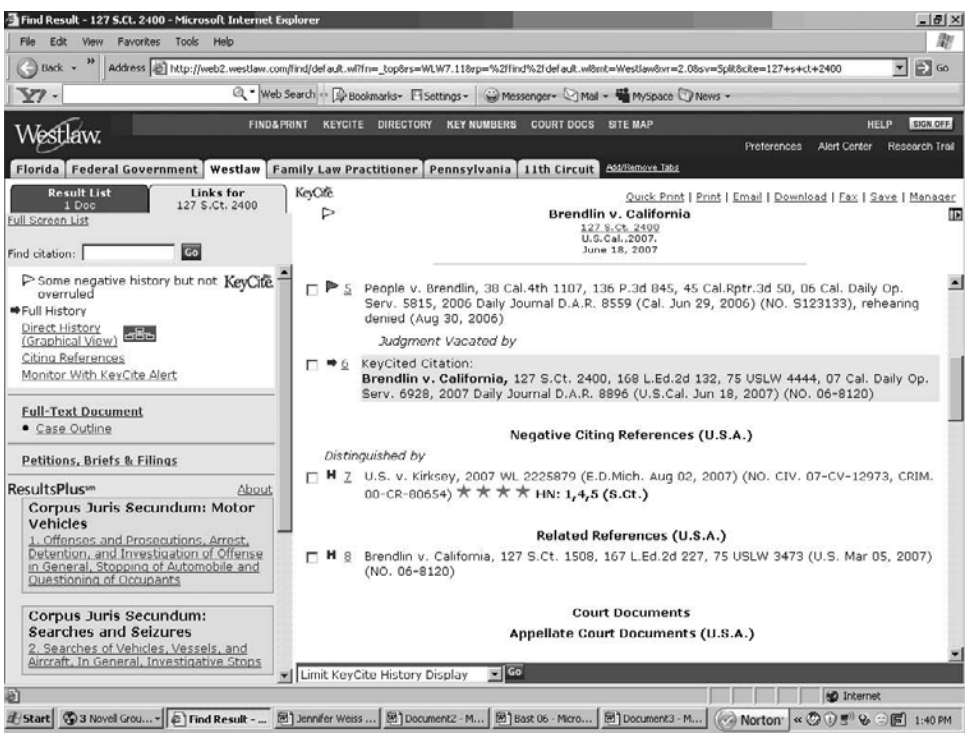
Clicking on the "Citing References" tab automatically brings up the documents that have cited to *Brendlin* (Exhibit 6-12). In contrast to the print *Shepard's*, KeyCite gives full citation information for all cases and secondary material. The citation information for cases that have cited the case being KeyCited includes the first page of the case and the page on which the KeyCited case is cited.

Thus, with KeyCite, citations concerning the history of the case are separated from citations to cases that have cited the case being KeyCited. Exhibit 6-11 shows cases

EXHIBIT 6-11 (A–B)
Full History Screen of *Brendlin*. *(Reprinted with permission of Thomson Reuters/West.)*



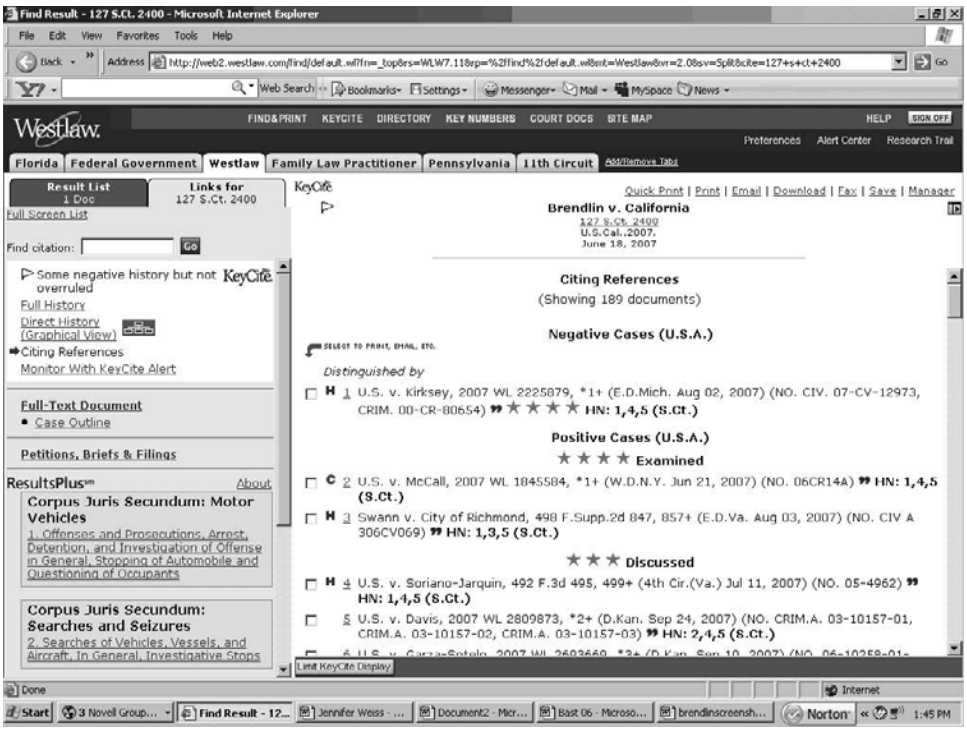
(A)



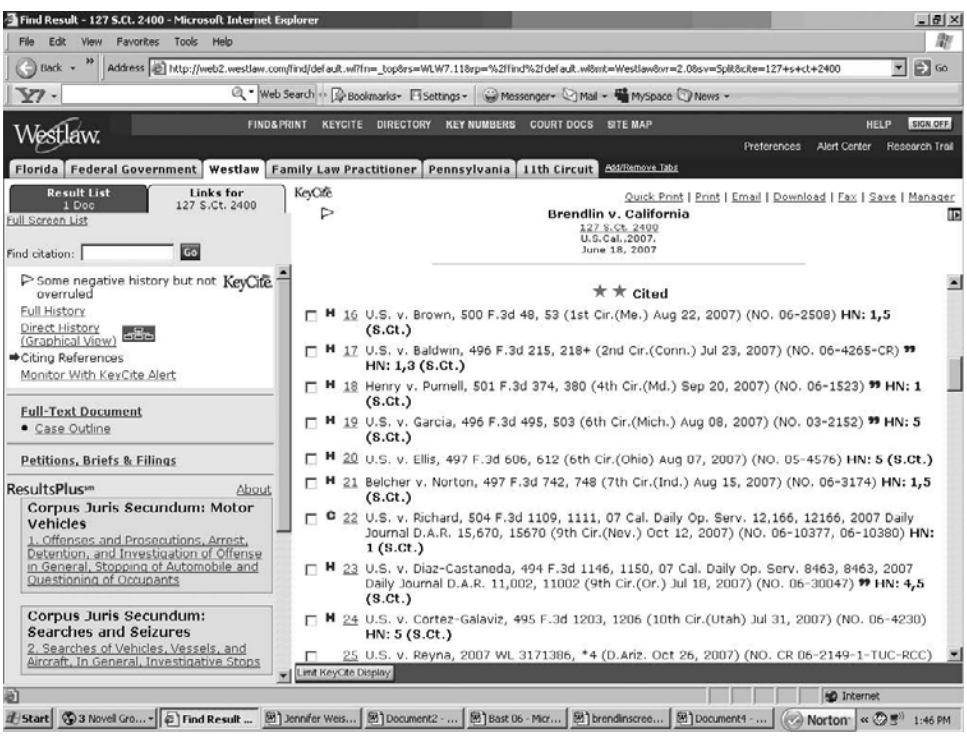
(B)

concerning the case history of *Brendlin*. Exhibit 6-12 shows a KeyCite screen containing cases citing to *Brendlin*.

"Citation References" materials are separated into several sections. Typical sections are "Negative Cases," "Positive Cases," "Administrative Materials," "Secondary Sources," and "Court Documents." As shown in Exhibit 6-12, *Brendlin* had one case listed under "Negative



(A)

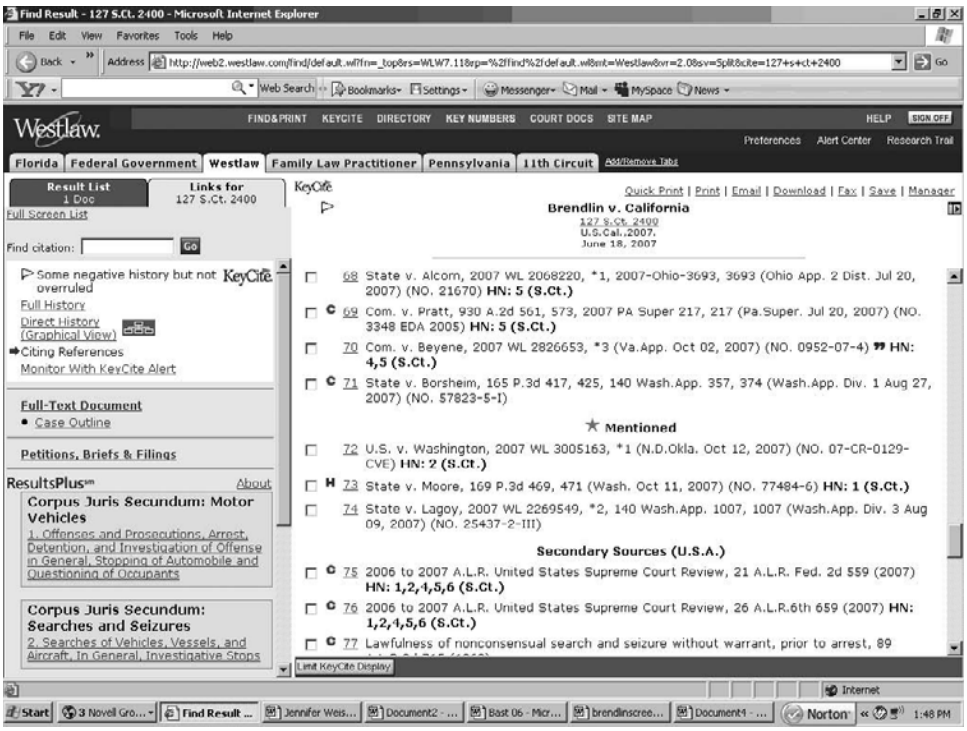


(B)

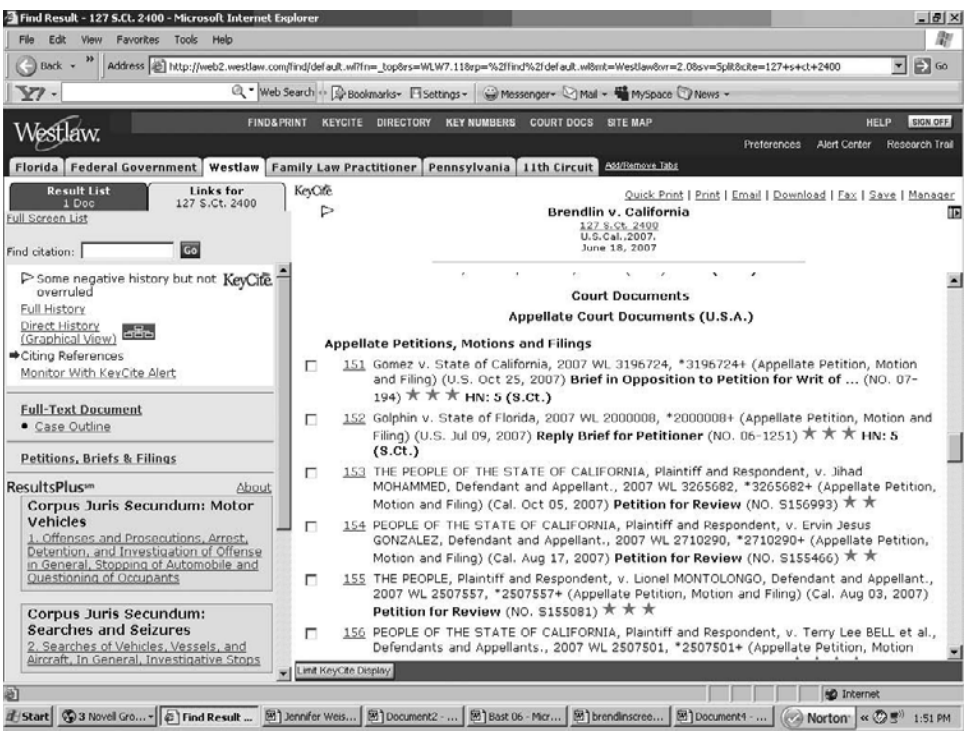
EXHIBIT 6-12 (A–D)
Selected screens from Citing References to *Brendlin*. *(Reprinted with permission of Thomson Reuters/West.)*

Cases," which is the same case that was listed in the Full History as distinguishing *Brendlin*. Below that, *Brendlin* has sections of "Positive Cases," "Secondary Sources," and "Court Documents." The "Positive Cases" section begins with the first screen of Exhibit 6-12, and the "Secondary Sources" and "Court Documents" sections follow.

EXHIBIT 6-12
(Continued)



(C)



(D)

depth of treatment stars
In Key Cite, each case found as having cited the case being KeyCited is identified by one to four stars. These stars indicate how extensively the case being KeyCited is discussed by the cases that cite it.

The positive cases citing *Brendlin* are grouped by the depth of discussion of *Brendlin* they contain by one to four **depth of treatment stars**. The cases containing the most in-depth discussion of the KeyCited case are listed before cases containing a briefer discussion of the KeyCited case. The cases with the fullest discussion of the case being KeyCited are marked "✶✶✶✶ Examined." A case in this category would include an in-depth discussion

of the KeyCited case, usually more than a page. The cases in which the KeyCited case is discussed are marked "✶✶✶ Discussed." A case in this category includes a substantial discussion of the KeyCited case, usually more than a paragraph but less than a page. The cases in which the KeyCited case is cited and discussed briefly are marked "✶✶ Cited." A case in this category includes a brief discussion of the KeyCited case, usually less than a paragraph. The cases that simply cite the KeyCited case are marked "✶ Mentioned." A double quotation mark indicates that the KeyCited case is quoted in the listed case.

Within each depth of treatment grouping, the cases are listed hierarchically, with United States Supreme Court cases preceding federal court of appeals cases, which precede federal district court cases, which precede state court cases. The federal court of appeals cases are listed in numerical order by circuit. State court cases are listed alphabetically by state.

Exhibit 6-12 shows the information for *Brendlin* retrieved by clicking the "Citing References" link. The information following "✶✶✶✶ Discussed" shows that two cases examined *Brendlin*. The first of the two cases discussed headnotes 1, 4, and 5 of *Brendlin*, the second case discussed headnotes 1, 3, and 5 of *Brendlin* and both cases quoted from *Brendlin*.

USING KEYCITE FOR STATUTES

KeyCite can also be used with statutes. When viewing a statute on WESTLAW, a red flag indicates that a section has been amended or repealed by a session law. A yellow flag indicates that pending legislation is available for a section. With KeyCite, citations concerning the history of the statute are separated from citations to cases and other materials that have cited the statute being KeyCited.

SUMMARY

- Citators allow the legal researcher to determine whether and where the authority found has been cited in any source.
- "Shepardizing" involves consulting *Shepard's* citators.
- The two reasons for consulting citators are to discover whether your authority is still good law and to locate more recent authority dealing with the same legal principle found in your authority.
- To Shepardize an authority, consult each volume of the appropriate *Shepard's* set to see whether your authority has been cited in any other source.
- Shepardizing needs to be done systematically or you may miss something.
- Check to determine that you are Shepardizing under the correct volume and series of the correct reporter and that you have consulted every applicable *Shepard's* volume.
- Consult the abbreviation tables at the beginning of each *Shepard's* volume to determine what the abbreviation stands for.
- Abbreviations in the left-hand margin of a column of *Shepard's* citations indicate whether an authority has been affirmed, reversed, or vacated.
- Other abbreviations indicate the treatment of the authority you are Shepardizing in other sources.
- *Shepard's* case citations are grouped by court: federal courts in descending order and then state court decisions arranged alphabetically.
- Shepardizing may also be done on LexisNexis, or a CD-ROM edition of *Shepard's*.
- WESTLAW uses KeyCite to perform the same function as performed by *Shepard's* on LexisNexis.

KEY TERMS

citators
depth of treatment stars
direct history
KeyCite
negative indirect history
Shepard's Citations
status flags

CYBERLAW EXERCISES

1. Shepard's home page is located at <http://law.lexisnexis.com/shepards>. Take the online tour. What are three material differences between online and print *Shepard's*?
2. WESTLAW's home page is located at <http://www.westlaw.com/>. The home page offers information on KeyCite. What is the difference between a yellow and a red status flag in the upper-left-hand corner of a case?

LEGAL RESEARCH ASSIGNMENT—CITATORS

1. What is the name of the *Shepard's* you would use to Shepardize decisions of the United States Supreme Court?
2. What is the name of the *Shepard's* you would use to Shepardize decisions of the United States District and Circuit Courts?
3. What is the name of the *Shepard's* you would use to Shepardize decisions of the state courts of your state?
4. The case found at 174 Fed. App'x. 798 went to the United States Supreme Court.
   a. Give the proper citation to the case in the federal circuit court.
   b. Give the proper citation to the case in the United States Supreme Court.
   c. Give the proper citation to the case in the federal circuit court, including subsequent history in the United States Supreme Court.
5. The case found at 191 Fed. App'x. 326 went to the United States Supreme Court.
   a. Give the proper citation to the case in the federal circuit court.
   b. Give the proper citation to the case in the United States Supreme Court.
   c. Give the proper citation to the case in the federal circuit court, including subsequent history in the United States Supreme Court.
6. The case found at 482 F.3d 790 went to the United States Supreme Court.
   a. Give the proper citation to the case in the federal circuit court.
   b. Give the proper citation to the case in the United States Supreme Court.
   c. Give the proper citation to the case in the federal district court, including subsequent history in the federal circuit court.
7. The case found at 418 F. Supp. 2d 962 went to the federal circuit court.
   a. Give the proper citation to the case in the federal district court.
   b. Give the proper citation to the case in the federal circuit court.
   c. Give the proper citation to the case in the federal district court, including subsequent history in the federal circuit court.
8. The case found at 374 F. Supp. 2d 758 later went to the federal circuit court and the United States Supreme Court.
   a. Give the proper citation to the case in the federal district court.
   b. Give the proper citation to the case in the federal circuit court.
   c. Give the proper citation to the case in the United States Supreme Court.
   d. Give the proper citation to the case in the federal district court, including subsequent history in the federal circuit court and the United States Supreme Court.
9. The case found at 411 F. Supp. 2d 212 later went to the federal circuit court and the United States Supreme Court.
   a. Give the proper citation to the case in the federal district court.
   b. Give the proper citation to the case in the federal circuit court.

c. Give the proper citation to the case in the United States Supreme Court.
d. Give the proper citation to the case in the federal district court, including subsequent history in the federal circuit court and the United States Supreme Court.

10. The case found at 448 F. Supp. 2d 1330 later went to the federal circuit court and the United States Supreme Court.
    a. Give the proper citation to the case in the federal district court.
    b. Give the proper citation to the case in the federal circuit court.
    c. Give the proper citation to the case in the United States Supreme Court.
    d. Give the proper citation to the case in the federal district court, including subsequent history in the federal circuit court and the United States Supreme Court.

11. The case found at 401 F. Supp. 2d 702 later went to the federal circuit court and the United States Supreme Court.
    a. Give the proper citation to the case in the federal district court.
    b. Give the proper citation to the case in the federal circuit court.
    c. Give the proper citation to the case in the United States Supreme Court.
    d. Give the proper citation to the case in the federal district court, including subsequent history in the federal circuit court and the United States Supreme Court.

12. The case found at 304 F. Supp. 2d 981 later went to the federal circuit court and the United States Supreme Court.
    a. Give the proper citation to the case in the federal district court.
    b. Give the proper citation to the case in the federal circuit court.
    c. Give the proper citation to the case in the United States Supreme Court.
    d. Give the proper citation to the case in the federal district court, including subsequent history in the federal circuit court and the United States Supreme Court.

13. Is *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) still good law? (In your answer state why or why not and give any applicable citation.)

14. Is *Thompson v. Immigration and Naturalization Service*, 375 U.S. 384 (1964) still good law? (In your answer state why or why not and give any applicable citation.)

15. Give the proper citation to the 2007 case that discussed *United States v. Washington*, 455 F.3d 824 (8th Cir. 2006).

16. Give the proper citation to a case showing whether *United States v. Turner*, 209 F.3d 1198 (10th Cir. 2000) was heard by the United States Supreme Court.

17. Give the proper citation to the 2003 case that dealt with the legal concept of headnote 2 of *Reyes-Garcia v. Rodriguez & Del Valle, Inc.*, 82 F.3d 11 (1st Cir. 1996).

18. Give the proper citation to the 2001 case that dealt with the legal concept of headnote 2 of *United States v. Turner*, 209 F.3d 1198 (10th Cir. 2000).

19. Give the proper citation to the 2007 case that quoted from and dealt with the legal concepts of headnotes 1 and 2 of *United States v. Washington*, 455 F.3d 824 (8th Cir. 2006).

20. Give the proper citation to the 2007 case that cited to and quoted from Alva v. Teen Help, 469 F.3d 946 (10th Cir. 2006) in a dissenting opinion.

21. Give the proper citation to the 2007 case that dealt with legal concepts of headnotes 9 and 12 of *United States v. McDonald*, 453 F.3d 958 (7th Cir. 2006).

22. Using *Shepard's United States Case Names Citator*, LexisNexis or WESTLAW, look up the 2007 United States Supreme Court case, *Kimbrough v. United States*, and give the proper citation to the full opinion of the Court.

23. Using Shepard's United States Case Names Citator, LexisNexis or WESTLAW, look up the 2007 United States Supreme Court case, Watson v. United States, and give the proper citation to the full opinion of the Court.

24. Using Shepard's United States Case Names Citator, LexisNexis or WESTLAW, look up the 2007 United States Supreme Court case, *Gall v. United States*, and give the proper citation to the full opinion of the Court.

25. Using Shepard's Federal Case Names Citator, LexisNexis or WESTLAW, look up the 2007 Seventh Circuit Court of Appeals case, *United States v. Patridge*, and give the proper citation to the full opinion of the Court.

DISCUSSION POINTS

1. What are the dangers of failing to use a citator when performing legal research?
2. How is a citator helpful in performing legal research?
3. What are the advantages of using an online citator over a print citator?
4. How soon will print citators disappear?
5. How do Shepard's Citators differ from KeyCite?

Student CD-ROM
For additional materials, please go to the CD in this book.

Online Companion™
For additional resources, please go to http://www.paralegal.delmar.cengage.com.

CHAPTER 7

Overview of the Research Process and Ethical Considerations

INTRODUCTION

This chapter is designed to provide you with an overview of the research process. Now that you have learned about the basic types of law books a legal researcher would use, it is time to discuss how to use them together and to explore basic research strategies. The chapter discusses considerations preliminary to beginning legal research, basic approaches to legal research, and the steps in the research process. The final section of the chapter discusses how inadequate legal research can result in an ethics violation.

Throughout the chapter, the Peak search and seizure problem from the following section will be used as an example.

GEORGE PEAK ILLUSTRATIVE FACT PATTERN

Imagine that you are a criminal defense attorney representing a college student arrested on federal criminal charges for drug possession. You will be researching several possible defenses for your client, George Peak.

George was riding with two other college students, Mark and Jesse Cape, returning to college after a weekend at home. George and the two brothers lived within a few blocks of one another and a family friend suggested that George catch a ride with them. Even though they lived close and attended the same college, George had never met the brothers before. Mark was driving south on I-95 towards Daytona Beach, with Jesse in the front seat and George in the back, when a police officer pulled over Mark's car. The officer said he had stopped the car because the driver's window was excessively tinted, making it impossible for the officer to see inside the car.

The officer stood at the window on the driver's side and asked for Mark's license and car registration. In addition, the officer asked Jesse and George for their names and birthdates. While Mark was retrieving the documents, the officer used a tint meter to measure whether the tint on the driver's window complied with Florida statutes. The officer announced that if the window tinting was any darker it would have been illegal; he claimed that the bright sun and difference in color between the driver's window and the windshield made him think that the tinting was excessively dark.

The officer returned Mark's license and car registration, wished them a nice day, and walked toward the patrol car. After a few steps, the officer turned back to Mark's car and

said, "You don't mind if I search your car and all containers therein, do you?" Mark stated, "I guess not." The officer asked the three students to wait in the patrol car while he searched Mark's car. Once in the back seat of the patrol car, George said, "Do you think that it was a good idea to let him search the car?" Jesse told Mark, "Why did you do that? He'll find the blunts."

The officer found the blunts, cigars hollowed out to contain marijuana, in the console between the front seats. In a panel of the front seat passenger's door, the officer found fifty hits of heroin packaged for distribution. Using names and birthdates, the officer used his handheld radio to run a check on the three students. The officer discovered an outstanding arrest warrant for Mark and Jesse on heroin distribution charges, but nothing on George. When the officer announced that he was arresting the three students, George protested, explaining that he barely knew Mark and Jesse and had no idea that the drugs were in the car. George pointed out that neither the console, which opened from the front, nor the front door panel was accessible to a backseat passenger.

After the three were arrested, they discovered that the police officer had tape-recorded their conversation in the back of the patrol car. George is worried because his innocent remark in the patrol car, "Do you think that it was a good idea to let him search the car?" would make someone believe that he knew about the illegal drugs.

The three are facing criminal charges for possession of illegal drugs in the United States District Court for the Middle District of Florida.

THE EIGHT STEPS OF LEGAL RESEARCH

Generally, legal research encompasses a series of steps, beginning with a research problem and ending with an answer to the problem. As a beginning legal researcher, you can use the research flowchart contained in this chapter to guide you. An abbreviated version of the research flowchart is found in Exhibit 7-1. Notice that the flowchart contains eight steps. An expanded version of each of the eight steps is included in Exhibits 7-5, 7-6, 7-8, 7-9, 7-10, 7-12, 7-13, and 7-14, located throughout this chapter.

The eight steps of legal research:

- step one requires you to gather all relevant factual information,
- step two requires you to identify relevant key words that you will use as search terms in indexes to secondary and primary sources,

EXHIBIT 7-1
Abbreviated Research Flowchart.

Step one—Gather and study all relevant factual information for your research problem.

Step two—Identify key terms.

Step three—Learn more about the area of law you are researching through secondary authority.

Step four—Locate primary authority.

Step five—Once you have found primary authority, use the primary authority to locate other primary authority.

Step six—Once you think you have found all relevant primary authority, review what you have found and check to determine whether you have updated all of your sources.

Step seven—Review what you have found and decide whether you are finished with your research.

Step eight—Evaluate what you have found and determine the answer to your research question.

- step three requires you to use secondary sources,
- steps four and five require you to find relevant primary sources,
- step six requires you to update your primary sources,
- step seven requires you to determine whether you have completed your research, and
- step eight requires you to formulate an answer to your research problem.

As you become more experienced in performing legal research, you may choose to vary the steps you pursue in answering your research problem.

Remember that your goal is to find all relevant authority, not just the authority favorable to you. You need to uncover adverse authority so you can formulate a defense to the adverse authority.

PRELIMINARY CONSIDERATIONS

GETTING ORGANIZED

Legal research can be time-consuming and details are important. To be successful, you must be organized, methodical, and thorough. One way to organize your research is to keep a research journal in which you record any relevant information you have found. A research journal may seem time-consuming at the beginning of your research. However, the time you spend writing in your research journal should help you focus your research. Refer to Exhibit 7-2 for tips on keeping a research journal. Reviewing your research journal from time to time will remind you what avenues of research you have pursued. Keep thinking of other key words, topics, and sources you could use and remember to check each of the primary and secondary sources you have learned about in this book.

It might be useful to use the Research Checklist (Exhibit 7-3) as part of, or in addition to, your research journal to make sure that your research is as thorough as possible.

Research Journal

Purposes:

1. To document your progress in researching a legal problem
2. To document the development of your factual and legal analysis of a legal problem

Procedure

1. Log in the date and time you spent on legal problem.
2. Note key terms, legal issues, citations, legal sources consulted, and other relevant information.
3. Describe how you spent your time (reading, researching, discussing, reflecting, writing) and how the understanding of the legal problem was affected.
4. Note any ideas you develop that may be useful in understanding the problem.
5. Pose questions frequently to keep your thinking focused.
6. Note what research avenues did and did not lead to answers.
7. Record the results of Shepardizing or KeyCiting.
8. Reread previous entries and comment on the facing page.

EXHIBIT 7-2
Research Journal.

EXHIBIT 7-3
Research Checklist.

Research Checklist

Name:

Re:

Research begun:

Research completed:

Key words:

Legal encyclopedia:

__ state

__ C.J.S.

__ Am. Jur. 2d

Topics checked:

_____ __ pocket part checked

_____ __ pocket part checked

_____ __ pocket part checked

_____ __ pocket part checked

American Law Reports:

Annotations checked:

_____ __ pocket part checked

_____ __ pocket part checked

_____ __ pocket part checked

Digests:

Topic and key number checked:

_____

_____

_____

_____

EXHIBIT 7-3
(Continued)

Statutes found:

_____ __ pocket part checked __ citator used

_____ __ pocket part checked __ citator used

_____ __ pocket part checked __ citator used

Cases found:

_____ __ citator used

_____ __ citator used

_____ __ citator used

_____ __ citator used

_____ __ citator used

Administrative regulations found:

_____ __ updated

_____ __ updated

_____ __ updated

Constitutional provisions found:

_____ __ updated

_____ __ updated

_____ __ updated

Court rules found:

_____ __ citator used

_____ __ citator used

_____ __ citator used

Other sources checked:

__ Legal periodicals

__ Restatements

__ Treatises

__ Other

Notes on other sources:

_____

_____

_____

_____

_____

_____

_____

JURISDICTION

jurisdiction
1. The geographical area within which a court (or a public official) has the right and power to operate. 2. The persons about whom and the subject matters about which a court has the right and power to make decisions that are legally binding.

A preliminary question to tackle is **jurisdiction,** i.e., whether federal, state, or local law will likely govern your research problem. A research problem may be governed by the law of more than one jurisdiction. The researcher is hoping to find mandatory authority, but may have to rely on persuasive authority if there is no mandatory authority on point.

For example, in the George Peak problem, George and the two brothers are facing federal illegal drug charges. Thus, federal law governs. In addition, a researcher would research the Florida statute that was the basis for the officer stopping the car. It does not appear from the facts given that local law is applicable.

CURRENCY

currency
The principle that a legal source is authoritative as of the date of the research.

Currency is critical in legal research. Each source should be updated as you use it, and any sources you intend to use as authority should be updated at the end of your research. Updating includes checking both the hardbound volume and the pocket part, if performing your research in print sources, and using a citator to determine if your source is good law. Research should be updated again if there is a time lag between the completion of your research and the time you use the results of your research. If you have updated your sources as you have gone along, you only need update your authority from the date of your last update.

THREE BASIC APPROACHES TO LEGAL RESEARCH

There are at least three approaches to the research process, depending on the amount of knowledge you possess concerning the areas of law involved in your research problem and depending on whether you are starting with a known primary source (Exhibit 7-4). The three approaches to the research process are the overview approach, the topic approach, and the known primary source approach.

OVERVIEW APPROACH: LEARNING ABOUT THE GENERAL TOPIC

If you have little or no knowledge about the areas of law you are researching, you may want to begin the research process in secondary sources to gain a basic understanding of the areas of law. The secondary sources should give you an overview of the areas of law related to your legal question. Your background reading may help you focus your later research and help you generate more key terms to use.

TOPIC APPROACH: LEARNING ABOUT THE GENERAL TOPIC

The topic approach differs from the overview approach in that someone pursuing the topic approach narrows the scope of research at the outset to a single topic. As described in the following paragraphs, the topic approach can be pursued beginning either in primary sources or secondary sources. The danger with focusing your research early on is that you may miss something in another area of law.

If you have knowledge about the areas of law you are researching, you may decide to begin the research process in primary sources to quickly locate relevant primary sources. If searching for case law, you might begin your research by examining the outline of a

EXHIBIT 7-4
Three Approaches to the Research Process.

The three approaches to the research process:
1. Overview approach
2. Topic approach
3. Known primary source approach

particular topic in a digest. If searching for statutes or administrative regulations, you might begin your research in the index to those statutes or regulations.

A researcher pursuing the topic approach in primary sources skips from step two to step four, omitting background research in secondary sources.

Another option for the knowledgeable researcher is to perform focused research in secondary sources. Even a knowledgeable researcher would be glad to quickly locate a law review or legal periodical article on point. The article usually saves the researcher time by summarizing the law in the area and citing relevant authority. The researcher can pull the cited authority, read it, update it, and pursue another avenue of research.

A researcher pursuing the topic approach in secondary sources follows all eight steps in the research process, but may not explore the secondary sources as thoroughly as someone pursuing the overview approach.

KNOWN PRIMARY SOURCE APPROACH: STARTING FROM A PRIMARY SOURCE YOU HAVE

The third approach is the known primary source approach. Sometimes you are starting with a known primary source. Read the primary source carefully and then explore links to other research tools.

A researcher pursuing the topic approach in primary sources skips from step two to step four, omitting background research in secondary sources.

STEP ONE: GATHERING INFORMATION

The length of time you spend researching in the law library will probably be shortened by the time you spend organizing and gathering information beforehand. If you start researching without gathering all relevant information, you may spend hours researching a question that could have been answered by reviewing pertinent documents or gathering more facts.

Thus, the first step in the legal research process is to gather and study all relevant factual information pertaining to your research problem (Exhibit 7-5). In all likelihood, someone gave you some information concerning the research problem. Exhibit 7-5 includes examples of sources of relevant information. If you brainstorm, you might determine other sources of relevant information.

A warning is in order here. Unless you are licensed to practice law, you are performing tasks, like gathering information, under the supervision of an attorney. You may not offer legal advice and must not give the impression that you are licensed to practice law. Hold this in mind when gathering facts.

If you were given the assignment to research the George Peak search and seizure problem, you would start by reviewing the information you have. This means that you

Research Flowchart

Step one: Gather and study all relevant factual information for your research problem. Sources of relevant factual information include:

- statements of witnesses and other persons who know about the incident
- documents
- computer data
- videotapes
- tangible items

EXHIBIT 7-5
Step One: Gathering Research.

would carefully read the George Peak illustrative fact pattern contained in the second section of this chapter. Then you would gather all other relevant information. If possible, you would talk to George, Mark, Jesse, the officer, and anyone else who might have information. Gather any documents related to the incident. Any reports concerning the incident would be important. The incident may have been videotaped from the patrol car. If so, it would be extremely important to obtain a copy of the videotape.

Once you have gathered all the relevant information, it is time to move on to step two and identify key terms.

STEP TWO: IDENTIFYING KEY TERMS

key terms
Words central to a legal research problem that can be used by the legal researcher to begin researching in print indexes or to formulate a query in computer-assisted legal research.

The next step is to review all the information you have gathered and use it to identify **key terms** and issues (Exhibit 7-6). The key terms can be used to start your research in the indexes to secondary or primary sources. From the search and seizure problem you might make a list of the following terms: *search and seizure, car, Fourth Amendment, tape recording*, and *arrest*. Because the indexes you consult may use words other than the ones you have identified, brainstorm to identify related words. A legal thesaurus might be helpful at this point. From brainstorming and consulting a legal thesaurus, you might think of the terms *vehicle, automobile, taping, exclusionary rule*, and *probable cause*. As you progress in your research, add any other key words you find to your list.

Identification of key terms is a very important step in your research. Perhaps because of its importance, this section discusses three methods to identify key terms. Your professor may favor one method of identifying key terms over the other two, in which case that is the method with which you should begin. As you develop expertise in performing legal research, you may decide which of the three methods would be the most productive.

The explanation of digests in Chapter 3 introduced two lists of elements that could profitably be used to generate key words; the key words could be used to access information in the descriptive word indexes of the digests. These lists can also be used at a preliminary stage in your research to generate key terms. The lists are the basis for the first two methods for identifying key terms and are more fully explained in the following two sections.

IDENTIFICATION OF KEY TERMS: PARTIES, PLACES, ACTS OR OMISSIONS, DEFENSE, AND RELIEF

West suggested the first list:

1. the *parties* involved;
2. the *places* where the facts arose, and the *objects* or *things* involved;
3. the *acts* or *omissions* that form the *basis of action* or *issue*;
4. the *defense* to the action or issue; and
5. the *relief* sought.

EXHIBIT 7-6
Step Two: Identifying Key Terms.

Research Flowchart

Step two: Identify key terms by brainstorming and using one or more of the methods described in this chapter for identifying key terms. The three methods described are to:

1. Identify key terms by focusing on parties, places, acts or omissions, defense, and relief;
2. Identify key terms by focusing on things, acts, persons, and places; and
3. Identify key terms by using indexes and tables of contents and the cartwheel.

IDENTIFICATION OF KEY TERMS: THINGS, ACTS, PERSONS, AND PLACES

A similar set of elements was suggested by Lawyers Cooperative Publishing Company (now a part of West):

1. the *things* involved in the case,
2. the *acts* involved in the case,
3. the *persons* involved in the case, and
4. the *places* where the facts arose.

Notice that both lists contain the same four elements:

1. parties or persons,
2. place,
3. objects or things, and
4. acts or omissions.

In addition, the West list contains the defense and the relief sought.

The following explanation examines the George Peak case in terms of these two methods of identifying key terms.

PARTIES OR PERSONS

The persons involved are three private individuals—George Peak, Mark Cape, and Jesse Cape—and the police officer.

PLACE

The case arose along the interstate highway. George was first located in the car Mark was driving and then conversed with Mark and Jesse in the rear seat of the patrol car.

OBJECTS OR THINGS

The officer used a tape recorder to record George, Mark, and Jesse's conversation in the rear seat of the patrol car. The officer searched their car and found illegal drugs.

ACTS OR OMISSIONS FORMING THE BASIS OF THE ACTION OR ISSUE

The officer stopped Mark for excessive tinting on the car windows; however, the officer discovered that the tinting was within the allowable limits. The officer searched the car on Mark's consent. The officer secretly tape-recorded George, Mark, and Jesse's conversation in the rear seat of the patrol car.

DEFENSE

If the evidence against George, the drugs and the tape-recorded conversation, were suppressed, the criminal charges would have to be dropped for lack of evidence.

RELIEF

George would like the criminal charges against him dropped.

KEY TERMS

Some key words relating to the stop and search might be:

> Search and seizure, suppress, evidence, traffic violation, car, highway, police officer, drugs.
>
> *Also think of synonyms:*
>
> automobile, vehicle, interstate, law enforcement officer, custody.

Some key words relating to the tape recording of the conversation might be:

Patrol car, privacy, conversation, tape recorder, secret recording, evidence.

Also think of synonyms:

police car, communication, surreptitious, tape.

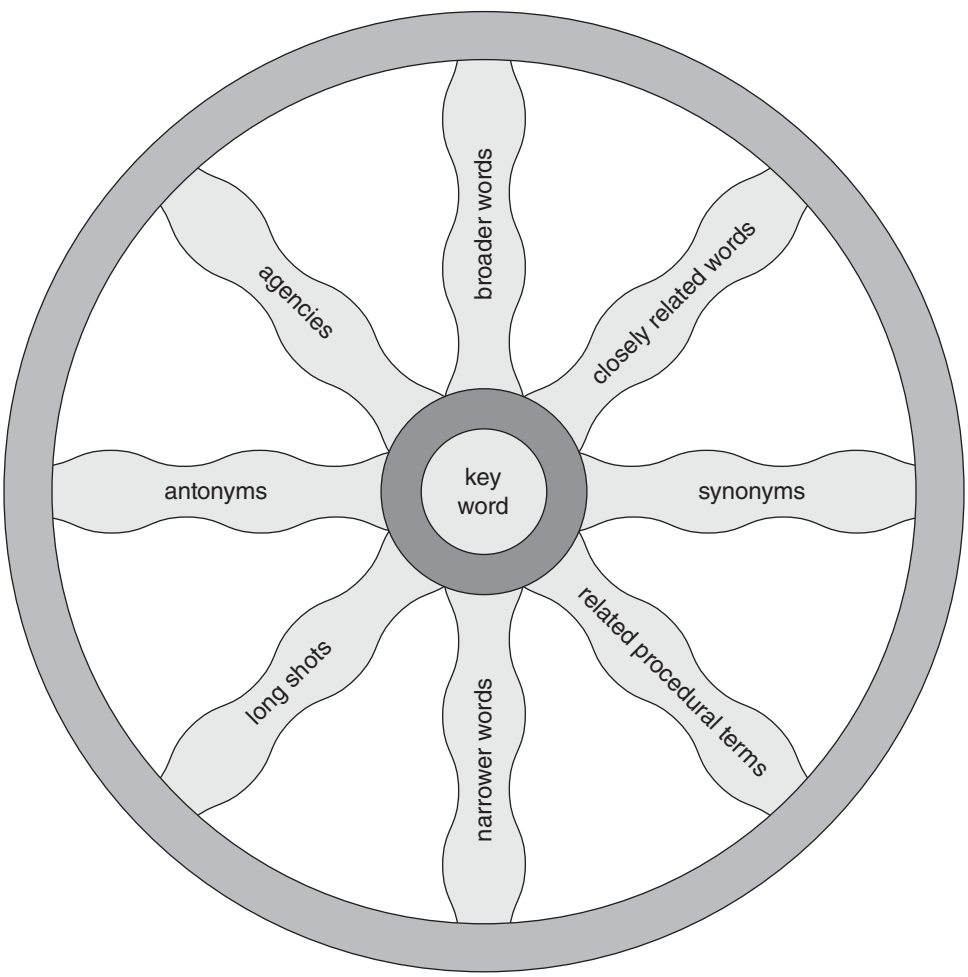
IDENTIFICATION OF KEY TERMS BY USING INDEXES AND TABLES OF CONTENTS: THE CARTWHEEL

The cartwheel is the third method for generating key terms. This method differs from the other two by requiring the researcher to use indexes to law books to identify key terms. The method is called the cartwheel because the visual depiction of the steps taken by the researcher resembles a cartwheel (see Exhibit 7-7). The cartwheel has a hub and eight spokes.

Place the word you think will be a key word at the hub of the cartwheel. Each of the eight spokes represents another category of words found in an index. The eight categories are:

1. broader words
2. narrower words
3. antonyms
4. synonyms
5. closely related words
6. long shots

EXHIBIT 7-7
The Cartwheel Method of Identifying Key Terms.



7. agencies
8. related procedural terms

To employ the cartwheel method, the researcher looks up the word *conversation* in the index and table of contents of several sets of law books. Law books that might be profitable to consult include legal encyclopedias, digests, statutory codes, treatises, and *Index to Legal Periodicals*. When consulting various indexes, keep in mind the eight spokes of the cartwheel and take note of words that fall within the various categories. Those words the researcher has discovered can be looked up in the various indexes to generate additional words. If the researcher fails to find any reference to a word being looked up, the researcher can look up another related word or look up the word in another index.

The following are words that the researcher might generate using the cartwheel method to explore the term *conversation*.

Broader words—debate, meeting, verbal exchange, evidence

Narrower words—soliloquy, speech, address, confession, incriminating statement

Antonyms—silence, body language, implied communication, public meeting, actions

Synonyms—exchange, communication, talk

Closely related words—private, privacy, expectation of privacy

Long shots—taping, tape recording, interception

Agencies—law enforcement agency, police department, sheriff's office, highway patrol

Related procedural terms—suppression, motion to suppress, dismissal of criminal charges, admissibility of evidence

After identifying key terms, it is time to proceed to step three.

STEP THREE: LEARN MORE ABOUT THE AREA OF LAW YOU ARE RESEARCHING THROUGH SECONDARY AUTHORITY

If you know little or nothing about the area of law involved in the problem you are researching, a good beginning point in your research is to read a textual explanation of that area of the law. Legal encyclopedias and *American Law Reports* are the two most widely available sources giving you this type of information. Check to see whether your library has any looseleaf services that cover the area you are researching. Use the key words you have identified to locate relevant topics in the legal encyclopedias, relevant annotations in *American Law Reports*, and relevant materials in looseleaf services (Exhibit 7-8).

By looking in the index to *American Jurisprudence 2d* and *American Law Reports*, someone researching the search and seizure problem would locate the following materials:

68 Am. Jur. 2d Searches and Seizures §§ 234–237 (2000 & Supp. 2008).

Chapter 3 contains sample pages from the *American Jurisprudence* topic.

Law review and legal periodical articles may give you even more specific information. ***Index to Legal Periodicals*** is a good source to use in locating these articles either by subject or by author. Familiarize yourself with other resources available in your library, including treatises and **hornbooks.** A legal textbook covering the area of law you are researching may be another good place to start. Appendix A contains a textual explanation of some aspects of search and seizure and the exclusionary rule, entitled "Search and Seizure and the Exclusionary Rule." This information was adapted from a criminal law textbook.

Index to Legal Periodicals
A print index used to locate periodicals and law reviews by either subject or author.

hornbooks
Books summarizing the basic principles of one legal subject, usually for law students.

EXHIBIT 7-8
Step Three: Researching Secondary Authority.

Research Flowchart

Step three: Learn more about the area of law you are researching through:

- legal encyclopedias
- ALR annotations
- looseleaf services
- treatises
- hornbooks
- textbooks
- law review articles
- articles in legal periodicals

Note the following in your learning journal:

- citations to relevant authority
- possible issues
- applicable jurisdiction (federal, state, or local) and make a checklist of publications to review.

As you read about the topic you are researching, note in your learning journal or the research journal anything that may be helpful to you later [citations to relevant authority, possible issues, and applicable jurisdiction (federal, state, or local)]. Also make a checklist of the publications to review. Make sure you list primary and secondary sources and finding tools for federal, state, and local jurisdictions.

This overview may help you familiarize yourself with the key terms used in the areas of law you will be researching. Add these terms to the list of key terms you will use in further research. For example, the terms *interception* and *oral communication* are key terms for the hypothetical problem involving George Peak. The overview also may give you a preliminary idea of the scope of your research. For the hypothetical problem, you might find that you will be researching federal rather than state law. The key to determining the legitimacy of the car stop and George's arrest might be case law interpretations of the Fourth Amendment. The key to determining the legitimacy of the officer tape recording George, Mark, and Jesse's conversation might be the federal communications statutes and case law interpretations of those statutes. The hypothetical does not seem to raise issues governed by administrative regulations.

Now that you have some background knowledge on the George Peak problem, proceed to step 4.

STEP FOUR: LOCATING PRIMARY AUTHORITY

Armed with general knowledge about search and seizure and civil forfeiture, you are ready to locate primary sources (Exhibit 7-9). Often, the hardest part of the research process is locating the first piece of relevant information. Once you locate the first piece of relevant information, use some of the techniques that follow to move from that information to more relevant information.

There is no one right place to start to locate primary sources. You may first want to locate primary sources by using the citations noted in your learning journal. Most legal sources have an index. Part of the research process involves researching the key terms you have developed in the appropriate index. If you think the problem involves

Research Flowchart

Step four: Locate primary authority by:

- using citations found in secondary authority;
- using indexes to find relevant statutes, constitutional provisions, administrative regulations and court rules; and
- using digests to find relevant cases.

EXHIBIT 7-9
Step Four: Locating Primary Authority.

a statute, constitution, administrative regulation, or court rule, consult the appropriate index. While reporters are not accompanied by indexes, digests function as indexes for reporters.

For example, you would find the text to the Fourth Amendment by looking in the index to the Constitution under "search and seizure" (see Appendix M). You would find the federal eavesdropping and wiretapping statutes (18 U.S.C. §§ 2510–2521) by looking in the index to the *United States Code* or an annotated code under "wiretapping" (see Appendix L); you would find the federal court rule governing motions to suppress (Rule 12) by looking in the index to the *Federal Rules of Criminal Procedure* under "motion to suppress."

Consult a digest to find relevant cases. Locate cases in the digest either by consulting the Descriptive-Word Indexes (located at the end of the digest set) or reviewing a topic outline (printed at the beginning of each topic). When you locate a primary source, use the primary source to locate other primary sources. For example, you could look in the descriptive word index to *Federal Practice Digest, Fourth Series* under "search and seizure." The index would tell you that there is a digest topic "Searches and Seizures." You could look at the outline at the beginning of the topic to identify relevant key numbers.

You have found some primary authority that might answer your legal problem. Now it is time to proceed to step five.

STEP FIVE: LOCATING OTHER PRIMARY AUTHORITY

If the legal problem is simple, perhaps answered by a statute or court rule, then a single source may be sufficient. However, a more complex legal problem usually calls for additional legal research to flesh out the answer to the problem (Exhibit 7-10).

Research Flowchart

Step five: Once you have found primary authority, use the primary authority to locate other primary authority.

If you have a statute or constitutional provision:

- pull any primary authority referenced in the statute or constitutional provision, and
- consult an annotated code or constitution.

If you have a relevant case:

- pull any cases referenced in the known case,
- use the headnotes of the known case to locate other cases in the digest, and
- use a citator.

EXHIBIT 7-10
Step Five: Locating Other Primary Authority.

To locate other primary authority, it is helpful to understand the relationship among primary sources, secondary sources, and finding tools. In the preceding chapters, legal research tools (primary sources, secondary sources, and finding tools) have been discussed individually. When researching a legal problem, you must combine their use.

Research tools are linked to each other in a variety of different ways. Information in one research tool can lead to more information in the same or another research tool. Note links to other research tools and follow up the links as you move through the research process. Exhibit 7-11 contains research tips based on the relationship among the various research tools. This section more fully explains the relationship among the various research tools.

What do you do after you find a relevant statutory or constitutional provision? Once you find a relevant statutory or constitutional provision, there are three ways to use the provision to locate other primary authority. First, read the provision carefully and note any cross-references to other statutory or constitutional authority. Then, pull the authority referenced. Also examine how the provision fits with other statutory or constitutional provisions. You may find definitions of terms or related statutory provisions.

The second way is to consult an annotated code or constitution. Locate the applicable statute or constitutional provision and begin reading the references following the provision. The references may refer you to related constitutional provisions, statutes, and administrative regulations as well as digest topics, legal encyclopedia topics, and law review articles. Then, read the case summaries. If a reference or case summary involves

EXHIBIT 7-11
Relationship among Research Tools.

1. Look for citations to primary sources in footnotes and pocket parts of legal encyclopedias, *American Law Reports* annotations, and other secondary sources. Note the citations that are potentially relevant and look up the source corresponding to each citation.
2. While reading primary sources, note the citations that are potentially relevant and look up the source corresponding to each citation.
3. While reading cases, note the digest information from relevant headnotes and use that information to locate summaries of relevant cases in the appropriate digest.
4. Use a citator to ascertain whether the case is still good authority and to find more recent relevant cases.
5. In an annotated statutory code, read the research references following a relevant statute to find references to other primary sources, secondary sources, and digests.
6. Read the case summaries following a relevant annotated statute to find relevant cases.
7. Use a citator to ascertain whether the statute is still good authority and to find relevant cases.
8. In an annotated constitution, read the research references following a relevant constitutional provision to find references to other primary sources, secondary sources, and digests.
9. Read the case summaries following a relevant constitutional provision to find relevant cases.
10. Use a citator to ascertain whether the constitutional provision is still good authority and to find relevant cases.
11. In annotated court rules, read the research references following a relevant court rule to find references to other primary sources, secondary sources, and digests.
12. Read the case summaries following a relevant court rule to find relevant cases.
13. Use a citator to ascertain whether the court rule is still good authority and to find relevant cases.

the same question you are researching, note the citation, pull the authority, and read it. A third way to locate other authority is to Shepardize or KeyCite your constitutional or statutory provision.

What do you do after you find a relevant case? Once you find a relevant case, there are three ways to use the case to locate other cases. The first way is to read the case and note the citations to earlier cases cited in it. Then, pull and read any of those earlier cases that seem helpful. A second way is to make note of relevant headnotes from the case, locate the same digest topic in the digest, and read the digest abstracts to locate more cases. A third way of locating cases is to Shepardize or KeyCite the case. Using citators will give you citations to later cases citing the case. The case also may cite other primary sources such as statutes, constitutional provisions, court rules, or administrative regulations.

Use citations in the footnotes and pocket parts of legal encyclopedias, ALR annotations, and other secondary sources to lead you to relevant cases and statutes.

Once you find a relevant case, read it, noting internal citations to other primary sources, including other cases, statutes, court rules, and administrative regulations. Note the digest topic and number from any relevant headnotes and use that information to locate summaries of relevant cases under the same topic and number of the appropriate digest. Use a citator to ascertain whether the case is still good authority and to find more recent relevant cases.

Once you find a relevant statute, read it, noting internal citations to other statutes. Carefully read the research references, following the statute for citations to related constitutional provisions, statutes, administrative regulations, secondary sources, and digest topics. Read the case summaries to find relevant cases. Do not forget to check the pocket part to the volume and any interim pamphlets. Use a citator to double-check the status of the statute and to find relevant cases.

Once you find a relevant constitutional provision, locate it in an annotated code. Carefully read the research references, following the provision for citations to related constitutional provisions, statutes, administrative regulations, secondary sources, and digest topics. Read the case summaries to find relevant cases. Do not forget to check the pocket part to the volume and any interim pamphlets. You probably do not need to use a citator to check the status of a provision from the United States Constitution, but do so for a state constitutional provision. Using a citator will allow you to find relevant cases.

Now, continue to step six.

STEP SIX: REVIEWING FOUND SOURCES AND UPDATING

Legal research involves discovering what the law is and how it will affect the client's case. Your goal in legal research is to find all applicable constitutional provisions, statutes, court rules, and administrative regulations. As far as case law is concerned, your goal is to find cases that constitute mandatory authority; if there is no mandatory authority, you are searching for cases that constitute persuasive authority. Where primary authority is unavailable, you may look to secondary sources. Certain types of secondary sources, such as restatements, law review articles, and well-respected treatises, generally carry more weight than other secondary sources and may be highly persuasive.

Step six requires you to evaluate what you have found thus far and determine which sources need to be updated by checking any applicable pocket parts and using a citator to ascertain that your primary sources are still good law (Exhibit 7-12). Once you have finished this, you may continue to step seven.

EXHIBIT 7-12
Step Six: Reviewing Found Sources and Updating.

Research Flowchart

Step six: Once you think you have found all relevant primary authority, review what you have found and check to determine whether you have updated all of your sources.

If you have a statute or constitutional provision:

1. Double-check to ascertain that you have the most current version of the statute or constitutional provision. If researching in print volumes, check hardbound volumes, pocket parts, advance sheets, and session law services. If researching online, check to determine whether the source has been amended, repealed, or found to be unconstitutional.
2. Use a citator to determine whether the source is still good law. Research any references in the citator indicating a change in the law or any relevant case law interpretations.

If you have a relevant case:

1. Analyze how much of an impact the case has on your research. Note the year of the decision, the court authoring the decision, and whether the case is mandatory or persuasive authority.
2. Use a citator to determine whether the source is still good law. Research any references in the citator indicating any relevant case law interpretations.

STEP SEVEN: DECIDING WHETHER YOU ARE FINISHED WITH YOUR RESEARCH

Your research process must be as efficient as possible to save you unnecessary wasted time and limit the client's fees; at the same time, the research must be as thorough as possible. You may have a limited amount of time to research a particular issue because you must meet a filing deadline. Your office may have quoted the client a certain amount in attorneys' fees.

When are you finished with your research? You are probably finished when you have checked each of the main primary and secondary sources and you keep finding the same authorities (Exhibit 7-13). Before you stop, double-check to make sure you have updated any authorities you intend to use by using a citator and follow any other avenues of research suggested by the information you obtain from the citator.

Once you have decided that you have finished your research, it is time to proceed to step 8.

STEP EIGHT: EVALUATE WHAT YOU HAVE FOUND AND DETERMINE THE ANSWER TO YOUR RESEARCH QUESTION

Recall that what started you on the process of legal research was the legal problem that had been presented to you. Once you have completed finding your sources, you must critically evaluate them and formulate an answer to your research problem (Exhibit 7-14).

EXHIBIT 7-13
Step Seven: Deciding Whether You Are Finished with Your Research.

Research Flowchart

Step seven: Review what you have found and decide whether you are finished with your research.

1. Determine if there is any type of primary authority you have not researched and whether you need to do so.
2. Determine if there is any type of secondary authority you have not researched and whether you need to do so.
3. Use a citator to update any additional primary source you discover.

Research Flowchart

Step eight: Evaluate what you have found and determine the answer to your research question.

EXHIBIT 7-14
Step Eight: Determining the Answer to Your Research Question.

Do not be surprised if your research does not turn up a clear-cut answer to your research problem. You will likely be disappointed if you were expecting to find a case with facts identical to your legal problem. (This is referred to as a case on all fours.) The most you may be able to find is a case with similar facts or a statute that appears to apply to your legal problem. Your research might discover a conflict in authorities, in which case you might have to predict which line of reasoning a judge may follow. You might not find primary sources that are mandatory in the jurisdiction if the problem is of first impression. (Something is of first impression if it presents a novel fact pattern.) You may have found primary sources from sister jurisdictions that you can use as persuasive authority.

You may be asked to summarize the results of your research in a document called an office memo. If so, see Chapter 13 for a detailed explanation of writing the office memo.

INADEQUATE LEGAL RESEARCH AS AN ETHICS VIOLATION

Besides causing the client problems, the lawyer can be disciplined or disbarred under state lawyer ethics rules that require adequate legal research. In addition, the lawyer must supervise non-lawyer assistants and may be held responsible for the actions of the non-lawyer assistants. Thus, a lawyer may be held responsible if a paralegal was given the responsibility of performing legal research and failed to adequately research the law.

Each state has its own lawyer ethics rules required to be followed by lawyers admitted to practice law in the state. Many states, such as Maryland, have lawyer ethics rules patterned on the American Bar Association's *Model Rules of Professional Conduct*. Rule 1.1 of the Maryland Rules of Professional Conduct generally describes the type of representation the lawyer must provide the client. Rule 1.1 of the Maryland Rules of Professional Conduct states:

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Incompetence may mean inadequate legal research or poor writing skills. Often, an attorney who violated Rule 1.1 because of inadequate research may have problems complying with Rule 1.3. Rule 1.3 requires the attorney to perform in a timely manner. Rule 1.3 of the Maryland Rules of Professional Conduct states:

Rule 1.3 Diligence

A lawyer shall shall act with reasonable diligence and promptness in representing a client.

In 2005, the Court of Appeals of Maryland (the Maryland state court of last resort) decided a case involving Charles M. James, III, who had been accused of violating a number of Maryland ethics rules including Rules 1.1 and 1.3. James represented

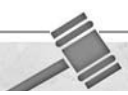
Mr. Kazim who wanted to sue Mr. Fleckinger because Fleckinger allegedly had an affair with Kazim's wife, which caused the Kazims to divorce. James was planning to sue Fleckinger for adultery, but failed to discover that there was no cause of action for adultery, and James failed to tell Kazim that adultery could not be the basis of a lawsuit. The appellate court stated:

> Essentially, James argues that violation of the criminal statute prohibiting adultery . . . is in and of itself a cause of action somehow related to the negligence and intentional infliction of emotional distress claims. However, even *cursory* research on Mr. James's part would have revealed that in *Doe v. Doe*, 358 Md. 113, 747 A.2d 617 (2000), Judge Eldridge, speaking for this Court, emphasized that, "This Court decided twenty years ago that public policy would not allow tort damages based upon adultery. *See Kline v. Ansell*, 287 Md. 585, 414 A.2d 929 (1980). That decision should not be ignored simply because the plaintiff has employed different labels and named a different defendant."

Attorney Grievance Com'n of Maryland v. James, 870 A.2d 229, 240–41 (Md. 2005).

The court disbarred James for violating Rules 1.1 and 1.3 and for irregularities in James' dealing with client monies entrusted to James. Other cases and short passages illustrating incompetent legal representation caused by inadequate research and writing are included at various points in this book.

In *Idaho State Bar v. Tway*, the Idaho Supreme Court suspended Tway for five years for various acts of misconduct, including Tway's failure to file the client's civil rights case within the statute of limitations. Tway did minimal legal research and found a 1981 case stating that the statute of limitations was three years. Tway failed to update the case by using a citator. (Use of citators is explained in Chapter 6.) Updating the 1981 case would have shown that the Idaho Supreme Court decided in 1986 that civil rights cases are subject to a two-year statute of limitations.



YOU BE THE JUDGE

What would you do if an attorney failed to articulate a legal theory, perhaps because the attorney's legal research was inadequate?

In reaching your decision, consider the following alternatives:

- You could dismiss the case.
- You could perform the necessary legal research and, in your opinion, roundly chastise the attorney for failing to adequately research the law.

To see how two federal courts dealt with inadequate legal research, see *Bradshaw v. Unity Marine Corporation, Inc.*, 147 F. Supp. 2d 668 (S.D. Tex. 2001); *Ernst Haas Studio, Inc. v. Palm Press, Inc.*, 164 F.3d 110 (2d Cir. 1999) in Appendix K.

SUMMARY

- Before you start researching in the law library, gather and organize information and read all pertinent documents.
- Throughout the research process, take notes of what you have found, citations to relevant authority, and ideas for other avenues of research.

- Review all the information you have gathered and use it to identify key terms and issues.
- You may want to learn more about the area of law you are researching by consulting secondary sources such as legal encyclopedias, *American Law Reports* annotations, looseleaf services, and law review articles.
- Locate primary authority by using citations found in secondary authority, indexes, and digests.
- Use primary authority to locate other primary authority through reading cited primary authority, case summaries in annotated codes and constitutions, and Shepardizing or KeyCiting.
- You are probably finished with your research when you have checked each of the main primary and secondary sources and keep finding the same authorities.
- Consult the Research Flowchart printed in this chapter to develop a research strategy or explore other avenues of research.
- Inadequate legal research may result in an ethics violation.

KEY TERMS

currency
hornbooks
Index to Legal Periodicals
jurisdiction
key terms

EXERCISES

1. Pick one of the research problems from Appendix E.
2. Research the problem you have chosen.
3. List the citations to any relevant legal sources.
4. Using your research, write the answer(s) to the selected research problem.

CYBERLAW EXERCISES

1. WESTLAW's home page is located at <http://www.westlaw.com/>. The home page offers information on those new to WESTLAW. Take the tour.
2. The Legal Information Institute at Cornell Law School maintains a home page with a wealth of legal information. The home page is located at <http://www.lawSchool.cornell.edu/>. Explore some of the material accessible via this home page.
3. LexisNexis' home page is located at <http://www.lexis.com/>. The home page offers a tour of the site. Take the tour.
4. A fee-based legal research site offering an alternative to WESTLAW and LexisNexis is VersusLaw (<http://www.versuslaw.com>). Compare the types of sources available there to the sources available at the fee-based sites.
5. FindLaw (<http://www.findlaw.com>) is a well-known legal research starting point. Research a legal question using this site.
6. WashLaw Web (<http://www.washlaw.edu>) is another well-known legal research starting point. Research a legal question using this site.
7. For a different approach, try the "law" directory under government at <http://yahoo.com>. Compare the sources available there to the sources available via FindLaw and WashLaw Web.

8. The American Bar Association's home page (<http://www.abanet.org>) contains links to federal government sites, selected law libraries, and other online research sites. Try accessing a few of the links.
9. Also try <http://www.law.com>. The site has current legal news plus links to multiple legal resources. Access and read a few of the current news items.

DISCUSSION POINTS

1. Think of a legal problem that you have encountered lately. What specific steps would you take to research the problem?
2. Which of the three approaches seems to be more beneficial and why?
3. Which of the three approaches to identifying key terms would you attempt first and why?

Student CD-ROM
For additional materials, please go to the CD in this book.

Online Companion™
For additional resources, please go to http://www.paralegal.delmar.cengage.com.

CHAPTER 8

Computer-Assisted Legal Research

INTRODUCTION

Due to the need for up-to-the-minute information on a wide range of topics, the legal profession is well suited to benefit from reliance on computer-assisted legal research (CALR). Attorneys and paralegals must embrace technology to keep abreast of the ever-expanding amount of legal information being disseminated electronically worldwide.

A 2007 American Bar Association Technology Survey found that almost one quarter (24 percent) of research used by responding attorneys is conducted by paralegals, and the vast majority of attorneys now conduct legal research **online**. Use of the Internet has become so prevalent that virtually all lawyers responding to the survey (95 percent) have access to the Internet at the office, and 84 percent have access while on the road.

The Internet and its graphic component—the World Wide Web—offer enormous opportunities to improve the speed, currency, and cost-efficiency of conducting research. When computer-assisted legal research was first developed in the 1970s, it borrowed Boolean searching techniques from the field of computer programming. A **Boolean search** looks for a particular term or group of terms in a specific relationship to one another. Boolean searches can include limits with respect to time; for example, court opinions are always dated, so a paralegal can use a Boolean search to locate cases decided in a given year or in a range of years. For more information on Boolean searching, refer to the short Web tutorial at <http://www.internettutorials.net>, and Appendix F for a detailed discussion of Internet technology.

online
The condition of being connected to a network of computers or other devices. The term is frequently used to describe someone who is currently connected to the Internet; variation in spelling: on-line.

Boolean search
Most database searching is based on the principles of Boolean logic. A Boolean search looks for a particular term or group of terms in a specific relationship to one another.

CALR: PROS AND CONS

While law schools and paralegal education programs continue to teach effective use of traditional print resources to locate primary and secondary law, the use of computers and the Internet for legal research has become an integral part of today's law practice and legal education. Refer to Chapter 1 of this text for a discussion of primary and secondary sources of the law.

The gradual shift to electronic legal research has been especially beneficial to small firms and solo practitioners with neither the budget nor space to house an extensive print library. In private law firms and corporate law departments, space to shelve rapidly expanding print collections is being converted to offices for attorneys and paralegals who generate revenue. For law firms with multiple locations, and attorneys and staff who access information remotely, the law library is a laptop computer with Internet access.

A truly paperless "virtual" law library is not likely in the foreseeable future. However, a transition from paper to online subscription databases and free Web resources is becoming a more popular option for conducting legal research. Computer-assisted legal research is not intended to replace manual research, and is often best used in conjunction with print resources. As a result, attorneys and paralegals need to be proficient in both print and computerized legal research tools.

Online research is recommended when:

- currency is very critical
- a comparable print source is unavailable
- information is not published in paper format
- researching a new and emerging area of law or current event
- an online version is easier to use than its print counterpart
- researching facts, persons, or entities that can be described with specificity
- cite checking a case, statute, or administrative decision

Manual research is recommended when:

- researching older materials or historical data
- dealing with a procedural or evidentiary question of law
- you know little or nothing about the area of law or subject you are researching
- a print source is preferable to the online version
- information is not available from a reliable online source
- you found too much (or irrelevant) information using online resources
- establishing general knowledge of an area of law
- exploring complex concepts and legal theories
- dealing with a concept that can be phrased in many different ways using multiple synonyms
- search terms are too common, ambiguous, have alternate meanings, or have too many synonyms to effectively narrow your online search

The growing exception to some of the "pros" traditionally associated with manual research is the availability of very current and reliable scholarly and technical data on the Internet. For example, when researching a specific consumer product, manufacturing process, or medical device, start with free Web resources.

ELECTRONIC INFORMATION FORMATS

Computer-assisted information includes three broad formats:

1. Commercial online subscription databases
2. Computer disks
3. The Internet

COMMERCIAL ONLINE SUBSCRIPTION DATABASES

Commercial online legal databases include LexisNexis® and WESTLAW®. The trend is toward Web-based information and many vendors, including WESTLAW, no longer upgrade or support the software version of their products. In 2006, LexisNexis began charging software users a surcharge as an incentive to use its Web product. Refer to the section of this chapter on Legal Research Databases for a more in-depth discussion of LexisNexis and WESTLAW.

If Web access to a subscription database such as WESTLAW or LexisNexis is based on transactional pricing, users are not charged per minute for reading retrieved data online—only for each new transaction (e.g., running a search, executing a new search, editing a search query, changing databases or files, linking to a new document, or printing a document). With hourly pricing database contracts, users pay set charges based on the time spent searching or browsing in a specific database. Pricing varies by vendor and database. If the database contract allows users to select from hourly or transactional pricing, rely on the "10 Minute Rule"—if online for ten minutes or less, use the hourly option; otherwise, select transactional. Transactional pricing should be avoided when running a search in multiple databases or editing your initial search query, but is recommended when reading results online before sending selected documents to print or download.

COMPUTER DISKS

Computer disks commonly include Compact Disc-Read Only Memory (CD-ROMs) and Digital Video Disks (DVDs), which have replaced the old 5-1/4" and 3-1/2" disks. Computer disks often accompany a companion print resource, making access to forms and other information searchable and easier to locate. A single CD-ROM holds approximately 300,000 pages of text, making it an excellent alternative to large, multi-volume print publications. Electronic products are generally updated with a new disk monthly, bimonthly, or quarterly. No fees are incurred when searching, only the initial price of the product and annual renewal and updating costs.

THE INTERNET

No vocation is better suited to using the Internet as a research tool than the legal profession. We are in the business of locating, retrieving, analyzing, organizing, and disseminating information, and the Internet is the single most comprehensive collection of data ever compiled. Information that once took hours, days, and even weeks to obtain can now be viewed, downloaded, and printed without ever leaving the office. The "virtual" aspect of the Internet provides access to a much broader collection of legal information than would be possible with traditional print resources.

In many cases, Internet resources are virtually free, although some sites are proprietary (requiring registration and a user password), and may offer a combination of free and **fee-based** services. Web sites often provide the most current information available, and may offer resources that cannot be found in any other format. A good example is the trend toward Web-only electronic publishing of many scholarly journals, newsletters, and law review articles. Refer to Appendix F for a detailed discussion of the various components of the Internet and the Web.

fee-based
Used to describe online database services that require users to pay a fee before being able to access the information; users are generally charged fees to search the database based on annual or monthly contracts, or on a pay-as-you-go "per transaction" basis.

COPYRIGHT IN A DIGITAL ENVIRONMENT

Rapid changes in information technologies pose new issues for copyright law. Today, a digital file can be copied and instantaneously distributed worldwide through the Internet, potentially depriving the copyright holder of revenue from licensed sales. Existing United States copyright law is governed by the Copyright Law of the United States, contained in Title 17 of the *United States Code*. Since its enactment, there have been several key pieces of federal legislation passed by Congress in an attempt to address the omission of provisions covering copyright protection of electronic information, and Congress continues to address this oversight in an effort to provide adequate protections for both electronic publishers and consumers.

For now, publishers of original information on the Internet are provided the same copyright protections as those who publish in other mediums, print and electronic. You should not reproduce or reprint in any manner the complete, or a substantial portion of, text or graphics from a Web site without permission.

LEGAL RESEARCH DATABASES

LexisNexis® and WESTLAW® are the leading online legal information providers, with comprehensive coverage of United States (federal and state) and international legal materials, news, and business information.

LexisNexis went online nationally in 1973 and holds the distinction of being the oldest computer-assisted legal research information service provider. That same year, West Publishing Company began work on its own computer-assisted legal **database**—WESTLAW. The earliest version of WESTLAW was launched in 1975. Over the years, both products have undergone major redesigns and enhancements in an effort to keep pace with technology, competitors, and the demands of their users.

database
A collection of information organized in such a way that a computer program can quickly select desired pieces of data; a type of electronic filing system. Traditional databases are organized by fields, records, and files. A field is a single piece of information, a record is one set of fields, and a file is a collection of records.

LexisNexis and WESTLAW have had a profound impact on the way law-related materials are distributed, offering timely, convenient access to federal and state primary and secondary law materials. Their nonlegal databases provide access to national and regional newspapers, scholarly journals, company and financial data, and **public records**.

public records
Documents or other written records required by law to be maintained by a governmental agency, filed with a court clerk, or recorded with a county comptroller's office; generally open to view by the public.

There are other Web-based subscription services providing access to case law, federal and state statutes, legal forms, practice guides, and other legal information. While the scope and content of these databases is substantially less than LexisNexis or WESTLAW, they are much less expensive, making them attractive alternatives for solo practitioners and small law firms. Examples include LOISLaw at <http://www.loislaw.com>, the National Law Library at <http://www.itislaw.com>, and VersusLaw at <http://www.versuslaw.com>. For our purposes, this section will focus on LexisNexis and WESTLAW.

LEXISNEXIS

<http://www.lexis.com>

The LexisNexis Group (collectively "Lexis"), a business division of Reed Elsevier, PLC, is a major electronic publisher and information provider serving professionals in law, business, government, and law enforcement. With more than 5 billion searchable documents from more than 36,000 legal, news, and business sources, Lexis offers one of the world's largest full-text collections of legal and factual information.

In late 1999, Lexis introduced its Internet product, Lexis.com, signaling a shift from the proprietary telecommunications software version to Web-based online searching. Since 2006, technical support is no longer available for the software version, and software users are now charged a surcharge. Subscribers are finding the Web version more user-friendly and accessible from multiple locations.

Users unfamiliar with researching in Lexis should consult a Lexis telephone customer service representative for assistance *before* logging on and incurring online access charges. The representative will suggest the best libraries and files to use, and even help formulate a search query.

LexisNexis Source Locator

Before starting any Lexis research session, it is also a good idea to consult the searchable *Directory of Online Sources* or Source Locator, a powerful online tool for retrieving targeted information from thousands of Lexis information resources. There is no charge to search the Source Locator, found under the Customer Service Center tab on the main lexis.com page under the "Latest Updates" heading.

Libraries and Files

The Lexis database is arranged under various "libraries" of information consisting of a large collection of related materials for a given area of legal research or general topic. Libraries

are comprised of files, individual or group. Users of the Web version will find information organized in a directory fashion, with major libraries including Legal, News & Business, and Public Records. Under each major category are links to related "files" of information, arranged alphabetically. For example, under the "Legal" tab, file folders exist for:

- Cases—U.S.
- Areas of Law—By Topic
- Secondary Legal

LexisNexis Research History

When searching on Lexis, being able to retrace research steps and return to recent searches and results is very helpful. To access, click on "History" in the upper-right corner of the screen. "Recent Results" displays all searches from the past twenty-four hours first. Click on the "Archived Activity" tab to access searches performed in the previous thirty days. From these two screens, users can rerun or edit their searches and sort by date.

Custom Source Tabs

When signing on to Lexis, the source selection screen displays with a choice of four tabs: Legal, News & Business, Public Records, and Find a Source. A nice feature of the Web version is the ability to create custom tabs—quick links to the major libraries used most often. Users can add up to fourteen custom tabs, in addition to the four standard tabs, and remove or reorder them as needed.

LexisNexis Alerts

The ECLIPSE™ feature has a new name—LexisNexis® Alerts, an electronic service providing automatic updates, often referred to as **alerts**, to saved research sessions. As part of the new functionality, users can receive updates from both Shepard's® and LexisNexis CourtLink®, making it easy to stay current on coverage of relevant businesses, court cases, and coverage from more than 20,000 news sources.

alerts
A function of many Internet search engines and subscription databases allowing users to specifiy terms and phrases pertaining to a topic, or tag a case, statute or other document they would like to be notified of when new activity is available. Most alerts are delivered by e-mail.

With this time-saving feature, enter a search once, save it as an Alert search, and rerun the search at user-selected intervals (daily, weekly, monthly). Each Alert search is saved under the user's unique Lexis identification number and can be recalled from any computer with access to the Internet.

Shepard's Citations

Shepard's Citations Service® is available exclusively through Lexis. Shepard's offers comprehensive coverage of case law, federal and state statutes, federal administrative regulations, court rules, law reviews, and other sources of the law. The Shepard's database is updated daily to provide extremely current cite validation information. Refer to Chapter 6 of this text for more information on legal citators and cite validation.

Get a Document and Get & Print

The most economical way to retrieve a *single* document (e.g., court decision, statute, law review article) on Lexis.com is Get a Document™. When working with *multiple* documents, use Lexis Get & Print™ by typing a list of several citations and submitting with a single login command, thus saving time and money.

LexisNexis Paralegal Community

Use the drop menu to select the "Paralegals" option from the main LexisNexis Legal page at <http://law.lexisnexis.com>. The site is designed specifically for paralegals, to provide the information and tools needed to succeed in your career.

Features include:

- Paralegal discussion forum
- Online tutorials, webinars (Web-based seminars), and a resource center
- *The Paralegal Update*—articles and tips for effective use of Lexis.com

New Features and Enhancements

- ***Smart Indexing Technology:*** Link to similar documents via LexisNexis SmartIndexing Technology™ to find connections between related documents that otherwise may have been overlooked.
- ***LexisNexis® Dossier:*** Dossier delivers easy-to-read profiles of nearly 35 million companies worldwide, making it simple to view comprehensive information about a company at a glance, in a single structured portfolio. A portfolio includes company news, management, financial information, patents, trademarks, company filings with the United States Securities and Exchange Commission, and other information from a variety of respected authorities.
- ***LexisNexis Total Litigator:*** Introduced in 2006, LexisNexis Total Litigator® is the most recent example of LexisNexis Total Practice Solutions, the company's new strategy aimed at law firms' broader business and practice needs. LexisNexis Total Litigator was endorsed as the "best option for litigators" by the National Institute of Trial Advocacy (NITA), the first such endorsement in the organization's 35 years of service to litigators. This suite of tools enables access to critical content and services mapped to the way litigators think and work, all according to the specific tasks they undergo throughout the litigation process.

WESTLAW

<http://www.westlaw.com>

The other major electronic legal information database is WESTLAW®, a registered trademark of Thomson Reuters, a conglomerate of print and electronic legal research tools.

No longer available in a software version, WESTLAW offers access to over 31,000 databases through its Web-based subscription service, Westlaw.com™. WESTLAW provides coverage for every jurisdiction and practice area of law, including federal and state statutes and court decisions, law reviews, federal regulations, continuing legal education (CLE) materials, news and business sources, public records, and court **dockets**.

docket
A case docket is maintained by the court clerk for every case filed and lists all the document filing activities associated with the case, along with a summary of the case, the parties, counsel, and the judge assigned to the case.

WESTLAW Database Directory

Search the *Westlaw Database Directory on the Web* at <http://directory.westlaw.com> without logging on and incurring charges. After selecting the appropriate database, subscribers are prompted to logon with a valid WESTLAW password, and charges incur from that point forward. Searching is easy with "Terms and Connectors" (Boolean) and "Natural Language" (plain English) search methods. It is always a good practice to check the scope and coverage of a particular database *before* logging on to WESTLAW and incurring costs.

WESTLAW Research Trails

WESTLAW Research Trails® are a fast and easy way to return to previous searches and unfinished research sessions. Research trails are automatically saved for fourteen days, and individual trails can be saved for longer by resetting expiration dates. To access, click on "Research Trail" in the upper-right corner of the screen. The current research trail displays on the first screen. Click on the "List of All Research Trails" tab to access searches for the prior fourteen days. Once a particular research trail is displayed, users can rerun, download,

or e-mail it. Another feature allows users to add notes to a research trail to indicate key topics and issues, clients, or other pertinent information.

Custom Tabs

When accessing Westlaw.com via the Internet, users can personalize the main welcome screen with over 140 custom-tabbed pages available for various practice areas and jurisdictions. While tabbed pages are time-savers by themselves, personalizing them provides even faster and easier access to information, making research sessions shorter and more productive. To set up, select the "Add/Remove Tabs" option in Westlaw.com, which links to a "Manage Tabs" page listing all available custom tabs.

WestClip and WESTLAW "Alert Center"

WestClip® is a service within WESTLAW allowing users to monitor breaking news and legal developments that could affect a pending case, client, or company. Once logged on to Westlaw.com, select the "Alert Center" link to create and save search clips. Create up to ninety-nine WestClip queries to automatically track newly added content of special interest in any WESTLAW database. Clips can be delivered directly to one or more e-mail addresses, a designated printer, fax machine, or computer disk. Be sure to monitor saved "alerts" and cancel when no longer needed to avoid ongoing charges.

KeyCite

KeyCite®, West's citation research tool, is very convenient to use on Westlaw.com. Paralegals are often asked to conduct cite validation of cases and other primary legal authorities cited in briefs, motions, and memoranda of law. Use KeyCite to instantly verify whether a case, statute, administrative decision, or regulation is still good law, and to find citing references to support and strengthen your supervising attorney's legal argument. KeyCite covers every case in West's National Reporter System® as well as millions of unpublished cases. It also provides citing references from thousands of law reviews, treatises, and other secondary legal materials. It is possible to receive instant notification of changes in the law with KeyCite Alerts®. Refer to Chapter 6 of this text for more information on legal citators and cite validation, and to Chapter 1 for a discussion of primary and secondary sources of the law.

WestCheck

WestCheck® at <http://westcheck.com> is an automated citation-checking software used to verify citations directly from a Microsoft Word or WordPerfect document, or in a manually entered citations list. Check citations in KeyCite, create a table of authorities for cases, statutes, and other legal authority cited in a document, and use the Find feature to retrieve the documents on WESTLAW. This time-saving tool verifies that all citations in a lengthy brief or memorandum of law are correct, and the supporting cases are still good law—something paralegals are often asked to do.

West Find & Print

West Find & Print® at <https://findprint.westlaw.com> provides a quick way to retrieve several cases, statutes, and other WESTLAW documents by entering their citations in a consecutive list and typing a user password once to automate the process of document delivery. Type or cut-and-paste up to ninety-nine individual citations in a single session, and then choose to print, e-mail, or download the documents. Retrieve documents and run KeyCite cite validation simultaneously with a single command, saving time and money.

Westlaw Guide for Paralegals

Paralegals can download a free guide explaining how to perform important tasks on WESTLAW, including retrieving and printing documents, accessing and searching

databases, and checking citations in KeyCite. The *Westlaw Guide for Paralegals* also explains how to retrieve court records and how to use public records to find information about people and companies. This and other WESTLAW user guides, product documentation, and reference materials can be downloaded for free at <http://west.thomson.com/> by selecting the Customer Support tab.

New Features and Enhancements

- ***Briefs, Dockets and Court Filings:*** Provides access to pleadings, motions, and legal memoranda from several jurisdictions to save time drafting similar documents. Also, use this feature to find briefs that are on point with a case, allowing attorneys to review the strategy and positions on both sides of the argument. Information is very current, with court dockets for newly filed cases updated daily.
- ***Fifty State Surveys:*** These can be a huge time-saver, offering state-by-state analysis tables comparing the commonalities and differences, by state, for key topics covering business, insurance defense, employment, real property, environmental, securities, and family law.
- ***Key Numbers Search Tool:*** The West Key Number System® is the master classification system of United States law and an effective legal research tool. The new Key Numbers search tool offers a convenient way for legal researchers to quickly find the right West Key Number for their issue and link to all of the on-point cases. Start with a natural language query and select a jurisdiction(s), which then displays up to five West Key Numbers for each jurisdiction matching the query. Clicking on a Key Number displays all the matching case headnotes. Refer to Chapter 4 of this text for a discussion on headnotes.
- ***Westlaw Profiler:*** Paralegals are often asked to locate information on the judge assigned to a case, opposing counsel, or expert witnesses. Westlaw Profiler™ provides crucial background information so attorneys know who they are up against.
- ***PastStat Locator:*** Shrinking library shelf space often prevents attorneys from having easy access to older versions of federal and state statutes. What do you do if asked to locate the version of a state statute that was in effect when the client's legal action arose? Statutes are not static; they are continuously amended, revised, overruled, and superseded. Finding the exact text of a statute as it existed on a particular date can be a daunting and time-consuming task. PastStat Locator™ on WESTLAW provides instant access to exact historical statutory versions, making this type of legislative research fast and cost-effective.

PUBLIC RECORDS DATABASES

In addition to conducting legal research for case law, statutes, administrative agency rulings and regulations, attorney general opinions, and other primary and secondary law resources, paralegals may be asked to locate various types of information in the **public domain**. Almost anything filed with a court or recorded in the official public records is part of the public domain, and includes birth and death records, marriage and divorce proceedings, civil judgments, tax liens, and criminal records (excluding minors). Not everything filed in a court proceeding is publicly available. Access to certain information may be sealed by court order, or not fully accessible due to federal or state privacy laws.

public domain
The public domain comprises the body of all creative works and other knowledge (writings, artwork, music, inventions) in which no person or organization has any proprietary interest (usually represented by a copyright or patent).

While some public information is available free on the Web, the convenience, efficiency, and reliability of researching available data through a variety of subscription services is often the better option. Start any public records research with free Web resources (e.g., federal agencies, company Web sites, and free online databases), and then use one or more subscription services to complete the research.

Always remember that unless stated otherwise, all **third-party information providers** obtain information directly from the original sources of the data (e.g., courts, federal and state government agencies, state and federal law enforcement agencies, and credit reporting companies), and compile this data in a uniform, user-friendly, searchable database. Disclaimers as to errors and omissions in content generally accompany the information provided to subscribers of these services.

third-party information provider
Refers to a company that compiles data received directly from the original sources (e.g., courts, government agencies, law enforcement, and the major credit reporting agencies), compiles it in a uniform, user-friendly, searchable database, and sells the repackaged information to subscribers for a fee.

In addition to the public records information available on Lexis and WESTLAW, there are other subscription services that focus exclusively on providing access to public records. Two products used by legal professionals include:

ACCURINT

<http://www.accurint.com>

Accurint® is a comprehensive Web-based research service used to locate assets, liabilities, background information, and other proprietary data on people and businesses, including bankruptcies, criminal histories, and litigation activity. Accurint uses a fixed pricing structure, so users know the cost of a particular search or report before incurring charges. For an additional fee, Accurint Court Search™ utilizes a contracted agent network to perform courthouse searches and document delivery nationwide. Carfax® Vehicle History Reports™ are now available as part of the "Assets" group of services.

A new feature is the People at Work™ search linking more than 132 million individuals to businesses. Results include information such as business address, phone numbers, and possible dates of employment. While other public records databases include options to search for "key people," this is usually limited to persons who are officers or directors of companies. Some databases include shareholders of public companies. Searching for employees who are not officers, directors, or shareholders can be helpful when trying to locate a former employee of a party to a lawsuit, or someone who may have information critical to a case. Paralegals are often asked to locate potential witnesses during the discovery phase of litigation, making Accurint's People at Work feature a valuable investigative research tool.

AUTOTRACK XP

<http://www.autotrackxp.com>

AutoTrackXP® offers access to billions of publicly available records nationwide, obtained from a variety of original sources such as federal and state agencies, law enforcement, and the three major crediting reporting companies. Using as little information as a name, AutoTrackXP cross-references an enormous amount of data—addresses, driver licenses, property deed transfers, residential and business phone listings, professional licenses, corporate information, and much more—and unifies it into a single, easy-to-read report. In compliance with federal privacy and credit reporting laws, certain information may be withheld from AutoTrackXP reports, such as a complete Social Security number (123-45-XXXX) or date of birth (01/XX/1950), where the last four digits of a Social Security Number and the two-digit day of birth are redacted. Accurint has a similar reduction policy.

EVALUATIVE GUIDELINES FOR INTERNET RESOURCES

One important goal when evaluating any resource is to determine whether the information presented is accurate and timely. This is especially true with legal and government information, regardless of the format.

Unlike print resources that go through a lengthy editorial or filtering process, information posted on the Internet is mostly unfiltered. This places the burden of evaluating the authority of Web-based resources on the researcher. Exhibit 8-1 outlines the major criteria to consider when evaluating Internet resources.

EXHIBIT 8-1
Evaluative Criteria for Internet Resources.

Criteria	Key Components
Authority of Source (Sponsorship)	• Who is the author? Is the author clearly identified? • What are the author's credentials? • Are the author and publisher the same entity? • Is there an *organizational sponsor* for the site? • Can you easily determine the author/publisher's reputation? • Can you easily contact the author with questions or comments? • Is the content author also the site webmaster? • Is the author and/or webmaster responsive to your questions?
Currency (Timeliness)	• Is the date of the last update or revision to the page content readily available? • Is the site current? • Is the information updated on a regular basis? • If the content is time sensitive, is it out of date? • Is the site archived?
Purpose and Usefulness	• Is the purpose (intent or focus) of the site clearly stated? • Is the intended audience easily determined from the main (home) page? • Does the site contain advertising (i.e., a marketing focus)? If so, does it distract from the resource content? • Is the information too old [or too new] for your needs? • Is the information copyrighted?
Scope and Content	• Is the scope (time span, coverage) of the information easily determined? • Is the content easy to understand (i.e., layman vs. expert level)? • Does the site include a variety of well-organized links? • Does the site include advertisements or promotional material? Is it excessive? • If so, does it distract from the information content? • Is there a political, cultural, or religious bias? • Are the sources for the content cited? • Does the author/sponsor's affiliation influence views presented on the site?
Objectivity and Balance	• Do you know the purpose of the site (news, personal, entertainment, informational, marketing, etc.)? • Is the author/publisher/sponsor's reason for publishing the information posted? • Is the information presented with a minimum of bias?
Accuracy and Reliability	• Is the information content accurate [*spelling*, *grammar*]? • Does the site contain technical errors (*How do you know?*)? • If the site contains links, are they reliable? • Does the site include any reviews or a rating system? • If so, are the reviewers' qualifications and/or rating criteria provided?
Technical Design	• Is the page well organized and easy to use? • Is the site design (*colors*, *background*, *fonts*, *layout*) appealing? • Does the page load reasonably fast? • If a highly graphic site, is there a text only option? • Is the site searchable? • Is there an index, table of contents, and/or site map to help navigation? • How well does the page print out? • Are any required plug-ins or "helper" applications clearly identified [with links to any necessary software downloads]?
Uniqueness	• Is the information available elsewhere in print, on CD-ROM or from another web site? • If so, would using another resource be preferable?

LEGAL AND GOVERNMENT INTERNET RESEARCH

There are many government, law school, and commercial Web sites providing access to federal, state, local and tribal primary law materials, including judicial opinions, statutes, administrative rules and regulations, and constitutions.

Appendix G outlines some of the best "starting points" and Web-search tools designed to make legal research on the Internet faster and more reliable. It is very important when researching legal and government information on the Internet that resources meet a majority of the evaluative criteria set forth in Exhibit 8-1 before relying on them.

FEDERAL LAW

USA.gov at <http://www.usa.gov> is the federal government's official Web portal, providing free public access to government information and services on the Internet. The site includes a directory of government agencies and departments, with separate pages for federal, state, local, and tribal law resources.

Appendix H highlights some of the best Web resources offering free access to United States federal government information on the Internet, including:

- all fifty Titles of the *United States Code*
- *Code of Federal Regulations* (CFR)
- *Federal Register*
- Public Laws
- Congressional Record transcripts
- Congressional committee reports and hearing transcripts
- Presidential Executive Orders

STATE LAW

State constitutions, statutes (also called codes or compiled laws), legislation (bills, amendments, resolutions), session laws (bills that have become law in a given year), and related materials promulgated by the legislative branch of all fifty states are readily available free on the Internet. As discussed below in the Administrative Law section of this chapter, access to state and local administrative codes, registers, rules, and regulations published by state agencies is becoming more accessible on the Web.

A good place to begin any state law research is the State and Local Government Internet Directory at <http://www.statelocalgov.net/>, a convenient one-stop access to the official Web sites for state agencies and city and county government. Use the drop-down menus on the home page to access information by state or topic. Web researches can generally locate official state government home pages by using the URL http://www.state.XX.us where the XX is the postal abbreviation for the state. (Example: use <http://www.state.DE.us> to access the home page for the Delaware state government Web portal.) Also refer to Appendix I, which summarizes some of the best state and municipal (local) government law resources on the Web.

ADMINISTRATIVE LAW

When researching federal, state, and local administrative law, the terms used to identify primary law resources may vary among jurisdictions. "Register" often refers to publications like the *Federal Register,* which may contain notices and/or the full-text of proposed and adopted rules. The use of the term includes similar publications which, in some jurisdictions, may be called bulletin or journal. "Code" refers to publications, which contain all effective administrative rules and regulations like the *Code of Federal Regulations*, and the

official compilations of administrative laws in many states. "Manual" often refers to the guidance document produced by a specific jurisdiction to assist rule-writing agencies.

Federal Administrative Law

The *Code of Federal Regulations* and the *Federal Register* are both searchable free on the Web through GPO*Access* at <http://www.gpoaccess.gov>. For more on GPO*Access*, refer to the section of this chapter on Legislative Information.

One of the most user-friendly Web sites for locating federal administrative law materials is Regulations.gov at <http://www.regulations.gov>, the government site devoted to free public access to federal rulemaking. Use this site to find federal agency regulations published daily in the *Federal Register*, conveniently arranged by topic. A helpful search option is the ability to limit a keyword search to a particular federal agency, designed to yield more precise results. Refer to Appendix H for a list of additional federal law resources on the Web.

State Administrative Law

The Administrative Codes and Registers (ACR) Section of the National Association of Secretaries of State (NASS) at <http://www.nass.org/> is a good resource for locating state administrative and regulatory law on the Web. The site links directly to the official state agency for each of the fifty states and United States territories directly responsible for receiving rule filings, publishing rules, or both. Most jurisdictions include access to the official administrative code or register, and other related administrative agency publications. Some states also provide free Web access to recent administrative law case information, case dockets, and the published decisions of administrative law judges.

Local Codes and Ordinances

The most comprehensive free Web resource for locating municipal codes and local ordinances for many cities and counties is the Municipal Code Corporation's Online Library at <http://www.municode.com/>. The site links directly to the current, official text of hundreds of municipal codes and ordinances, arranged alphabetically by state and local municipality.

GOVERNMENT AGENCIES

Information published and disseminated by government agencies has always been intended to be part of the public domain, easily accessible to all citizens. With the advent of technology and the Internet, the vast majority of this information is readily available free on the Internet. While initially an experiment to try and reduce the bulk of printed government publications and the expense of producing them, publishing on the Internet has proven to be an effective means of sharing and disseminating a wide variety of government information.

Government agency information on the state level continues to improve, but scope and content varies by jurisdiction. Two free Web sites for accessing federal and state government agency resources are Cornell University Law School's Legal Information Institute (LII) at <http://www.law.cornell.edu/> and FirstGov at <http://www.usa.gov/>. Refer to Appendix H for more information on these sites.

INTELLECTUAL PROPERTY LAW

Researching intellectual property law on the Internet has become much easier in recent years. Although additional print, electronic, and subscription databases may be required to insure a thorough search for older registrations, much of the research can now be done free on the Internet.

Patents and Trademarks

The United States government grants a patent to an inventor "to exclude others from making, using, offering for sale, or selling the invention through the United States or importing the invention into the United States." A trademark is a word, phrase, symbol, or design, or combination of words, phrases, symbols, or designs, which identifies the source of goods or services of one party from those of another. Many resources are available for searching United States patents and trademarks, but the United States Patent and Trademark Office (USPTO) at <http://www.uspto.gov> is the place to start. The following USPTO databases are recommended because of their coverage, currency, and ease of searching:

- USPTO Web Patent Databases
  - Full-text of patents 1976 to present
  - Scanned images from 1790 to present using a free **plug-in** download
  - Patent Applications database 2001 to present
  - Information on Assigned Patents, August 1980 to present
- Trademark Electronic Search System (TESS)
  - Access to more than four million pending, registered, and dead federal trademarks
  - Trademark Assignments 1955 to present
  - United States Registration Certificates

plug-ins.
Software programs that extend the capabilities of a Web browser in a specific way, providing the ability to play audio files or view video movies. Acrobat Reader® by Adobe is a popular plug-in.

Intellectual property attorneys often rely on the expertise of their paralegals for the day-to-day procedures involved in filing and tracking patent and trademark applications. Paralegals working in this area of the law should become familiar with the USPTO Electronic Filing System (EFS) used for online filing of patent applications.

United States Copyrights

Copyright is a form of protection provided by the laws of the United States (Title 17, *United States Code*) to the authors of "original works of authorship," including literary, dramatic, musical, artistic, and certain other intellectual works. This protection is available for both published and unpublished works. The United States Copyright Office at <http://www.copyright.gov> provides free access to copyright forms, information circulars, *Federal Register* notices relating to copyright issues, and other valuable information. In addition, Copyright Office records dating from January 1, 1978 to the present, including registration information and recorded documents, are available free online. Electronic submission of copyright applications and filings is available to registered users. Forms, factsheets, circulars and brochures, and various reports are also available free on the Copyright Office Web site.

INTERNATIONAL LAW

While the scope of this chapter does not allow for a thorough discussion of international law research on the Internet, there are several Web resources providing free access to primary and secondary legal and government information for foreign jurisdictions. Scope and coverage varies by country. Although most foreign government Web sites are in English or have an English language option, it is not uncommon to find sites with information published only in the native language of the host country. For a list of international law Web resources, refer to Appendix J. In addition, WESTLAW and LexisNexis include coverage of international law materials for many countries and regions of the world.

LAW REVIEWS, JOURNALS, AND LEGAL PERIODICALS

Many legal periodicals (e.g., newsletters, magazines, journals, and law reviews) are now published on the Web, full-text and searchable. Most law schools offer free Web access to recent issues of their law reviews and journals. The University Law Review Project at

‹http://stu.findlaw.com›, a collaboration of the commercial FindLaw site and various law schools, includes a directory of journal titles arranged by topic. There is also the option for full-text searching of all law reviews and journals published on the Internet, with a single Boolean keyword or phrase search. A reasonably priced alternative is HeinOnline at ‹http://www.heinonline.org/›, a subscription service providing access to hundreds of law reviews and journals, many archived back to the first published volume.

LEGISLATIVE INFORMATION

Many online subscription services such as LexisNexis and WESTLAW include extensive coverage of federal and state legislative information (e.g., bills, laws, statutes, legislative histories). Alternatively, most recent federal and state legislation is easily accessible free on the Internet. Archived coverage of older bills and laws varies depending on the jurisdiction and Web resource. Currency of the data supplied by reliable online information providers is preferred over comparable print publications and computer disks, which are generally updated monthly, quarterly, or annually. Most Web-based information is updated within twenty-four hours of public availability—an important factor to consider when conducting legislative research.

GPO*Access* at ‹http://www.gpoaccess.gov› and THOMAS at ‹http://thomas.loc.gov› are two Web sites providing extensive coverage of federal legislative information, with free access to full-text documents. The National Conference of State Legislatures (NCSL) at ‹http://www.ncls.org› has links to the home pages and other legislative resources for all states under the "Legislatures" tab on the main page. Refer to Appendices H and I for more discussion on these and other federal and state legislative Web resources.

COURTS AND CASE LAW

Internet coverage of court decisions, court rules of procedure, and court forms is fairly comprehensive at the state supreme and appellate court levels. At the trial court level, most courts have a Web presence, but the scope and content of information provided varies by jurisdiction. Generally, court forms, administrative procedures, and local rules are available online. Access to official court case dockets and pleadings filed in a case, especially scanned document images, is not always available free on state court Web sites.

Availability of federal court decisions on the Internet also varies by jurisdiction. Initially, only United States Supreme Court opinions and recent decisions of the federal appellate courts were available free on the Internet. At the federal trial court level, access to case information and decisions of the district and bankruptcy courts was limited. Fortunately, this has significantly improved.

Federal Courts

Today, federal court case dockets, court rules, oral argument calendars, and the full-text of every United States Supreme Court decision from 1893 to the present is available free on the Internet. The same is true for the federal appellate courts. Additional information such as court rules, trial calendars, and biographical data on federal judges and magistrates is generally available from a court's Web site.

Most United States district courts (civil and criminal) and bankruptcy courts provide access to case dockets and images of filed documents for a nominal cost through the subscription service PACER (discussed in detail later in this chapter). Selected opinions (usually high profile cases), court rules, administrative forms, filing fees, and other information are generally available from a court's official Web site.

The Federal Judiciary at ‹http://www.uscourts.gov›—the administrative arm of the United States federal courts—is the best place to find links to the home pages for the

United States Supreme Court, the federal courts of appeal, and the federal district and bankruptcy courts. A graphic map of the various federal appellate circuits, with hyperlinks to official court Web sites, is available at <http://www.uscourts.gov/> by selecting the "Court Links" tab.

STATE COURTS

Availability of case law on the Internet at the state court level varies by jurisdiction. Generally, expect to find the most comprehensive coverage at the highest state court levels, with scope and coverage decreasing as you move down the state judicial court structure.

The National Center for State Courts (NCSC) at <http://www.ncsconline.org> and the Library of Congress State and Local Government page at <http://www.loc.gov> include links to state courts on the Web and related information. Refer to Appendix I for a discussion of these and other state law Web resources.

COURT DOCKETS AND CASE HISTORY

Court case dockets provide a complete listing of all pleadings and papers filed in a case. Case summaries generally include the style of the case, case number, parties and their counsel, nature of the controversy or cause of action, and the judge assigned to the case.

Some jurisdictions provide limited free access to historic landmark decisions and recent opinions, so it is always a good idea to check a court's official Web site before using a fee-based subscription service such as LexisNexis or WESTLAW. To quickly locate federal and state court case dockets online, the Law Library Resource Exchange (LLRX) maintains a site with alphabetically organized links to federal and state court dockets, court rules, and forms at <http://www.llrx.com/> (found under the Court Rules, Forms and Dockets tab at the top of the main LLRX page).

PACER, CourtLink and CourtExpress, each discussed below, are commercial subscription services used to retrieve court dockets and case filings. Keep in mind that access to state courts is not available from all services, and only in limited jurisdictions where available.

LexisNexis CourtLink

Previously an independent company, CourtLink® at <http://www.courtlink.com> is now part of LexisNexis, and can be accessed using an existing LexisNexis customer password. CourtLink is a subscription research tool providing searchable access to over 2.6 million federal, state, and local court records and, in some jurisdictions, scanned images of actual documents filed with the court. Access to state court case dockets is expanding, with new courts added monthly.

Tracking of new activity or court filings in existing cases of interest via automatic e-mail notification is the most efficient way to keep abreast of events in other cases that may impact a client of the firm, or your supervising attorney's practice areas. Alerts can be set up by litigant/party, attorney, or subject matter.

WESTLAW CourtExpress

WESTLAW CourtExpress™ at <http://www.courtexpress.westlaw.com> is an integrated docket and document retrieval subscription service offering online access to court records from federal appellate, bankruptcy, and district courts, as well as a growing number of state courts. WESTLAW subscribers can access the service with an existing WESTLAW password to locate litigation records, retrieve court dockets to track case filings, run criminal searches, and order copies of court documents delivered via e-mail, fax, or express mail (additional document delivery fees may apply). Docket alerts and tracking can be set up to monitor new activity in a case. The WESTLAW integration lets CourtLink users link

directly to Westlaw documents (e.g., briefs filed in a case, statutes, court rules, judge and attorney profiles, and related case law) cited in a court docket.

Public Access to Court Electronic Records (PACER)

Public Access to Court Electronic Records, referred to by the acronym PACER, at <http://pacer.psc.uscourts.gov> is a subscription service of the United States courts, allowing registered users to obtain court case information and dockets from federal appellate, district, and bankruptcy courts. Currently, no state court case dockets are available on PACER.

There is no fee to register for access to PACER, although a valid login and password issued by the PACER Service Center are required to access the system. To register, contact the PACER Service Center at 1.800.676.6856 or register online. Once logged in, users are billed a nominal per-page charge (currently $.08) for retrieving and printing court dockets and other reports, and for viewing and printing imaged documents, where available. There are no online search fees.

Registered users can conduct nationwide searches to determine if a party (company or person) is involved in any federal litigation, or whether a person or company has filed for bankruptcy. Search options are limited to party name, case number, date range, or nature of suit. Most federal district and bankruptcy courts now offer electronic access to actual scanned images of pleadings and papers filed in the official court file, excluding juvenile court records and court files that have been sealed by court order and are not part of the public record. The most popular service provided by PACER is the U.S. Party/Case Index at <http://pacer.uspci.uscourts.gov>, a subscription database that catalogues, by name, an index of all named parties to federal court actions.

PACER is the official information retrieval service for use by all federal courts currently participating in the Case Management and Electronic Case Filing (CM/ECF) program. Users can rely on the PACER system as the official docket for federal courts. PACER and CM/ECF require separate passwords and logins for access. Registration to use both systems is free. To file documents electronically in a court's CM/ECF system, an attorney or paralegal must have a login and password issued by the local court. No one can access, view, or retrieve information and/or imaged documents from a court's system without a login and password.

Case Management and Electronic Case Filing (CM/ECF)

The Case Management and Electronic Case Files (CM/ECF) system offers federal courts the ability to maintain court records electronically, and to accept court filings over the Internet. While the viewing and retrieval of official court information is governed by the nationally administered PACER system, filing of court documents through CM/ECF is governed by locally established court policies and procedures. Electronic filing allows attorneys to bring cases to the attention of the courts, counsel of record, and the parties faster by avoiding the delays associated with photocopying and mailing or faxing paper documents. Documents filed with the court through CM/ECF are generally accessible to the court instantaneously, and to the public within twenty-four hours of filing through the electronic public access system—PACER.

The Paralegal's Role in CM/ECF

Paralegals, legal assistants, and other legal support staff working in any area of the law where pleadings and papers are filed with the courts should know which courts in their jurisdiction accept electronic filings. In many law firms, corporations, and other legal settings, the paralegal may be the primary contact for implementing and coordinating electronic case filing.

The Federal Judiciary at <http://www.uscourts.gov/> and the PACER Service Center at <http://pacer.psc.uscourts.gov/> provide information about CM/ECF. The PACER site

also maintains a current list of United States federal appellate, district, and bankruptcy courts participating in the CM/ECF system. Several state courts are beginning to implement pilot CM/ECF projects for electronic filing. A good resource for information on electronic filing technology in the state courts is the National Center for State Courts' Technology Division at <http://www.ncsconline.org>.

SUMMARY

- Attorneys and paralegals must embrace technology to keep abreast of the ever-expanding amount of legal information disseminated electronically worldwide.
- The Internet is fundamentally changing the way law firms are organized, how they relate to clients, the courts, information suppliers, and employees, and how attorneys and paralegals conduct legal research.
- Technology and the Internet are integral parts of today's law practice. Appendix F discusses Internet technology, including protocols, domain name registration, Web browsers and plug-ins, intranets and extranets, blogs, and RSS news feeds. See Appendix F for a discussion of these terms. Figure F-1 covers the various parts of a Web address and current Internet domain name extensions.
- Computer-assisted legal research (CALR) borrowed Boolean searching techniques from the field of computer programming. A Boolean search looks for a particular term or group of terms in a specific relationship to one another.
- Computer-assisted or "electronic" information resources include three broad formats: commercial online subscription databases, computer disks, and the Internet.
- Attorneys and paralegals need to be proficient in both print and computerized legal research tools.
- Computer-assisted legal research is not intended to replace manual research, and is often best used in conjunction with print resources.
- The Internet is not always the best resource tool. Unless you know exactly where to go, the Internet may not be the fastest or most economical way to find what you need.
- Set a realistic time limit—Web searching can be daunting, and it is easy to lose track of time.
- LexisNexis went online in 1973 and is the oldest full-text, computer-assisted legal research information provider. The earliest version of WESTLAW was launched in 1975. LexisNexis and WESTLAW remain the most popular online legal subscription databases, with extensive coverage of legal, news, and business information.
- Online research is recommended when currency is critical, the online version is easier to use than its print counterpart, or when a comparable print source is unavailable
- Unlike print products that go through a lengthy editorial and filtering process, information posted on the Internet is mostly unfiltered. This places the burden of evaluating the authority of Web-based resources on the researcher.
- An important goal when evaluating any information resource is to determine whether the information presented is accurate and timely. This is especially true with legal and government information, regardless of the format. Exhibit 8-1 is a list of recommended criteria for evaluating Web resources.

- News and up-to-the-minute information on a variety of topics, customized to meet specific research needs, can be automatically delivered via e-mail alerts and RSS feeds. LexisNexis Alerts and WESTLAW WestClips are examples of e-mail alerts. See Appendix F for a discussion of these terms.
- Publishers of original information on the Internet and the Web are provided the same copyright protection as those who publish in other mediums—print and electronic.
- Unless stated otherwise, all third-party online information vendors obtain public records information directly from the original sources of the data (e.g., courts, federal and state agencies, law enforcement, and credit reporting companies). Popular commercial electronic public records databases include Accurint and AutoTrackXP.
- Government (.gov), law schools and universities (.edu), and commercial (.com) Web sites provide free searchable access to primary law materials, including case law, statutes, administrative codes, and constitutions. Appendix G outlines some of the best starting points for quickly locating legal and government information on the Internet. Refer to Figure F-1 in Appendix F for an illustration of Internet domain name extensions currently in use.
- Appendix H includes free Web resources providing access to United States federal government information on the Internet. Appendix I summarizes recommended Web sites with free access to state and municipal government resources.
- Most federal trial courts—United States district courts (civil and criminal) and bankruptcy courts—provide access to case dockets and scanned images of filed documents for a nominal cost through the subscription service PACER.
- Availability of case law at the state court level varies by jurisdiction, with the most comprehensive coverage at the highest state court levels. Scope and coverage decreases as you move down the state judicial court structure.
- Popular commercial subscription services used to retrieve court case dockets and case filings include CourtExpress, CourtLink, and PACER.
- The Case Management and Electronic Case Files (CM/ECF) system, developed over the past several years by the Federal Judiciary for electronic case management, offers federal courts the ability to maintain court records electronically, and to accept court filings over the Internet.
- There are currently no government mandated controls on who can post information on the Internet and no federal, state, or international laws or regulations governing Web content. The burden of evaluating information posted on the Internet is solely the responsibility of the researcher. Always verify the source and currency of data published on the Web.
- LexisNexis and WESTLAW offer free Web sites devoted exclusively to paralegals. Information designed to help paralegals succeed includes online product tutorials, discussion forums, articles, and research tips.

KEY TERMS

alerts
Boolean search
database
dockets
fee-based
online
plug-in
public domain
public records
third-party information provider

EXERCISES

1. When conducting legal and government research on the Internet, what criteria are most important for evaluating a Web resource? Explain your answer.
2. What is a Boolean search?
3. What are PACER and CM/ECF, and how are they related?
4. Are WESTLAW and LexisNexis third-party information providers? Explain your answer.

CYBERLAW EXERCISES

1. *California v. Brendlin* is a United States Supreme Court case reprinted on the CD-ROM that accompanies this textbook. Locate a copy of this published judicial opinion. Which Web site did you use, and why?
2. Locate the most recent Form 10-K annual report for Microsoft Corporation, filed with the United States Securities and Exchange Commission.
   a. When (month-day) does Microsoft's fiscal year end?
   b. In which state is Microsoft incorporated?
   c. Which Web site did you use to locate this information?
3. Using the official Web version of the *Federal Rules of Civil Procedure*, answer the following questions:
   a. What does Rule 11 cover?
   b. Which Rule (and subsection) sets forth the prerequisites for filing a class action lawsuit?
4. Locate federal Public Law No. 106-102 using the THOMAS Web site at <http://thomas.loc.gov> to answer the following questions:
   a. What was the corresponding House or Senate bill number for this legislation?
   b. Which member of Congress sponsored the bill?
   c. When was the legislation introduced?
   d. When did it become law?
   e. How does this legislation impact information published on the Internet?

DISCUSSION POINTS

1. How has technology changed the way legal research is conducted.
2. How would you respond to a supervising attorney who wants to cancel the firm's subscriptions to LexisNexis and WESTLAW now that "everything is free on the Internet"?
3. When is online computer-assisted legal research recommended over using print materials? Discuss specific examples of legal information that can be located more cost-efficiently using free Internet resources.

Student CD-ROM
For additional materials, please go to the CD in this book.

Online Companion™
For additional resources, please go to http://www.paralegal.delmar.cengage.com.

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CHAPTER 9

Introduction to Legal Writing

INTRODUCTION

Your study of material in Chapters 9 and 10 introduces you to legal writing and fundamental writing skills. Chapter 9 briefly discusses many different types of legal documents, and later chapters discuss some of the most important ones in detail—transmittal and client opinion letters (Chapter 11), pleadings (Chapter 12), law office memos (Chapter 13), memoranda of law (Chapter 14), and appellate briefs (Chapter 15). Most likely, your professor has selected a number of these chapters to study. Information in any chapters not studied in class may guide you should you be asked to draft other documents. Chapter 10 discusses fundamentals of writing that apply to all types of legal documents. Appendix B explains citation rules and Appendix C explains rules for quotations and short-form citations. Appendices B and C also provide exercises for you to practice what you have learned. Appendix D explains how to avoid some of the most common mechanical errors in legal writing and provides exercises for you to practice what you have learned.

This chapter is designed to provide you with an understanding of:

- basic concepts to consider when writing legal documents;
- ethical obligations relevant to legal writing; and
- types of legal writing.

WRITING TIP

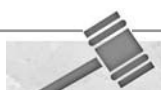
Keep Copies of Your Documents

You should keep copies of the documents you completed in your legal writing class. At some point you may be applying for a job and your potential employer may request a writing sample. You can use a document written for class as a writing sample; however, you need to make your potential employer aware that the document is based on a hypothetical situation and there is no confidential client information being disclosed when you share the document with the potential employer. Another reason to retain copies of documents produced for class is that they can serve as samples should you be asked to write a similar document in the future. Prior to using a previously written document, revise the document to incorporate any feedback your professor provided.

The first portion of the chapter introduces you to concepts fundamental to legal writing such as the importance of legal writing to the law, writing as communication, a warning against communicating too much, and elimination of mechanical errors. The second portion of the chapter discusses relevant attorney ethics rules, with examples from recent cases in which attorneys were disciplined for violating ethics rules related to legal writing. The third portion of the chapter discusses legal documents designed to inform, persuade, and record information.

IMPORTANCE OF GOOD LEGAL WRITING TO THE LAW

Good legal writing is vitally important to those professionally involved with the law. Attorneys, judges, and paralegals are in the business of communicating, and their success depends in good measure on how well they write. As explained in this chapter, the goal of a legal document may be to inform, to persuade, or to record information, depending on the document. Serious problems with meeting any of these goals may have negative consequences. For the judge, a poorly written opinion or order may result in reversal on appeal. For the attorney, errors in legal writing may result in loss of a case, loss of a client, litigation of ambiguously written legal documents, legal malpractice lawsuits, or professional sanctions. A paralegal may lose a job over a poorly written document.

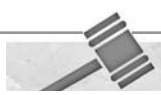


YOU BE THE JUDGE

What sanction is appropriate where the attorney's brief was poorly written?

In answering the question, assume that the brief was "virtually incomprehensible" and "would compare unfavorably with the majority of the handwritten pro se pleadings prepared by laypersons which [the] Court reviews on a daily basis."

To see how a court answered the question, see *Kentucky Bar Ass'n v. Brown*, 14 S.W.3d 916, 917, 919 (Ky. 2000) in Appendix K.



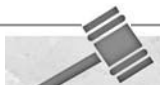
YOU BE THE JUDGE

Is it appropriate to sanction an attorney for citation errors in briefs?

- Would your answer change if you knew that the "briefs contained numerous citation errors that made identification of the cases difficult, cited cases for irrelevant or incomprehensible reasons, made legal arguments without citation to authority, and inaccurately represented the law contained in the cited cases"?
- If you decide to sanction the attorney, what sanction would be appropriate?

To see how a court answered the questions, see *In re Shepperson*, 674 A.2d 1273, 1274 (Vt. 1996) in Appendix K.

Even if the client should win on the merits, a poorly written document can obscure the legal analysis needed for the judge to rule in the client's favor. On the other hand, in a close case a well-written document may persuade the decision-maker that the law is on your side and may lead to a decision in your favor.



YOU BE THE JUDGE

In your opinion, would you ever compliment an attorney on the quality of the attorney's writing?

- When would you incorporate a portion of the attorney's brief in your opinion?

To see how a court answered the questions, see *United States v. Le*, 228 Fed. Appx. 827 (10th Cir. 2007) in Appendix K.

Do not be intimidated by legal writing. Although certain things, such as citation form and the format for some legal documents, are peculiar to legal writing, legal writing in many ways is not that different from writing you have done in the past. You can think of learning legal writing as fine tuning the writing skills you already have. In addition, just because you are doing legal writing does not mean that you leave your common sense behind. You will often have to pull on your own experiences in analyzing problems and in brainstorming to arrive at solutions.

Writing is not easy—not for good writers, nor even for professional writers. Your writing will improve with practice and a good grasp of the fundamentals. The following chapters are designed to give you practice in legal writing and to explain those fundamentals.

WRITING AS COMMUNICATION

The purpose of all writing, including legal writing, is to communicate. For centuries, legal writing has been criticized for being wordy and hard to understand because of the use of Latin phrases and legal terms. Although not universally accepted, the trend today is to write legal documents in plain English. (Statutes in some states require consumer contracts to be written in plain English.) Writing in plain English means writing so the document can easily be understood. It requires good organization and format combined with elimination of excess words, Latin phrases, and unnecessary legal terms. Practice plain English whenever possible.

One commonsense thing you have probably done in your past writing is to think of your audience. You need to do the same in legal writing. Before you start writing, determine who your audience will be. For a client letter, it will be the client. For a memorandum of law, it will be the judge and opposing counsel. For a contract, it will be the parties to the contract. These are the obvious answers. Then think who else you need to make sure understands what you have written. For example, documents designed to record information, such as deeds, contracts, and wills, may end up being litigated. A cautious writer of those types of documents will keep in mind the attorneys who might litigate and the judge who might interpret the meaning of those documents.

While writing, ask yourself whether your intended (and perhaps your unintended) audience will understand what you have written. If you are writing to the client, will the client understand what you have written? If not, explain your message in simpler terms. Are the words you use too abstract or inexact? If so, use more specific words or explain yourself in more detail. Are any words too ambiguous? If so, try defining any ambiguous word.

Your ultimate goal is to have your reader understand what you have written. If you think your reader will have trouble understanding what you have written, revise your document. Even if your reader will understand what you have written, can you add more transitional language or signposts to make the document easier to understand? (The terms transitional language and signposts are explained in Chapter 10.) One way to determine

whether your writing is easy to understand is to read the document out loud. Revise the parts of the document that do not read well when being read out loud. Another way is to have someone unfamiliar with the subject matter read your document. Ask that person which passages were hard to understand and revise them.

A WARNING AGAINST COMMUNICATING TOO MUCH

You must be careful not to communicate too much. If you were playing poker, you would not let the other players see your hand. Just as you would guard your poker hand, an attorney representing the client's best interest will guard against certain information being disclosed and will be careful in the way information is presented. Care in word choice is extremely important because anything in writing may be used against the writer later. An attorney dealing with a confidential matter may refrain from putting the matter in writing for this reason. If the information is adverse to the client, it may be better to communicate the information orally rather than to put it in writing.

In contrast, a paper trail is often useful as proof of exactly what was communicated. Certain information needs to be written so it can have legal effect now and be referred to later (contracts, wills, deeds, court documents). An attorney may put advice or information in writing in case there is any question later as to what the attorney communicated. A client opinion is often put in writing so the client can study it in detail and refer to it later; putting the advice in writing protects the attorney if the client tries to apply the advice to some future situation beyond the scope of the opinion letter. Certain information may be given to the opposing attorney in writing to furnish proof that the opposing attorney was aware of the information.

WRITING TIP

Warning on Metadata

In the electronic age you need to be wary of inadvertently communicating too much through metadata. Metadata is information invisible to the reader of a print document but visible or accessible in an electronic document. The information can include the client's name, the author's name, the name of the author's employer, history of the document, hidden text, comments, revisions to the document, and prior versions of the document. Depending on the circumstances, this information can be the type you do not want to disclose because it is confidential or sensitive. You may need to use a "scrubbing" program to remove metadata prior to transmission and the hard drive of a computer that is being discarded should be scrubbed to remove confidential or sensitive information.

ELIMINATION OF MECHANICAL ERRORS

Communicating is the fun part of legal writing. The other necessary, though tedious, part is eliminating mechanical errors. You need to do your best to eliminate mechanical errors for two reasons. First, you want your reader to concentrate on your message and not be distracted by mechanical errors. Second, a reader who spots a number of mechanical errors will begin to wonder if the writer was sloppy. If the writer did not take the time to proof for typographical and spelling errors, perhaps the writer's sloppiness extended to legal research, too. You do not want to lose your credibility over a few easily eliminated mechanical errors.

In this author's experience, students typically have trouble with three categories of mechanical errors. You are already familiar with the first category of mechanical errors from your previous writing experience. These errors, which include problems with apostrophes, antecedents, spelling, run-on sentences, sentence fragments, parallel construction, and sequence of tenses, are discussed in Appendix D.

The second category of mechanical errors will be new to you if you have not had previous legal writing experience. This category includes problems with quotations and citations. The rules for quotations and citations are discussed in Appendix C.

Third-category mechanical errors include errors other than second-category errors. This category includes errors such as quoting from a headnote or case syllabus, not using plain English, not giving a page reference to material from a primary or secondary source, not quoting exactly, plagiarizing, using contractions in more formal legal documents, using the word "I" in more formal legal documents, and elegant variation (using more than one word to refer to the same thing). These errors are discussed in Chapter 10.

ETHICAL OBLIGATIONS

Boxes in this chapter contain the text of ethics rules from various states that impact on the information included in written documents. The attorney ethics rules of your state may be similar in wording or intent. The writer should be mindful of the attorney ethics rules; a number of them concern the contents of written documents and the consequences for violating them can be very serious, as shown in the excerpts from disciplinary cases accompanying the rules.

COMPETENCE IN WRITING

Rule 1.1 of the Kansas Rules of Professional Conduct generally describes the type of representation the lawyer must provide the client. Rule 1.1 of the Kansas Rules of Professional Conduct states:

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Incompetence may mean inadequate legal research, poor writing skills, or both as shown in the following disciplinary case.

In 2005, the Supreme Court of Kansas disbarred a fledgling attorney, Bret Landrith, for violating a number of Kansas ethics rules, including rule 1.1. Landrith's disciplinary case before the Supreme Court of Kansas was based on ethics complaints arising from two of his first four cases he handled in practice. In the first of the two cases, Landrith represented Price, the biological father whose parental rights had been terminated. The judge deciding the case stated:

> we are compelled to express consternation over most of the issues framed and argued by the appellant in this appeal. We generally conclude that, with the exception of a legitimate appeal from the termination of parental rights, [Price] and his counsel [Landrith] have asserted claims that have no factual or legal basis, often citing only conclusory and unsupported allegations of fact or without providing any supportive legal authority. We are inclined to admonish that vigorous advocacy certainly does not require or tolerate such conduct. We have diligently reviewed and addressed all claims asserted, but our objective discussion and determinations should not be viewed as condoning the assertion of such unsupported claims in our court.

In re Landrith, 124 P.3d 467, 472 (Kan. 2005).

In the second case, the federal Magistrate stated:

> the undersigned wishes to express some words of caution to both plaintiff and Mr. Landrith. This case has been handled in an extremely haphazard manner. The court is mindful of and sympathetic to plaintiff's statement during the recent pretrial conference . . . that no attorney other than Mr. Landrith was willing to take plaintiff's case and that plaintiff is therefore thankful for Mr. Landrith's loyalty. But plaintiff would be prudent to bear in mind that loyalty and competence are different qualities. Stated more directly, the court is deeply troubled by Mr. Landrith's apparent incompetence. The pleadings he has filed [citations omitted], and his non-responsive, rambling, ill-formed legal arguments during the pretrial conference, suggest that he is not conversant with even the most basic aspects of the Federal Rules of Civil Procedure. The court doubts that Mr. Landrith has any better grasp of the substantive law that applies to this case.
>
> Based on what transpired at the pretrial conference, plaintiff appears more articulate that Mr. Landrith. Plaintiff may be better served by representing himself without any attorney if indeed Mr. Landrith is the only attorney willing to take the case.
>
> *Id*. at 475.

The time Landrith spent practicing before being disbarred was roughly equivalent to the three years a full-time student spends in law school. Landrith graduated from Washburn Law School in 2001 and passed the bar in 2002. Normally, one would imagine that a court would give an inexperienced attorney with ethical violations some leeway and perhaps impose suspension rather than disbarment; however, Landrith's actions in his three years of practice were examples of how not to practice law, causing havoc with his clients, the courts, and other attorneys. The following statement by the Supreme Court of Kansas indicates why the court meted out the ultimate sanction to an attorney so early in his career:

> [Landrith] violated his duty to his clients to provide competent representation. He violated his duty to refrain from interfering with the administration of justice. He violated his duty to the legal profession to maintain personal integrity. He violated these duties intentionally. As a result of his misconduct, [Landrith] caused actual injury to the adoptive parents of Baby C; to Vincent, their counsel; and to the legal system and the legal profession. [Landrith]'s behavior cost Baby C's adoptive parents more than $20,000. Vincent forgave the parents an additional $10,000 in attorney fees. In addition, the personal anxiety and stress experienced by the adoptive parents in their experience with the legal system was dramatically increased due to [Landrith]'s conduct.
>
> Furthermore, the legal system itself suffered injury as a result of [Landrith]'s misconduct. The Kansas Court of Appeals and the United States District Court for the District of Kansas wasted valuable resources because of [Landrith]'s absolute incompetence and interference with the administration of justice. Finally, the legal profession has been damaged by [Landrith]'s false accusations against members of the judiciary; attorneys; court personnel; and other state, county, and municipal employees.
>
> *Id*. at 485.

Rule 1.1 of the Kansas Rules of Professional Conduct Rule 1.1 was patterned on rule 1.1 of the American Bar Association's *Model Rules of Professional Conduct*. States often adopt the language of the ABA *Model Rules* as the state ethics rules with virtually no change in wording; however, states are free to adopt their own version of a rule as New Hampshire did. New Hampshire's version of rule 1.1 is much more detailed, perhaps providing more guidance. Rule 1.1 of the New Hampshire Rules of Professional Conduct states:

Rule 1.1. Competence

(a) A lawyer shall provide competent representation to a client.
(b) Legal competence requires at a minimum:
  (1) specific knowledge about the fields of law in which the lawyer practices;
  (2) performance of the techniques of practice with skill;
  (3) identification of areas beyond the lawyer's competence and bringing those areas to the client's attention;
  (4) proper preparation; and
  (5) attention to details and schedules necessary to assure that the matter undertaken is completed with no avoidable harm to the client's interest.
(c) In the performance of client service, a lawyer shall at a minimum:
  (1) gather sufficient facts regarding the client's problem from the client, and from other relevant sources;
  (2) formulate the material issues raised, determine applicable law and identify alternative legal responses;
  (3) develop a strategy, in collaboration with the client, for solving the legal problems of the client; and
  (4) undertake actions on the client's behalf in a timely and effective manner including, where appropriate, associating with another lawyer who possesses the skill and knowledge required to assure competent representation.

The New Hampshire version of rule 1.1 distinguishes between an attorney's usual areas of practice, on one hand, and other areas of law, on the other hand, in which the attorney may need the assistance of another attorney. Securities law can be quite complex, as attorney William Richmond found when the Supreme Court of New Hampshire suspended him from practice for six months under rule 1.1, among other rules, for his mishandling of an initial public offering of stock for Environmental Showcase, Limited (ESL). Richmond and Seaton Gras started ESL and Richmond served as chief operating officer, corporate counsel, member of the board of directors, and shareholder, with this conflict of interest one of the bases for the disciplinary action against Richmond. The court found that Richmond violated rule 1.1 based on the following facts:

> In August 1999, on ESL's behalf, Richmond filed a form U-7 disclosure document with the New Hampshire Bureau of Securities Regulation (Bureau) in order to conduct a sale of up to one million dollars of common stock. The web site for Richmond's law firm suggested that he had experience in helping small businesses file direct public offerings, although Richmond had only drafted offerings that had never been filed. The Bureau completed an initial review of the form U-7 and commented on at least eighty-four items that required correction or additional disclosure. After further discussions with the Bureau, Richmond later withdrew the form U-7 on ESL's behalf. The Bureau conducted an investigation that resulted in a consent order in which Richmond, Gras and ESL admitted violating State securities laws by selling unregistered securities and selling securities without a license. . . . ESL agreed to pay a $7,500 administrative fine and Richmond and Gras were ordered to cease and desist from further violations of the securities laws.

In re Richmond's Case, 872 A.2d 1023, 1027 (N.H. 2005).

CONFIDENTIAL INFORMATION

Rule 1.6 of the Connecticut Rules of Professional Conduct concerning confidential information guides the attorney in determining the information the attorney is required to disclose, prohibited from disclosing, or permitted to disclose in written documents.

Rule 1.6 provides:

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by subsection (b), (c), or (d).

(b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm.

(c) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary to:

  (1) Prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in substantial injury to the financial interest or property of another;

  (2) Prevent, mitigate or rectify the consequence of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used;

  (3) Secure legal advice about the lawyer's compliance with these Rules;

  (4) Comply with other law or a court order.

(d) A lawyer may reveal such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

In 2004 the Connecticut Superior Court suspended attorney Sheri Paige from practice for one year for violating various state ethics rules, including rule 1.6. The court found that:

> [Paige] customarily reused paper which contained confidential client information as scrap. She did not protect the information on this paper from being revealed to other clients. In one instance, on the back of a note she gave to [her client] Zidan with information as to where to purchase life insurance, was information concerning another client's medical treatment, the name of the treating physician, and the medical bill details. By allowing access to this confidential information, the respondent violated Rule 1.6(a).

Statewide Grievance Comm. v. Paige, No. CV030198335S, 2004 WL 1833462, at *7 (Conn. Super. Ct. July 14, 2004).

Most attorneys have more common sense and would protect confidential client information more carefully than Paige did; however, many attorneys are not as technologically savvy as they should be and may inadvertently transmit electronic documents containing sensitive metadata or may send unencrypted emails containing confidential client information.

MERITORIOUS CLAIM

Rule 3.1 of the Kansas Rules of Professional Responsibility prohibits a lawyer from making a claim that has no basis in the law.

Rule 3.1 provides:

> **Rule 3.1 Meritorious Claims and Contentions**
>
> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. . . .

In *Landrith,* the 2005 Kansas case discussed above, Landrith filed a Second Amended Complaint in federal court that added six additional defendants but failed to serve the six defendants with a copy of the complaint until two days before the pretrial conference. Landrith claimed that service on the defendants was unnecessary because "(1) Kansas statutes imputed knowledge of lawsuits against a municipality to all employees of the municipality; (2) the defendants had already entered an appearance; (3) the defendants had actual notice of the lawsuit." *In re Landrith*, 124 P.3d 467, 475 (Kan. 2005). The court found that Landrith's claim that he properly served the defendants violated rule 3.1 because it was baseless.

CANDOR TOWARD THE TRIBUNAL

Rule 3.3 of the Hawaii Rules of Professional Conduct concerns the relationship between the attorney and the judge, prohibiting the attorney from making false statements and requiring the attorney to disclose material facts and adverse authority not disclosed by opposing counsel. The judge often relies on statements of the attorneys appearing in court, at least initially, and is understandably dismayed if an attorney intentionally misstates the law.

In 2005, the Supreme Court of Hawaii considered whether Ronald Au should be disciplined for, among other allegations, misstating information about a case to the trial court judge. Au's statements about *Sherry v. Ross*, 846 F.Supp. 1424 (D.Haw.1994) allegedly violated rules 3.3(a)(1) and 8.4(c) of the Hawaii Rules of Professional Conduct, both of which prohibit an attorney from making false statements.

Rule 3.3 provides:

> **Rule 3.3 Candor Toward the Tribunal**
>
> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of material fact or law to a tribunal;
>
> (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
>
> (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take remedial measures to the extent reasonably necessary to rectify the consequences. . . .

In *Au*, Au told the trial court judge:

- that *Sherry* was decided on the "attorney-client crime-fraud provisions [of Rule 503 of the Hawaii Rules of Evidence (HRE)] and the Fraudulent Conveyance Act . . . [under] HRS 651 C-4";
- that, in *Sherry*, the debtor conveyed real property to his wife with the help of an attorney who prepared the conveyance;
- that the United States Court of Appeals for the Ninth Circuit upheld the "Federal Court"; and
- that the "Court [presumably the Ninth Circuit] found that fraudulent intent was not proven under the fraudulent conveyances provision as under the common law provision."

In fact, Au's description of *Sherry* was not accurate because

- *Sherry* addresses neither the attorney-client privilege nor the "crime-fraud" exception to the attorney-client privilege;
- *Sherry* does not mention a relationship between an attorney and a client, nor does it mention an attorney or an attorney assisting in a conveyance;
- *Sherry* was decided under neither the "Fraudulent Conveyance Act" nor the "Uniform Fraudulent Transfer Act," but rather, *Sherry* was decided under the common law;
- in *Sherry*, a third party (not the debtor) conveyed property to a debtor's wife, and a subsequent creditor challenged the conveyance; and
- Magistrate Judge Francis I. Yamashita of the United States District Court for the District of Hawaii authored *Sherry*, and there was no Ninth Circuit opinion.

Office of Disciplinary Counsel v. Au, 113 P.3d 203, 205–06 (Hawaii 2005).

The Supreme Court of Hawaii suspended Au for five years for violating rules 3.3(a)(1) and 8.4(c) as well as committing other ethics violations.

The bar association has the power to discipline an attorney for violating ethics rules, as does the judge. In a 2005 case, a federal judge sanctioned the defendant, the defendant's attorney, and her law firm for "bad faith litigation tactics through their systematic and repeated misstatements of the record, frivolous objections to Plaintiff's statement of facts, and repeated mischaracterizations of the law" under rule 11 of the Federal Rules of Civil Procedure. (For the text of rule 11, see Exhibit 5-8.) If the case had been in state court, the attorney would have been in violation of the state equivalent of rule 3.3. The judge ordered the defendant to pay the plaintiff and the plaintiff's attorney $5,000; the judge ordered the defendant's attorney personally to pay the plaintiff and the plaintiff's attorney $5,000 and take twenty hours of ethics education; and the judge ordered the defendant's law firm to pay the plaintiff and the plaintiff's attorney $5,000 and required each of its attorneys to take six hours of ethics education. In addition, the judge publically reproved the defendant's attorney and her law firm.

Moser v. Bret Harte Union High School Dist., 366 F.Supp.2d 944, 978, 988 (E.D.Cal. 2005).

FAIRNESS TO OPPOSING PARTY AND COUNSEL

Rule 3.4 of the Kansas Rules of Professional Responsibility requires an attorney to be fair to opponents by refraining from certain activities.

Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.

A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

In *Landrith,* the 2005 Kansas case discussed above, the court found that Landrith violated rule 3.4(c) by knowingly and intentionally failing to follow court rules. Landrith's almost complete failure to follow court rules prolonged the litigation, at considerable extra cost to the other party.

IMPARTIALITY AND DECORUM OF THE TRIBUNAL

Rule 20:3.5 of the Wisconsin Supreme Court Rules is patterned on rule 3.5 of the American Bar Association's *Model Rules of Professional Conduct*. Rule 20:3.5 prohibits the attorney from improperly influencing the judge or others involved in a court case and prohibits the attorney from disrupting the courtroom.

Rule 20:3.5 provides:

SCR 20:3.5. Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order or for scheduling purposes if permitted by the court. If communication between a lawyer and judge has occurred in order to schedule the matter, the lawyer involved shall promptly notify the lawyer for the other party or the other party, if unrepresented, of such communication;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.

In a 2008 case from a Wisconsin intermediate appellate court, the court took the unusual step of sending its opinion to the Wisconsin Office of Lawyer Regulation, presumably for an investigation of whether written statements in the appellate brief of the attorney for St. Croix County critical of opposing counsel violated rule 20:3.5. The court stated:

> 14 Although we resolve this issue in the County's favor, we take issue with its brief. We understand corporation counsel's obvious frustration over repeated litigation with Bettendorf, particularly in light of the fact situation in this case. But corporation counsel's brief contains a collection of attacks against Bettendorf's attorney[FN2] that are nothing more than unfounded, mean-spirited slurs. Given corporation counsel's grievances against Bettendorf's attorney, such hyperbole is, at the very least, ironic.

FN2. Corporation counsel actually refers to Bettendorf, not the attorney, in his brief, after noting that his "understanding of protocol" prevents him from referring directly to the attorney by name.

> 15 Contending that appellant's recitation of the facts is misleading is not an uncommon accusation from respondents. However, corporation counsel goes beyond noting this perceived misrepresentation and complains that opposing counsel's "desire to serve his self-interest is excessive. With apparent hubris, he mocks and insults this court and the appellate system with this approach and this appeal." Corporation counsel then comments: "Creating facts creates a false reality. Bettendorf ['s attorney] needs a false reality to maintain this appeal."
>
> 16 To refute counsel's contention that this court exceeded its authority on review, corporation counsel notes that Bettendorf's attorney "goes beyond what I could conceive anyone doing. He doesn't push the envelope, he totally shreds it." Corporation counsel also asserts counsel's "rant is factually baseless. . . . The rest of his argument in this regard is the same ranting." Corporation counsel then cites *Alice in Wonderland*

by Lewis Carroll, to less-than-persuasive effect, and summarizes this appeal as having a "farcical theme."

17 "A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, *other lawyers* and public officials." (Emphasis added.) PREAMBLE, SCR ch. 20 (2005–06). "The advocate's function is to present evidence and argument so that the cause may be decided according to law. . . . An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."[FN3] COMMENT, SCR 20:3.5 (2005–06). Given corporation counsel's unwarranted belligerence, it is the determination of this panel that a copy of this opinion shall be furnished to the Office of Lawyer Regulation for review and further investigation, as that office may deem appropriate.

FN3. We thus appreciate Bettendorf's attorney's professionalism and restraint, demonstrated by his refusal to turn his reply brief into a similar set of attacks.

Bettendorf v. St. Croix County, No. 2007AP2329, 2008 WL 2097398, at ¶¶ 14–17 (Wis. Ct. App. May 20, 2008).

TRUTHFULNESS IN STATEMENTS TO OTHERS

Rule 4.1 of the Maryland Lawyers' Rules of Professional Conduct prohibits the attorney from making false statements and requires the attorney to disclose certain information. Rule 4.1 provides:

Rule 4.1. Truthfulness in Statements to Others

(a) In the course of representing a client a lawyer shall not knowingly:
  (1) make a false statement of material fact or law to a third person; or
  (2) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.
(b) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

The Court of Appeals of Maryland, the Maryland state court of last resort disbarred attorney Andrew Steinberg for violating fourteen Maryland ethics rules, one of which was rule 4.1. This violation occurred in connection with Steinberg's representation of Christine Serabian based on the following facts:

[Rule] 4.1 prohibits a lawyer from making false statements of material fact to third persons. This includes misrepresentations made to clients, opposing counsel, or any other third person. Throughout his representation of Ms. Serabian, the record reveals several instances where [Steinberg] made misrepresentations. The most glaring is the misrepresentation made to Mr. Meng, [opposing counsel] regarding the 13 November deposition, when [Steinberg] told opposing counsel that his client refused to be deposed. Ms. Serabian testified at the *ex parte* hearing that she did not make such a statement. A second major misrepresentation followed Steinberg's discharge, when he informed both Ms. Serabian and Mr. Meng that he had filed a motion to withdraw. He did not file actually until months later.

Attorney Grievance Com'n of Maryland v. Steinberg, 910 A.2d 429, 446 (Md. 2006).

RESPECT FOR RIGHTS OF THIRD PERSONS

Rule 4.4 of the Kansas Rules of Professional Responsibility prohibit an attorney from taking actions only to harass others.

Rule 4.4 provides:

> **Rule 4.4 Respect for Rights of Third Persons**
>
> (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
>
> (b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

In *Landrith*, the 2005 Kansas case discussed above, the court found that Landrith violated rule 4.4 by falsely accusing public officials and others connected with his cases of improprieties. Landrith made some of these accusations after the disciplinary proceeding was filed against him:

> [Landrith] filed an 85-page document in this disciplinary proceeding, repeating accusations he had made in previous filings and adding new accusations. He accused now Justice Luckert and Judge Anderson of mismanaging funds; Justice Luckert of backdating an entry of appearance; the Shawnee County District Court staff of telling deliberate falsehoods; Chief Justice Kay McFarland and appellate clerk Green of obstructing justice and denying Price his constitutional rights; two other district judges of obstructing justice; Judge Pierron of deliberate and knowing falsehoods; and Vincent of altering records and other crimes, including operating "a baby export business." Additional accusations continued in this vein.
>
> [Landrith] also stated that, having "since researched and investigated the matter further," he was "now certain" that Vincent, Wichita attorney Martin Bauer, attorney Alan Hazlett, and Stanton Hazlett, were engaged "in a common enterprise to kidnap Kansas babies through deception and coercion and sell the infants in an illicit commerce that is entirely dependent upon the participation of some officials in the Kansas Judicial Branch."
>
> [Landrith] also made numerous accusations against specific named Topeka city officials and generally against the Topeka Police Department for harassing and stalking his clients and his witnesses. Both Price and Bolden, as well as several of [Landrith]'s witnesses, presented affidavits attesting to the conspiracy involved in these cases and to the fact that Topeka police began harassing and stalking them once [Landrith] instituted the appeals for Price and Bolden.

In re Landrith, 124 P.3d 467, 476 (Kan. 2005).

THE ATTORNEY'S RESPONSIBILITY REGARDING NON-ATTORNEY ASSISTANTS

Rule 5.3 of the Louisiana Rules of Professional Conduct require the lawyer to supervise nonlawyer assistants and hold the lawyer responsible for the actions of the nonlawyer assistants.

Rule 5.3 provides:

Rule 5.3. Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

In 2005 the Supreme Court of Louisiana suspended Norman Mopsik from the practice of law for sixty days for his failure to properly supervise a paralegal in his office. The following are the facts according to one of the justices who concurred in part and dissented in part because the justice thought that Mopsik should have received a stiffer sanction:

> [Mopsik] represented Randall Schmitt, but never met with or spoke to his client because he allowed [paralegal] Shirley Gai to "handle" the matter. For her part, Ms. Gai wrote several letters to opposing counsel on the letterhead of respondent's law firm, which she signed in her own name, without designating herself as a paralegal or otherwise indicating that she is not an attorney licensed to practice law in Louisiana. Ms. Gai frequently referred to Mr. Schmitt as "my client,"[FN1] and she spoke with counsel on the telephone several times and went to his law office to meet with him regarding the Schmitt matter. In turn, opposing counsel addressed Ms. Gai as "Attorney at Law" when he corresponded with her. Notably, his false impression that Ms. Gai was an attorney was never corrected. In mid-July 2001, some six weeks after the representation commenced, Ms. Gai filed an ex parte petition for temporary joint custody on Mr. Schmitt's behalf in the Civil District Court for the Parish of Orleans. Though his story later changed, [Mopsik] admitted in a sworn statement that he drafted and signed the petition for temporary joint custody and gave it to Mr. Schmitt or Ms. Gai to file at Civil District Court. [Mopsik] also admitted that Ms. Gai was the primary contact on Mr. Schmitt's case and that he never spoke with opposing counsel concerning the matter. Finally, though [Mopsik] has claimed that he reviews "every single file" in his office—some 1,500 open files—at least once a

month, he admitted that he never reviewed the Schmitt file and could not recall seeing many of the letters written to Ms. Gai by Mr. Healy and vice-versa.

FN1. [Mopsik] was asked about this reference during the formal hearing in this matter. He testified that he was not at all troubled by Ms. Gai's referring to Mr. Schmitt as her client because she only used those words "in the context as being a paralegal."

In re Mopsik, 902 So.2d 991, 996-97 (La. 2005)(Kimball, J., concurring in part and dissenting in part).

In 2003, a panel of the Federal Circuit Court of Appeals for the Ninth Circuit decided that the trial judge should not have extended the deadline for filing an appeal where the attorney relied upon a law firm calendaring clerk who mistakenly calendared the deadline for sixty days from the judgment instead of thirty. The court stated, "What counsel did was to delegate a professional task to a nonprofessional to perform. Knowledge of the law is a lawyer's stock in trade. Bureaucratization of the law such that the lawyer can turn over to nonlawyers the lawyer's knowledge of the law is not acceptable for our profession." The court added, "Here there was ignorance of the rules, compounded by delegation of knowledge of the rules to a nonlawyer for whom responsibility was not accepted." Later, the Ninth Circuit, en banc, vacated the three-judge panel decision and affirmed the trial court. *Pincay v. Andrews*, 389 F.3d 853 (9th Cir. 2004)(en banc). Although the 2003 decision is no longer good law, it is a wake-up call to any attorney who fails to properly supervise nonlawyer assistants.

STATEMENTS CONCERNING JUDGES

Rule 8.2 of the Pennsylvania Rules of Professional Conduct prohibits the attorney from making a false statement concerning a judge's integrity.

Rule 8.2 provides:

Rule 8.2. Statements Concerning Judges and Other Adjudicatory Officers

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

The Supreme Court of Pennsylvania disbarred Eugene Wrona in 2006 for violating three ethics rules, one of which was rule 8.2, while handling his first court case on his own. The court found that he violated rule 8.2 based on the following facts:

> [Wrona] represented [Farouk Z. Hamoui] in a child support matter in the Court of Common Pleas of Lehigh County. [Wrona] came to believe that original audiotapes of court proceedings in the case had been altered to omit statements or testimony and that the transcripts of those proceedings, prepared from the audiotapes, therefore did not accurately reflect all that had been said in the course of those proceedings. After filing unsuccessful motions to "correct the record" to have the allegedly omitted statements added to the record, [Wrona] began in late 2000 to accuse the presiding judge in the support case, Alan M. Black, and other court personnel in the Court of Common Pleas of Lehigh County of involvement or complicity in the criminal alteration of audiotapes of court proceedings. These accusations were made

> in a succession of letters, pleadings, court filings, affidavits and internet postings. These accusations continued to the time of [Wrona]'s filings and testimony in this disciplinary proceeding.

Office of Disciplinary Counsel v. Wrona, 908 A.2d 1281, 1288 (Pa. 2006).

The Pennsylvania Disciplinary Board investigated the case and recommended that Wrona be disbarred even though this was the first case that Wrona had handled on his own. The Supreme Court of Pennsylvania adopted the Board's recommendation, perhaps in part because it did not appear that Wrona could be rehabilitated.

> More than in any other case of this nature, [Wrona] is truly unfit to practice law. He exhibited no awareness of his responsibilities and obligations to the court. He was prepared to fight his case in any way possible, including making false and injurious accusations against a judge in a persistent manner through a number of years and to a variety of audiences. This "zealous" representation goes far beyond that contemplated by the ethical rules governing this profession. [Wrona] has not demonstrated that he possesses the qualities and character necessary to practice law in this Commonwealth. Despite his own opinion of his actions, the record is clear that [Wrona] did not serve his client well. It is the Board's opinion that the general public is well-served to have [Wrona] removed from the roll of active attorneys.

Id. at 1290.

ATTORNEY MISCONDUCT

Rule 8.4 of the Kansas Rules of Professional Conduct broadly prohibits the attorney from violating any of the ethics rules, doing anything dishonest, fraudulent, deceitful, or criminal, or doing anything prejudicial to the administration of justice.

Rule 8.4 provides:

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) Violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) engage in conduct that is prejudicial to the administration of justice;
(e) state or imply an ability to influence improperly a government agency or official;
(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
(g) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

In 2004, the Supreme Court of Kansas publicly censured attorney E. Thomas Pyle, III. After local newspapers published articles concerning Pyle's censure, Pyle sent a letter to at least 281 people explaining the censure. The Kansas Disciplinary Administrator filed a complaint against Pyle claiming that the letter violated a number of ethics rules, including

rule 8.4. In 2007, the Supreme Court of Kansas suspended Pyle from the practice of law for three months because the act of sending the letter violated rule 8.4(d). The court found that the purpose of the letter was to:

- Reargue whether respondent violated any rules of professional conduct and whether he was deserving of any punishment;
- Portray a "large number" of the members of the Board of Discipline as lackeys for the insurance industry and some undefined number of members as susceptible to improper influence by prior relationships with respondents or "political capital" possessed by those respondents;
- Indicate that the members of his hearing panel erred as a matter of law in relying on an outdated version of Rule 4.2;
- Communicate that he had always disagreed and continued to disagree with the panel's findings, which had been accepted by this court;
- Explain the source of his animosity toward insurers and publish his theory that the particular insurance company involved in the litigation underlying his discipline had brought pressure to bear on the Disciplinary Administrator, the Disciplinary Board, and/or this court to make sure he was punished for his legitimate advocacy; and, finally,
- Minimize the significance of the level of sanction imposed by this court, *i.e.*, equate his published censure to a "public 'slap on the wrist'" with no effect on his practice.

In re Pyle, 156 P.3d 1231, 1241–42 (Kan. 2007).

The court decided that the administration of justice had been prejudiced as evidenced by responses Pyle received to his letter:

> At least some of these responses indicated that the letter had persuaded the recipient that respondent could not get a fair hearing, *i.e.*, that he had been "burned" only because he had the audacity to "stir the pot" in an oppressively unfriendly forum, one much more welcoming to insurance company interests.

Id. at 1248.

TYPES OF LEGAL WRITING

The purposes of legal documents are to inform, to persuade, to record information, and to set forth the law to be followed. The balance of this chapter will discuss the different types of legal documents falling within the first three categories—documents designed to inform, persuade, or record information. Cases, statutes, court rules, and administrative rules and regulations are specialized types of legal writing that set forth the law. You are already somewhat familiar with the substance and format of these documents from your legal research course, although further discussion of them is beyond the scope of this book.

LEGAL WRITING DESIGNED TO INFORM

The purpose of a transmittal letter, a client letter, a letter to a third party, an opinion letter, and an office memo is to inform. (The client letter and the letter to a third party are also dealt with in the following section because another purpose of those documents is to persuade.) As the name suggests, a client letter is written to the client. The subject matter of a client letter may be anything from a simple cover letter explaining a document attached to the letter, to a letter containing basic facts such as the time and date of

a closing, to a letter answering a legal question the client has asked. The first two types of client letters are often referred to as *transmittal letters*. The purpose of a transmittal letter is to communicate basic information. The letter answering a legal question the client has asked is often referred to as a *client opinion letter*. It is the most complicated and takes care to write. The transmittal letter and the client opinion letter are the subject of Chapter 11.

A client letter and a letter to a third party may be similar in subject matter but usually differ in treatment of that subject matter. The two letters will likely differ in substance and wording because there are certain things which would be discussed in confidence with the client that would not be revealed to a third party. Care in word choice is essential, because anything contained in a letter may be later used against the writer should the matter be litigated.

Be careful not to confuse a client opinion letter with an opinion letter. When attorneys refer to an *opinion letter*, they are usually referring to a formal letter written by an attorney in which the attorney gives the opinion that the transaction is legal. The attorney writing the opinion letter is the attorney for one of the parties to the transaction. For example, an opinion letter may be required in a loan closing, a securities offering, or a real estate closing. The opinion letter is usually addressed to one of the other parties to the transaction. Its status is that of a professional work product, and the party may sue the attorney who wrote the letter if the transaction does not result as the attorney has stated in the letter. This type of opinion letter is beyond the scope of this book, but the client opinion letter is discussed extensively in Chapter 11.

The *law office memo* is used to inform the reader of the results of legal research. The information in the law office memo is used by the client or the attorney to solve the problem researched. The office memo is discussed extensively in Chapter 13.

LEGAL DOCUMENTS DESIGNED TO PERSUADE

As previously discussed, a second purpose of the client letter and the letter to the third party is to persuade. This is also the purpose of a pleading, a memorandum of law, and an appellate brief. The job of the attorney is to represent the client's best interests by persuading others that the client's argument is the one that should be adopted.

Think for a moment how the client's argument is formulated. Imagine that two parties have a contract dispute. The attorneys have in front of them the same contract and, if they have competently performed their legal research, the same primary and secondary authority. Each attorney reviews the contract and any authority in the light most favorable to the client. Just as there are two sides to every story, there are at least two arguments that can be made on the same set of facts. Each attorney will argue that the contract interpretation most favorable to the client applies and distinguish away any interpretation not supporting the client's position. If the law seems to be contrary to the client's position, the attorney can argue for a change in the law or can argue that the law should not be enforced because it is unconscionable or unconstitutional.

The client letter, the letter to the third party, a pleading, the memorandum of law, and the appellate brief may all contain the same legal argument. The differences among them is the time frame in which each is used and the format. Take a closer look at each of these documents.

Although the client letter and the letter to the third party may be used at any time, they are often used as persuasive documents prior to or in anticipation of litigation. Both types of letters analyze a problem and argue persuasively that the problem should be resolved in a certain way. The letter to the third party may conclude by saying that the client will be forced to file a lawsuit if the third party does not resolve the problem as suggested

in the letter. After the lawsuit has been filed, the letter to a third party may also be used as a persuasive document in pre-trial settlement negotiations.

pleadings
Formal statements by the parties to a lawsuit setting forth their claims or defenses. Sometimes, written motions and other court papers are called pleadings, but this is not strictly correct.

Pleadings are formal statements by the parties to a lawsuit setting forth their claims or defenses. Examples of pleadings include a complaint, an answer, and a counterclaim. The format and basic substance of civil law pleadings are governed by the Federal Rules of Civil Procedure for federal courts and are governed by the state rules of civil procedure for state courts.

memorandum of law
A brief of law. It is often submitted to a judge in a case. The purpose of the memorandum of law is to support and argue the client's position in the lawsuit.

A **memorandum of law** is a written document containing the attorney's argument substantiated by relevant authority. At the trial level, an attorney may prepare, or may be required to prepare a memorandum of law, the purpose of which is to persuade the judge to reach a particular decision. The format for the memorandum of law is discussed extensively in Chapter 14.

appellate brief
Written statement submitted to an appellate court to persuade the court of the correctness of one's position. An appellate brief argues the facts of the case, supported by specific page references to the record, and the applicable law, supported by citations of authority.

An **appellate brief** is a formal statement by a party submitted to the appellate court. When a case is appealed, each attorney submits a written statement to the appellate court to persuade the court of the correctness of the client's position. An appellate brief argues the facts of the case and the applicable law, supported by citations to authority. The format for the appellate brief is discussed extensively in Chapter 15.

Anyone writing persuasive documents must be mindful of ethics rules.

LEGAL DOCUMENTS DESIGNED TO RECORD INFORMATION

The primary purpose of a deed, a contract, a will, a case brief, or a corporate document is to record information so the information can be reread later. These documents are sometimes referred to as planning documents because they set forth a plan of what will happen in the future so the parties can avoid litigation. Well-written planning documents should prevent rather than encourage litigation. Look at these planning documents.

deed
A document by which one person transfers the legal ownership of land to another person.

A **deed** is a document by which real property or an interest in real property is transferred from one person to another. A deed contains the names of the parties, the date, the operative words transferring the property, and the property description. A warranty deed contains title covenants (promises made by the person transferring the property that certain things are true concerning title to the property), whereas the quitclaim deed does not. Although there are similarities in the format for deeds from state to state, real property transactions are largely creatures of state law, so the law of the state in which the property is located should be consulted as to any particular format required.

contract
An agreement that affects or creates legal relationships between two or more persons. To be a contract, an agreement must involve: at least one promise, consideration (something of value promised or given), persons legally capable of making binding agreements, and a reasonable certainty about the meaning of the terms.

A **contract** is an agreement entered into to do or refrain from doing a particular thing. The contract must be supported by adequate consideration (that which is given in exchange for performance or the promise to perform), must involve an undertaking that is legal to perform, and must be based on mutuality of agreement and obligation between at least two competent parties.

will
A document in which a person tells how his or her property is to be handed out after death. If all the necessary formalities have been taken care of, the law will help carry out the wishes of the person making the will.

A **will** is an instrument by which a person makes a disposition of his or her property, to take effect after death. A will contains the name of the person making the will, the date, the operative words willing that person's property, and the property description. In contrast to a deed, a will is revocable during a person's lifetime. While there are similarities in the format for wills from state to state, wills are also largely creatures of state laws, so the law of the state in which the property is located should be consulted as to any particular format required.

case brief
An outline or summary of a published court opinion.

A **case brief** is an outline or summary of a published court opinion. One reason to brief a case is to understand the case better by identifying its important parts. The other reason to brief a case is to be able to refer to the case brief to refresh one's memory without having to read the whole case again. Although the format for a case brief varies from person

to person, some standard parts of a case brief are the case citation, the facts, the history of the case, the issue(s), the holding(s), the reasoning, and the disposition.

Corporate documents are those documents necessary, usual, or permitted for the establishment and operation of a corporation. Because the corporation is a creature of statute, it comes into existence only upon complying with requirements of state statute. Generally, state statutes require articles of incorporation or a corporate charter to be filed with the secretary of state and an incorporation fee be paid. Other corporate documents include bylaws, rules, and minutes. The format for corporate documents is beyond the scope of this book.

SUMMARY

- Good legal writing is vitally important to attorneys, judges, and paralegals.
- The trend is to write legal documents in plain English (writing so the document can be easily understood).
- Your ultimate goal is to have your reader understand what you have written.
- Legal writing also involves eliminating mechanical errors; this book tells you how to eliminate mechanical errors common to writing in general and how to avoid errors with quotations and citations, as well as to avoid mechanical errors peculiar to legal writing.
- When writing, one must be cognizant of ethics rules.
- Poor writing may violate attorney ethics rules and lead to disciplinary action.
- The purposes of legal documents are to inform, to persuade, to record information, and to set forth the law to be followed.
- This book devotes a chapter to the transmittal letter (designed to inform), and the client opinion letter (designed to inform and persuade), a chapter to pleadings (designed to persuade), a chapter to the office memo (designed to inform), a chapter to the memorandum of law (designed to persuade), and a chapter to the appellate brief (designed to persuade).
- The purpose of a transmittal letter is to communicate information, and the client opinion letter answers a client's legal question.
- Pleadings are formal statements by the parties to a lawsuit setting forth their claims or defenses.
- The office memo is used to inform the reader of the results of legal research.
- A memorandum of law is a written document usually filed with the court which contains the attorney's argument substantiated by relevant authority.
- An appellate brief is a formal statement by a party submitted to the appellate court.

KEY TERMS

appellate brief
case brief
contract
deed
memorandum of law
pleadings
will

CYBERLAW EXERCISES

1. If you were working for a law firm that had a case to be heard by the United States Supreme Court, videos of the justices discussing brief writing would be must-see items. In 2006–2007 Bryan Garner interviewed eight of the nine justices on the United States Supreme Court concerning legal writing and posted the educational video clips linked to his company's Web site (<http://www.lawprose.org/>). Go to the Web site, watch the videos of one of the justices, and list three legal writing tips the justice provides.
2. The American Bar Association home page allows you to access Internet sites for national, international, state, and local bar associations. The home page is located at <http://www.abanet.org>. Use the page to locate information on your state and local bar.
3. The WashLaw Web site (<http://www.washlaw.edu>) allows you to access legal dictionaries. Go to the Web site and click on "legal dictionaries."
4. If you are interested in researching legal ethics concerning the Internet and metadata, try <http://www.legalethics.com>. The site also contains links to other ethics sites.

EXERCISES

1. Why is good legal writing important to the legal profession?
2. How does legal writing resemble or differ from writing you have done in the past?
3. Who are the audiences for the different types of legal writing referred to in the chapter?
4. Is it always a good idea for legal writing to communicate as much as possible?
5. Where could you look in this book to find out how to eliminate mechanical errors from legal writing?
6. Name types of legal writing not covered in depth in this book.
7. What is the purpose of these types of legal writing?

DISCUSSION POINTS

1. Is it fair to suspend an attorney for poor writing skills?
2. What types of legal documents have you read? What are the purposes of those documents?
3. Which documents will you be writing as class assignments? Why do you think your professor had assigned those documents?

Student CD-ROM
For additional materials, please go to the CD in this book.

Online Companion™
For additional resources, please go to http://www.paralegal.delmar.cengage.com.

CHAPTER 10

Fundamentals of Writing

INTRODUCTION

This chapter introduces you to certain writing fundamentals that apply to all types of legal writing. The writing process comprises three steps, from the prewriting stage, to writing, to editing and proofing. After covering the prewriting stage, the chapter discusses matters to keep in mind while writing, editing, and proofing. These include organization, topic sentences, transitional language, signposts, paragraphing, format, and avoiding errors peculiar to legal writing other than errors in quotations and short-form citations. These errors include quoting from a headnote or case syllabus, not using plain English, not giving a page reference to material from a primary or secondary source, not quoting exactly, plagiarizing, using contractions in more formal legal documents, using the word "I" in more formal legal documents, and elegant variation (using more than one word to refer to the same thing).

WRITING PROCESS

The writing process should have three steps:

1. prewriting
2. writing
3. editing and proofing

The novice writer plunges into writing without going through the prewriting step and may not spend enough time on the third step. Some of you will be slow to be convinced and some of you will never be convinced that all three steps are necessary. If your professor does not force you to proceed through all three steps by requiring you to turn in an outline, a written document, and a revision of the written document, try completing the three steps on your own. You will be pleased with the results.

PREWRITING

Prewriting involves performing any necessary research, formulating a writing "plan," and outlining. Do not skimp on any of these activities. Your "research strategy" should include good notetaking and case briefing as you go along. You may spend a little more time doing research, but a little extra time on research should shorten the time you spend formulating your writing plan and outlining.

From time to time you may need to pause and collect your thoughts. Mentally review what you have accomplished and think about the direction you are heading. You need to pay attention to detail yet not lose sight of the big picture.

The research required to write letters, deeds, contracts, and wills may be limited to gathering facts and identifying the information to be included. In writing an office memo, a memorandum of law, or an appellate brief, your research usually will be more extensive than for other types of documents. Performing research may mean various things, from gathering facts by reviewing documents and interviewing people to doing legal research in the law library. Research needs to have been completed as nearly as possible before you start writing or you may find yourself backtracking later.

As you do your research, you should start to decide what your writing plan will be. In other words, how will you organize your facts and the results of your research to make sense to your reader? As you look at the information in front of you, you will probably identify a number of ideas you want to communicate to your reader. In formulating your plan, you must decide on a scheme for arranging these ideas and developing them for the reader.

Your plan is somewhat dictated by the type of document you are writing. Research the standard format for the type of document you are writing. For certain documents, such as deeds and wills, you will probably want to follow the organizational format customarily used in your area but do not depend entirely on the recognized format. Make any organizational changes necessary to make sure your reader understands what you have written. The format for court documents may be dictated by court rule. Even though you must follow the overall organizational framework set out in the rule, make sure you have good internal organization.

If you are writing an office memo, a memorandum of law, or an appellate brief, prewriting should involve developing a thesis. Think about your facts in relation to the results of your research. Then try to step back and look at the "whole picture." If you think about it long enough you will find a central idea that runs through your facts and research material. This is your thesis. Think of your thesis as the border to a puzzle. Once you have established your thesis, use it as a framework and fit your facts and research material within it.

Try to develop a "flowchart" or "road map" as part of your writing plan for your office memo, memorandum of law, or appellate brief. A flowchart should help you to understand the legal analysis applicable to the legal problem you are researching. If you can complete a flowchart, you are probably on the right track with your legal analysis. Frequent reference to your flowchart will help you write your outline. If you cannot construct a flowchart because you cannot make sense of your research, you either need to spend more time to "fit the pieces" together or you need to do more research.

Once you have completed your flowchart, start writing an outline. The outline can be as brief or as detailed as you like. An outline that does not contain very much detail will not take as long to write but will be less helpful in the writing process. An outline that is too skeletal is not very useful. You need to include enough information in your outline to organize yourself before you start writing and determine whether your legal analysis flows. A more detailed outline will take more time to write but should speed up the writing process and cut down on revision time.

If your writing plan is not clear, your writing will be unclear. If your writing is unclear, your reader will end up doing the organization that should have been your job. A reader saddled with this task will not enjoy reading what you have written and may become very frustrated in the attempt.

WRITING

After you have completed the prewriting step, you can progress to writing your document. This section explains how you can help your reader understand your document by organizing it well.

OVERALL ORGANIZATION AND ORGANIZATION WITHIN SECTIONS

Good organization is essential for readability. Depending on the complexity of your document, you may have various levels of organization. Your document must be well organized at each level. Section headings provide overall organization. Then you must organize your writing within each section, and you must organize what you say within each paragraph and within each sentence.

A discussion or reasoning portion of a legal document should contain an introduction, explain the relevant law, and apply the law to the facts. The conclusion may be part of the body of the document or may be in a separate section. In explaining the relevant law and applying it to the facts, the body of the discussion should develop the idea introduced in the introduction and lead up to the conclusion. Develop the idea step by step so you do not lose your reader along the way, explaining even the most obvious steps. Just because you can see the connection between steps two and four does not necessarily mean that your reader will be able to unless the connection is spelled out. The development can be logical or chronological depending on the nature of the discussion.

WRITING TIP

Keep Your Intended Reader in Mind in Organizing Your Document

It is important to keep your intended reader in mind when organizing your document. Spend some time determining what is important for your intended reader to know and provide that information as early as possible in the document. A well-organized document is more professional and may produce a better result than one in which the reader is tasked with combing the document to locate relevant information. For example, when an appellate court reviews the trial court grant of a motion for summary judgment to the defendants on a number of counts de novo, the appellate court must determine whether there is a genuine issue of material fact for each count. The plaintiff/appellant can help the appellate court by separately discussing the law and the evidence showing disputed material facts for each count toward the beginning of the appellate brief. See *Western Wisconsin Water, Inc. v. Quality Beverages of Wisconsin, Inc.*, Nos. 03-2903, 03-3438, 2005 WL 240938, at *3 (Wis. Ct. App. Feb. 3, 2005) in Appendix K.

ORGANIZATION OF AN OFFICE MEMO

To understand what was explained in the preceding section, look at the various levels of organization of an office memo. The office memo is used to record the law found as a result of the research, to explain how the researcher analyzed the law and applied it to the facts, and to propose a solution to the problem. The overall organizational framework is set by the typical office memo format: facts, issue(s), answer(s), reasoning, and conclusion. This is the first level of organization.

The key to the second level of organization is your formulation of the issue(s). An issue must be well organized to contain as much information as possible while still being readable. If you have more than one issue, you need to carefully consider the order in which you will present the issues. The way you formulate your issue(s) dictates everything else in the office memo. Look at your issue(s) and decide what facts are relevant or significant to the issue(s). These are the only ones that should be included in the facts section.

Your answer(s), as the terms imply, are simply answer(s) to your issue(s) and should mirror your issues. The reasoning section flows from the issue(s) because it tells the reader how you got from your issue to your answer. The conclusion is a more detailed statement of your answer(s).

The reasoning section should contain a thesis paragraph, which serves as an introduction, an explanation of relevant law, and an application of the law to the facts. If you have more than one issue, you may want to follow the thesis paragraph with an explanation of the law that is applicable to all the issues first and then discuss each issue separately. For example, a section entitled "reasoning" may begin with a thesis paragraph that serves as an overall introduction and may continue with a statement of the law relevant to all issues. The balance of the reasoning portion of the office memo is broken up into the same number of sections as there are issues. You may visually break up the reasoning portion of the office memo for your reader by using headings for each issue such as "reasoning for issue one" and so on. More levels of organization may be needed if you have sub-issues within issues.

ORGANIZATION AT THE PARAGRAPH LEVEL

The final levels of organization are at the paragraph and sentence levels. You will lose your reader if your overall organization and the organization within the various sections is good but your paragraphs and sentences are not well organized. This section discusses organization at the paragraph level. The following section discusses organization at the sentence level.

Remember your English teacher talking to you about topic sentences? Most paragraphs need topic sentences. (A paragraph reciting a string of chronological events might get along without a topic sentence.) A topic sentence summarizes the topic being discussed in the paragraph. The rest of the paragraph should develop and expand on the idea introduced in the topic sentence. Because the reader will best remember the first and last sentences of the paragraph, the topic sentence is usually, but not always, in one of those two positions.

Look at the preceding paragraph. The first sentence in the paragraph caught the reader's attention. The second sentence is the "topic sentence" and contains the main idea of the paragraph: paragraphs usually need topic sentences. The rest of the paragraph expands on the idea contained in the topic sentence. The rest of the paragraph gives an exception to the use of topic sentences, explains what a topic sentence does, explains how the rest of the paragraph relates to the topic sentence, and gives the typical location of the topic sentence.

If your discussion sounds disjointed, check your paragraph structure. Do you deal with a single idea in each paragraph? If you have more than one idea in a paragraph, split up the paragraph so you give each idea its own paragraph. Do you have a topic sentence? If not, write a sentence that contains the essence of the rest of your paragraph. Did you develop the idea introduced in the topic sentence? If not, decide what else you can say about the idea and add it to the paragraph. If you cannot develop a topic sentence, perhaps the idea needs to be part of another paragraph or you need to eliminate it.

WORD ORDER WITHIN SENTENCES

Although readers may enjoy a challenge, do not challenge your reader too often with unconventional word order. Most sentences should follow the conventional structure for English sentences: subject, verb, and object (if any). Your reader should easily understand your sentences without having to hunt for the subject and the verb. Help your reader by keeping the subject, verb, and object close together and near the beginning of the sentence. Every now and then you may want to vary the conventional subject/verb/object structure to emphasize certain words. Because your reader will remember the beginning and end

of your sentence better than the middle of the sentence, put the information you want to emphasize either at the beginning or at the end of the sentence.

The following are "mixed-up" sentences from student writing. Read them, determine which word order rules have been broken, and decide how the sentences can be corrected.

1. The United States Supreme Court in two cases had to determine whether an investigatory stop was based on reasonable suspicion.
2. Trooper Vogel testified that the appellants, based on a reasonable suspicion created by a drug courier profile, were hauling drugs.
3. In *Smith*, relying on a drug courier profile Trooper Vogel stopped a car.

Here are suggested corrections to these sentences. They are only suggestions. You may have come up with better answers.

1. In two cases the United States Supreme Court had to determine whether an investigatory stop was based on reasonable suspicion.
2. Trooper Vogel testified he had a reasonable suspicion that the appellants were hauling drugs and that his suspicion was based on the drug courier profile.
3. In *Smith*, Trooper Vogel stopped the car in reliance on the drug courier profile.

TRANSITIONAL LANGUAGE AND SIGNPOSTS

Be kind to your reader by using transitional language and signposts as frequently as possible. Think of the textbooks you have been assigned to read this semester. You probably dread trying to read one or two of them and you may actually enjoy reading some of them. Even the most impenetrable subject matter can be made less so through use of transitional language and signposts. On the other hand, easier subject matter can seem just as impenetrable without transitional language and signposts. After reading this section, it would be interesting for you to take a look at your textbooks and analyze the author's writing style for use of transitional language and signposts.

Transitional language provides a "transition" or link between what you have just written and what you are going to write about. For example, the first sentence in this chapter provides a subject matter transition from Chapter 9 to Chapter 10 by explaining that Chapter 10 introduces the reader to the fundamentals of legal writing. Although transitional language introducing a new topic can be used anyplace in the paragraph, it is usually used at the beginning of the paragraph (as it was in the example) or at the end of the paragraph. Use of transitional language at the end of a paragraph allows the writer to introduce the topic of the next paragraph. The writer can then emphasize the new topic by discussing it again immediately in the first sentence of the new paragraph. You can also use transitional words like "although," "even if," "after," "before," and "because" to show the reader the relationship between sentences in a paragraph.

transitional language
Provides a "transition" or link between what you have just written and what you are going to write about.

Signposts are words or phrases that point the reader in the right direction and provide a framework for understanding the document. The signposts in the first paragraph of this chapter are the words "the first part of the chapter," "the second part of the chapter," and "the third part of the chapter." They make it easier for the reader to understand the chapter by preparing the reader to expect the chapter to discuss three main topics: the writing process, writing structure, and certain kinds of mechanical errors. Signposts can also highlight main points in a discussion. For example, the words "the main issue before the court . . ." tells the reader that that will be the central focus of the discussion and provides a context for the rest of the discussion.

signposts
Words or phrases in a document that point the reader in the right direction and provide a framework for understanding the document.

PARAGRAPHING AND TABULATION

To paragraph or not to paragraph: that is the question. There is no one right paragraph length. Some paragraphs may be one sentence long while other paragraphs may contain a number of sentences. One gauge of correct paragraph length is the subject matter of the paragraph. Each paragraph should discuss one main idea. If a paragraph is long and sounds disjointed, it may be because you are trying to discuss more than one idea in a single paragraph. Break up the paragraph into shorter paragraphs.

Another gauge of correct paragraph length is readability. Each page of print should contain a minimum of two or three paragraphs. A reader faced with a long, solid block of print will retain less of what you said than if the same material were broken up into a number of shorter paragraphs. A page containing a series of one- and two-sentence paragraphs is just as bad. If you find yourself with a series of one- and two-sentence paragraphs, see whether your text is easier to read if you combine several of the paragraphs.

tabulation
A format that enhances readability where the writer wants to convey information concerning a number of items or activities, with the writer listing each item or activity on a separate line.

Tabulation can be used very effectively in legal writing where you have a list of items or activities. When you tabulate, you place each item or activity on a separate line. Each line, except for the last and next to the last lines, ends with a semicolon. The next to the last line ends with a semicolon and the word "and" or "or." The last line ends with a period.

The first page of this chapter contains the following example of tabulation:

The writing process should have three steps:

1. prewriting;
2. writing; and
3. editing and proofing.

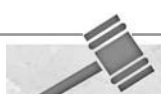
Compare the tabulated material with the following:

The writing process should have three steps: prewriting, writing, and editing and proofing.

The only difference between the two sentences is tabulation. Tabulation makes the sentence much easier to read and understand.

GRAPHICS

Usually, the writer thinks of conveying ideas to the reader through words alone; however, a complicated sequence of events or a complex argument might be easier for the reader to understand through the use of graphics. Graphics might include timelines, flowcharts, diagrams, and tables. The reader may understand the convoluted procedural history of a case better through the inclusion of a timeline. Explanation of the consequences of pursuing each of several alternatives may be better explained through the use of a flowchart. The differences and similarities between two cases may be more easily grasped by including them in a table or spreadsheet.



YOU BE THE JUDGE

Does poor writing and failure to follow court rules violate attorney ethics rules and, if so, what discipline is appropriate?

In reaching your decision, consider the following information:

- The attorney was knowledgeable in the law.
- The attorney continuously filed documents containing spelling and grammar errors.
- The attorney's disregard of court rules caused him to omit proof of service on a number of occasions and to file a motion to withdraw after the deadline.

To see how a state court answered the question, see *In re Disciplinary Action against Hawkins*, 502 N.W.2d 770 (Minn. 1993) in Appendix K.

MECHANICAL ERRORS

Legal writing students typically have trouble with three categories of mechanical errors. The first and second categories of mechanical errors are discussed in Appendixes C and D. This section discusses a third category of mechanical errors—errors that are peculiar to legal writing other than errors in quotations and short-form citations. This section will discuss the following errors:

1. quoting from a headnote or case syllabus;
2. not using plain English;
3. not giving a page reference to material from a primary or secondary source;
4. not quoting exactly;
5. plagiarizing;
6. using contractions in more formal legal documents;
7. using the word "I" in more formal legal documents; and
8. using elegant variation.

QUOTING FROM A HEADNOTE OR CASE SYLLABUS

The error that will most quickly identify you as a novice legal writer is quoting from a headnote or case syllabus. The reason that you should not use any material other than the opinion itself is that the material other than the opinion is not the law and may even be wrong because the publisher wrote it. It is appropriate to refer to or quote from the opinion because it is the law. The publisher or the official reporter for the court prepared the material in the reporter, other than the opinion itself. The non-opinion material is usually, but not always, accurate. It may on occasion contain outright errors. Because the non-opinion material is a summary of material from the case, you may have a different impression of what the law is from reading the non-opinion material than from reading the opinion itself. In addition, the summary may not refer to a part of the case important for your research. The only way to find that material is to read the whole case.

NOT USING PLAIN ENGLISH

Writing in plain English means writing so the document can easily be understood. It requires good organization and format combined with elimination of excess words, Latin phrases, and unnecessary legal terms and jargon. Organization and format were discussed in an earlier section of this chapter. The appendix entitled "Mechanical Errors" discusses elimination of excess words and contains exercises allowing you to practice what you learn.

Some attorneys seem to think that the more Latin phrases and legal terms they include, the better their writing will be. The contrary is usually true. Although there are some Latin terms (like "*res ipsa loquitur*") whose meanings are clear to attorneys but are hard to translate into English, use of most Latin terms is unnecessary and may alienate your reader. *Res ipsa loquitur* is a Latin term meaning "the thing speaks for itself"; it is a rebuttal presumption (a conclusion that can be changed if contrary evidence is introduced) that a person is negligent if the thing causing an accident was in his or her control only, and if that type of accident does not usually happen without negligence. Eliminate all Latin terms if possible. Where you have to use a Latin term like *res ipsa loquitur*, do so with caution. If there is any question whether your reader will understand the term, define it. You can often slip in a definition in a parenthetical phrase within the sentence without insulting your reader's intelligence.

The same thing holds true with legal terms. Eliminate any legal terms or words you think your reader will have trouble understanding and replace them with words your reader will understand. For example, attorneys often speak of "drafting" a document and the client "executing" it. The client may be confused if the attorney's cover letter refers to the document the attorney has "drafted" and asks the client to "execute" the document. For the legally unsophisticated client, it would be preferable to refer to the document the attorney has "written" and ask the client to "sign" it.

OMITTING A PAGE REFERENCE TO MATERIAL FROM A PRIMARY OR SECONDARY SOURCE

Most students know they need to give a page reference when they quote from a case so the reader can quickly find and read the passage in the case. In legal writing, you must also give a page reference when you are referring to specific material from a case even if you are not quoting the material. For example, you may give the facts from the case in your own words. As a courtesy to your reader, you need to tell your reader the page or pages on which the facts are located so the reader can refer to that part of the case without reading the entire opinion. A reference to a specific page is sometimes referred to as a **pinpoint citation** because the citation pinpoints or specifically locates the information for the reader. You do not have to give a page reference if you are referring to the case in general, rather than referring to specific material from the case, and you have previously given the full citation to the case.

pinpoint citation
A citation including the page number(s) on which a quotation or referenced material appears.

A pinpoint citation may precede or follow the information to which it is referring. The location of the pinpoint citation (before or after the applicable information) is unimportant. You must provide the pinpoint citation and locate it so the reader is clear what information is being referenced. In the next paragraph the first pinpoint citation precedes the information being referenced and the second pinpoint citation follows the information being referenced. "*Terry*" appears by itself in the middle of the paragraph where the case is being referred to in general terms.

> *Terry v. Ohio*, 392 U.S. 1, 27 (1968) was the landmark case which lowered the burden of proof necessary for a stop from probable cause to "reasonable suspicion." In *Terry* the United States Supreme Court held that police officers could stop someone on the street to investigate possible drug activity so long as the stop is based on something more than "inarticulate hunches." *Id*. at 22.

NOT QUOTING EXACTLY

A writer's stock in trade is his or her credibility. You will lose your credibility quickly if you do not quote accurately. It is important that anything you quote, but especially primary sources, be accurate. If your quotes are not accurate, your reader will think, at best, that you are sloppy and, at worst, that you are intentionally misleading the reader. You must disclose to your reader any intentional alteration of quoted material. Appendix C explains how to show alterations. If you quote a passage that was printed with a typographical error or other mistake, do not correct the passage. Instead, quote the passage as originally printed and insert "[sic]" after the mistake. "[Sic]" tells the reader that the mistake was that of the original author.

PLAGIARIZING

plagiarism
Taking all or part of the writing or idea of another person and passing it off as your own.

Plagiarism is adopting another writer's work as your own without giving proper credit to the other writer. Plagiarism exists when you quote from a primary or secondary source without putting the language in quotation marks. It also exists when you have generally followed

another writer's style and word choice even though not every word is the other writer's. Instead of plagiarizing, you should either quote the other writer directly or put the material entirely in your own words. To put the material in your own words, you need to know the substance of it well enough that you can "retell" it without referring back to the text.

USING CONTRACTIONS IN MORE FORMAL LEGAL DOCUMENTS

Most legal documents, except for letters and memos to business associates who are also friends, have at least a slightly formal tone of voice. Certain words, such as contractions, that are common in oral communication do not fit in formal legal documents because the tone of these words is too informal. When you are writing a legal document, think twice before you use a contraction or informal word. Chances are it does not belong in your document.

USE OF THE WORD "I" IN MORE FORMAL LEGAL DOCUMENTS

When giving an opinion in a document such as a client letter, an office memo, a memorandum of law, or an appellate brief, keep the word "I" out of your writing. Although you have a personal opinion and the legal opinion you give very likely coincides with your own opinion, your analysis must be backed up with the law rather than your personal opinion. Rephrase your sentences in third person (e.g., "The virtual identity of the facts in the two cases means that . . .") instead of in first person singular (e.g., "I think that . . ."). You can include your personal opinion in more formal legal documents so long as you state it in impersonal language.

ELEGANT VARIATION

One English teacher or another in the past has probably suggested to you that you make your writing interesting by using as many different words as possible to refer to the same thing. This is called **elegant variation**. Elegant variation is terrific for most writing other than legal writing. In legal writing, pick a word to refer to something and use it whenever you refer to the same thing. For example, this book uses "attorney" to refer to a person licensed to practice law. It would be elegant variation to also refer to that person as a "lawyer," "counselor," and "practitioner." A legal thesaurus may profitably be used when you are trying to choose the right term. Once you chose your term, stick with it throughout your document.

elegant variation
Use of a number of different words to refer to the same thing.

Elegant variation is not appropriate in legal writing because attorneys focus so intently on word choice. If in writing a contract, you first referred to the document as a "contract," you have defined the document as a "contract." If you later referred to it as an "agreement," an attorney will wonder why you have changed the wording from "contract" to "agreement." The attorney will wonder whether the writer might have made a mistake or whether the writer was referring to two different documents, one of which was a "contract" and the other was an "agreement." Although it may seem uncomfortable at first to keep using the same word over and over again, you will soon get used to it.

EDITING AND PROOFING

The final step, editing and proofing, is perhaps the most important step in the writing process, yet often the one overlooked by the novice writer. Good writing is a product of careful planning and writing, followed by revising multiple times. Editing and proofing are difficult because the writer has been so absorbed in the writing process that the writer has lost necessary objectivity, which leads to an inability to spot errors easily noted by others. This difficulty is compounded by the fact that the typical legal document is quite complex.

The writer must base the legal document on applicable law, the writer must communicate the substance of the document clearly communicated to the reader, the writer must avoid mechanical errors, and the writer must cite correctly.

WRITING TIP

Start Writing the Document Early Enough that You Have Time for Revision

If possible, complete the first draft of your document with plenty of time prior to your deadline. Put your document away for a while and bring it out when you have sufficient time to edit and proofread. Because of the lapse of time, you can take a fresh look at the document and you can approach it more objectively, finding errors that you might not otherwise have noticed. If time constraints do not allow you to let your document lay fallow for a while, try one of the other editing and proofreading techniques recommended below.

To revise effectively, the writer should tackle one thing at a time, revising first for substance and meaning, then to eliminate mechanical errors, and then to correct citation form. Often you can find someone to help you check your document for meaning and readability by reading it. It is a good sign if the person understands what you are trying to explain and you can provide a fuller explanation of whatever the person finds unclear. Another technique is to read the document out loud, perhaps into a tape recorder. This technique provides sufficient distance between the writer and the document that the writer notices missing words and other problems that the writer may miss when reading silently.

Your word processing program can help you catch obvious typographical and grammatical errors; however, do not place all of your faith in spell and grammar check. Your computer program will not catch the use of a correctly spelled word that is the wrong word in context.

WRITING TIP

Spell Check Does Not Replace the Need for Careful Proofreading

Relying on the computer to highlight typographical errors is no substitute for careful proofreading. For examples of embarrassing errors this might cause, go to ‹http://www.youtube.com› and view the video the "impotence of proofreading."

SUMMARY

- The three steps of the writing process are:
  - prewriting;
  - writing; and
  - editing and proofing.
- Before you start writing you should perform any necessary research and formulate a writing plan.
- It is a good idea to develop a flowchart and/or outline before you start writing.
- Good organization is essential for readability.

- Carefully organize words within sentences, sentences into paragraphs, and paragraphs into an entire document.
- Overall organization may be dictated by the traditional format of the type of document you are writing.
- Most paragraphs need topic sentences.
- Do not challenge your reader too often with unconventional word order.
- Use transitional language to provide a link between what you have just written and what you are going to write about.
- Use signposts to point the reader in the right direction and provide a framework for understanding the document.
- Paragraph and tabulate to enhance readability.
- Make sure you know how to eliminate the eight mechanical errors discussed at the end of the chapter.

KEY TERMS

elegant variation
pinpoint citation
plagiarism
signposts
tabulation
transitional language

CYBERLAW EXERCISES

1. Bryan Garner has interviewed many judges concerning legal writing and posted the educational video clips linked to his company's Web site (<http://www.lawprose.org/>). Several of the interviews concern editing or proofreading. Go to the Web site, identify an interview concerning editing or proofreading, watch the video of the judge, and list three legal writing tips the judge provides.
2. The WashLaw Web site (<http://www.washlaw.edu>) allows you to access legal dictionaries. Go to the Web site and click on "legal dictionaries."
3. The Michigan Bar has published numerous articles concerning writing in plain language. To access the article, go to <http://www.michbar.org>, click on "publications" and "Michigan Bar Journal." Articles from several years are archived online. You can locate articles on plain language by reviewing the index by topic. Find several.
4. Search an online database for cases in which an attorney's failure to proofread had serious consequences; give the citation and the consequences in three cases.

EXERCISES

1. What do you do before you write?
2. How can you improve your prewriting step?
3. Take a document you have written and analyze it:
   a. How is the overall organization?
   b. Do you use topic sentences?
   c. Is the word order within sentences logical?
   d. Can you use more transitional language and signposts?
   e. Do you paragraph about the right amount, too often, or too infrequently?
   f. Can you make more use of tabulation?
   g. Are you prone to any of the eight mechanical errors discussed in the chapter?

DISCUSSION POINTS

1. How can organization help your reader understand what you have written?
2. What are some examples of transitional language?
3. What are some examples of signposts?
4. What is tabulation and how can it be incorporated into a document?
5. What is the reason for giving a page reference to authority used in your document?
6. What is plagiarism and how can you avoid it?

Student CD-ROM
For additional materials, please go to the CD in this book.

Online Companion™
For additional resources, please go to http://www.paralegal.delmar.cengage.com.

CHAPTER 11

Transmittal Letter, Client Opinion Letter, and E-Mail Correspondence

INTRODUCTION

Two types of letters an attorney often writes to clients are the transmittal letter and the client opinion letter. This chapter explains the purpose and use of the letters and their proper format. It also includes a sample transmittal letter and two sample client opinion letters. The first sample client opinion letter has been footnoted to provide you with writing tips. It should be helpful to refer to the footnotes when writing client opinion letters.

E-mail correspondence is increasingly prevalent and has replaced letters in many instances. In addition, information formerly communicated in a law office memo (Chapter 13) may increasingly be communicated via e-mail. This chapter discusses appropriate e-mail usage and format.

PURPOSE OF THE TRANSMITTAL LETTER

One of the most common types of letters written in the law office is the transmittal letter, the cover letter used when forwarding a document or other information to the client or to a third party. The purposes of the transmittal letter are to explain the information being transmitted, to instruct the recipient in any further action to be taken, and to cover any related matters. For example, the sample transmittal letter in Exhibit 11-1 is the cover letter for an attorney-client retainer agreement (the contract between the attorney and client memorializing the employment relationship between client and attorney). The transmittal letter explains to the client what the attached document is, asks the client to sign the two copies of the agreement and return one copy to the attorney, and suggests that the client schedule an appointment with the attorney.

Another purpose of the transmittal letter is to document that the information attached to the letter was sent to the client and to document the instructions given. Usually the attorney places a copy of the transmittal letter and attachment in the client file. Later, the attorney can refer to the file copy to learn what was sent to the client. If the client loses the transmittal letter or the attachment, the material can be re-sent.

STYLE OF LETTERS

Clients judge the competency of the attorney by the way the attorney presents himself or herself. Clients may lose confidence in the attorney if they spot errors in letters received from the attorney. In contrast, a clear but knowledgeable letter will strengthen the attorney-client relationship and may cause the client to recommend the attorney to others.

EXHIBIT 11-1
Sample Transmittal Letter.

Florida Attorney
101 Main Street
Anytown, Anystate
May 4, 2009

Via facsimile number: (000) 000-0000
Confirmation number: (000) 000-1000

Esteemed Client
201 Oak Street
Anytown, Anystate

Re: Attorney-Client Retainer Agreement

Dear Ms. Client:

It was a pleasure to meet with you in my office yesterday to discuss your potential lawsuit against Rack & Ruin, Inc. Enclosed are two copies of the Attorney-Client Retainer Agreement we had discussed. The Agreement states the terms of our attorney-client relationship.

Please sign both copies of the Agreement on page 2 in the space provided for your signature and keep one copy of the Agreement for your files. Please return the second signed copy to me in the enclosed stamped, self-addressed envelope.

I would like to meet with you again to discuss any paperwork you are able to find on Rack & Ruin, Inc. Once you have gathered any applicable information, please call my office and schedule an appointment with me.

Very truly yours,

Florida Attorney

The ten style tips listed on this page are applicable to the transmittal letter and the client opinion letter. The list probably contains nothing new. Most of the suggestions listed are a matter of common sense. They are things that you would wish someone writing a letter to you would do.

WRITING TIPS

What To Do

Keep the following writing tips in mind:

Do

1. Use plain English.
2. Be precise and specific.
3. Write at a level of formality appropriate for the recipient.
4. Be consistent in maintaining the same level of formality throughout the letter.
5. Keep your sentences fairly short.
6. Break up each page of the text with paragraphs.
7. State the purpose of the letter early in the letter (preferably in the "Re:" or in the opening line of the body of the letter).
8. Proofread the letter.
9. Double check that any enclosures are included.
10. Note any special transmittal method other than regular mail (facsimile, certified mail, etc.).

Glance over the style tips and try to keep them in mind as you write your transmittal or client opinion letter. As you revise the letter, use the list as a checklist and make sure you have complied with it.

PURPOSE OF THE CLIENT OPINION LETTER

From time to time, a client will ask an attorney a question that requires the attorney to do some research before giving the client the answer. After the attorney researches the question, the attorney may give the client the answer orally or in writing. The letter the attorney writes to the client explaining the answer is usually referred to as a client opinion letter because it gives the client the attorney's legal opinion. Another alternative is to tell the client the answer and follow up the conversation with a client opinion letter. The client opinion letter repeats what the client was told in the conversation and would add any additional information suggested by the conversation.

Generally, it is wise for the attorney to give the answer to the client's question in a client opinion letter. The client can reread the opinion letter as many times as necessary and refer to it later. Putting the opinion in writing means that the client will more likely understand the opinion as it was stated by the attorney. The client opinion letter usually states that the opinion it contains is limited by the facts stated in the letter and by the law as of the date of the letter. This language, and the fact that the opinion is in writing, protect the attorney to the extent possible from having the attorney's advice misconstrued or applied in the future to a different set of facts. An attorney might decide not to put the attorney's opinion in writing if the subject matter of the attorney's opinion is confidential. Another reason not to put the opinion in writing is that a written opinion may be discoverable in litigation.

The main purpose of the client opinion letter is to answer the client's question, but the opinion letter does not just contain the answer. A good client opinion letter also contains a statement of the facts on which the opinion was based, an explanation of applicable law, and an explanation of how the law applies to the facts. The tone of the client opinion letter is usually objective, rather than persuasive, because it explains the law, whether favorable or unfavorable to the client. There is no need to be persuasive and argue the client's position, because the letter is directed to the client.

Chapter 13, which discusses the law office memo, may sound very similar to what you read in this chapter. The reason is that both a client opinion letter and the office memo require the same type of research and analysis to answer a legal question or problem. The client opinion letter and the office memo differ in content because the audience is different. Unless the client is sophisticated, the client opinion letter should be stated in lay terms and include few quotations or citations. (If the client is sophisticated, he or she may be sent the office memo itself rather than a separate client opinion letter.) Another difference is format. A client opinion letter more closely resembles a business letter, although it may have internal headings similar to those of a law office memo.

FORMAT OF THE CLIENT OPINION LETTER

Although there is no one format for client opinion letters, the format given in this chapter is fairly standard. As you read the explanation in this chapter, compare it with the sample client opinion letters in Exhibits 11-2 and 11-3.

HEADING

The heading contains the name and address of the attorney, the date, the name and address of the client, and the subject matter (the "re"). The date is important because, unless otherwise stated in the letter, it is assumed that the opinion is based on the law current through the date of the letter. For ease of reading and reference, the "re" will identify the subject matter of the letter with a reasonable amount of detail.

OPENING

The opening paragraph sets the stage. It typically reminds the client of the context of the client's question and reiterates the client's question. This is a good place to state any limitations on the opinion contained in the letter. The attorney typically states that the opinion is limited to the facts contained in the letter and the law of the state (or federal law, if federal law applies) as of the date of the letter. It is advisable to state that the opinion may be different given different facts or a different date.

FACTS

The facts significant to the opinion are stated objectively in this section. If important facts are not known, this should be stated. It is wise to ask the client to review the facts and advise the attorney of any necessary additions or changes.

ANSWER

The answer section explains the answer to the client's question, with any necessary detail and clarification.

EXPLANATION

In the explanation section, the attorney explains the law in lay terms and then explains how the law applies to the facts. The challenge is to support the answer with the law, yet explain it in a way the client can understand. Generally, the attorney would not use quotations or citations in this section, but they may be included if the client is sophisticated. Even if the client is not sophisticated, the opinion may quote the relevant portion of an important statute or case. If a source is quoted or a case is referred to specifically, the citation should be given. The subject matter content and the way it is presented must be geared to the particular client.

CLOSING

The closing is no different from the closing in any other business letter. The attorney may want to tell the client what action needs to be taken and may direct the client to contact the attorney with any further questions concerning the opinion.

SAMPLE CLIENT OPINION LETTERS

INTRODUCTION

This section contains two sample client opinion letters. The first sample letter has been footnoted to provide you with writing tips. Normally, the client opinion letter includes no footnotes; the footnotes in the first sample client opinion letter should not be considered part of the letter.

The sample client opinion letter in Exhibit 11-2 was written to a mother whose son had been arrested for possession of cocaine. The cocaine was found in the car trunk when the son's car was stopped on Interstate 95 in Florida. The son is originally from Florida but had been attending an out-of-state university. Prior to the arrest, the son had returned to Florida with a friend to visit his mother and to enjoy spring break. The mother hired the attorney to represent the son and has asked the attorney whether the cocaine found can be suppressed.

The second sample client opinion letter in Exhibit 11-3 was written to a client who had been arrested for possession of methamphetamines. The client was a passenger in a car stopped on the interstate. The drugs were found in the client's purse. The client's conversation with the car's driver was tape-recorded while they sat in the patrol car as the officer searched their car. The passenger hired the attorney to represent her and has asked whether the methamphetamines and the tape recording can be suppressed.

EXHIBIT 11-2
First Client Opinion Letter.

Florida Attorney
Main Street
Anytown, Florida
April 6, 2009

Ms. Mom Campbell
Oak Street
Anytown, Florida

Re: Whether cocaine found in the Campbell car when it was stopped on I-95 may be suppressed.

Dear Ms. Mom Campbell:

You hired me to represent your son who had been arrested for possession of cocaine on April 1, 2009. On April 3, 2009 I met with you and with your son and you asked me whether the cocaine could be suppressed. This opinion is limited to the facts contained in the facts section of this letter and to federal law as of the date of this letter and is solely for your benefit and for the benefit of your son.[1]

Facts

The following facts were gathered from the April 3, 2009 interview with you and Mike Campbell, your son, and a review of the police report. Please contact me or have your son contact me if there are any inaccuracies to be corrected or any additions to be made.[2]

Your son and his best friend, John Wright, were driving north on I-95 returning from spring break in Florida, when they were stopped by members of a drug task force made up of Volusia County Sheriff officers and federal drug enforcement agents. The agents requested permission to search the car. When your son refused consent, the agents brought in a drug dog that alerted to the trunk of the car. The agents then claimed that the dog's actions gave them probable cause to search the trunk and gave your son the choice of either opening the trunk or waiting until the agents obtained a search warrant. After your son opened the trunk, the agents found two kilograms of cocaine in a brown paper bag. Your son and Wright were arrested and charged with possession with intent to distribute cocaine.

The agents claimed they stopped your son's car because your son was following the car in front of him too closely and because the following facts fit a drug courier profile used by the Volusia County Sheriff officers:

1. The car was a large late model;
2. The car had out-of-state tags;
3. The car was being driven cautiously at the speed limit;
4. The car was being driven on a known drug corridor, I-95;
5. There were two passengers in the car;
6. The passengers were in their twenties;
7. The car was being driven in the early evening; and
8. The passengers were dressed casually.[3]

Although not listed by the agents, your son and Wright believe the real reason they were stopped is because they are Afro-Americans.

Answer

The court should suppress the cocaine if it decides that your son did not commit a traffic violation. In opposition to the motion to suppress, the government will likely make two arguments.

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[1]This sentence protects the attorney by naming the persons who can rely on the opinion. Perhaps the attorney was trying to avoid having the other defendant (the son's best friend) rely on the letter, by stating that the letter's benefit is limited to the mother and son. This language is usually used when third parties not represented by the attorney may try to rely on the opinion.

[2]This language protects the attorney by requesting that both mother and son verify that the facts are accurate. The prior sentence identifies the source of the attorney's information.

[3]When you have a list of items, make it easier for your reader to skim down the list by tabulating. Number each item, follow each item except for the last one by a semicolon, and place the word "and" after the semicolon following the next-to-last item. Make sure that you follow parallel construction for all items. If you are unsure what *parallel construction* means, refer to Appendix D.

(continues)

EXHIBIT 11-2
(Continued)

One argument is that the agents had reasonable suspicion that your son's car contained illegal drugs. They may claim that their reasonable suspicion was based on a drug courier profile. The government should lose this argument because of the similarity between the facts in your son's case and another case. In the other case involving a car stop based on a drug courier profile, the court granted the defendant's motion to suppress the illegal drugs found because the stop violated the defendant's constitutional rights to be free from unreasonable search and seizure.

The second argument is that the agents had probable cause to stop your son's car for following too closely. In a 1996 case, the United States Supreme Court decided that a police officer may stop a car for any type of traffic violation, no matter how minor. This means that the traffic stop is valid so long as there is a technical violation; it does not matter if the reason the agents gave was a pretext for a stop based on race. The Court stated that a challenge to a stop allegedly based on race should be brought under the Equal Protection Clause and not under the Fourth Amendment. The Court did not explain that an Equal Protection Clause challenge is difficult to prove because it requires evidence of intentional discrimination.

The applicable Florida motor vehicle statute prohibits a vehicle from following another vehicle "more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon, and the condition of, the highway." Unfortunately, there is no simple test to determine if your son violated the statute. The court will have to determine from any evidence presented whether the distance at which your son was following the car in front of him was reasonable and prudent.

The court should grant the motion to suppress if we can convince the judge that your son was following the car at an appropriate distance; the cocaine would not have been found had the car not been stopped.

Explanation of the government's first argument

The Fourth Amendment to the United States Constitution protects your son "against unreasonable searches and seizures." The Fourth Amendment does not prohibit all searches and seizures—just *unreasonable* searches and seizures. The courts have allowed officers to stop cars on the highway to investigate a "reasonable suspicion" of illegal drug activity. In a case involving facts almost identical to those in your son's case, the court found that a highway stop was not reasonable under the Fourth Amendment even though the stop was made based on a drug courier profile. *United States v. Smith*, 799 F.2d 704, 712 (11th Cir. 1986).[4] (This was the drug courier profile case referred to in the answer section.)

You will probably be interested to know more about *Smith* because the facts in that case are nearly identical to the facts in your son's case. This letter will first give you the facts from *Smith* and then compare them to the facts from your son's case.

Smith

One night in June of 1985, Trooper Robert Vogel, a Florida Highway Patrol trooper, and a DEA agent were observing cars traveling in the northbound lanes of I-95. They hoped to intercept drug couriers. When Smith's car passed through the arc of the patrol car headlights, Vogel noticed the following factors that matched his drug courier profile:

1. The car was traveling at 3:00 a.m.;
2. The car was a 1985 Mercury, a large late model car;
3. The car had out-of state tags;

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[4]"704" is the first page of *Smith* and "712" is the page on which the finding of the court referred to in the preceding sentence is located. As a courtesy to the reader, a page reference should be given when specific material from a case is referred to even if the material is not directly quoted.

The two types of sentences in legal writing are textual sentences and citation sentences. A **textual sentence** is the type of sentence you have been writing all your life. It is a complete grammatical sentence with a subject and a verb. A **citation sentence** contains only citations. A **string citation** is a citation sentence with more than one citation. In a string citation, the citations should be separated by semicolons.

A sentence is more difficult to read when it contains a full case citation, especially if the citation is long. To avoid including a full citation in a textual sentence, you can refer to a case in very general terms or refer to a legal principle from a case and give the full citation to the case in a citation sentence following the textual sentence.

EXHIBIT 11-2
(Continued)

4. There were two occupants of the car who were around 30; and
5. The driver was driving cautiously and did not look at the patrol car as the Mercury passed through the arc of the patrol car headlights.

Id. at 705–06.[5]

The above drug courier profile is almost identical to the profile used by the officers in your son's case.[6] In both *Smith* and your son's case, the cars were traveling after dark, the cars were large late models with out-of-state tags, the cars were being driven "cautiously," and each car contained two passengers in their twenties or thirties. The differences between the two profiles are very minor. Your son and Wright were dressed casually while it is not known how Smith and Swindell were dressed. Smith and Swindell did not look at Vogel as they passed. It is not known whether your son and Wright looked in the agents' direction as your son drove past. Your son and Wright claim that race was a factor in their stop even though it was not listed as such by the agents. Smith and Swindell's race is unknown.[7]

In *Smith*, Vogel followed the Mercury for a mile and a half and noticed that the Mercury "wove" several times, once as much as six inches into the emergency lane. Vogel pulled Smith over. When a drug dog alerted on the car, a DEA agent searched the trunk and discovered one kilogram of cocaine. Smith and his passenger, Swindell, were arrested and were charged with conspiracy to possess cocaine with the intent to distribute it. *Id.* at 706. On appeal, the *Smith* court held that the stop of Smith's car violated Smith's constitutional rights and found that Smith's motion to suppress should have been granted. *Id.* at 712.

Just as there was nothing in your son's drug courier profile to differentiate your son and Wright from other innocent college students returning from spring break in Florida, there was nothing in Vogel's drug courier profile to differentiate Smith and Swindell from other law-abiding motorists on I-95. It is usual to drive after dark to avoid heavy traffic or to complete an interstate trip. Although many motorists speed on the highways, motorists driving "cautiously" at or near the speed limit are simply obeying traffic laws. Many people other than drug couriers drive large late model cars with out-of-state tags. A motorist between the ages of twenty and forty is not unusual.

Explanation for the government's second argument

In 1996, the United States Supreme Court decided that a stop for a traffic violation does not violate the driver's constitutional right against unreasonable search and seizure. *Whren v. United States*, 517 U.S. 806, 818 (1996). In *Whren*, Brown was driving a Pathfinder in which Whren was a passenger. Brown was stopped at a stop sign looking down into Whren's lap. Plain clothes police officers were patrolling this "high drug area" of the District of Columbia in an unmarked patrol car. The Pathfinder caught the attention of the officers because Brown remained stopped at the stop sign for approximately twenty seconds. When the patrol car made a U-turn to follow the Pathfinder, Brown

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[5]When you need to cite a block quote or other material set off from the rest of the text, as is the tabulation here, bring the citation back to the left margin. "*Id.*" is used here because "*id.*" refers back to the immediately preceding citation, *Smith*. When citing inclusive pages with three or more digits, drop all but the last two digits of the second number and place a hyphen between the numbers.

[6]This is an example of a topic sentence. A **topic sentence** contains one main idea summarizing the rest of the paragraph, with the rest of the paragraph developing the idea presented in the topic sentence. Most paragraphs should have topic sentences. The typical location of a topic sentence is the first sentence in the paragraph. Sometimes the topic sentence is the last sentence in the paragraph and pulls together the rest of the paragraph. Some paragraphs, typically narrative paragraphs, do not have a topic sentence.

If a paragraph sounds disjointed or unorganized, try pulling it together using a topic sentence. If a topic sentence does not help, think about breaking the paragraph up into more than one paragraph.

[7]This paragraph applies the facts in *Smith* to the facts in *Campbell*. Applying facts from one case to another case involves explaining the similarities and differences between the two sets of facts. Instead of simply stating that the facts from the two cases are very similar, the paragraph specifically states which facts are the same. Sometimes, in the application, you need to explain in what way the facts are similar if they are not identical.

You can either apply the *Smith* facts to *Campbell* as done here or you can wait until you have thoroughly discussed *Smith*. When you prepare your outline prior to starting to write the client opinion letter, spend some time moving parts of your reasoning around to determine the best flow for your reasoning.

(continues)

EXHIBIT 11-2
(Continued)

turned right without signaling and started off at an "unreasonable speed." The patrol car stopped the Pathfinder. When one of the officers approached Brown's window and peered in, the officer saw that Whren had two plastic bags of crack cocaine on his lap. The officers arrested Whren and Brown. *Id.* at 808, 809.

Prior to *Whren*, some courts, including the court deciding *Smith*, had decided that a car stop for a traffic violation was unconstitutional unless a reasonable officer would have made the stop. The *Smith* court found that the cocaine should have been excluded from evidence because a reasonable officer would not have stopped Smith's car for the alleged traffic violation. 799 F. 2d at 711. However in *Whren*, the United States Supreme Court rejected the argument that the reasonable officer standard should apply. 517 U.S. at 813. The Court decided that the stop was constitutional because the officers observed Brown violate the traffic code. *Id.* at 819.

Whren and your son's case are very similar in that in both cases, the government claimed that the stop of a suspect's car did not violate the driver's right against unreasonable search and seizure because there was some irregularity in the way the car was being driven that gave the officer reason to stop the car. The driving "irregularities" are similar in that failure to use a turn signal in changing lanes, speeding, and following too closely are moving violations that can pose a severe safety hazard; under the circumstances, none appeared to adversely impact any other vehicle's safety.

After *Whren*, it would be very difficult to convince a court that a stop for an alleged traffic violation is unconstitutional. However, if the court finds that the driver did not violate any traffic regulation, then the stop would be unconstitutional.

The Florida motor vehicle statute identified by the officer in your son's case states: "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon, and the condition of, the highway." Fla. Stat. Ch. 316.0895 (1) (2004). No simple test determines if your son violated the statute. The court must determine from any evidence presented whether the distance at which your son was following the car in front of him was reasonable and prudent.

The alleged driving irregularities in *Whren* and your son's case are dissimilar in certain respects. While it was clear that Brown committed a traffic violation, the Florida statute cited in this case does not apply to your son if he was following at a safe distance. Determining whether one vehicle is following another vehicle too closely involved much more of a judgment call than determining whether the Pathfinder failed to signal when turning right and exceeded the speed limit. The position of the vehicles on the highway and the weather and road conditions must all be considered to determine if your son violated the statute.

I will be meeting with your son within the next few days to discuss the facts in more detail and I anticipate filing a motion to suppress after that meeting. Should you or your son have any questions concerning this matter do not hesitate to call me.

Very truly yours,

Florida Attorney

CORRESPONDENCE

With a computer on almost each person's desk, it is tempting to send an e-mail rather than telephone someone, visit someone, or send a letter. Most of you have grown up using e-mails to communicate rather than sending letters, and many of you may have had little practice in letter writing. In certain circumstances, an e-mail is preferable if one wants a quick answer to a specific question or wants to set up an appointment. E-mail correspondence can provide answers to simple questions and allow busy professionals to coordinate schedules without speaking on the telephone at the same time.

EXHIBIT 11-3
Second Client Opinion Letter.

Florida Attorney
Main Street
Anytown, Florida
March 23, 2009

Ms. Cruz Estrada
Main Street
Mytown, Florida

Re: whether drugs found in your purse may be suppressed

Dear Ms. Estrada:

You hired me to represent you after you were arrested for possession of methamphetamines on March 14, 2009. On March 17, 2009 I met with you and you asked me whether the drugs could be suppressed. This opinion is limited to the facts contained in the facts section of this letter and to federal law as of the date of this letter and is solely for your benefit.

Facts

The following facts were gathered from the March 17, 2009 interview with you and a review of the police report. Please contact me if there are any inaccuracies to be corrected or any additions to be made.

You were riding with your friend, Luis Briones, when Luis's car was pulled over. You and Luis were traveling south on I-95 toward Miami to visit friends. The officer said he had stopped the car because Luis was speeding.

After he stopped you, the officer stood at the window on the driver's side and asked for Luis's license and car registration. While Luis searched his wallet for the documents, the officer noticed a glass vial containing small kernels of an off-white substance in Luis's lap. Believing the vial to contain crack cocaine, the officer announced that he was seizing it. He asked you and Luis to exit the car and asked Luis for his wallet.

You got out of the car with your purse strap slung over your shoulder. The officer approached you and said, "You don't mind if I search this, do you?" Without giving you time to respond, the officer grabbed your purse and began to search it. Inside your purse, he found a brown paper envelope. You told the officer that someone had given it to you to give to a friend in Miami.

Still holding your purse, the officer asked you and Luis to wait in the patrol car while the officer searched Luis's car. You and Luis nervously waited in the back seat of the patrol car. You admitted to Luis that the envelope was yours and that it contained illegal drugs.

After you were arrested, you discovered that the police officer had tape-recorded your conversation in the back of the patrol car. Luis believed that the reason the officer gave for stopping Luis's car must have been a pretext because, at the most, he was driving five miles over the speed limit. He said he suspected that he had been stopped for what is jokingly referred to as the offense of DWH or Driving While Hispanic.

You were charged under the federal drug statutes.

Answer concerning the motion to suppress the drugs found in your purse

The court should suppress the drugs if you file a motion to suppress. In opposition to the motion to suppress the drugs, the government will likely make two arguments.

One argument is that you consented to the search of your purse. If you had consented to the search, then the drugs would be admissible. Whether you consented is determined by what a reasonable person would believe. The government should lose this argument because a reasonable person would probably not believe that you had consented. The officer gave you no time to respond after he stated, "You don't mind if I search, do you?" You would not likely give the officer consent because your purse held personal items.

The second argument is that the officer had probable cause to search Luis's car after he discovered that Luis had drugs. Where an officer has probable cause to search the car, the officer can search containers found in the car that might hold the object of the search. Even though the officer can search containers found in the car, the officer would not be able to search your person, at least without more evidence than he had.

Once the court rules against the government on the government's two arguments, the court should grant the motion to suppress the drugs found in your purse.

(continues)

EXHIBIT 11-3
(Continued)

Answer concerning the motion to suppress the tape recording

The court should deny the motion to suppress the tape recording if judged solely under the federal eavesdropping statutes; however, the court may suppress the tape of your conversation with Luis if the court finds that the tape was tainted by the unconstitutional search of your purse.

The federal eavesdropping statutes prohibit the taping of private conversations unless the officer was a party to the conversation and consented to the taping. The tape recording of a private conversation may not be used as evidence. To gauge whether a conversation is private, the federal statutes require the court to consider whether you expected the conversation to be private and whether society perceived the expectation to be reasonable.

In a case with similar facts, the court held that there is no reasonable expectation of privacy where the conversation took place in the rear seat of a patrol car. If a conversation in the rear seat of a patrol car is not considered private, then the tape may not be suppressed under the federal eavesdropping statutes.

Even though the tape of the conversation may not be suppressed under the federal eavesdropping statutes, we can use the argument that the unconstitutional search of your purse tainted the tape. The court might find that you would not have told Luis about the contents of your purse while you were in the patrol car, had your purse not been searched a few minutes earlier.

Explanation of the government's first argument

The Fourth Amendment to the United States Constitution protects you "against unreasonable searches and seizures." The Fourth Amendment does not prohibit all searches and seizures—just *unreasonable* searches and seizures. Although obtaining a search warrant before conducting a search is preferable, the courts have allowed a number of exceptions to the search warrant requirement over the years. The search of your purse is constitutional if you consented to the search.

The United States Supreme Court has stated the standard for determining when an individual has consented to the search of a car. *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective reasonableness'—what would the typical person have understood by the exchange between the officer and the suspect?" *Id.*

Applying the objective reasonableness standard, it would not be objectively reasonable to believe that you consented to the search of your purse. You did not verbally consent nor did your actions demonstrate consent. A woman's purse often contains objects of a personal nature that the individual wants to guard from prying eyes. A purse is often considered an extension of the individual's outer clothing. Because of the private nature of your purse, it probably would take some overt action or response on your part before it would be reasonable to believe that you consented.

Explanation for the government's second argument

An exception to the search warrant requirement is stopping a vehicle to investigate a traffic violation. Once a vehicle is stopped, the officer can search the car if there is probable cause of criminal activity. Even without consent, the officer can search containers found in the car and suspected of holding the object of the officer's search, no matter who owns the container. An officer may not search someone's person without probable cause.

As far as the container exception is concerned, the United States Supreme Court held that "police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search." *Wyoming v. Houghton*, 526 U.S. 295, 307 (1999). The facts of *Houghton* and your case will be compared to determine if the search of your purse was constitutional.

In *Houghton*, David Young was stopped for speeding and a faulty brake light. After the officer saw a hypodermic syringe in Young's pocket, Young admitted that he used it to take drugs. The officer asked the two female passengers seated in the front seat to exit the car and the officer searched the car. The officer found Sandra Houghton's purse on the back seat of the car. Searching the purse, the officer found a brown pouch that contained drug paraphernalia and a syringe containing methamphetamine in a large enough quantity for a felony conviction. Houghton claimed that the brown pouch was not hers. The officer also found a black container that contained drug paraphernalia and a syringe containing a

EXHIBIT 11-3
(Continued)

smaller amount of methamphetamine, insufficient for a felony conviction. Houghton's arms showed fresh needle-marks. The officer arrested her. 526 U.S. at 297–98.

In *Houghton*, the Court held "that police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search." *Id.* at 307. The Court noted that an individual carrying a package in a vehicle travelling on the public roads has a reduced expectation of privacy; however the Court did note the "unique, significantly heightened protection afforded against searches of one's person." *Id.* at 303. The Court found no reason to afford more protection to a container owned by a passenger than a container owned by the driver. *Id.* at 305.

The facts of *Houghton* and your case are similar in that the two cars were stopped for alleged traffic violations and the officers searched a passenger's purse. The facts of the two cases differ in that Houghton's purse was on the back seat of the car, Houghton had exited the car without taking the purse with her, and Houghton at first disclaimed ownership of the purse. In contrast, you took your purse with you when you exited the car and it was attached to you when the officer snatched it from your shoulder.

In *Houghton*, the Court drew a distinction between the permissible search of containers and the search of an individual. The officer would not have been permitted to search Houghton without probable cause that she was carrying drugs or a weapon on her person.

Explanation concerning the motion to suppress the tape recording

The federal eavesdropping statutes protect certain types of face-to-face conversations against interception. A conversation is not an oral communication unless the conversants expect that the conversation is private and an objective third party would consider that expectation reasonable. It is illegal to intercept an oral communication. If an oral communication is taped in violation of the eavesdropping statutes, the conversation cannot be used as evidence in court.

Thus, if your and Luis's conversation was an oral communication, it should be suppressed. Whether the conversation is an oral communication turns on whether you had a reasonable expectation of privacy while seated in the rear seat of the patrol car. One prong of the two-prong test is satisfied; you had an expectation of privacy or you would not have discussed the contents of your purse. The other prong of the test is whether your expectation was reasonable. On one hand, the conversation was not audible outside the patrol car. The only way the officer could have heard the conversation was by taping it. On the other hand, you were not sitting in Luis's car. You were sitting in the officer's car. While an expectation of privacy in Luis's car would have been reasonable, it is unclear from the statutes whether an expectation of privacy in the officer's car was reasonable. Some might equate the officer's car to the officer's office. If you were conversing in an office of a police station, it might not be reasonable to expect privacy.

In a case with similar facts, the issue before the United States Court of Appeals for the Eleventh Circuit was "whether the district erred in denying the motion to suppress the tapes resulting from the secret recording of McKinnon's pre-arrest conversations while he sat in the back seat of the police car." *United States v. McKinnon*, 985 F.2d 525, 526 (11th Cir. 1993).

In *McKinnon*, police officers stopped a pick-up truck for failure to travel in a single lane on the Florida Turnpike. Theodore Pressley was driving and Steve McKinnon was the passenger. Pressley consented to the search of his vehicle. While the officers were searching, McKinnon and Pressley waited in the rear seat of the patrol car. There they made incriminating statements that were secretly recorded by the officers. The officers arrested McKinnon and Pressley after finding cocaine in the truck and they were again placed in the rear seat of the patrol car. The officers again recorded McKinnon's and Pressley's incriminating statements. *Id.*

The *McKinnon* court considered the meaning of the term "oral communication" under the federal statutes. An oral communication is protected against taping. If a conversation is taped in violation of the statutes, the tape may be suppressed. A conversation is an oral communication only if the conversants exhibited a subjective expectation of privacy and the expectation of privacy was objectively reasonable. The court seemed to agree with the government's argument that a patrol car functions as the officer's office and the rear seat of the patrol car functions as a jail cell. *Id.* at 527. The court held "that McKinnon did not have a reasonable or justifiable expectation of privacy for conversations he held while seated in the back seat area of a police car." *Id.* at 528.

(continues)

EXHIBIT 11-3
(Continued)

In examining the facts of *McKinnon* and your case, the facts concerning the taping seem virtually identical. In each case, an officer asked two individuals to wait in the patrol car prior to their arrest. The officer taped their conversation in the rear seat of the patrol car; the conversation contained incriminating statements. One difference between the two cases is that the officer in *McKinnon* also taped McKinnon's conversation following his arrest. This difference is not significant because an arrestee held in the back of a patrol car would have a lesser expectation of privacy than a person not under arrest.

Where a police officer obtained evidence in an unconstitutional manner, that evidence is excluded from use at trial. If that evidence leads the officer to other evidence, the other evidence is derivative of the first evidence. The derivative evidence is known as fruit of the poisonous tree and is also inadmissible. Generally, evidence that is tainted by the prior unconstitutional conduct is inadmissible; however, in some instances the second evidence is admissible because the connection between the unconstitutionally seized evidence and the subsequently obtained evidence is marginal.

We will argue that the tape is derivative of the evidence the officer discovered searching your purse. If the court finds that the tape is tainted from the unconstitutional search of your purse, the tape will also be inadmissible.

I will be meeting with you within the next few days, and I anticipate filing a motion to suppress the drugs and the tape recording after that meeting. Should you have any questions concerning this matter do not hesitate to call me.

Very truly yours,

Florida Attorney

Your familiarity with e-mail correspondence in an informal setting may not have adequately prepared you for using it appropriately in the professional setting. The purpose of this portion of the chapter is to offer guidelines on when e-mail correspondence is appropriate and style tips to keep in mind in composing the e-mail.

In deciding whether to send an e-mail, it might be helpful to consider the differences between an e-mail message and other types of communication. An e-mail is similar to a letter in that it is written and can be referenced later. This semi-permanence is an advantage for recordkeeping and can be an advantage when dealing with a complex matter; however, the semi-permanency of e-mails and letters means that one must carefully scrutinize their contents to determine if there is anything in them that could come back to haunt the writer later. Although a letter can be copied and forwarded to a recipient unintended by the letter writer, copying and mailing a letter takes a great deal more effort than forwarding an e-mail. In some circumstances, an e-mail recipient may give in to the temptation of forwarding an e-mail demeaning or insulting someone behind the person's back. In addition, the recipient of the forwarded e-mail receives the entire exchange of correspondence contained in the e-mail.

One should also consider whether the information is confidential in nature and whether the sender has the recipient's correct and current e-mail address. Because an e-mail message sometimes goes to someone other than the intended recipient, it is customary in law practice to include a confidentiality warning at the bottom of the e-mail message stating that the message is only for the intended recipient and should not be considered a communication with others. Another way to protect confidential information is to encrypt it. Even though a confidentiality warning or encrypting information may protect the sender in some circumstances, there is a risk of sending confidential information via e-mail. A misdirected e-mail message became the subject matter of a lawsuit when a law

firm sent an individual's confidential and sensitive information to the individual's former e-mail address rather than to the individual's current e-mail address, and the information was accessed by the individual's former employer.

One advantage of a telephone conversation over a letter or e-mail message is that the conversation is not in writing and is not semi-permanent unless tape recorded; thus, if you have something sensitive to discuss, you might want to discuss the matter in a telephone conversation or in person. However, be aware that there is a chance that the conversation might be tape recorded, either legally or illegally. Of course, even if the conversation is not taped, a person who is a party to a conversation may be able to testify about the conversation, but the testimony does not capture the tone and inflection of the speaker and is subject to being disputed as being inaccurate. Other advantages of a "live" conversation are that a participant hears the other person's tone of voice, there is more of a context for the conversation, the participants can immediately clarify any misunderstandings, and the participants can discuss a matter in great length. Without being able to hear the sender's voice as one would during a telephone or in-person conversation, the reaction to the sender's e-mail might be very different than intended. The sender should consider how the e-mail message could be interpreted. For example, what the sender perceives as light and joking in tone could be perceived by the recipient as sarcastic and wounding.

Advantages of sending an e-mail message are that it is much quicker than composing and sending a letter through the mail and the typical e-mail correspondent is very familiar with corresponding in that fashion.

A writer's familiarity with informal e-mail correspondence is a disadvantage if the writer does not recognize that one should maintain a certain level of formality with business correspondence. A young legal professional from Generation X or Generation Y may be corresponding with someone from the Mature Generation (born prior to 1946) or a baby boomer who grew up with print correspondence and expects e-mail messages to mirror print correspondence. This may mean that the sender should include a greeting typical of a letter such as "Dear——:" and a closing such as "Very truly yours" followed by a signature, especially if the sender's name is not obvious from the e-mail address. The sender can anticipate what the recipient expects by reviewing prior correspondence. It is usually advisable for the sender to set up the sender's e-mail program to generate an automatic signature line with contact information.

If sending a law office memo via e-mail, the sender can use the law office memo format in the body of the e-mail or attach a document containing the law office memo. Because e-mail message formatting can be different when viewed by the recipient, it may be preferable to attach the law office memo as a document to the e-mail.

The speed with which one can reply to an e-mail message can be a disadvantage; if the e-mail recipient had an emotional reaction to an e-mail message, the natural response might be to reply in kind. A heated e-mail response has the advantage over a telephone conversation or personal visit in that there is no direct simultaneous confrontation. Even though the temptation to respond immediately is great, the better advice usually is not to respond immediately because one often regrets sending a hasty response composed in the heat of the moment. It might be better for the recipient of an angry e-mail not to respond at all or send a response later when one has had the opportunity to craft a more appropriate one. Although satisfying at the time, one should avoid sarcasm, insults, accusations, derogatory language, and otherwise uncivil language in e-mails. After cooling down, the sender may regret having sent the e-mail and the e-mail may be used against the sender in the future.

Just as with print correspondence, the recipient may very well judge the writer based on the substance and style of the e-mail correspondence. One should avoid abbreviations or symbols common to informal e-mail correspondence, spelling mistakes, grammar

mistakes, and punctuation mistakes. One should use wording appropriate to the recipient and carefully consider the substance of the message. Some part of the message that is other than the main focus of the message and that the sender wrote in haste may become crucial later, especially if the subject matter of a lawsuit. Make sure you state facts accurately.

Many of the writing tips for letters discussed in this chapter also apply to e-mail messages. Use plain English, be precise and specific, keep your sentences fairly short, and break up the message into paragraphs, double-spacing between paragraphs.

The organization of the e-mail message is as important as the organization of other legal writing. Your recipient is busy and may not read your entire e-mail unless the recipient knows that it is in his or her best interest to do so. Put the most important information at the beginning of the e-mail so that the recipient will not have to scroll down to read it. If your e-mail is a little long or the substance is complex, you can make your organization obvious by using headings and numbering paragraphs.

One should also consider matters seemingly extrinsic to the e-mail message itself. These include the e-mail address of the sender, the sender's screen name, the subject matter of the e-mail, the e-mail recipients, and attachments referenced in the e-mail. The sender's e-mail address or screen name should not be used if objectionable to the intended receiver or possible recipients. For example, in a 2008 Virgina appellate court case, the screen name on a document that an attorney sought to introduce into evidence before Judge West was "westisanazi."

Because many recipients of e-mail correspondence decide whether to read an e-mail message based on the subject matter, the subject line of an e-mail should accurately reflect the subject of the e-mail and should be changed if the correspondence has shifted from one topic to anther. The subject line is an opportunity to communicate specific and meaningful information.

Before sending, one should check the recipients; all of us have been on a listserv where an obviously personal message was sent out to the entire listserv. The consequence of doing this on a listserv is embarassment but the consequence of doing this in the legal profession can be considerably more serious. The sender should double-check to ascertain that all attachments referenced in the e-mail were actually attached to the e-mail.

Perhaps the most important advice is to reread and proofread an e-mail message before sending it. If possible, the sender should imagine what the recipient knows and then determine whether the recipient will understand the message. It is common when composing an e-mail to omit words when one is typing quickly. Rereading the message from the viewpoint of the recipient and adding additional wording or an additional explanation may help the sender from being embarrassed or receiving questions from the recipient when the meaning of the message is unclear. Rereading and proofing may also help avoid technical errors (spelling, grammar, punctuation) and errors with the subject line, recipients, and attachments.

SUMMARY

- The transmittal letter is the cover letter used when forwarding a document or other information to the client or to a third party.
- The client judges the competency of the attorney by the way the attorney presents himself or herself. A client letter may either cause the client to lose confidence in the attorney or may strengthen the attorney-client relationship.
- The client opinion letter answers the client's question and contains a statement of the facts, an explanation of applicable law, and an explanation of how the law applies to the facts.

- The format of the client opinion letter generally contains a heading, an opening, the facts, an answer, an explanation, and a closing.
- The client opinion letter should state that it is limited to the facts in the letter, to federal and/or state law of a certain date, and to the benefit of the client.
- Gear the language in the client opinion letter to the sophistication of the client.
- You may or may not want to include citations or quotations in the client opinion letter.

CYBER EXAMPLES

When writing legal documents for the first time, it may be helpful to look at examples. Professor Colleen Barger at the University of Arkansas at Little Rock School of Law had a Web site that links to pages of other legal research and writing professors (http://www.ualr.edu/cmbarger/).

EXERCISES

1. What are important style tips to remember when writing a transmittal letter?
2. What does the heading of a client opinion letter contain?
3. What does the opening of a client opinion letter contain?
4. What facts should a client opinion letter contain?
5. What does the answer section of a client opinion letter contain?
6. What does the explanation section of a client opinion letter contain?
7. What does the closing of a client opinion letter contain?

WRITING EXERCISE

Your professor may ask you to write a client opinion letter based on the information from Appendix A.

DISCUSSION POINTS

1. Locate a transmittal letter you have received. Does it follow the style tips in this chapter?
2. What are your reactions to the first client opinion letter?
3. What are your reactions to the second client opinion letter?

Student CD-ROM
For additional materials, please go to the CD in this book.

Online Companion™
For additional resources, please go to http://www.paralegal.delmar.cengage.com.

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CHAPTER 12

Pleadings

INTRODUCTION

Pleadings are the formal statements by the parties to an action setting forth their claims or defenses. This chapter explains the purpose, use, and format of the "complaint" and the "answer" and includes two sample complaints and answers.

The sample pleadings have been extensively footnoted to provide you with writing tips. The footnotes in the sample pleadings are not part of the pleadings themselves. If the footnotes do not make sense to you right now, read them again when you are writing your own complaint and answer.

PURPOSE AND USE

A civil lawsuit begins with the plaintiff filing the **complaint** with the court. The complaint is the initial **pleading** in a **civil action**, in which the plaintiff alleges a **cause of action** and asks the court to remedy the wrong done to the plaintiff. The purposes of the complaint are for the plaintiff to state what happened and to state the relief that the plaintiff is requesting from the court.

The **answer** is a pleading in response to the complaint. The answer may deny the allegations of the complaint, agree with them, state that the plaintiff is without knowledge of them, or introduce **affirmative defenses** intended to defeat plaintiff's lawsuit or delay it. The purposes of the answer are for the defendant to reply to the claims plaintiff raised in the complaint, to state defendant's affirmative defenses, and to state related claims (called **counterclaims**) that the defendant has against the plaintiff.

Look for a moment at the first sample complaint and answer included in this chapter. The plaintiff is Jake Carson and the defendant is Tom Harris. Jake and Tom ran against each other for the position of student body president at Collegiate University. The basis of Jake's suit was the statement Tom made about Jake in Tom's political skit, presented on the eve of the election. In the skit, Tom stated to a student playing the part of Jake that "Jake" was HIV-positive. Jake claims that the skit also depicted him as a homosexual. Jake was so outraged by the skit that he hired an attorney to sue Tom for slander and for depicting him in a "false light" as being a homosexual. The pleadings were filed in Florida state court.

complaint
The first main paper filed in a civil lawsuit. It includes, among other things, a statement of the wrong or harm done to the plaintiff by the defendant, a request for specific help from the court, and an explanation why the court has the power to do what the plaintiff wants.

pleading
The process of making formal, written statements of each side of a civil case. First the plaintiff submits a paper with "facts" and claims; then the defendant submits a paper with "facts" (and sometimes counterclaims); then the plaintiff responds; etc., until all issues and questions are clearly posed for a trial.

civil action
A lawsuit that is brought to enforce a right or to redress a wrong, rather than a court action involving the government trying to prosecute a criminal.

cause of action
1. Facts sufficient to support a valid lawsuit.
2. The legal theory upon which a lawsuit ("action") is based.

answer
The first pleading by the defendant in a lawsuit. It responds to the charges and demands of the plaintiff's complaint.

affirmative defense
That part of a defendant's answer to a complaint that goes beyond denying the fact and arguments of the complaint. The burden of proof for an affirmative defense is on the defendant.

counterclaim
A claim made by a defendant in a civil lawsuit that, in effect, "sues" the plaintiff. It can be based on entirely different things from the plaintiff's complaint (a permissive counterclaim) and may even be for more money than the plaintiff is asking.

A second sample complaint and answer follows the first set of pleadings. The second set of pleadings were filed in federal court because a federal statute gives the federal court jurisdiction over lawsuits alleging interception of telephone conversations. The plaintiff, Phone Addicted, alleges that the defendant, Nosy Neighbor, has used a scanner to listen to Phone Addicted's cordless telephone conversations.

FORMAT

COURT RULES

Once you determine the court in which the complaint will be filed, you must carefully review any applicable court rules and statutes. The first sample set of pleadings should comply with the Florida Rules of Civil Procedure because they were filed in Florida state court; the second sample set of pleadings should comply with the Federal Rules of Civil Procedure. It might also be helpful to review court files to learn the format customarily used in the particular court.

Court rules may specify the contents of the complaint and the answer. For example, Rule 8 of the Federal Rules of Civil Procedure requires the complaint to state "a claim for relief." The same rule requires the answer to "state in short and plain terms its defenses to each claim asserted and. . .[to] admit or deny the allegations asserted against it by an opposing party."

Commonly, the court rules and official forms accompanying the court rules specify the content and format of the caption (the heading of the court paper) and the body of the pleading. For example, Rules 7 through 13 of the Federal Rules of Civil Procedure govern the content of the complaint, answer, affirmative defenses, and counterclaim; Rule 84 references the Appendix of Forms accompanying the rules and states: "The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate." (See the caption of the sample pleadings contained in this chapter.)

FORMS

Although pleadings can be written entirely from scratch, someone writing a pleading will usually try to find one or more pleadings that are similar to the one the person is writing and use those pleadings as a guide. An attorney may recall a similar lawsuit the attorney has dealt with in the past and use a pleading from that matter as a guide.

Another option is to consult forms and formbooks. Court rules may have appended to them official forms. A number of commercial publishers publish formbooks. As the term implies, formbooks are volumes containing forms that may be referred to as a guide. There is a wide variety of formbooks. The forms contained in a particular publication may be much simpler than those contained in another formbook. Some formbooks are written in plain English while others contain a lot of "legalese." Many forms are now available on the Internet.

If you use a form you must tailor it to the particular situation you are dealing with. Just because material is contained in a form, it does not mean that the material is correct for your jurisdiction. Be sure to research the cause of action and defenses for your jurisdiction to ascertain you have all the elements of the cause of action and have correctly stated the relief available and any affirmative defenses.

Besides including forms, a formbook often contains checklists of typical provisions included in a particular pleading. When writing a pleading, it is helpful to glance down the checklist to make sure you have included all necessary provisions.

FORMAT OF THE COMPLAINT

This section gives a brief explanation of the various parts of the complaint and then the various parts of the answer. It might be helpful for you to read the rest of this section and the "format of the answer section" while comparing the explanation to the two sets of sample pleadings in this chapter.

COMPLAINT—CAPTION, TITLE, AND INTRODUCTORY CLAUSE

This section (called the "caption") contains the name of the court, the names of the parties, and the case number. The title indicates the type of pleading. For example, Form 1 of the Appendix to the Federal Rules of Civil Procedure gives the general format of the caption and Rule 10 specifies the content of the caption and the pleading title. Rule 10(a) of the Federal Rules of Civil Procedure states:

> Every pleading must have a caption with the court's name, a title, a file number, and a Rule 7(a) designation. The title of the complaint must name all the parties; the title of other pleadings, after naming the first party on each side, may refer generally to other parties.

Rule 7(a) limits the types of documents that can be filed to motions and the following pleadings:

(**1**) a complaint;

(**2**) an answer to a complaint;

(**3**) an answer to a counterclaim designated as a counterclaim;

(**4**) an answer to a crossclaim;

(**5**) a third-party complaint;

(**6**) an answer to a third-party complaint; and

(**7**) if the court orders one, a reply to an answer.

After the caption and title and before the first numbered paragraph, an unnumbered sentence (called the "introductory clause" or "commencement") states who is filing the complaint and against whom it is being filed.

COMPLAINT—BODY

This section (called the "body" or "charging portion" of the complaint) contains a series of numbered paragraphs telling the court why it has jurisdiction of the case and what has happened. For example, Rule 8 of the Federal Rules of Civil Procedure requires the complaint to contain:

> (**1**) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; [and]
> (**2**) a short and plain statement of the claim showing that the pleader is entitled to relief.…

Rule 8 encourages claims to be stated simply: "Each allegation must be simple, concise, and direct. No technical form is required"; but the rule allows alternative statements of a claim and inconsistent but separate claims.

Rule 10 of the Federal Rules of Civil Procedure specifies the format for the body of the pleading:

> A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number

to a paragraph in an earlier pleading. If doing so would promote clarity, each claim founded on a separate transaction or occurrence—and each defense other than a denial—must be stated in a separate count or defense.

YOU BE THE **JUDGE**

Does a complaint against "President Bush, God as U.S.-based divine benefactor, several government agencies, *The New York Times*, and Kentucky Fried Chicken" comply with Rule 8 of the Federal Rules of Civil Procedure?

In reaching your decision, consider the following information:

- Although the complaint is lengthy, the rambling nature of the complaint makes it difficult to determine the claim the plaintiff has against the named defendants.

To see how a court answered the question, see *Jungle Democracy v. USA Government at Washington, DC & at Denver*, 206 Fed. Appx. 756 (10th Cir. 2006) in Appendix K.

COMPLAINT—PRAYER FOR RELIEF

This section of the complaint (called the "prayer for relief") states what the plaintiff wants the court to do. For example, Rule 8 of the Federal Rules of Civil Procedure requires the complaint to contain "a demand for the relief sought, which may include relief in the alternative or different types of relief." A plaintiff may ask the court for various types of damages, for an injunction, for specific performance, or for some other type of relief.

COMPLAINT—SIGNATURE BLOCK

The signature block usually contains the name of the attorney, the name and designation of the person the attorney is representing, the attorney's address, and the attorney's telephone number. Many state courts require the attorney's bar membership number. Rule 11 of the Federal Rules of Civil Procedure provides:

> Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number.... The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

COMPLAINT—VERIFICATION

The verification is a notarized statement of the party, rather than of the attorney, "verifying" the statements contained in the complaint. Some states dispense with verification of court documents unless specifically required by an applicable rule or statute. You should check to determine whether the court in which your complaint is being filed requires verification. Rule 11 of the Federal Rules of Civil Procedure states that court documents need not be verified: "Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit."

Although Rule 11 does not require verification, the effect of the rule is to certify that certain matters are true.

> (**b**) **Representations to the Court**. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(**1**) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(**2**) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(**3**) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(**4**) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

If the matters are not true, the judge may sanction any person seeking to rely on the matters. Rule 11 sanctions have become a powerful tool of the judge, allowing monetary or nonmonetary sanctions.

YOU BE THE **JUDGE**

What would you do if you were a federal court judge and you discovered that an attorney filed a case in federal court even though there was no basis for federal jurisdiction?

In reaching your decision, consider the following information:

- The attorney had previously filed the same case in state court and the state court dismissed the case because the attorney failed to file the correct paperwork.
- You are wondering if you should find the attorney in violation of Rule 11 and, if you do, you are wondering how you should discipline the attorney.

To see how a federal court answered the question, see *Balthazar v. Atlantic City Medical Center*, 279 F. Supp. 2d 574 (D. N.J. 2003) in Appendix K.

FORMAT OF THE ANSWER

ANSWER—CAPTION, TITLE, AND INTRODUCTORY CLAUSE

The caption is the same as the caption for the complaint. The title reflects that this is an answer. The introductory clause identifies the defendant and introduces the body of the answer.

ANSWER—DEFENSES

As stated previously, the answer states the defendant's defense, admitting or denying plaintiff's claims. Rule 8(b) of the Federal Rules of Civil Procedure requires the defendant to "state in short and plain terms its defenses to each claim asserted against it" and "admit or deny the allegations asserted against it by an opposing party" and quite specifically states how any denial is to be made:

(**2**) ***Denials–Responding to the Substance.*** A denial must fairly respond to the substance of the allegation.

(**3**) ***General and Specific Denials.*** A party that intends in good faith to deny all the allegations of a pleading—including the jurisdictional grounds—may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.

(4) ***Denying Part of an Allegation.*** A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

(5) ***Lacking Knowledge or Information.*** A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.

(6) ***Effect of Failing to Deny.*** An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

AFFIRMATIVE DEFENSES AND COUNTERCLAIMS

Rule 8 of the Federal Rules of Civil Procedure requires any affirmative defense to be stated in the same format as the body of the complaint.

A counterclaim, like the body of the complaint, would be followed by a prayer for relief.

CERTIFICATE OF SERVICE

If the attorney for the defendant serves the answer on the plaintiff's attorney, a certificate of service must be included. There was no certificate of service included in the complaint because the complaint was served on the defendant by the court, not by the plaintiff's attorney.

EVIDENTIARY FACTS, ULTIMATE FACTS, AND LEGAL CONCLUSIONS

evidentiary facts
Facts that are learned directly from testimony or other evidence. Important factual conclusions inferred from evidentiary facts are called ultimate facts.

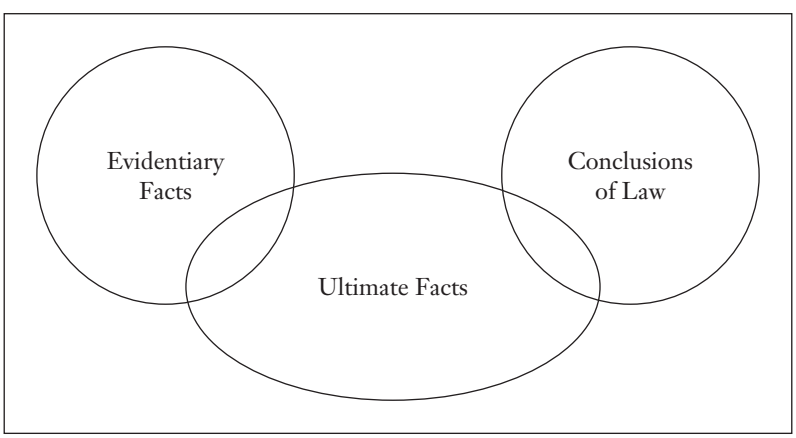
ultimate facts
Facts essential to a plaintiff's or a defendant's case. Often facts that must be inferred from other facts and evidence.

legal conclusion
A statement about legal rights, duties, or results that is drawn from specific facts.

An understanding of the terms *evidentiary facts*, *ultimate facts*, and *legal conclusion* is vital in drafting allegations of a complaint. This section will first explain what these terms mean. Then the section will explain the relationship among the terms and drafting allegations.

Evidentiary facts are facts admissible in evidence. **Ultimate facts** are the facts in a case upon which liability is determined or based. Ultimate facts establish the elements of the cause of action. A **legal conclusion** is a statement of the result in a situation that involves applying the law to a set of facts. A legal conclusion states an element of the cause of action. As shown in Exhibit 12-1, there is an overlap between evidentiary facts and ultimate facts and there is an overlap between ultimate facts and conclusions of law. To understand these terms, examine how they relate to the first sample complaint.

EXHIBIT 12-1
Relationship among Facts and Conclusions.



EVIDENTIARY FACTS

Paragraphs 2 through 6 and 8 contain evidentiary facts. For example:

> In October 2002 plaintiff was a student at Collegiate University, a member of the Collegiate Beta Fraternity, and a candidate for student body president of Collegiate University.
>
> In October 2002 defendant was a student at Collegiate University, a member of the Collegiate Alpha Fraternity, and a candidate for student body president of Collegiate University.
>
> In defendant's skit, defendant portrayed "plaintiff's doctor" and another student portrayed plaintiff.
>
> Paragraph 7 contains a mixture of evidentiary and ultimate facts. The "kernel" of the ultimate facts has been bracketed:
>
> In defendant's skit, defendant, [in the presence and hearing of] plaintiff and the students and faculty watching the skit, [maliciously and falsely announced] that plaintiff had tested HIV-positive, saying "you tested HIV-positive."

ULTIMATE FACTS

Paragraphs 9 and 10 contain ultimate facts (establishing elements of defamation):

> Plaintiff at the time of defendant's statement was in good health and free from any disease, and the statements of defendant were wholly untrue.
>
> As a result of defendant's slanderous statement, plaintiff suffered, and continues to suffer, great nervousness, and mental anguish.

CONCLUSIONS OF LAW

Paragraph 11 contains conclusions of law:

> Plaintiff, as the direct result of defendant's statement, in addition to the nervousness and bodily injury, has been injured in plaintiff's good reputation in the Collegiate University community. Defendant published such false and slanderous statement about plaintiff to numerous students and faculty of Collegiate University, who have changed their attitude toward plaintiff, and who have begun to question plaintiff as to whether plaintiff has tested HIV-positive, which the slanderous remark of defendant wrongly, maliciously, and untruthfully imputed to plaintiff.
>
> The essence of paragraph 11 is that:
>
> Tom Harris made a defamatory statement about Jake Carson;
>
> Tom Harris published the statement to numerous students and faculty of Collegiate University; and
>
> The statement damaged Jake Carson's reputation.

DRAFTING ALLEGATIONS

Now that you have an idea of the difference among evidentiary facts, ultimate facts, and conclusions of law, notice how these terms relate to drafting allegations. The body of the complaint will contain evidentiary facts, ultimate facts, and conclusions of law. The complaint should be drafted so that defendant admits as much as possible and denies as little as possible. Defendant is more likely to admit evidentiary facts than to admit ultimate facts and will routinely deny conclusions of law. Therefore, the body of the complaint should as much as possible separate evidentiary facts from ultimate facts from conclusions of law. In the answer, defendant admitted paragraphs 2 through 6 and part of paragraph 7. The paragraphs defendant admitted contained evidentiary facts. Exhibit 12-2 contains tips for drafting a complaint.

EXHIBIT 12-2
Tips for Drafting a Complaint.

In drafting the complaint, follow this list of things to do:

Do

1. Separate evidentiary facts, ultimate facts, and conclusions of law. (Defendant will be more likely to admit allegations if evidentiary facts are separated from ultimate facts.)
2. Write in plain English. (Make your allegations clear to the judge.)
3. Place only one or two sentences in each numbered paragraph. (If a number of facts are included in a paragraph and one of the facts is wrong, defendant may deny the whole paragraph.)
4. Do not include more evidentiary facts than necessary. (Plaintiff will be faced with proving facts not admitted.)
5. Use descriptive words for allegations favorable to plaintiff; use abstract words for allegations adverse to plaintiff. (The judge will more likely remember a description that brings a picture to mind than an abstract statement of adverse facts.)
6. Use objective rather than subjective language. (It is harder for the defendant to deny objectively stated facts.)
7. State facts precisely. (Defendant can easily deny inaccurate facts.)

FIRST SAMPLE SET OF PLEADINGS

FIRST SAMPLE COMPLAINT

IN THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

JAKE CARSON,)
Plaintiff,)
) CIVIL ACTION
- vs -) No. 09-000-00
)
TOM HARRIS,)
Defendant.)[1]

COMPLAINT[2]

Plaintiff, JAKE CARSON, sues defendant, TOM HARRIS, and alleges:[3]

[1]The caption contains the name of the court, the names of the parties, and the case number. There is one plaintiff and one defendant in this lawsuit. If there were more parties, all of them would be named in the caption of the initial complaint. In all other documents, only the first party on each side would be named, followed by "*et al.*" replacing all other parties. "*Et al.*" is short for "*et alia*," meaning "and others." "JAKE CARSON, plaintiff vs. TOM HARRIS, Defendant" is often referred to as the style of the case. The case number is supplied by the court clerk. The number "09" indicates the year the case was filed. The next number indicates the order of filing. Cases are given consecutive numbers based on the order filed. For example, "100" would mean that the case was the one hundredth case filed in 2009. The sample complaint is unnumbered—"000"—to show that it is not an actual case.

[2]Rule 1.100 of the Florida Rules of Civil Procedure requires that court documents "indicate clearly the subject matter of the paper and the party requesting or obtaining relief." The form complaints at the end of the Florida Rules of Civil Procedure (see, for example Forms 1.932–1.942) are simply named "COMPLAINT." Some jurisdictions may require the pleading name to indicate the relief requested, for example, "COMPLAINT FOR DAMAGES."

[3]This introductory clause (also referred to as the "commencement") states who is suing whom. Notice that the introductory clause is not numbered.

COUNT I—DEFAMATION[4]

1. This is an action for damages that exceed $15,000.[5]
2. In October 2008 plaintiff was a student at Collegiate University, a member of the Collegiate Beta Fraternity, and a candidate for student body president of Collegiate University.[6]
3. In October 2008 defendant was a student at Collegiate University, a member of the Collegiate Alpha Fraternity, and a candidate for student body president of Collegiate University.[7]

This introductory clause is modeled on the one contained in the forms at the end of the Florida Rules of Civil Procedure: "Plaintiff, A.B., sues defendant, C.D., and alleges:" (see Forms 1.932–1.942). This plain English clause is much easier to read than the traditional introductory clause filled with legalese. For example, the introductory clause rewritten in legalese might look something like this:

> Now comes the above-named plaintiff, Jake Carson, by and through his attorney of record, Florida Attorney, and for cause of action and complaint against the defendant herein alleges unto this honorable court: Write your pleadings in plain English complying with the court rules of your jurisdiction. Plain English pleadings are easier for the client to understand and are less time-consuming in the long run.

For simplicity sake, there is one plaintiff and one defendant in this sample complaint. For ease of reference they are referred to as "Plaintiff" and "Defendant" throughout the complaint. If this were a real complaint, Jake might have also named the Alpha Fraternity and Collegiate University as defendants. Multiple defendants could be referred to by short forms established in the introductory clause. For example:

> Plaintiff, JAKE CARSON, sues Defendants, TOM HARRIS ("Defendant Harris"), ALPHA FRATERNITY ("Defendant Fraternity"), and COLLEGIATE UNIVERSITY ("Defendant University") and says:
>
> or
>
> Plaintiff, JAKE CARSON, sues Defendants, TOM HARRIS ("Harris"), ALPHA FRATERNITY ("Fraternity"), and COLLEGIATE UNIVERSITY "University" and says:

Once you establish short forms, you should use them consistently throughout the rest of the complaint. For readability, you may want to put party names in all capital letters.

[4]In a complaint with more than one count, the counts are usually numbered for ease of reference. The count heading may also state the cause of action (here "COUNT I—DEFAMATION" and "COUNT II—FALSE LIGHT INVASION OF PRIVACY") or relief sought. The relief sought in another complaint, for example, may be "SPECIFIC PERFORMANCE" and "DAMAGES." If the complaint contains a single count, the count need not be headed.

In this complaint, the background for both counts is alleged in numbered paragraphs 1 through 8. Paragraph 12 of Count II realleges paragraphs 1 through 8. Another way to organize the complaint is to provide a heading "COMMON ALLEGATIONS" after the introductory paragraph. The "COMMON ALLEGATIONS" section of the complaint would contain numbered paragraphs 1 through 8. Then the complaint would state:

COUNT I—DEFAMATION

9. Plaintiff realleges and incorporates paragraphs 1–8.

[5]The paragraphs of the body of the complaint (sometimes referred to as the "charging portion" of the complaint) are numbered consecutively. In the body of the complaint the plaintiff alleges plaintiff's "ultimate facts." This paragraph establishes the court's jurisdiction. In Florida, the circuit court handles cases with more than $15,000 in controversy.

[6]Paragraphs 2 through 11 contain the ultimate facts on which plaintiff relies. The two purposes of the body of the complaint are to:

1. give the defendant notice of plaintiff's claims; and
2. include all the elements of the cause of action plaintiff alleges.

Before you write the body of the complaint, make a list of the elements of the cause of action. After you have completed the body of the complaint, double check to make sure you have included ultimate facts needed for all elements.

[7]Paragraphs 2 and 3 identify the parties. Usually the parties are identified early in the complaint.

4. The October 20, 2008 issue of the Collegiate University student newspaper reported that plaintiff and defendant "were running neck and neck" in the student body president race.[8]
5. On October 20, 2008, the day before the student body president election, plaintiff and defendant presented skits to Collegiate University students and faculty at the Collegiate University football stadium.
6. In defendant's skit, defendant portrayed "plaintiff's doctor" and another student portrayed plaintiff.
7. In defendant's skit, defendant, in the presence and hearing of plaintiff and the students and faculty watching the skit, maliciously and falsely announced that plaintiff had tested HIV-positive, saying "you tested HIV-positive."
8. In the student body president election on October 21, 2008, plaintiff received 10% of the vote and defendant received 90% of the vote.
9. Plaintiff at the time of defendant's statement was in good health and free from any disease, and the statements of defendant were wholly untrue.
10. As a result of defendant's slanderous statement, plaintiff suffered, and continues to suffer, great nervousness and mental anguish.
11. Plaintiff, as the direct result of defendant's statement, in addition to the nervousness and bodily injury, has been injured in plaintiff's good reputation in the Collegiate University community. Defendant published such false and slanderous statement about plaintiff to numerous students and faculty of Collegiate University, who have changed their attitude toward plaintiff, and who have begun to question plaintiff as to whether plaintiff has tested HIV-positive, which the slanderous remark of defendant wrongly, maliciously, and untruthfully imputed to plaintiff.

COUNT II—FALSE LIGHT INVASION OF PRIVACY

---

12. Plaintiff realleges and incorporates paragraphs 1–8.[9]
13. Prior to October 20, 2008, a rumor had circulated on the Collegiate University campus that plaintiff was a homosexual and the rumor was traced back to defendant's fraternity.
14. Defendant's statement during the skit and the manner of its presentation, in light of the rumor that plaintiff was a homosexual, falsely depicted plaintiff as a homosexual.
15. Plaintiff is not a homosexual and defendant's depiction of plaintiff as a homosexual was highly offensive to plaintiff.

[8]Plaintiff begins to narrate what happened. The narrative is written in past tense.
[9]Paragraph numbering is consecutive from one count to the next.

16. Defendant's depiction of plaintiff as a homosexual was done with knowledge of its falsity or reckless disregard whether the depiction gave a false impression or not.
17. As a result of defendant's depiction of plaintiff as a homosexual, plaintiff suffered, and continues to suffer, great nervousness and mental anguish.
18. Plaintiff, as the direct result of defendant's depiction of plaintiff as a homosexual, in addition to the nervousness and bodily injury, has been injured in plaintiff's good reputation in the Collegiate University community. Such false depiction has been circulated also among plaintiff's personal friends, who have changed their attitude toward plaintiff, and who have begun to question as to whether plaintiff is a homosexual, which depiction defendant wrongly, maliciously, and untruthfully imputed to plaintiff.

Plaintiff therefore requests judgment granting the following relief as to counts I and II:[10]

A. an award of compensatory damages in an amount to be set at trial;
B. an award of punitive damages in an amount to be set at trial;
C. an award of costs and attorney's fees; and
D. such other relief as the court deems appropriate.[11]

JURY DEMAND

Plaintiff demands trial by jury.[12]

Florida Attorney
101 Main Street
Anytown, Florida
Attorney for plaintiff
(407) 000-0000
Bar No. 0000000

[10]This is the beginning line of plaintiff's prayer for relief. The line is not numbered but the various types of relief sought are lettered with capital letters. Traditionally, the first line of the prayer for relief would have read as follows:

> WHEREFORE, Plaintiff, JAKE CARSON, demands that this honorable court grant judgment for the following relief:

This line has been rewritten in the sample complaint to eliminate legalese. Also the word "requests" (a word sounding less strident) has been substituted for "demands."

Another way to organize the complaint would be to have two prayer for relief sections—one following paragraph 11 and the other as it is in the sample complaint following paragraph 18.

[11]This "catchall phrase" typically is included in the prayer for relief. It allows the court to grant relief other than that specifically requested.

[12]Typically the plaintiff will request a jury trial. If plaintiff decides later against a jury trial, the right may be waived.

FIRST SAMPLE ANSWER

IN THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

JAKE CARSON,	)	
Plaintiff,	)	
	)	CIVIL ACTION
- vs -	)	No. 09-000-00[13]
	)	
TOM HARRIS,	)	
Defendant.	)	

ANSWER[14]

Defendant TOM HARRIS answers Plaintiff's complaint and says:

1. He admits paragraph 1 for jurisdictional purposes only and otherwise denies it insofar as it is applied to him.
2. He admits paragraph 2.[15]
3. He admits paragraph 3.
4. He admits paragraph 4.
5. He admits paragraph 5.
6. With respect to paragraph 6, he denies making the quoted statement maliciously or falsely. Otherwise he admits paragraph 6.[16]
7. He is without knowledge of paragraph 7.
8. He is without knowledge of paragraph 8.
9. He is without knowledge of paragraph 9.
10. He is without knowledge of paragraph 10.
11. He is without knowledge of paragraph 11.
12. With respect to paragraph 12, he repeats his response to paragraphs 1 through 8.
13. He is without knowledge of paragraph 13.
14. He denies paragraph 14.
15. He is without knowledge of paragraph 15.

[13]The case number is copied from the complaint.

[14]Because there is a single defendant "ANSWER" is a sufficient title. If there were multiple defendants and the answer was that of all defendants, title the pleading "DEFENDANTS' ANSWER." If the answer was that of less than all the defendants, the title should indicate the party filing the answer. For example, "ANSWER OF DEFENDANT COLLEGIATE UNIVERSITY."

[15]Here the defendant's numbered paragraphs correspond to the numbering of the paragraphs in the complaint. Another way to organize the answer would be for the defendant to list in a single numbered paragraph the paragraphs of the complaint admitted, to list in a single numbered paragraph the paragraphs of the complaint denied, and to list in a single numbered paragraph the paragraphs of the complaint of which defendant has no knowledge. For example:

2. He admits paragraphs 2 through 6.
3. He is without knowledge of paragraphs 8 through 11, 13, 15, 17, and 18.
4. He denies paragraphs 14 and 16.

[16]Rule 1.110 of the Florida Rules of Civil Procedure requires the defendant to specify which part of the allegation is admitted and which part of the allegation is denied.

16. He denies paragraph 16.
17. He is without knowledge of paragraph 17.
18. He is without knowledge of paragraph 18.

FIRST AFFIRMATIVE DEFENSE

19. Defendant's skit was an obvious expression of humor and could not reasonably be understood as describing an actual fact about plaintiff or an actual event in which plaintiff participated.

SECOND AFFIRMATIVE DEFENSE

20. Plaintiff has failed to allege facts showing that defendant's skit was presented with falsity, negligence, actual malice, or reckless disregard for the truth.

CERTIFICATE OF SERVICE

I furnished a copy of this answer to Florida Attorney, attorney for plaintiff, 101 Main Street, Anytown, Florida, by U.S. mail on _____, 20 ____.

_____
Unnamed Attorney
Attorney for defendant
TOM HARRIS
100 Court Street
Anytown, Florida
(407) 880-0000
Florida Bar No. 100000

SECOND SAMPLE SET OF PLEADINGS

SECOND SAMPLE COMPLAINT

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

PHONE ADDICTED,
Plaintiff,
v. Case No. 6:09-CIV-000-ORL-00AAA
NOSY NEIGHBOR,
Defendants.
_____/

COMPLAINT

Plaintiff, PHONE ADDICTED, sues defendant, NOSY NEIGHBOR, and alleges:[17]

COUNT I—INTERCEPTION OF WIRE COMMUNICATION

1. This court has jurisdiction of this case pursuant to 28 U.S.C.A. § 1331 (West 2003)[18] and 18 U.S.C.A. § 2520 (West 2000 & Supp. 2008).[19]
2. From 1986 to the present, plaintiff has resided at 200 Magnolia Street, Oviedo, Florida.[20]
3. From 2001 to the present, defendant has resided at 202 Magnolia Street, Oviedo, Florida.
4. Plaintiff regularly uses a cordless telephone to place and receive telephone calls at her residence.
5. Defendant owns a scanner capable of intercepting cordless telephone conversations.
6. In June and July of 2008, defendant intentionally intercepted and recorded a number of plaintiff's telephone calls.
7. Defendant's intentional interception of plaintiff's telephone calls violated 18 U.S.C.A. § 2511 (1) (West 2000).

COUNT II—DISCLOSURE OF WIRE COMMUNICATION

8. Plaintiff realleges and incorporates paragraphs 1–6.
9. In June and July of 2008, defendant played tapes of several of plaintiff's conversations.

[17]Rule 8(a) of the Federal Rules of Civil Procedure governs the content and form of the complaint, as discussed earlier in this chapter.
[18]Title 28 U.S.C.A. § 1331 (West 2003) provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." This is commonly referred to as federal question jurisdiction.
[19]This statute authorizes a civil action by a person whose conversation has been wrongfully intercepted or disclosed.
[20]Rule 8(d)(1) of the Federal Rules of Civil Procedure governs the substance and form of allegations of the complaint, as discussed earlier in this chapter.

10. Defendant amplified the tapes so that plaintiff could hear them while she was on her property.
11. At least two other neighbors could hear the tapes from their properties.
12. In broadcasting the tapes, defendant intentionally disclosed to other persons the contents of plaintiff's conversations.
13. Defendant knew that he had obtained the tapes of plaintiff's conversations through the interception of plaintiff's cordless telephone calls.
14. Defendant's intentional disclosure of the tapes of plaintiff's cordless telephone conversations violated 18 U.S.C.A. § 2511 (1) (West 2000).

Plaintiff therefore requests judgment granting the following relief as to counts I and II:[21]

A. an award of compensatory damages in an amount to be set at trial;
B. an award of punitive damages in an amount to be set at trial;
C. an award of costs and attorney's fees;
D. an injunction prohibiting defendant from intercepting, tape-recording, and broadcasting plaintiff's telephone conversations; and
E. such other relief as the court deems appropriate.

JURY DEMAND

Plaintiff demands trial by jury.

Florida Attorney
101 Main Street
Anytown, Florida
Attorney for plaintiff
(407) 000-0000
Bar No. 0000000

[21]Title 18 U.S.C.A. § 2511 (1) (West 2000) authorizes compensatory and punitive damages, reasonable attorney's fees and costs, and injunctive relief. The authorized compensatory damages are either actual damages or "statutory damages of the greater of $100 a day for each day of violation or $10,000."

SECOND SAMPLE ANSWER

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

PHONE ADDICTED,
Plaintiff,
v. Case No. 6:09-CIV-000-ORL-00AAA
NOSY NEIGHBOR,
Defendants.
_____/

ANSWER

Defendant NOSY NEIGHBOR answers Plaintiff's complaint and says:[22]

1. He admits paragraph 1 for jurisdictional purposes only and otherwise denies it insofar as it is applied to him.
2. He admits paragraph 2.[23]
3. He admits paragraph 3.
4. He is without knowledge of paragraph 4.
5. He denies paragraph 5.
6. He denies paragraph 6.
7. He denies paragraph 7.
8. With respect to paragraph 8, he repeats his response to paragraphs 1 through 6.
9. He admits paragraph 9.
10. He admits paragraph 10.
11. He is without knowledge of paragraph 11.
12. He admits paragraph 12.
13. He denies paragraph 13.
14. He denies paragraph 14.

FIRST AFFIRMATIVE DEFENSE[24]

---

15. Defendant recorded only those portions of plaintiff's conversations audible from defendant's property.

[22]Rule 8(b) of the Federal Rules of Civil Procedure governs the form and substance of defenses and denials, as discussed earlier in this chapter.
[23]Rule 8(d) of the Federal Rules of Civil Procedure governs the effect of failure to deny, as discussed earlier in this chapter.
[24]Rule 8(c) of the Federal Rules of Civil Procedure governs affirmative defenses.

SECOND AFFIRMATIVE DEFENSE

16. Defendant broadcast only those portions of plaintiff's conversations recorded while defendant was on defendant's property.

CERTIFICATE OF SERVICE

I furnished a copy of this answer to Florida Attorney, attorney for plaintiff, 101 Main Street, Anytown, Florida, by U.S. mail on _____, 20____.

_____

Unnamed Attorney
Attorney for defendant
100 Court Street
Anytown, Florida
(407) 880-0000
Florida Bar No. 100000

SUMMARY

- The *complaint* is the initial pleading in a civil action, in which the plaintiff alleges a cause of action and asks that the court remedy the wrong done to the plaintiff.
- The *answer* is a pleading in response to the complaint.
- Pleadings must conform to applicable court rules and statutes.
- Pleading forms may be used to draft a pleading but must be tailored to the particular situation with which you are dealing.
- Generally the complaint contains a caption, claims, prayer for relief, and signature block.
- Generally the answer contains a caption, defenses, affirmative defenses and counterclaims, and a certificate of service.
- *Evidentiary facts* are facts admissible in evidence.
- *Ultimate facts* are the facts in a case upon which liability is determined or based.
- A *legal conclusion* is a statement of the result in a situation that involves applying the law to a set of facts.
- When drafting the complaint, follow these writing tips:
  1. Separate evidentiary facts, ultimate facts, and conclusions of law.
  2. Write in plain English.
  3. Place only one or two sentences in each numbered paragraph.
  4. Do not include more evidentiary facts than necessary.
  5. Use descriptive words for allegations favorable to plaintiff; use abstract words for allegations adverse to plaintiff.
  6. Use objective rather than subjective language.
  7. State facts precisely.

KEY TERMS

affirmative defense
answer
cause of action
civil action
complaint
counterclaim
evidentiary facts
legal conclusion
pleading
ultimate facts

CYBERLAW EXERCISES

1. Bryan Garner has interviewed many trial court judges concerning legal writing and posted the educational video clips linked to his company's Web site (<http://www.lawprose.org/>). Go to the Web site, identify the interview of a trial court judge with connections to your state or a neighboring state, watch the video of the judge, and list three legal writing tips the judge provides.
2. The Smoking Gun (<http://www.thesmokinggun.com>) is a Web site that posts documents "from government and law enforcement sources, via Freedom of Information requests, and from court files nationwide." A number of the documents are pleadings concerning famous individuals. View several of the documents posted at this Web site.
3. The Above the Law Web site (<http://www.abovethelaw.com/>) is a legal tabloid with "news, gossip, and colorful commentary on law firms and the legal profession." The Web site regularly contains information on frivolous lawsuits. Access the Web site, note the subject matter of several of the lawsuits, and discuss the consequences of filing the lawsuit to the parties, the attorneys, and society.
4. The Overlawyered Web site (<http://overlawyered.com/>) also contains information on frivolous lawsuits. According to the Web site, "Overlawyered.com explores an American legal system that too often turns litigation into a weapon against guilty and innocent alike, erodes individual responsibility, rewards sharp practice, enriches its participants at the public's expense, and resists even modest efforts at reform and accountability." Access the Web site, note the subject matter of several of the lawsuits, and discuss the consequences of filing the lawsuit to the parties, the attorneys, and society.
5. Before drafting a pleading, determine the format and content required by applicable court rules. The WashLaw Web site (<http://www.washlaw.edu>) allows you to access court rules. Go to the Web site and find court rules for your state.
6. The WashLaw Web site (<http://www.washlaw.edu>) allows you to access legal forms. Go to the Web site and find a relevant legal form.
7. LawCrawler (<http://www.lawcrawler.com>) is a highly-rated search engine that limits its searches to sites known to contain legal information. Try searching for "pleadings" using LawCrawler.

CYBER EXAMPLES

1. When writing legal documents for the first time, it may be helpful to look at examples in addition to those in this book. This chapter provides some examples. Professor Colleen Barger at the University of Arkansas at Little Rock School of Law had a Web site that links to pages of other legal research and writing professors (<http://www.ualr.edu/cmbarger/>).
2. Pleadings are increasingly available on the Internet. To find some pleadings, you might access <http://www.llrx.com/extras/webpacers.htm>. Some of the pleadings are available at no cost through this URL.
3. Access several pleadings from your state on WESTLAW and compare them to the examples in this chapter.

DISCUSSION POINTS

1. Go to <http://www.smokinggun.com> and find some pleadings. How do the pleadings compare to the sample pleadings in this chapter?
2. What court rules are required to be followed when submitting pleadings to federal court?
3. What court rules are required to be followed when submitting pleadings to the state courts of your state?
4. Locate some pleadings filed in a court in your area. Which paragraphs contain evidentiary facts, ultimate facts, and legal conclusions?

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CHAPTER 13

Law Office Memo

INTRODUCTION

One of the standard legal documents written by a paralegal or attorney is what will be referred to in this book as the "law office memo." (Sometimes it may be referred to as an "office memo" or "interoffice memorandum.") This chapter includes two sample office memos and explains the purpose and use of the office memo and its format. The first time you read this chapter, glance over the sample office memos, noting their format. Then refer back to the sample office memos as they are being analyzed in the balance of the chapter.

The first sample office memo has been extensively annotated to provide you with writing and citation tips. If the notes do not make much sense to you right now, read them again after you have reviewed the rules for citations and quotations contained in Appendixes B and C. It might also be helpful to you to refer to the footnotes again when you are writing your own office memo.

PURPOSE AND USE

Legal research is required when the client or the attorney is confronted with a legal problem and the answer to the problem is unclear. A client who is planning a business deal may be wondering how the deal can be structured most advantageously to minimize taxes. Often a client is contemplating suing someone. It is important for both the client and the attorney to know what the chances are of the client obtaining a judgment and whether the client would be entitled to attorney fees. After the lawsuit has been filed, there may be a procedural question that the attorney needs researched.

The main purposes of the office memo are to record the law found as a result of the research, to explain how the researcher analyzed the law and applied it to the facts, and to ultimately propose a solution to the problem. At the moment the research on the problems has been completed; the researcher is the "expert" on the legal principles involved but the researcher will quickly forget many of the details of the research. Depending on the complexity of the questions, one hour, several hours, or several weeks of research might have been required. For a client being billed at an hourly rate, research is expensive but necessary. Writing an office memo allows both the client and the attorney to benefit from the research. The office memo can be read several times and discussed before a decision is made. Although you will find that your first office memo seems to take days to write, edit,

and rewrite, the time spent by an experienced writer on an office memo is fairly small in comparison to the time spent doing the research.

Usually, multiple copies of the office memo are made, with one copy being kept by the researcher, one copy going to the attorney in the office who had requested the research, one copy being placed in the client file, one copy going to the client (if the client is sophisticated enough to understand it), and one copy being placed in a research file in the office. The attorney and the client use their copies to decide how to resolve the problem discussed in the memo. The copy in the client file can be used later to quickly refer to the facts or to the analysis behind the decision made. Often the researcher has spent time pulling the facts together from various sources and organizing them. The memo may be referred to quickly to refresh one's memory on the facts without having to consult various sources or to understand later why the particular decision was made. The copy placed in the research file may be used to aid in later research; there may be further research to be done later on the same or a related problem. The researcher can quickly pull prior office memos and determine whether any of the research previously done can be used. If the researcher is lucky enough to find a prior office memo involving the same problem, all the researcher may have to do is update the research from the date of the prior memo.

STYLE

A number of common style errors made in office memos can be easily avoided if you know what to do and what not to do. After you have written the first draft of your office memo, read this section again and make any necessary change to your memo.

First of all, the tone of the office memo should be objective rather than persuasive. Choose words that are fairly neutral. For example, referring to the illegal drug problem as a "serious menace" as one court did in its opinion is fine for an opinion, but that language sounds too persuasive for an office memo. Instead substitute "serious problem."

Secondly, keep yourself out of the memo. Even if the office memo contains your opinion, keep the tone of the office memo as impersonal as possible and do not use the word "I." Instead of saying: "I think that . . ." you might substitute: "Based on similar facts in Smith and Campbell it is obvious that. . . ."

A third style tip is to avoid using contractions, slang, or any other informal expressions that are normally used in spoken rather than in written communication. Although the tone of the office memo does not have to be so formal it is uninviting to read, it should be somewhat formal. Contractions and slang lend too informal a tone to your office memo.

A fourth error is use of elegant variation. Your English composition teacher probably told you not to use the same word twice and to use synonyms to make your writing more interesting. This is fine for English composition but not for legal writing. If you use two different words that mean the same thing, like "lawyer" and "attorney" or "purchaser" and "buyer," an attorney reading your writing will immediately want to know why you changed wording. The attorney will also assume there is some reason for the change. Perhaps you were referring to something different when you used a different word. If you are referring to the same thing a second time, use the same reference term.

The final style error is to use an abstract word when a more specific one is available. For example, in *Campbell* (the case on which the first sample office memo was based), the agents discovered cocaine in Campbell's car. Rather than talking about suppression of the "evidence" or the "drugs," tell your reader that Campbell filed a motion to suppress the "cocaine." It is just as easy to use the word "cocaine," it makes it easier for your reader to picture, and the word is more descriptive than "evidence" or "drugs."

FORMAT

Although there is no one correct format for office memos, the format given in this chapter is fairly standard. Another format frequently used has the same major sections but places the facts after the issues and answers. Ask your professor what format he or she prefers. You will need to do the same thing if you are asked to write an office memo for your job. Many law offices have a format that the attorneys prefer.

The following portion of this chapter tells you in general terms what to put in each section of the office memo. You may want to read the following sections while comparing them to the sample office memos.

TO AND FROM

These two sections contain the name of the person who assigned you the office memo and your name. If the office memo will be read by persons other than the person who assigned you the memo, you may want to add their names as well.

RE

Identify the subject matter of the office memo in a phrase with sufficient detail so a reader will know whether to read further.

DATE

The memo should be dated either the date you complete your research or the date you deliver it to your reader. The date is important for future reference because it is assumed that the research reflected in the memo is current with the date of the memo or shortly before.

FACTS

Clearly state significant facts that the reader needs to know to understand the reasoning section of the memo and limit them to one or two paragraphs. The facts are the facts; do not invent facts. If you do not know important facts spend more time gathering them, or, if that is impossible, state what facts are not known. Where important facts are unknown, you may have to assume facts and then base your research and your office memo on the assumed facts. This is fine so long as you clearly state your assumption and explain that your discussion and conclusion are based on your assumption. You may even want to assume facts in the alternative and explain what conclusions you would reach based on the various assumptions.

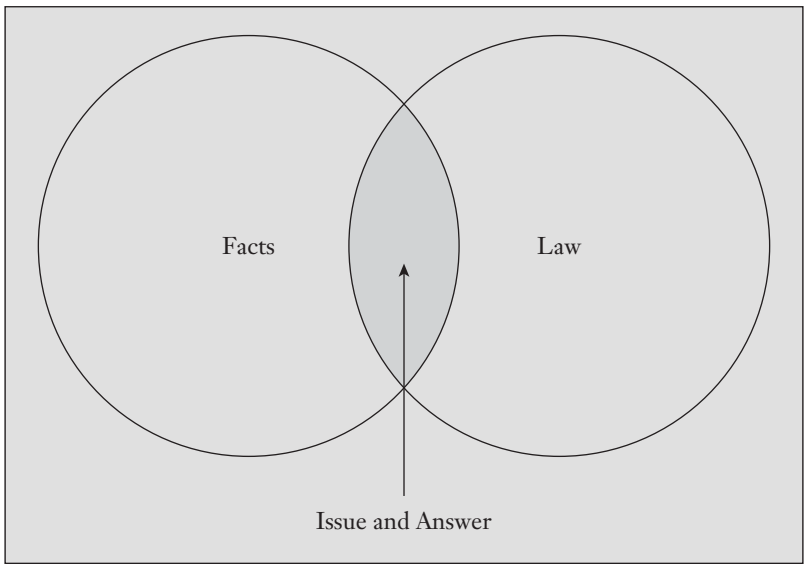
ISSUE(S) AND ANSWER(S)

You should spend considerable time writing your issues and answers because they are the heart of your memo. You may have an idea of what your issues will be before you begin your research, so write down your issues at this preliminary stage. As you perform your research and write your office memo, you will probably find yourself revising your issues and answers several times.

An issue and the corresponding answer should each be one sentence in length while giving the reader the most information possible. An issue is usually stated in the form of a question, and the answer is a full sentence response to the issue. Usually there are the same number of issues as answers, with each issue being paired with an answer. Number your issues and answers to make it easier for your reader. If you find, in including as much information as possible in your issue and answer, that the issue and answer become unwieldy, experiment with splitting up an issue and answer into two issues and two answers.

An issue and answer contain a blend of fact and law, as depicted in Exhibit 13-1. For example, the first issue and answer from the first sample office memo in this chapter are shown.

EXHIBIT 13-1
Issue and Answer.



The words relating to the facts are underlined and the words relating to the law are italicized. Some words are italicized and underlined because they relate both to law and to fact.

ISSUE

1. Did the agents have *reasonable suspicion* to stop the car for an *illegal* drug violation?

ANSWER

1. Because the *factors* in the *drug courier profile*, even if taken together, did not support *reasonable suspicion* of *illegal* drug activity, the cocaine should be *suppressed* unless the agents had *probable cause* to stop the car for a *traffic violation*.

REASONING

The substance of the reasoning portion of the office memo usually is comprised of a thesis, a short conclusion, the statement of the rule of law, and the application of the rule of law to the facts.

Format for Reasoning

The reasoning portion of the first and second sample office memos in this chapter are examples of the way in which an office memo with more than one issue and one answer can be organized. The first sample office memo contains two issues and two answers; the second sample office memo contains three issues and three answers.

Thesis Paragraph

thesis paragraph
This paragraph should contain your thesis—the central idea of your memo.

The reasoning portion of your office memo should begin with a **thesis paragraph**. This paragraph should contain your thesis—the central idea of your memo. It should serve as a road map, giving your reader the big picture of your memo. Besides stating your thesis in your thesis paragraph, you may want to state your final conclusion in simple terms.

Rule of Law

statement of the rule of law
The law contained in legal sources.

The **statement of the rule of law** is the law contained in any legal sources and which will be applied to your facts later in your memo. Usually the law is contained in primary

sources, but sometimes you may have to rely on secondary sources (such as law review articles or legal periodicals) if there are no primary sources on point.

You need to clearly explain the rule of law to the reader so the reader has a solid basis for understanding the rest of your reasoning. If your law is contained in constitutional or statutory provisions you may want to quote the relevant portions of those provisions. Leave out any portions of the provisions that are irrelevant and indicate any omission by the use of an ellipsis. If the provisions are very simple, you may want to explain them in your own words rather than quoting them. If your law is from case law, explain enough about the precedent case so the reader can understand what the case stands for and can better comprehend your application of the case to the facts of the current problem. You may need to devote one or more paragraphs to explaining the significant facts of an important case where you will later be comparing the facts of the case to the facts of the current problem. Your reader will be able to understand the rest of your reasoning better if you have first given the reader a good foundation in the rule of law.

Application of Law to Facts

Many students spend so much energy explaining the rule of law that they do not have energy for the application and may skip from the rule of law to the conclusion. This is a fatal error because the application is the most important part of the office memo. Omission of the application in the office memo results in a reduction of the student's grade, severely hampers the reader's understanding, and greatly lessens the memo's utility.

When applying the law to the facts, you must lead the reader step by step from the law to your conclusion. You must specifically explain why a constitutional or statutory provision applies or does not apply to the facts before explaining the consequences of the application. When applying case law, specifically tell your reader what facts from a case are similar to and what facts are different from the facts in the memo and explain why. It is not sufficient to simply state that facts are similar or different without telling your reader which facts you are referring to and why. You may not be conscious of some of the steps you used in concluding that a particular case is or is not controlling. Try to consciously think of the steps you went through in moving from the law to the conclusion and then write your steps down on paper so your reader can understand your analysis.

Exhibits 13-2 and 13-3 are charts you might use to help you brainstorm your application. Use Exhibit 13-2 if you have a case you will be discussing in the application portion of your reasoning. Use a separate chart for each case discussed in your application. In the first column, list facts that are similar when comparing the facts of the problem you have researched. List facts that differ in the second column. In the last column, state the rule of law from the case and state a conclusion for your research problem. Remember the doctrine of stare decisis. If the case you are using is mandatory authority and the facts are substantially the same as the facts in your research problem, then the research problem should be decided the same way. If the facts are not substantially similar, then your research problem may be decided differently than the case.

Use Exhibit 13-3 if you have one or more statutes you are applying to your research problem. In the first column, write the citations to your statutes. In the second column, list ways in which the statutory language applies or does not apply to your research problem. In the third column, write your conclusion as to the applicability of the statutes to your research problem.

Your writing of the statement of the rule of law and the application should be so clear that someone who has never read about the area of law before can understand your memo. You probably have a friend or relative who has a difficult time understanding a detailed

NAME OF CASE		
Facts that Are Similar	Facts that Are Different	Rule of Law and Conclusion

EXHIBIT 13-2 Case Analysis Chart.

STATUTORY ANALYSIS		
Relevant Statutory Sections	Relevance	Conclusion

EXHIBIT 13-3 Statutory Analysis Chart.

explanation. Picture yourself with that person and imagine how you could explain your office memo to that person. Have someone else who has no knowledge of that area of the law read your memo and tell you if there are any passages he or she could not understand. Rewrite those passages so almost anyone can understand them. Try reading your office memo out loud either to yourself or to someone else. A passage that seems perfectly clear when you read it silently may not sound very clear when read out loud. Rewrite any passages that are unclear or awkward.

CONCLUSION

Your conclusion should be a final paragraph that ties everything together. Remember that in applying case law to your facts you are guided by the *doctrine of stare decisis*. If the facts in a prior case from the same or a higher court are substantially similar, then the answer to the problem should be the same as the result reached by the court in the prior case. Summarize the similarities and differences between the case law used as authority and the facts of the memo and explain what cases you are relying on to reach your conclusion.

FIRST SAMPLE OFFICE MEMO

To: legal research and writing classes

From: your author

Re: whether cocaine found in a car stopped on I-95 should be suppressed

Date: April 13, 2009

Facts

Mike Campbell[1] and his best friend, John Wright, were driving north on I-95 returning from spring break in Florida, when they were stopped by members of a drug task force made up of Volusia County Sheriff officers and federal drug enforcement agents. The agents requested permission to search the car. When Campbell refused consent, the agents brought in a drug dog that alerted to the trunk of the car. The agents then claimed that the dog's actions gave them probable cause to search the trunk and gave Campbell the choice of either opening the trunk or waiting until the agents obtained a search warrant. After Campbell opened the trunk, the agents found two kilograms of cocaine in a brown paper bag. Campbell and Wright were arrested and charged with possession with intent to distribute cocaine. Prior to trial they filed a motion to suppress the cocaine claiming that it was the fruit of an unreasonable search and seizure.

The agents claimed they stopped the Campbell car because Campbell was following the car in front of him too closely and because the following facts fit a drug courier profile used by the Volusia County Sheriff officers:

1. The car was a large late model;
2. The car had out-of-state tags;
3. The car was being driven cautiously at the speed limit;
4. The car was being driven on a known drug corridor, I-95;
5. There were two passengers in the car;
6. The passengers were in their twenties;

[1]It is easier for your reader to understand if you refer to people by their names (a surname is sufficient) instead of as "plaintiff," "defendant," or similar terms. An alternative is to use terms such as "suspect" or "officer."

7. The car was being driven in the early evening; and
8. The passengers were dressed casually.[2]

Although not listed by the agents, Campbell and Wright believe the real reason they were stopped is because they are Afro-Americans.

Issues[3]

1. Did the agents have reasonable suspicion to stop the car for an illegal drug violation?
2. Did the agents have probable cause to stop the Campbell car for the driver's failure to follow at a safe distance?

Answers[4]

1. Because the factors in the drug courier profile, even if taken together, did not support reasonable suspicion of illegal drug activity, the cocaine should be suppressed unless the agents had probable cause to stop the car for a traffic violation.
2. If Campbell failed to follow the vehicle in front of him at an appropriate distance, the stop did not violate the passengers' fourth amendment[5] right against unreasonable search and seizure and the cocaine cannot be suppressed on that ground.

Reasoning[6]

Federal legislation makes possession of cocaine a crime and officers have the task of enforcing this legislation. One method used to check illegal drug activity is to cut down on the transportation of illegal drugs along the nation's highways.[7] Unfortunately, there is no accurate method to determine which cars on the highway are carrying drugs unless the cars are stopped and searched. The car driver and passengers expect that activities within the car will be private and not subject to the scrutiny of law enforcement officials. They may feel that their privacy is invaded if a law enforcement officer stops the car to investigate. A trained police officer may have a hunch that a car's occupants are engaged in illegal

[2]When you have a list of items, make it easier for your reader to skim down the list by tabulating. Number each item, follow each item except for the last one by a semicolon, and place the word "and" after the semicolon following the next to last item. Make sure that you follow parallel construction for all items. (See Appendix D for an explanation of parallel construction.)

[3]Each issue should be a single-sentence question. Between the issue and the answer you should give your reader the most information possible. Often a reader will read the issues and the answers first to determine if he or she should read the whole memo. It is very frustrating for the reader if the reader cannot make that determination without reading the rest of the memo.

[4]Each answer should be a complete, single-sentence answer responding to an issue. Usually there are the same number of answers as there are issues. An exception would be, for example, if the issue is so broad that there are two parts to the answer. As previously, between the issue and the corresponding answer, give your reader the most information possible. If you find an issue and answer getting so long as to be unwieldy, try splitting them up into two issues and answers.

[5]If you refer to a constitutional or statutory provision in an issue or answer by number, also give your reader a short explanation of the provision's subject matter. Otherwise your reader will be frustrated by not knowing why you cited a particular provision. It is usually better not to give case citations in issues or answers. Instead, state the rule of law from the case in your issue or answer and cite the case in the reasoning section of your memo.

[6]You should begin the reasoning portion of your office memo with a thesis paragraph. A well-written thesis paragraph provides the reader with a framework into which the balance of the memo can be placed. It also tells the reader your ultimate conclusion.

A *thesis* is the central idea running through the entire memo. The time you spend before you start writing in developing your thesis is well worth it. Once you find a central idea, it will be much easier to organize the writing of your memo. To find a thesis, think in broad terms of a problem or controversy which is the basis for your memo—the problem or controversy that caused you to do the research in the first place. This memo concerns the delicate balance between society's interest in enforcing criminal drug statutes against the individual's constitutional right against unreasonable search and seizure. The courts recognize society's interest by prosecuting those believed to have violated criminal drug statutes, but the courts also recognize the individual's constitutional right by excluding any evidence obtained in violation of the Fourth Amendment.

[7]Be sure to keep your tone objective rather than persuasive.

activity; however, a law enforcement officer may not constitutionally stop a car unless there is a reasonable suspicion of illegal activity or there is a traffic violation.[8]

The stop of Campbell's car to investigate for criminal activity was not permissible because the agents did not have reasonable suspicion of illegal drug activity. If Campbell violated a Florida statute by following too closely, the stop for a traffic violation was constitutionally justifiable.[9]

The Fourth Amendment[10] to the United States Constitution guarantees "[t]he[11] right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures" and allows a search warrant to be issued only upon "probable cause."[12] The Fourth Amendment does not prohibit all searches and seizures—just *unreasonable* searches and seizures. Although obtaining a search warrant before conducting a search is preferable, the courts have allowed a number of exceptions to the search warrant requirement over the years. One exception[13] is for illegal drug activity and another exception is to investigate a traffic violation. These two exceptions are the ones involved in *Campbell* and are discussed in detail in this memo.

Terry v. Ohio, 392 U.S. 1 (1968)[14] was the landmark case that lowered the burden of proof necessary for a stop from probable cause to "reasonable suspicion." In *Terry*[15] the United States Supreme Court held that police officers could stop someone on the street to investigate possible drug activity so long as the stop was based on something more than an "unparticularized suspicion or 'hunch.'"[16] To reach the level of reasonable suspicion, the officer may rely on "reasonable inferences" from "unusual conduct." *Id*. at 27.[17] Such stops made on reasonable suspicion are often referred to as "Terry stops" after *Terry* and the definition of Terry stops has been broadened to apply to car stops. Once a Terry stop is made, the officers would still need probable cause or consent to search a car.

In recent years, federal courts[18] have decided a number of cases in which the defendants filed motions to suppress claiming that the evidence seized from cars should be suppressed because of a violation of their right against unreasonable search and seizure. In a case involving almost identical facts to those in *Campbell*,[19] the United States Court of Appeals for the Eleventh Circuit found that a highway stop was not reasonable under the Fourth Amendment even though the stop was made based on a drug courier profile and the driver had allegedly committed a traffic violation. *United States v. Smith*, 799 F.2d 704,

[8]This paragraph is the thesis paragraph.

[9]This paragraph contains a short conclusion.

[10]When quoting a constitutional or statutory provision, quote only the relevant portion. Set quotations of fifty words or more off from the rest of the text in a quotation block indented left and right but not enclosed in quotation marks. If the quoted passage contains a quotation, the internal quotation should be enclosed in quotation marks.

[11]The brackets indicate a change in the quotation from the original. Originally, the "t" was upper case.

[12]Periods and commas go inside quotation marks. Other punctuation is placed outside quotation marks unless it is part of the quotation.

[13]Signposts are words used to guide the reader in a particular direction. "One exception" and "another" are signposts clearly identifying the two exceptions that are discussed in much more detail later in the memo.

[14]The first time you are referring to a case by name you must give the full citation. After that you should use a short-form citation.

Citations in the sample office memo are given in *Bluebook* form. Your professor may require you to cite according to some other citation rule (perhaps your state's citation rule). If so, always check the appropriate citation rule to make sure you are citing correctly.

[15]Once you have given the full citation for a case and are referring to the case in general terms, you can refer to it by using one or two of the words from the name of the case and underlining or italicizing it. Be sure the words you select are not so common as to cause confusion. Here, for example, use *Terry* rather than *Ohio*.

[16]To indicate quotes within quotes, alternate double and single quotation marks, with double quotations outermost.

[17]"*Id*." means that you are referring to the immediately preceding authority cited and "27" tells you the page number on which your reader will find the material.

[18]Capitalize the word "court" only when referring to the United States Supreme Court or to the full name of any other court.

[19]Refer to "*Campbell*" showing it is a case because Campbell and Wright have had charges filed against them.

712 (11th Cir. 1986).[20] Although the *Smith* court found that the *Smith* drug courier profile did not support reasonable suspicion, the use of drug courier profiles is not per se unconstitutional. *Id*. at 708 n. 5.[21] The United States Supreme Court has allowed the use of drug courier profiles where all the factors of the drug courier profile taken together do support reasonable suspicion. *United States v. Sokolow*, 490 U.S. 1, 9 (1989).

In 1996, the United States Supreme Court decided that a stop for a traffic violation does not violate the driver's constitutional right against unreasonable search and seizure. *Whren v. United States*, 517 U.S. 806, 818 (1996). Under the Fourth Amendment, a police officer may stop a car for any type of traffic violation, no matter how minor. A traffic stop is constitutional so long as there is a technical violation of a traffic regulation; it does not matter if the reason the agents gave was a pretext for the stop based on race. If Campbell violated the Florida statute by following too closely, then the stop was constitutional. If Campbell did not violate the statute, then the stop was unconstitutional.

This memo will discuss *Smith*,[22] *Sokolow*, and *Whren* and apply them to the above facts to answer the two issues being considered.[23]

Reasoning for issue one[24]

One night in June of 1985, Trooper Robert Vogel, a Florida Highway Patrol trooper, and a DEA agent were observing cars traveling in the northbound lanes of I-95, in hopes of intercepting drug couriers. When Smith's car passed through the arc of the patrol car headlights, Vogel noticed the following factors that matched his drug courier profile:

1. The car was traveling at 3:00 a.m.;
2. The car was a 1985 Mercury, a large late model car;
3. The car had out-of state tags;
4. There were two occupants of the car who were around 30; and
5. The driver was driving cautiously and did not look at the patrol car as the Mercury passed through the arc of the patrol car headlights.

799 F.2d at 705–06.[25]

[20]Page "704" is the first page of *Smith* and "712" is the page on which the finding of the court referred to in the preceding sentence is located. As a courtesy to the reader, a page reference should be given when specific material from a case is referred to even if the material is not quoted.

The two types of sentences in legal writing are textual sentences and citation sentences. A textual sentence is the type of sentence you have been writing all your life. It is a complete grammatical sentence with a subject and a verb. A citation sentence contains only citations. A "string citation" is a citation sentence with more than one citation. In a string citation, the citations should be separated by semicolons.

A sentence is more difficult to read when it contains a full case citation, especially if the citation is long. To avoid including a full citation in a textual sentence, refer to a case in very general terms or refer to a legal principle from a case and give the full citation to the case in a citation sentence following the textual sentence.

[21]This reference is to footnote 5 of *Smith* located on page 708.

[22]Delete excess words by writing "*Smith*" instead of "the *Smith* case" or "the case of *Smith*."

[23]This sentence contains transitional language helping the reader make the transition from the introductory material contained in the first part of the reasoning section to the reasoning for issue one. Your reader will understand your memo better if you make transitions from one paragraph to the next as smooth as possible by using transitional language.

[24]The material that applies to both issues was placed in the preceding section. The material in this section of the memo applies to issue one. Some of the material in this section, such as some of the facts from *Smith*, also apply to issue two. Rather than state the *Smith* facts all over again in the next section, you can refer the reader back to this section, if necessary.

[25]When providing a citation for a block quote or other material set off from the rest of the text, as is the tabulation here, bring the citation back to the left margin. "*Id*." cannot be used here because "*id*." would refer back to the immediately preceding citation, *Sokolow*, instead of to *Smith*. Where "*id*." cannot be used, give the volume number of the reporter, the abbreviation for the reporter, "at," and the page number. You could precede this short form citation by "*Smith*," if *Smith* had not been cited for a page or more or the reader might confuse the citation with another case, especially one from the same volume of the same reporter. This is not necessary here because *Smith* has been cited fairly recently.

When citing inclusive pages with three or more digits, drop all but the last two digits of the second number and place a hyphen between the numbers.

This drug courier profile is almost identical to the *Campbell* profile.[26] In both *Smith* and *Campbell* the cars were traveling after dark, the cars were large late models with out-of-state tags, the cars were being driven "cautiously," and each car contained two passengers in their twenties or thirties. The differences between the two profiles are very minor. Campbell and Wright were dressed casually while it is not known how Smith and Swindell were dressed. Smith and Swindell did not look at Vogel as they passed. It is not known whether Campbell and Wright looked in the agents' direction as Campbell drove past. Campbell and Wright claim that race was a factor in their stop even though it was not listed as such by the agents. Smith and Swindell's race is unknown.[27]

In *Smith*, Vogel followed the Mercury for a mile and a half and noticed that the Mercury "wove" several times, once as much as six inches into the emergency lane. Vogel pulled Smith over. When a drug dog alerted on the car, a DEA agent searched the trunk and discovered one kilogram of cocaine. Smith and his passenger, Swindell, were arrested and were charged with conspiracy to possess cocaine with the intent to distribute it. Smith and Swindell's motions to suppress the cocaine were denied and they were tried and convicted. *Id*. at 706.

The issue before the appellate court was whether the stop of Smith's car was reasonable. *Id*.[28] This is the same basic issue that will be before the *Campbell* court when it considers Campbell and Wright's motion to suppress. The *Smith* court held that the stop of Smith's car could not be upheld as a valid Terry stop, *id*. at 708, finding that "Trooper Vogel stopped the car because [Smith and Swindell][29] . . . matched a few nondistinguishing characteristics contained on a drug courier profile and, additionally, because Vogel was bothered by the way the driver of the car chose not to look at him." *Id*. at 707.

Just as there was nothing in the *Campbell* drug courier profile to differentiate Campbell and Wright from other innocent college students returning from spring break in Florida, there was nothing in Vogel's drug courier profile to differentiate Smith and Swindell from other law-abiding motorists on I-95. It is usual to drive after dark to avoid heavy traffic and to complete an interstate trip.[30] Although many motorists speed on the highways, motorists driving "cautiously" at or near the speed limit are simply obeying traffic laws. Many people other than drug couriers drive large late model cars with out-of-state tags. A motorist between the ages of twenty and forty is not unusual.

[26]This is an example of a topic sentence. A topic sentence contains one main idea summarizing the rest of the paragraph, with the rest of the paragraph developing the idea presented in the topic sentence. Most paragraphs should have topic sentences. The typical location of a topic sentence is the first sentence in the paragraph. Sometimes the topic sentence is the last sentence in the paragraph and pulls together the rest of the paragraph. Some paragraphs, typically narrative paragraphs like the preceding paragraph, do not have a topic sentence.

If a paragraph sounds disjointed or unorganized, try pulling it together using a topic sentence. If a topic sentence does not help, think about breaking the paragraph up into more than one paragraph.

[27]This paragraph applies the facts in *Smith* to the facts in *Campbell*. Applying facts from one case to another case involves explaining the similarities and differences between the two sets of facts. Instead of simply stating that the facts from the two cases are very similar, the paragraph specifically states which facts are the same. Sometimes in the application you need to explain in what way the facts are similar if they are not identical.

You can either apply the *Smith* facts to *Campbell* as done here or you can wait until you have thoroughly discussed *Smith*. When you prepare your outline prior to starting to write the office memo, spend some time moving parts of your reasoning around to determine the best flow for your reasoning.

[28]When you are referring to material from the same page as the material you referred to in the last citation, use just "*id*." Note that *id*. is capitalized only at the beginning of a sentence.

[29]"Smith and Swindell" are in brackets because this wording was inserted into the quotation by the person writing the memo. The ellipsis (. . .) shows that something was omitted from the original wording of the quotation. Your quotations must exactly match the wording and punctuation of the authority the quotation comes from. If you are sloppy in quoting and your reader discovers that you have taken "liberties" with the quotation, your reader may suspect that you are sloppy in other ways—perhaps even in your research. See Appendix C for an explanation of quoting correctly.

[30]No page reference is needed where you have already given the facts in the cases you are using as authority and are referring to those cases in general.

The contrast between the *Campbell* and *Smith* drug courier profiles, which do not support reasonable suspicion, and the *Sokolow* drug courier profile, which was held to support reasonable suspicion, is instructive. *Sokolow*, 490 U.S. at 3. In *Sokolow*, DEA agents found 1,063 grams of cocaine inside Sokolow's carry-on luggage when he was stopped in Honolulu International Airport based on the following profile:

1. He had paid $2,100 in cash for two airplane tickets from a roll of $20, which appeared to contain $4,000;
2. He was ticketed under a name other than his own;
3. He traveled to Miami, a known drug source, and back;
4. Although his round trip flight lasted 20 hours, he stayed in Miami only 48 hours;
5. He appeared nervous;
6. He was about 25 years old;
7. He was dressed in a black jumpsuit and was wearing gold jewelry which he wore during both legs of the round trip flight; and
8. Neither he nor his companion checked any luggage.[31]

Id. at 3–5. The Court explained that the provided drug courier profile must be evaluated in light of "the totality of the circumstances—the whole picture." *Id*. at 8 (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)).[32] "Any one of these factors [in the drug courier profile] is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion." *Id*. at 9. The *Sokolow* dissent would have found that all of the factors even if "taken together" did not amount to reasonable suspicion. In criticizing the use of a drug courier profile to stop suspects, the dissent noted "the profile's 'chameleon-like way of adapting to any particular set of observations' " "subjecting innocent individuals to unwarranted police harassment and detention." *Id*. at 13 (Marshall, J., dissenting)[33] (quoting *Sokolow v. United States*, 831 F.2d 1413, 1418 (9th Cir. 1987), *rev'd*, 490 U.S. 1 (1989)[34]).

As predicted in the *Sokolow* dissent, Smith, Swindell, Campbell, and Wright were subjected to "unwarranted police harassment and detention" even though the factors in the respective drug courier profiles, even if "taken together," did not amount to reasonable suspicion. In contrast, several of the *Sokolow* factors, such as carrying such a large amount of cash and traveling a long distance to stay a relatively short period of time, are unusual or even suspicious in and of themselves. Each of the *Smith* and *Campbell* factors was not at all out of the ordinary alone and certainly taken together did not amount to reasonable suspicion.

Conclusion[35] for issue one

Because the drug courier profiles in *Smith* and *Campbell* are virtually identical and are in sharp contrast to the *Sokolow* drug courier profile, the *Campbell* court should find that there was not reasonable suspicion to stop Campbell and the stop on that ground was an unconstitutional violation of Campbell and Wright's constitutional guarantee against

[31]Only those facts from *Sokolow* that are relevant to the discussion of *Smith* are given.

[32]When you are quoting from a case that in turn quotes from another case, identify the second case by putting the citation to the second case in parentheses following the citation for the case you are quoting.

[33]You must identify the type of opinion you are quoting from if it is other than the majority opinion.

[34]Subsequent history must be given for the lower court decision in *Sokolow*.

[35]Your conclusion section at the end of a reasoning section ties together your previous discussion and reaches a conclusion. The difference between the conclusion section for issue one and answer one is that answer one is a more condensed one-sentence version of the conclusion section.

unreasonable search and seizure. Unless the agents had probable cause to investigate the alleged traffic violation, the *Campbell* court should suppress the cocaine as the fruit of an unconstitutional search and seizure.

Reasoning for issue two

An examination of *Whren v. United States* is necessary to answer the second issue. In *Whren*, Brown was driving a Pathfinder in which Whren was a passenger. Brown was stopped at a stop sign looking down into Whren's lap. Plain clothes police officers were patrolling this "high drug area" of the District of Columbia in an unmarked patrol car. The Pathfinder caught the attention of the officers because Brown remained stopped at the stop sign for approximately twenty seconds. When the patrol car made a U-turn to follow the Pathfinder, Brown turned right without signaling and started off at an "unreasonable speed." The patrol car stopped the Pathfinder. When one of the officers approached Brown's window and peered in, he saw that Whren had two plastic bags of crack cocaine on his lap. The officers arrested Whren and Brown. 517 U.S. at 808, 809.

Justice Scalia phrased the issue as "whether the temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth Amendment's prohibition against unreasonable seizures unless a reasonable officer would have been motivated to stop the car by a desire to enforce the traffic laws." *Id*. at 808. The Court answered the question, "no." "[T]he district court found that the officers had probable cause to believe that petitioners had violated the traffic code. That rendered the stop reasonable under the Fourth Amendment, the evidence thereby discovered admissible, and the upholding of the convictions by the Court of Appeals for the District of Columbia Circuit correct." *Id*. at 819.

Whren and Brown, both black, had urged the Court to apply the reasonable officer standard. They argued that, because of the multitude of traffic ordinances, an officer could almost invariably find some reason to stop a particular vehicle for an alleged traffic violation. This might allow an officer to target a particular vehicle to be stopped on the pretext of a traffic violation, where the real reason for stopping the vehicle was an impermissible factor such as the race of the persons in the vehicle. *Id*. at 810. The Court dismissed this argument. "We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment." *Id*. at 813. The Court did not explain that an Equal Protection Clause challenge is difficult to prove because it requires evidence of intentional discrimination.

Prior to *Whren*, some courts, including the court deciding *Smith*, had decided that a car stop for a traffic violation was unconstitutional unless a reasonable officer would have made the stop. The *Smith* court found that the cocaine should have been excluded from evidence because a reasonable officer would not have stopped Smith's car for the alleged traffic violation. 799 F.2d at 711. However in *Whren*, the United States Supreme Court rejected the argument that the reasonable officer standard should apply. 517 U.S. at 813.

After *Whren*, it would be very difficult to convince a court that a stop for an alleged traffic violation is unconstitutional. However, if the court finds that the driver did not violate any traffic regulation, then the stop would be unconstitutional.

The applicable Florida motor vehicle statute states: "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon, and the condition of, the highway." Fla. Stat. Ch. 316.0895 (1) (2008). No simple test determines if Campbell violated the statute. The court must determine from any evidence presented whether the distance at which Campbell was following the car in front of him was reasonable and prudent.

Whren and *Campbell* are very similar in that in both cases, the government claimed that the stop of a suspect car did not violate the driver's right against unreasonable search and seizure because there was some irregularity in the way the car was being driven that gave the officer reason to stop the car. The driving "irregularities" are similar in the failure to use a turn signal in changing lanes and speeding in *Whren* and the following too closely in *Campbell* are moving violations that can pose a severe safety hazard; under the circumstances, neither appeared to adversely impact any other vehicle's safety.

The alleged driving irregularities in *Whren* and *Campbell* are dissimilar in several respects. While it was clear that Brown committed a traffic violation, the Florida statute that Campbell allegedly violated does not apply to Campbell if he was following at a safe distance. Determining whether one vehicle is following another vehicle too closely involved much more of a judgment call than determining whether the Pathfinder in *Whren* failed to signal when turning right and exceeded the speed limit. The position of the vehicles on the highway and the weather and road conditions must all be considered to determine if Campbell violated the statute by following the vehicle in front of him too closely.

CONCLUSION FOR ISSUE TWO

Whren rejected the argument that a pretextual traffic stop is unconstitutional. *Whren* is binding on the *Campbell* court. Following the mandatory authority of *Whren*, the *Campbell* court should hold that the stop was constitutional if the agents had probable cause of a traffic violation; the court should hold that the stop was unconstitutional if there was no traffic violation. If the *Campbell* stop violated the Fourth Amendment, Campbell and Wright's motion to suppress would be denied. If the stop were unconstitutional, the cocaine would be suppressed.

SECOND SAMPLE OFFICE MEMO

To: legal research and writing classes

From: your author

Re: whether drugs found in a car passenger's purse should be suppressed

Date: July 13, 2009

Facts

Cruz Estrada was riding with her friend, Luis Briones, when Luis's car was pulled over. They were traveling south on I-95 toward Miami to visit friends. The officer said he had stopped the car because they were speeding.

The officer stood at the window on the driver's side and asked for Luis's license and car registration. While Luis searched his wallet for the documents, the officer noticed a glass vial containing small kernels of an off-white substance in Luis's lap. Believing the vial to contain crack cocaine, the officer announced that he was seizing it. He asked Luis and Cruz to exit the car and asked Luis for his wallet.

Cruz got out of the car with her purse strap slung over her shoulder. The officer approached her and said, "You don't mind if I search this, do you?" Without giving her time to respond, the officer grabbed her purse and began to search it. Inside her purse, he found a brown paper envelope. Cruz claimed that someone had given it to her to give to a friend in Miami.

Still holding Cruz's purse and Luis's wallet, the officer asked them to wait in the patrol car while he searched Luis's car. Cruz and Luis nervously waited in the backseat

of the patrol car. Cruz admitted to Luis that the envelope was hers and that it contained illegal drugs.

After Cruz and Luis were arrested, she discovered that the police officer had tape-recorded their conversation in the back of the patrol car. Luis told her that the reason the officer gave for stopping them must have been a pretext because, at the most, he was driving five miles over the speed limit. He said he suspected that he had been stopped for what is jokingly referred to as the offense of DWH or Driving While Hispanic.

She has been charged under the federal drug statutes.

Issues

1. Did the officer have probable cause to stop the Briones car for speeding where Luis was exceeding the speed limit by only a few miles and Luis suspects that his race (Hispanic) was the motivation for the stop?
2. Where the officer grabbed Cruz's purse from her shoulder, did the officer's search of Cruz's purse violate her Fourth Amendment right against unreasonable search and seizure and can the drugs found in her purse be suppressed?
3. Where the officer tape-recorded Cruz and Luis's conversation while they were seated in the backseat of the patrol car, is the tape admissible as evidence?

Answers

1. Because an officer can stop the car for any traffic violation, no matter how minor, the stop did not violate Cruz's Fourth Amendment right against unreasonable search and seizure and the drugs cannot be suppressed on that ground.
2. Because Cruz did not consent to the search of her purse, she may be able to have the drugs suppressed if the court views her purse as an outer layer of clothing.
3. Because Cruz and Luis had no reasonable expectation of privacy in the back of the patrol car, their conversation was not an "oral communication," suppressible under the federal eavesdropping statutes; however, the tape may be suppressed if the court decides that the search of Cruz's purse was unconstitutional and the tape is derivative of the search.

Reasoning

The *Estrada* facts illustrate the tension between an individual's expectation of privacy and a federal law enforcement officer's duty to enforce the federal drug statutes. Car occupants usually feel that items they transport in a car will remain private; however, the Fourth Amendment allows a police officer to stop a car for a traffic violation and question the occupants. The officer may search the car if the occupants consent or if the officer has probable cause that the car contains illegal drugs. During the search, the officer may ask the car occupants to wait in the patrol car for their safety or comfort. Suspects seated in the rear seat of a patrol car may expect the same amount of privacy they would have were they in a private car. With the patrol car doors and windows closed, the officer outside the patrol car cannot hear the suspects' conversation. However, the officer might tape the suspects' conversation in the belief that the patrol car is similar to the officer's office in a police station.

Cruz can allege that her Fourth Amendment rights were violated when the officer stopped the car in which she was riding and searched her purse. She can also claim that her conversation in the backseat of the patrol car should have been protected against being tape-recorded under the federal eavesdropping statutes. The stop of the car for a traffic violation was constitutionally justifiable. Because Cruz did not consent to the search of her

purse, she may be able to have the drugs suppressed if the court views her purse as similar to an outer layer of clothing. The conversation in the backseat of the patrol car will not be suppressed under the federal eavesdropping statutes because Cruz and Luis had no reasonable expectation of privacy; however, if the search of Cruz's purse was unconstitutional and the incriminating statements on the tape were the fruit of the search, then the tape could be suppressed as well.

General reasoning for issues one and two

The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures" and allows a search warrant to be issued only upon "probable cause." The Fourth Amendment does not prohibit all searches and seizures—just *unreasonable* searches and seizures. Although obtaining a search warrant before conducting a search is preferable, the courts have allowed a number of exceptions to the search warrant requirement over the years. At least two exceptions apply to a vehicle search. One exception is for the occupants to consent to a search of the vehicle. *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). A second exception is that the officer can search the car if there is probable cause of criminal activity. Even without consent, the officer can search containers found in the car and suspected of holding the object of the officer's search, no matter who owns the container. *Wyoming v. Houghton*, 526 U.S. 295, 300–01 (1999). An officer may not search someone's person without probable cause. *Id*. at 303. These exceptions are the ones involved in *Estrada* and are discussed in detail in this memo.

Reasoning for issue one

On June 10, 1996, the United States Supreme Court decided a landmark case in which the Court held that the Fourth Amendment allows a police officer to stop a vehicle for any type of traffic violation. *Whren v. United States*, 517 U.S. 806, 819 (1996). The facts of *Estrada* and *Whren* will be compared to determine if the *Estrada* vehicle stop was constitutional.

In *Whren*, plain clothes law enforcement officers were patrolling a high drug area of the District of Columbia when they passed a Pathfinder truck stopped at a stop sign. The driver was looking into the lap of the passenger and the truck paused an overly long period of time at the stop sign. As the patrol car made a U-turn to approach the truck, the truck turned right without signalling and started off at an "unreasonable" speed. The patrol car overtook the truck and stopped it. Whren was a passenger and Brown was the driver. When one officer looked through the driver's window, he saw plastic bags of something resembling crack cocaine in Whren's hands. *Id*. at 808.

In *Whren*, Justice Scalia phrased the issue as "whether the temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth Amendment's prohibition against unreasonable seizures unless a reasonable officer would have been motivated to stop the car by a desire to enforce the traffic laws." *Id*. at 808. The Court answered the question, "no." "[T]he district court found that the officers had probable cause to believe that petitioners had violated the traffic code. That rendered the stop reasonable under the Fourth Amendment, the evidence thereby discovered admissible, and the upholding of the convictions by the Court of Appeals for the District of Columbia Circuit correct." *Id*. at 819.

Whren and Brown, both black, had urged the Court to apply the reasonable officer standard. They argued, that because of the multitude of traffic ordinances, an officer could almost invariably find some reason to stop a particular vehicle for an alleged traffic violation. This might allow an officer to target a particular vehicle to be stopped on the pretext of a traffic violation, where the real reason for stopping the vehicle was an impermissible factor

such as the race of the persons in the vehicle. *Id*. at 810. The Court dismissed this argument. "We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment." *Id*. at 813. The Court did not explain that an Equal Protection Clause challenge is difficult to prove because it requires evidence of intentional discrimination.

After *Whren*, it would be very difficult to convince a court that a stop for an alleged traffic violation is unconstitutional. One instance is if the facts, which the officer states violate a traffic ordinance, are found by a court not to violate the ordinance. For example, an officer could stop a car because the officer believes that the windows are too heavily tinted. A court could find the stop unconstitutional if the tinting, although dark, did comply with the applicable traffic ordinance. Another instance is if the court finds that the officer lied; no facts existed that could support the alleged violation.

Whren and *Estrada* are very similar in that in those cases, the government claimed that the stop of a suspect car did not violate the driver's right against unreasonable search and seizure because there was some irregularity in the way the car was being driven that gave the officer reason to stop the car. The driving "irregularities" are similar in that Brown's failure to signal a right turn and speeding off and Briones' speeding did not appear to cause any imminent safety hazard. From the facts of the two cases, it appears that Brown exceeded the speed limit for only a short distance and Luis may have been travelling only a few miles over the speed limit. In each case, the reason articulated for the stop may have been a pretext for stopping the vehicle on account of the occupants' race.

Conclusion for issue one

Whren rejected the argument that a pretextual traffic stop is unconstitutional. *Whren* is binding on the *Estrada* court. Following the mandatory authority of *Whren*, the *Estrada* court should hold that the stop for speeding was constitutional because there was probable cause of a traffic violation. Because Cruz's fourth amendment right was not violated by the stop, the drugs would not be suppressed based on the Fourth Amendment.

Reasoning for issue two

The search of Cruz's purse is constitutional if she consented to the search or the container exception to the search warrant requirement extends to her purse. The United States Supreme Court has stated the standard for determining when an individual has consented to the search of a car. *Florida v. Jimeno*, 500 U.S. at 251. This portion of the office memo will examine whether the consent standard has been met. As far as the container exception is concerned, the United States Supreme Court recently held that "police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search." *Wyoming v. Houghton*, 526 U.S. at 307. The facts of *Jimeno*, *Houghton*, and *Estrada* will be compared to determine if the search of Cruz's purse was constitutional.

In *Jimeno*, Officer Trujillo overheard a telephone call from a public telephone in which Jimeno was discussing a drug deal. Trujillo followed Jimeno's car and stopped Jimeno for failure to stop when turning right on red. After informing Jimeno about the traffic violation, Trujillo

> went on to say that he had reason to believe that respondent was carrying narcotics in his car, and asked permission to search the car. He explained that respondent did not have to consent to a search of the car. Respondent stated that he had nothing to hide, and gave Trujillo permission to search the automobile.

500 U.S. at 249–50. Trujillo found drugs in a brown paper bag on the car floorboard. *Id*. at 250.

The Court then set forth the test for determining whether consent was given. "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical person have understood by the exchange between the officer and the suspect?" *Id*. at 251. Applying this standard, the Court found that Jimeno had consented to the search of the bag.

The facts of *Jimeno* and *Estrada* are similar in that the two cars were stopped for alleged traffic violations and the officers searched containers. The facts surrounding the consent issue differ greatly. Trujillo told Jimeno that the officer suspected that there were drugs in the car and explained that Jimeno did not have to consent to the search. When Trujillo asked Jimeno's permission, Jimeno claimed that he had nothing to hide and explicitly consented to the search. The officer in *Estrada* made a statement, "you don't mind if I search, do you?"; he did not ask Cruz for her consent. He gave Cruz no time to respond before snatching her purse. In *Jimeno*, the container was a brown paper bag located on the floor of the car. In *Estrada*, the container was Cruz's purse, hanging from her shoulder.

Applying the objective reasonableness standard, it would not be objectively reasonable to believe that Cruz had consented to the search of her purse. She did not verbally consent and her actions did not imply consent. A woman's purse often contains objects of a personal nature that the individual wants to keep safe from prying eyes. A purse is often considered an extension of the individual's outer clothing. Because of the private nature of Cruz's purse, it presumably would take some overt action or response before it would be reasonable to believe that she had consented.

In *Houghton*, David Young was stopped for speeding and a faulty brake light. After the officer saw a hypodermic syringe in Young's pocket, Young admitted that he used it to take drugs. The officer asked the two female passengers seated in the front seat to exit the car and the officer searched the car. The officer found Houghton's purse on the back seat of the car. Searching the purse, the officer found a brown pouch that contained drug paraphernalia and a syringe containing methamphetamine in a large enough quantity for a felony conviction. Houghton claimed that the brown pouch was not hers. The officer also found a black container that contained drug paraphernalia and a syringe containing a smaller amount of methamphetamine, insufficient for a felony conviction. Houghton's arms showed fresh needle marks. The officer arrested her. 526 U.S. at 297–98.

The issue in *Houghton* was "whether police officers violate the Fourth Amendment when they search a passenger's personal belongings inside an automobile that they have probable cause to believe contains contraband." *Id*. at 297. The Court held "that police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search." *Id*. at 307. The Court first relied on a 1982 case in which the Court had found that, where there was probable cause to search a car, it was constitutionally permissible to search containers found in the car that might hold the object of the search. *Id*. at 301–02. The Court noted that an individual carrying a package in a vehicle travelling on the public roads has a reduced expectation of privacy; however the Court did note the "unique, significantly heightened protection afforded against searches of one's person." *Id*. at 303. The Court found no reason to afford more protection to a container owned by a passenger than a container owned by the driver. *Id*. at 305.

In *Houghton*, Justice Breyer joined in the majority opinion and wrote a separate concurring opinion. In the concurring opinion, he stated that *Houghton* should be limited to vehicle searches and to containers found in a vehicle. He was troubled by the fact that it was Houghton's purse that was searched.

> [A]lso important is the fact that the container here at issue, a woman's purse, was found at a considerable distance from its owner, who did not claim ownership until the officer discovered her identification while looking through it. Purses are special containers. They are repositories of especially personal items that people generally like to keep with them at all times. So I am tempted to say that a search of a purse involves an intrusion so similar to a search of one's person that the same rule should govern both. However, given this Court's prior cases, I cannot argue that the fact that the container was a purse automatically makes a legal difference. . . . But I can say that it would matter if a woman's purse, like a man's billfold, were attached to her person. It might then amount to a kind of "outer clothing," which under the Court's cases would properly receive increased protection.

Id. at 308 (Breyer, J. concurring) (citations omitted).

The facts of *Houghton* and *Estrada* are similar in that the two cars were stopped for alleged traffic violations and the officers searched a passenger's purse. The facts of the two cases differ in that Houghton's purse was on the backseat of the car, Houghton had exited the car without taking the purse with her, and Houghton at first disclaimed ownership of the purse. In contrast, Cruz took her purse with her when she exited the car and it was attached to her when the officer snatched it from her shoulder.

In dicta in *Houghton*, the Court draws a distinction between the permissible search of containers and the search of an individual. The officer would not have been permitted to search Houghton without probable cause that she was carrying drugs or a weapon on her person. In the concurrence, Justice Breyer struggles with the fact that the container being searched is Houghton's purse. Were *Estrada* before him, he would likely find that the search of Cruz's purse was unconstitutional. As a concurrence, Justice Breyer's opinion is not mandatory authority. In addition, his opinion requiring the search of a purse attached to an individual to be treated similarly to the search of an individual's outer clothing is based on hypothetical facts.

Conclusion for issue two

Applying the standard for consent enunciated in *Jimeno*, Cruz did not consent to the search of her purse. A reasonable person would not believe that Cruz's lack of response to the officer's statement, "you don't mind if I search, do you?", could be considered consent. Thus, the consent exception to the search warrant requirement does not exist in *Estrada*. Because Cruz did not consent to the search of her purse, the search on that ground was unconstitutional.

The comparison of *Houghton* and *Estrada* is more difficult. If the facts in the two cases are substantially similar, then the *Estrada* court should hold that the drugs found in Cruz's purse should not be suppressed. If the *Estrada* court finds that Cruz's purse can be likened to an item of clothing she was wearing, then the drugs found in her purse should be suppressed.

Although the facts in *Houghton* and *Estrada* are similar, they are different enough that a court could find that the drugs found in Cruz's purse should be suppressed. Because her purse was next to her body, Cruz had a heightened expectation of privacy in it. The officer could not have constitutionally searched Cruz without more evidence. Thus, the search of her purse should also be unconstitutional and the drugs found in the purse should be suppressed.

Reasoning for issue three

To determine whether the audio recording of Cruz and Luis's conversation was permissible, the court must consider the federal eavesdropping statutes and their case law interpretation. The federal eavesdropping statutes protect certain types of face-to-face conversations against interception. To be protected, the conversation must qualify as an "oral communication." Under the statutes, an " 'oral communication' means any oral communications uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation. . . ." 18 U.S.C.A. § 2510 (2) (West 2000).

Thus, a conversation is not an oral communication unless the conversants expect that the conversation is private and an objective third party would consider that expectation reasonable.

It is illegal to intercept an oral communication. "[A]ny person who . . . intentionally intercepts . . . any oral communication . . . shall be punished." 18 U.S.C.A. § 2511 (1) (West 2000). One exception to this prohibition involves a police officer; however, the police officer must be party to the conversation or one conversant must have consented to the taping for the exception to apply. "It shall not be unlawful under this chapter for a person acting under color of law to intercept [an] . . . oral . . . communication where such person is a party to the communication or one of the parties has given prior consent to the interception." 18 U.S.C.A. § 2511 (2)(c) (West 2000). If an oral communication is taped in violation of the eavesdropping statutes, the conversation cannot be used as evidence in court. "Whenever any . . . oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding . . . before a court . . . if the disclosure of that information would be in violation of this chapter." 18 U.S.C.A. § 2515 (West 2000).

Thus, if Cruz and Luis's conversation were an oral communication, it should be suppressed. Whether the conversation is an oral communication turns on whether Cruz and Luis had a reasonable expectation of privacy while seated in the rear seat of the patrol car. One prong of the two-prong test is satisfied; they appear to have had an expectation of privacy or they would not have made incriminating statements. The other prong of the test is whether their expectation was reasonable. On one hand, the conversation was not audible outside the patrol car. The only way the officer could have heard the conversation was by taping it. On the other hand, Cruz and Luis were not sitting in Luis's car. They were sitting in the officer's car. While an expectation of privacy in Luis's car would have been reasonable, it is unclear from the federal statutes whether an expectation of privacy in the officer's car was reasonable. Some might equate the officer's car to the officer's office. If Cruz and Luis were conversing in an office of a police station, it might not be reasonable to expect privacy.

In a case with similar facts, the issue before the United States Court of Appeals for the Eleventh Circuit was "whether the district court erred in denying the motion to suppress the tapes resulting from the secret recording of McKinnon's pre-arrest conversations while he sat in the back seat of the police car." *United States v. McKinnon*, 985 F.2d 525, 526 (11th Cir. 1993).

In *McKinnon*, police officers stopped a pick-up truck for failure to travel in a single lane on the Florida Turnpike. Theodore Pressley was driving and Steve McKinnon was the passenger. Pressley consented to the search of his vehicle. While the officers were searching, McKinnon and Pressley waited in the rear seat of the patrol car. There they made incriminating statements that were secretly recorded by the officers. The officers arrested them after finding cocaine in the truck and they were placed in the rear seat of the patrol car. The officers again recorded McKinnon's and Pressley's incriminating statements. *Id*.

The *McKinnon* court considered the meaning of the term *oral communication* under the federal statutes. An oral communication is protected against taping. If a conversation is taped in violation of the statutes, the tape may be suppressed. A conversation is an oral communication only if the conversants exhibited a subjective expectation of privacy and the expectation of privacy was objectively reasonable. The court seemed to agree with the government's argument that a patrol car functions as the officer's office and the rear seat of the patrol car functions as a jail cell. The court held "that McKinnon did not have a reasonable or justifiable expectation of privacy for conversations he held while seated in the back seat area of a police car." *Id*. at 527.

In examining the facts of *McKinnon* and *Estrada*, the facts concerning the taping seem virtually identical. In each case, an officer asked two individuals to wait in the patrol car prior to their arrest. The officer taped their conversation in the rear seat of the patrol

car; the conversation contained incriminating statements. One difference between the two cases is that the officer in *McKinnon* also taped McKinnon's conversation following his arrest. This difference is not significant because an arrestee held in the back of a patrol car would have a lesser expectation of privacy than a person not under arrest.

A number of state and a number of federal courts, other than the *McKinnon* court, have faced the issue of whether an officer may secretly tape a conversation of individuals seated in the rear seat of a patrol car. In each case the court has said that taping is permissible. Carol M. Bast & Joseph B. Sanborn, Jr., *Not Just any Sightseeing Tour: Surreptitious Taping in a Patrol Car*, 32 Crim. L. Bull. 123, 130–31 (1996).

Cruz could make the argument that the search of her purse tainted the tape recording. Where a police officer obtains evidence in an unconstitutional manner, that evidence is excluded from use at trial. If that evidence leads the officer to other evidence, the other evidence is derivative of the first evidence. The derivative evidence is known as fruit of the poisonous tree and is also inadmissible. Generally, evidence that is tainted by the prior unconstitutional conduct is inadmissible; however, in some instances the second evidence is admissible because the connection between the unconstitutionally-seized evidence and the subsequently obtained evidence is marginal.

Conclusion for issue three

Although persuasive authority in other circuits, *McKinnon* is mandatory authority in this circuit. The facts concerning the taping are virtually identical in *McKinnon* and *Estrada*. A number of other state and federal courts have also held that there is no reasonable expectation of privacy for persons seated in the back of a patrol car. Therefore, a court should find that Cruz and Luis had no reasonable expectation of privacy while they were seated in the rear seat of the patrol car. Because they did not have a reasonable expectation of privacy, their conversation was not protected against taping as an oral communication.

If the court rules that the search of Cruz's purse was unconstitutional, then the tape may be suppressed if the search led Cruz to make the incriminating statements. Standard police procedure is to place a car's occupants in the rear seat of the police car while the officer is conducting a search and to tape their conversation. After the search of her purse, Cruz may have been more likely to discuss the drugs found in her purse. Cruz may have made reference to the drugs even if the officer had not found them in her purse. She might have commented that she was glad the officer did not search her purse.

The court will have to decide from the evidence the likelihood of Cruz making some type of incriminating statement without the officer having searched her purse. The court would not suppress the tape if the court decides that Cruz would have made the incriminating statements without the search of her purse.

SUMMARY

- The office memo records the results of legal research, explains how the researcher analyzed the law and applied it to the facts, and proposes a solution to the problem.
  - The tone of the office memo is objective rather than persuasive.
  - Generally the office memo contains a heading (to and from, re, and date), facts, issue(s) and answer(s), a thesis paragraph, the rule of law, the application of the law to the facts, and the conclusion.
  - Refer to people by their names or terms such as suspect or officer instead of appellant, appellee, or similar terms.

- Each issue and each answer should be single sentences.
- Between the issue and the answer you should give your reader the most information possible.
- Usually there are the same number of answers as issues.
- If you refer to a constitutional or statutory provision in an issue or answer by number, also give your reader a short explanation of the provision's subject matter.
- A "thesis" is the central idea running through the entire memo.
- Quote only the relevant portion of constitutions or statutes.
- The first time you refer to a case by name, give the full citation; after that, use a short-form citation.

KEY TERMS

statement of the rule of law

thesis paragraph

EXERCISES

1. Pick one of the research problems from Appendix E.
2. Research the problem you have chosen.
3. Write an office memo summarizing and explaining your research.

CYBER EXAMPLES

When writing legal documents for the first time, it may be helpful to look at examples. This chapter provides some examples. Professor Colleen Barger at the University of Arkansas at Little Rock School of Law had a Web site that links to pages of other legal research and writing professors (<http://www.ualr.edu/cmbarger/>).

DISCUSSION POINTS

1. Which footnotes in the first sample office memo seem to be the most helpful and why?
2. How does the second sample office memo differ from the first?
3. What changes would you make to either of the sample office memos to make them better?

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CHAPTER 14

Memorandum of Law

INTRODUCTION

One of the standard legal documents written by a litigation attorney for submission to court is what will be referred to in this book as the "memorandum of law." (Some attorneys refer to it as a "trial brief," a "trial level brief," or a "Memorandum of Points and Authorities.") This chapter explains the purpose, use, and format of the memorandum of law and includes two sample memorandums of law.

The first sample memorandum of law has been extensively annotated to provide you with writing and citation tips. If the notes do not make much sense to you right now, read them again after you have gone over the rules for citations and quotations contained in Appendices B and C. It might also be helpful to you to refer to the footnotes again when you are writing your own memorandum of law.

PURPOSE AND USE

In litigation, an attorney may be required by court rule, may be asked by the judge, or may feel the need to submit a written document called a "memorandum of law." For example, some United States district courts require any party filing a motion to also file a legal memorandum with citation of authorities in support of the relief requested. Certain rules give the party opposing the motion a time period to file a legal memorandum in opposition. As a court document, the memorandum of law is a matter of public record and a copy of it is delivered to opposing counsel. The purposes of the memorandum of law are to explain the client's position in a lawsuit and to convince the judge to rule in the client's favor.

Look for a moment at the first sample memorandum of law in this chapter, written by Mike Campbell's attorney. You may recall from prior chapters that Mike had been arrested for possession of cocaine. The cocaine was found in Mike's car after he was stopped on the interstate by DEA agents. Mike's position is that, because the stop of his car was unconstitutional, the cocaine should be suppressed as the fruit of an unconstitutional search and seizure. If Mike's attorney can convince the judge that the cocaine should be suppressed, the charge against Mike will have to be dropped for lack of evidence. Mike's attorney would formally request the judge to suppress the cocaine by filing a "motion to suppress" and, as required by local rule, a memorandum of law supporting the motion. Once Mike's attorney has filed the motion to suppress the cocaine

and the supporting memorandum of law, the government attorney will file a "motion in opposition to the motion to suppress" and a memorandum of law supporting the government's motion in opposition.

The circumstances surrounding Mike's arrest can be viewed from two perspectives: Mike's perspective and the perspective of the DEA agents. Mike would argue that the agents singled him out on the hunch that because he is Afro-American, he might be carrying illegal drugs. The agents then violated his constitutional right against unreasonable search and seizure by stopping and searching his car. The government would argue that the agents could have pulled Mike over either because of a traffic violation or because Mike fit a drug courier profile. In the agents' experience, persons who fit the drug courier profile often carry drugs. The drug courier profile, while not entirely accurate, has been one of the law enforcement officer's weapons in the war against the illegal drug trade.

The tone of the memorandum of law is persuasive. This is in contrast to the office memo, which is objective in tone. In her memorandum of law, Mike's attorney will try to persuade the judge that Mike's view of the facts is more accurate and is supported by case law interpretation of the Fourth Amendment. In the government's memorandum of law in opposition to Mike's motion to suppress, the government attorney will try to persuade the judge that Mike's motion to suppress should not be granted because the government's view of the facts is more accurate and applicable case law supports denial of the motion to suppress.

Although Mike's attorney has to represent Mike's best interests, this duty is tempered by the attorney's ethical duty as an officer of the court. Rule 4-3.3 of the Rules Regulating the Florida Bar states: "A lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal . . . [or] fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel. . . ." Attorney ethics rules in other states contain similar wording. Thus, Mike's attorney has a dual role. She is an advocate for Mike's best interests as well as an advisor to the court. Mike's attorney must present Mike's side of the story but may not invent or change facts. In presenting the law in support of Mike's position, the attorney may not intentionally mislead the court and must disclose law "directly adverse" to Mike's position that the government has failed to disclose.

STYLE

An attorney must work very hard to build credibility with the judge and must work just as hard not to lose this credibility. The writer must build credibility by making absolutely sure that the facts and the law in the memorandum of law are stated accurately. Choose words that emphasize the client's position but are not obviously biased. The memorandum will be more credible if you include adverse facts and law as well as facts and law in the client's favor. The judge will be comparing your memorandum with that of opposing counsel to see how you have dealt with adverse facts and law. Your failure to deal with adverse facts and law may make the judge think you are doing a sloppy job and you will quickly lose your credibility. Of course, adverse facts and law need only be mentioned and should not be dwelled upon. A well-organized memorandum will emphasize favorable facts and law and downplay unfavorable ones. (See the next section of this chapter for tips on organization.)

The appearance of the memorandum should be inviting, with enough descriptive headings to allow the judge to glance through the memorandum and "see" the flow of your writing. When the first draft of the memorandum has been completed, review it critically. Does it appear reader-friendly? Are the pages broken up into a number of paragraphs?

Is the print large enough to be easily read? Are the margins wide enough to give the reader's eyes a chance to rest? Can you make it easier to spot headings by putting them in bold type or underlining them? Make any necessary changes.

ORGANIZATION

When you are having trouble writing a memorandum of law, picture yourself as a busy judge with a heavy caseload and ask yourself what you would find helpful in a memorandum of law. A busy judge does not have the luxury of time to pore over a lengthy, disorganized memorandum containing a convoluted legal argument. The judge will be more inclined to read a shorter memorandum that is straightforward, well organized, and just long enough to get the point across. If you can squeeze the issues and short answers into the first two pages, you will have the judge's attention.

Remember that a reader will pay more attention to the beginning and the end than to the middle of sections within the memorandum. Put any information you want to emphasize either at the beginning or at the end of a section. For example, in the facts section, focus the reader's attention on the client by referring to the client first and retelling the facts from the client's perspective. Diffuse the opposing party's thunder by including any significant adverse facts but downplay them by briefly mentioning them in the light most favorable to the client midway through the facts section.

Do something similar with the argument section. If there is an easy way for the judge to dispose of the case in the client's favor, put the argument supporting that easy ruling first. Otherwise, put the strongest argument first. "Bury" any adverse law that must be disclosed in the middle of the argument section. A duty to disclose adverse law does not mean that it has to be discussed in detail. Refer to it, distinguish it, and move on. Do the same with the opposing party's counterarguments. Refer to them briefly and then focus on the client's argument. The best defense is a good offense.

The organizational tip for sections of the memorandum applies for sentences and paragraphs. If you want your reader to focus on particular words in a sentence, rearrange your sentence to put the words first or last in the sentence. The focus will be even greater if rearranging the sentence changes the grammatical structure from the typical subject-verb-object structure of English sentences. Be careful that you do not change from the typical structure too often or the atypical structure will become routine and lose its impact. In addition, sentences are harder for the reader to understand if they differ from the typical subject, verb, and object order.

The reader will pay more attention to the first and last sentences in a paragraph than to the middle of the paragraph. For that reason, make your topic sentence either the first or last sentence in the paragraph. Put any information you want to make sure the reader does not miss in the first or last sentences. If the important information is more than can fit in the first and last sentences of the paragraph, consider splitting the paragraph into a number of paragraphs. Put adverse information three-quarters of the way through the paragraph to de-emphasize it.

FORMAT

Although there is no one right format for a memorandum of law, the format given in this chapter is fairly standard. The format should be modified to conform to any applicable court rules and to the format customarily used for a particular court. For example, applicable court rules may specify line spacing, paper size, margins, document length, and information concerning the attorney signing the document, including the attorney's name, bar identification number, firm name and address, and telephone number.

The balance of this section gives a brief explanation of the various parts of the memorandum of law. It might be helpful for you to read the rest of this section while comparing the explanation to the sample memorandums of law later in this chapter.

CAPTION

The caption contains the name of the court, the names of the parties, the case number, and the title of the pleading. After the title of the pleading and before the questions presented section, it is customary to include a sentence stating who is submitting the memorandum and why it is being submitted.

QUESTIONS PRESENTED

The questions presented section contains several numbered questions for the judge to consider. The questions should be stated in the light most favorable to the client and should be worded so that the judge can easily reach an answer favorable to the client. Give as much information as possible in each question without sacrificing readability. There should be enough information so that the judge understands a question without having to refer to other sections of the memorandum.

Each question should contain a combination of law and facts and should ask how the law applies to the facts. Because the facts section of the memorandum follows rather than precedes the questions presented section, the judge will not have read the facts before reading the questions. Therefore, the most important facts should be included in the questions to familiarize them to the judge.

FACTS

The writer should create empathy for the client by painting a picture of the facts from the client's perspective. Choose descriptive words and incorporate a fair amount of detail when recounting facts favorable to the client. State the facts as specifically as possible to make them memorable. If the picture is created in sufficient detail, your picture will come to the judge's mind when considering the case. Relevant adverse facts which opposing counsel is likely to rely on can be mentioned briefly, in broad terms, and with little detail, using bland, uninteresting language.

Highlight your client's view of the facts. Focus the reader's attention on the client by referring to the client first and by calling the client by name. Try telling the facts in the order the client perceived them rather than in strict chronological order. This ordering of the facts will make it easier for the judge to understand the client's position.

Choose your words carefully. Words chosen should reflect favorably on the client without conveying an argumentative or adversarial tone. The writer's credibility may be lost if the language is too exaggerated or overly biased. Well-stated facts are so subtly persuasive that the judge can believe they are stated objectively.

ARGUMENT

The argument section is the longest and most complex portion of the memorandum of law. This section is divided into a number of subsections by headings called *point headings*. There may be an introductory portion of the argument section preceding the first main point heading. The introductory material contains a thesis paragraph and may explain law applicable to all the point headings in the memorandum. Each subsection following a point heading should explain the applicable rule of law and apply the rule of law to the facts.

Even though the tone of the memorandum of law is persuasive and the tone of the office memo is objective, the basic structure of the argument section of the memorandum of law should be similar to the structure of the reasoning section of an office memo.

You should present one or more thesis paragraphs, you should set forth the rule of law, and you should apply the rule of law to the facts of the case. Refresh your memory of how to write the thesis paragraph(s), the rule of law, and the application of law to facts by rereading those portions of the "Format" section of Chapter 13.

Although opposing counsel and others will read the memorandum of law, the intended and primary audience is the judge. The judge is not your adversary and may become your ally on the strength of the memorandum of law. Make the judge your ally by advising the judge as to why ruling in the client's favor is the correct solution to the problem. In most cases the judge has some discretion in making decisions. If you can convince the judge that he or she is your ally, the judge may use this discretion in your client's favor. Therefore, although the tone of the memorandum of law is persuasive, it should be subtly persuasive. Shy away from an argumentative or demanding tone of voice that may prejudice the judge against the client.

Thesis Paragraph

If an introductory portion of the argument section precedes the first main point heading, it should begin with a thesis paragraph. Besides stating your thesis in your thesis paragraph, you may want to use this paragraph to state your final conclusion in simple terms. If your argument section begins with a point heading rather than with an introductory portion, you should either follow your first point heading with a thesis paragraph or include a short thesis paragraph after each of your point headings. For a more detailed explanation of how to write a thesis paragraph, reread the thesis paragraph portion of the "Format" section of Chapter 13.

Rule of Law

A busy judge does not have the time to do extensive independent research before ruling on a motion. A judge will appreciate a step-by-step explanation of the current status of applicable law—either to familiarize the judge with an unfamiliar area of the law or to update the judge's knowledge. Be careful to advise rather than to lecture the judge on the law. A judge will appreciate a clear explanation of the law, but a judge who is being "lectured" may take offense. For the judge's easy reference, you may want to provide copies of the cases you have cited in the memorandum. For a more detailed explanation of how to write the rule of law, reread the rule of law portion of the "Format" section of Chapter 13.

Application of Law to Facts

After stating the rule of law, you must carefully lead the reader step by step from the law to your conclusion. For a detailed explanation of how to apply the rule of law to the facts, reread the application of law to facts portion of the "Format" section of Chapter 13.

Either your argument section or the conclusion section should contain one or more paragraphs summarizing your argument. This summary serves the same purpose as the conclusion section of an office memo; it ties the facts to the rule of law and reaches a conclusion. Customarily, this summary is part of the argument rather than the conclusion section. Look through some recent memoranda of law filed with the court to determine what the custom is in your area. If the summary is part of the "argument" section, you can either put a summary of the answers to all of the questions presented at the end of the argument section or have a summary paragraph at the end of each subsection within your argument.

CONCLUSION

The conclusion section of a memorandum of law specifically requests the judge to take a particular action or actions. The motion that accompanies Mike Campbell's memorandum of law is a motion to suppress the evidence found in Mike's car. If the evidence is

suppressed, the government will be forced to drop the charge against Mike for lack of evidence. Therefore, the conclusion section of the memorandum of law should request the judge to suppress the evidence and to dismiss the charge against Mike.

As stated before, you should include a summary of your argument in the conclusion section if you have not included it in the argument section.

FIRST SAMPLE MEMORANDUM OF LAW

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 6:09-CR-000-ORL-00MNN[1]

MICHAEL CAMPBELL and JOHN WRIGHT,

Defendants.

_____/

MEMORANDUM IN SUPPORT OF DEFENDANT CAMPBELL'S MOTION TO SUPPRESS[2]

Defendant Michael Campbell submits this memorandum of law in support of defendant's motion to suppress the evidence seized from the defendant's car.[3]

Questions presented:[4]

1. Did the law enforcement officer violate Mike Campbell's constitutional right against unreasonable search and seizure when the law enforcement officer stopped Mike's out-of-state tagged Lincoln Continental that Mike was driving on I-95 in the early evening at the speed limit when the only other information the officer had was that Mike and his passenger were Afro-American, in their twenties, and wore beach attire?

[1]This is the docket number written as required by rule 1.03(a) of the Local Rules of the United States District Court for the Middle District of Florida. The first part of the docket number, "6" is the division of the court, "09," is an abbreviation for "2009" (the year in which the case was filed). The third part of the docket number, "CR," indicates that this is a criminal rather than a civil case (abbreviated "CIV"). The fourth part of the docket number "000" indicates the order in which the case was filed in 2009. Were this a real case, the number of the case would be substituted for "000." Cases in the Orlando division of the district are consecutively numbered corresponding to the order in which they are filed. "ORL" indicates that this is an Orlando division case. The last two numbers give the number of the judge to whom the case is assigned, and the last three initials are the initials of the magistrate handling the case. As Middle District of Florida judges are appointed, they are numbered in sequence, and the numbers are used to identify which judge is handling a particular case.

[2]Use a descriptive title to identify the type of document (a memorandum of law), why it is being filed (in support of a motion to suppress), and the party filing the document (defendant Campbell). From the title, the judge should learn at a glance important information about the document without having to read the text of the document.

[3]Use a short introductory sentence to explain to the judge why the document is being submitted. It does not hurt to lay out the explanation like this in a full sentence even though it repeats information from the title of the document.

[4]Each of these questions asks how the law applies to the facts. Notice the word choice. The questions are worded from Mike's perspective and Mike is referred to by name. Specific facts are included in the questions for a number of reasons. The judge's decision to grant or deny the motion to suppress turns on whether the facts were sufficient to justify the stop, making the facts extremely important. Because the factors in the drug courier profile and the nature of the alleged traffic violation are generally favorable to Mike, they are detailed so they are easy to remember. The way

2. Did the officer violate Mike Campbell's constitutional right against unreasonable search and seizure when the officer followed the Campbell car for a distance and then pulled the car over, claiming that Mike was following the car in front of him too closely?

Facts:[5]

Mike Campbell and his best friend had decided, like thousands of other college students, to enjoy a Florida spring break. After Mike promised to drive carefully, Mike's father let Mike borrow his car, a brand new Lincoln Continental. After arriving in Florida, Mike and his friend spent every waking moment of their break on the beach. In the early evening on the last day of vacation they went straight from the beach to their car to begin the long trip back to school, calculating that they would have just enough driving time to make it back for their first class. Mike was driving north on I-95 thinking about the promise he had made to his father when he saw patrol cars parked in the median, one with its lights shining across the northbound lanes. Almost immediately after driving through the arc of the patrol car's headlights, Mike looked in the rearview mirror and saw the patrol car pull out behind him. The patrol car put on its flashing lights and pulled Mike over.

An officer got out of the patrol car, walked over to Mike's car, and asked for Mike's driver's license and car registration. As Mike handed over his license and the registration he noticed the officer eyeing Mike's beach attire suspiciously. When Mike told the officer they were heading back to school from spring break, the officer commented, "We don't see too many blacks down here over spring break." The officer added, "I stopped you for following the car in front of you too closely." Still holding the license and registration, the officer asked Mike whether the officer could search the car and said, "You don't have anything to hide, do you?" Hoping that if he answered "no" they could be on their way, Mike answered, "No." The officer said, "Wait here," turned around, walked back to the patrol car, and got in. Mike could not have left even if the officer had not told him to wait because the officer still had Mike's license and car registration.

Forty-five minutes later another patrol car pulled up and an officer got out with a dog. The officer led the dog around the car. The dog circled the car once and then stopped and pawed the car's trunk. The officer motioned Mike to roll down his window. The officer told him that the dog had detected drugs in the trunk of Mike's car. The officer told Mike that Mike could either open the car trunk or wait there whatever time was necessary for the officer to obtain a search warrant. Feeling that he had no choice, Mike opened the trunk. Both officers started pulling Mike's and his friend's belongings out of the trunk and tossing them on the ground. One of the officers found a brown paper bag containing cocaine wedged in a bottom corner of the trunk. Mike and his friend were arrested and were charged with possession with intent to distribute.

Argument:[6]

The car driver and passengers expect that activities within the car will be private and not subject to the scrutiny of law enforcement officials. They may feel that their privacy is invaded if a law enforcement officer stops the car to investigate. A trained police officer may have a hunch that a car's occupants are engaged in illegal activity; however, a law enforcement officer may not

the questions are worded, they "paint" the judge a picture of the scene, which the judge can use as a framework when reading the rest of the memorandum. The most important facts need to be laid out in the questions, or the judge will not be familiar with them, because the facts section follows the questions presented section.

[5]The facts are told from Mike's perspective and in the order he perceived them. Mike is referred to by name to create empathy, whereas the other persons are not. The wording was chosen to be subtly persuasive rather than obviously biased. Compare this statement of the facts with the facts contained in the office memo in Chapter 13.

[6]You should begin the argument portion of your memorandum of law with a thesis paragraph. A well-written thesis paragraph provides the reader with a framework into which the balance of the memo can be placed. It also tells the reader your ultimate conclusion.

constitutionally stop a car unless there is either a reasonable suspicion of illegal activity or there is a traffic violation. The stop of Mike's car to investigate for criminal activity was not permissible because the agents did not have a reasonable suspicion of illegal drug activity. The stop for a traffic violation was constitutionally justifiable only if Mike was following too closely.

The Fourth Amendment[7] to the United States Constitution guarantees "[t]he[8] right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures" and allows a search warrant to be issued only upon "probable cause."[9] A search warrant requirement was spelled out in the amendment to safeguard this important right. Over the more than two hundred years since the amendment was adopted, the individual's right against unreasonable search and seizure has been jealously guarded.

Although the time and level of evidence needed to obtain a search warrant protects the individual's constitutional right, the courts have allowed two exceptions to the search warrant requirement, both of which the government argues are applicable here and allowed them to stop the Campbell car. The first exception[10] requires a minimum of "reasonable suspicion" of illegal activity to stop a car and question its occupants. *Terry v. Ohio*, 392 U.S. 1, 27 (1968).[11] The second exception allows an officer to stop a car to investigate a traffic violation. *Whren v. United States*, 517 U.S. 806, 818 (1996).

Defendant Campbell's motion to suppress should be granted because neither of the two exceptions to the search warrant requirement apply here. The officer stopped Campbell's car on a mere "hunch" and Campbell was following at a "reasonable and prudent" distance, as required by the Florida Statutes. Fla. Stat. Ch. 316.0895 (1) (2008). This memorandum will first explain why there was not enough evidence to justify an investigatory stop and then why there was no traffic violation.[12]

A. Because the information the officer relied on to stop the Campbell car was no more than a mere "hunch," the evidence should be suppressed unless the officer had probable cause to stop the car for a traffic violation.[13]

Terry[14] was the landmark case that lowered the burden of proof necessary for a stop from probable cause to "reasonable suspicion." Such stops made on reasonable suspicion are often referred to as "Terry stops," after *Terry*, and the definition of Terry stops has been broadened to apply to car stops. The new reasonable suspicion standard allows a police officer to stop and briefly question someone, but is still designed to protect the innocent

[7]When quoting a constitutional or statutory provision, quote only the relevant portion. Set quotations of fifty words or more off from the rest of the text in a quotation block indented left and right but not enclosed in quotation marks. If the quoted passage contains a quotation, the internal quotation should be enclosed in quotation marks.

[8]The brackets indicate a change in the quotation from the original. Here the "t" was upper case originally.

[9]Periods and commas go inside quotation marks; other punctuation is placed outside quotation marks unless it is part of the quotation.

[10]Signposts are words used to guide the reader in a particular direction. "The first exception" and "the second exception" are signposts clearly identifying the two exceptions, which are discussed in much more detail later in the memo.

[11]The first time you are referring to a case by name you must give the full citation. After that you should use a short-form citation.

Citations in the sample office memo are given in *Bluebook* form. Your professor may require you to cite according to some other citation rule (perhaps your state's citation rule). If so, always check the appropriate citation rule to make sure you are citing correctly.

[12]This introductory portion of the argument section contains four paragraphs. The first paragraph is the thesis paragraph. The second and third paragraphs lay out in general terms the law applicable to the rest of the memorandum. The fourth paragraph contains a statement of the conclusion. Do not leave the judge in suspense. Tell the judge your conclusion up front. The fourth paragraph also contains signposts. With these signposts, the reader will expect the portion of the memorandum following the first point heading to discuss the drug courier profile and the portion of the memorandum after the second point heading to discuss the alleged traffic violation.

[13]This point heading answers the first question presented.

[14]Once you have given the full citation for a case and are referring to the case in general terms, you can refer to it by using one or two of the words from the name of the case and underlining or italicizing them. Be sure the words you select are not so common as to cause confusion. Here, for example, use *Terry* rather than *Ohio*.

traveler, singled out because of certain immutable personal characteristics such as race, sex, and age, from being subjected to "overbearing or harassing" law enforcement tactics. 392 U.S. at 14–15 n. 11. A stop made only on an "unparticularized suspicion or 'hunch' "[15] is unconstitutional. *Id*. at 27. Assuming the officer has the requisite reasonable suspicion for a Terry stop, the officer would still need probable cause or consent to search a car.[16]

The United States Court of Appeals for the Eleventh Circuit decided a case that involved almost identical facts to those being considered here. *United States v. Smith*, 799 F.2d 704 (11th Cir. 1986). In *Smith*, the government argued that a highway stop was constitutionally permitted based either on a drug courier profile or on Smith's alleged commission of a traffic violation. 799 F.2d at 705.[17] Smith filed a motion to suppress, claiming that the evidence seized from his car should be suppressed because of the violation of his right against unreasonable search and seizure. *Id*. at 706.[18] The United States Court of Appeals for the Eleventh Circuit found that the *Smith* drug courier profile did not support reasonable suspicion, reversed the lower court's denial of Smith's motion to suppress, and vacated Smith's conviction. *Id*. at 712.

One night in June of 1985, Trooper Robert Vogel, a Florida Highway Patrol trooper, and a DEA agent were observing cars traveling in the northbound lanes of I-95 in hopes of intercepting drug couriers. When Smith's car passed through the arc of the patrol car headlights, Vogel noticed the following factors that matched his drug courier profile:

1. The car was traveling at 3:00 a.m.;
2. The car was a 1985 Mercury, a large late model car;
3. The car had out-of-state tags;
4. There were two occupants of the car who were around thirty; and
5. The driver was driving cautiously and did not look at the patrol car as the Mercury passed through the arc of the patrol car headlights.

Id. at 705–06.[19]

This drug courier profile is almost identical to the *Campbell* profile.[20] In both *Smith* and this case, the cars were traveling after dark, the cars were large late models with out-of-state tags, the cars were being driven "cautiously," and each car contained two passengers in their twenties or thirties. The differences between the two profiles are very minor. Campbell and his friend were dressed casually, while it is not known how Smith and Swindell were

[15]To indicate quotes within quotes, alternate double and single quotation marks, with double quotations outermost.
[16]This discussion of *Terry* is written to support Mike's motion and to convince the judge to rule in Mike's favor. Compare it with the discussion of *Terry* contained in the office memo in the preceding chapter. There the *Terry* discussion was more balanced.
[17]Once you have cited a case in full, you should use a short-form citation the next time you refer to material from the case. This short-form citation contains "*Id*.," "at," and the page on which the "government's argument" is found in *Smith*. You should use "*Id*." here instead of repeating "799 F.2d" because this citation is to the same case cited in the immediately preceding citation. If *Smith* had been cited previously but not in the immediately preceding citation, the citation to *Smith* would have been "799 F.2d at 705" or "*Smith*, 799 F.2d at 705," with the short-form citation including the volume number and the abbreviation for the reporter in which *Smit*h is printed. To learn more about short-form citations, refer to Appendix C, which explains short-form citations.
[18]You should use "*Id*." here instead of repeating "799 F.2d" because this citation is to the same case cited in the immediately preceding citation. Retain "at 706" because the referenced material appears on page 706 instead of on page 705, the page of the previously-referenced material.
[19]When you need to give a citation for a block quote or other material set off from the rest of the text, as is the tabulation here, bring the citation back to the left margin. When citing inclusive pages with three or more digits, drop all but the last two digits of the second number and place a hyphen between the numbers.
[20]This is an example of a topic sentence. A topic sentence contains one main idea summarizing the rest of the paragraph, with the rest of the paragraph developing the idea presented in the topic sentence. Most paragraphs should have topic sentences. The typical location of a topic sentence is the first sentence in the paragraph. Sometimes the topic sentence is the last sentence in the paragraph and pulls together the rest of the paragraph. Some paragraphs, typically narrative paragraphs like the preceding paragraph, do not have topic sentences.

If a paragraph sounds disjointed or unorganized, try pulling it together using a topic sentence. If a topic sentence does not help, think about breaking the paragraph into more than one paragraph.

dressed. Smith and Swindell did not look at Vogel as they passed. It is not known whether Campbell looked in the agents' direction as Campbell drove past. Campbell claims that race was a factor in the stop even though it was not listed as such by the agents. Smith and Swindell's race is unknown.[21]

In *Smith*, Vogel followed the Mercury for a mile and a half and noticed that the Mercury "wove" several times, once as much as six inches into the emergency lane. Vogel pulled Smith over. When a drug dog alerted on the car, a DEA agent searched the trunk and discovered one kilogram of cocaine. Smith and his passenger, Swindell, were arrested and were charged with conspiracy to possess cocaine with the intent to distribute it. Smith and Swindell's motions to suppress the cocaine were denied and they were tried and convicted. *Id*. at 706.

The issue before the appellate court was whether the stop of Smith's car was reasonable. *Id*.[22] This is the same basic question to be answered by this court in determining whether Campbell's motion to suppress should be granted. The *Smith* court held that the stop of Smith's car could not be upheld as a valid Terry stop, *id*. at 708, finding that "Trooper Vogel stopped the car because [Smith and Swindell][23] . . . matched a few nondistinguishing characteristics contained on a drug courier profile and, additionally, because Vogel was bothered by the way the driver of the car chose not to look at him." *Id*. at 707.

Just as there was nothing in the *Campbell* drug courier profile to differentiate Campbell and his friend from other innocent college students returning from spring break in Florida, there was nothing in Vogel's drug courier profile to differentiate Smith and Swindell from other law-abiding motorists on I-95. It is usual to drive after dark to avoid heavy traffic or to complete an interstate trip.[24] Although many motorists speed on the highways, motorists driving "cautiously" at or near the speed limit are simply obeying traffic laws. Many people other than drug couriers drive large late model cars with out-of-state tags. A motorist between the ages of twenty and forty is not unusual.

The contrast between the *Campbell* and *Smith* drug courier profiles, which do not support reasonable suspicion, and another courier profile which was held to support reasonable suspicion is marked. *United States v. Sokolow*, 490 U.S. 1, 3 (1989).[25] In *Sokolow*, DEA agents found 1,063 grams of cocaine inside Sokolow's carry-on luggage when he was stopped in Honolulu International Airport based on the following profile:

[21]This paragraph applies the facts in *Smith* to the facts in *Campbell*. Applying facts from one case to another case involves explaining the similarities and differences between the two sets of facts.

Instead of simply stating that the facts from the two cases are very similar, the paragraph specifically states which facts are the same. Sometimes in the application you need to explain in what way the facts are similar if they are not identical.

You can either apply the *Smith* facts to *Campbell* midway in discussing *Smith*, as done here, or you can wait until you have thoroughly discussed *Smith*. When you prepare your outline prior to starting to write the memorandum of law, spend some time moving parts of your "argument" section around to determine the best flow.

[22]When you are referring to material from the same page as the material you referred to in the last citation, use just "*id*." *Id*. is capitalized only when it begins a sentence.

[23]"Smith and Swindell" are in brackets because this wording was inserted into the quotation by the person writing the memo. The ellipsis (. . .) shows that something was omitted from the original wording of the quotation. Your quotations must exactly match the wording and punctuation of the authority the quotation comes from. If you are sloppy in quoting and your reader discovers that you have taken liberties with the quotation, your reader may suspect that you are sloppy in other ways—perhaps even in your research. See Appendix C for an explanation of quoting correctly.

[24]No page reference is needed if you have already given the facts in the cases you are using as authority and are referring to those cases in general.

[25]To avoid including a full citation in a textual sentence, *Sokolow* is referred to in general terms and the citation to *Sokolow* is given in a separate citation sentence. Including the full citation in a sentence makes the sentence harder to read and understand.

1. He had paid $2,100 in cash for two airplane tickets from a roll of $20s which appeared to contain $4,000;
2. He was ticketed under a name other than his own;
3. He traveled to Miami, a known drug source, and back;
4. Although his round trip flight lasted 20 hours, he stayed in Miami only 48 hours;
5. He appeared nervous;
6. He was about 25 years old;
7. He was dressed in a black jumpsuit and was wearing gold jewelry that he wore during both legs of the round trip flight; and
8. Neither he nor his companion checked any luggage.[26]

Id. at 3–5. The Court held that the *Sokolow* drug courier profile did support reasonable suspicion. *Id*. at 11.

The *Sokolow* dissent would have found that all of the factors, even if "taken together," did not amount to reasonable suspicion. In criticizing the use of a drug courier profile to stop suspects, the dissent noted "the profile's 'chameleon-like way of adapting to any particular set of observations' " "subjecting innocent individuals to unwarranted police harassment and detention." *Id*. at 13 (Marshall, J., dissenting)[27] (quoting *Sokolow v. United States*, 831 F.2d 1413, 1418 (9th Cir. 1987), *rev'd*, 490 U.S. 1 (1989)[28]).

As predicted in the *Sokolow* dissent, Smith, Swindell, Campbell, and Campbell's friend were subjected to "unwarranted police harassment and detention" even though the factors in the respective drug courier profiles, even if "taken together," did not amount to reasonable suspicion. In contrast, several of the *Sokolow* factors, such as carrying such a large amount of cash and traveling a long distance to stay a relatively short period of time, are unusual or even suspicious in and of themselves. Each of the *Smith* and *Campbell* factors was not at all out of the ordinary alone and certainly taken together did not amount to reasonable suspicion.

B. Because Mike Campbell did not commit the traffic violation alleged by the officer, the evidence found in the trunk of Mike Campbell's car should be suppressed as the fruit of an unconstitutional search and seizure.

In *Whren*, Brown was driving a Pathfinder in which Whren was a passenger. Brown had stopped the vehicle at a stop sign and was looking down into Whren's lap. Plain clothes police officers were patrolling this "high drug area" of the District of Columbia in an unmarked patrol car. The Pathfinder caught the attention of the officers because Brown remained stopped at the stop sign for approximately 20 seconds. When the patrol car made a U-turn to follow the Pathfinder, Brown turned right without signaling and started off at an "unreasonable speed." The patrol car stopped the Pathfinder. When one of the officers approached Brown's window and peered in, he saw that Whren had two plastic bags of crack cocaine on his lap. The officers arrested Whren and Brown. 517 U.S. at 808, 809.

[26]Only those facts from *Sokolow* that are relevant to the discussion of *Smith* are given.

[27]You must identify the type of opinion you are quoting from if it is other than the majority opinion.

[28]This explanatory parenthetical tells the reader that the material Marshall is quoting came from the lower court decision in *Sokolow*. If you are quoting something that in turn quotes another source, you should identify the original source as is done here. Subsequent history must be given for the lower court decision in *Sokolow*.

Justice Scalia phrased the issue as "whether the temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth Amendment's prohibition against unreasonable seizures unless a reasonable officer would have been motivated to stop the car by a desire to enforce the traffic laws." *Id*. at 808. The Court answered the question, "no." "[T]he district court found that the officers had probable cause to believe that petitioners had violated the traffic code. That rendered the stop reasonable under the Fourth Amendment, the evidence thereby discovered admissible, and the upholding of the convictions by the Court of Appeals for the District of Columbia Circuit correct." *Id*. at 819.

Prior to *Whren*, some courts, including the court deciding *Smith*, had decided that a car stop for a traffic violation was unconstitutional unless a reasonable officer would have made the stop. The *Smith* court found that the cocaine should have been excluded from evidence because a reasonable officer would not have stopped Smith's car for the alleged traffic violation. 799 F.2d at 711. However in *Whren*, the United States Supreme Court rejected the argument that the reasonable officer standard should apply. 517 U.S. at 813.

After *Whren*, it would be very difficult to convince a court that a stop for an alleged traffic violation is unconstitutional. However, if the court finds that the driver did not violate any traffic regulation, then the stop would be unconstitutional.

The Florida motor vehicle statute identified by the *Campbell* officer states, "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon, and the condition of, the highway." Fla. Stat. Ch. 316.0895 (1) (2008). No simple test determines if Campbell violated the statute. The court must determine from any evidence presented whether the distance at which Campbell was following the car in front of him was reasonable and prudent.

The alleged driving irregularities in *Whren* and *Campbell* are dissimilar. While it was clear that Brown committed a traffic violation, the Florida statute cited in this case does not apply to Campbell. Determining whether one vehicle is following another vehicle too closely involved much more of a judgment call than determining whether the Pathfinder failed to signal when turning right and exceeded the speed limit. The position of the vehicles on the highway and the weather and road conditions must all be considered to determine if Campbell violated the statute.

The evidence that will be presented at the hearing on the motion to suppress will show that Fla. Stat. Ch. 316.0895 (1) does not apply to Campbell because Campbell was following the car in front of him at more than the appropriate distance given the vehicles' speed, the traffic, and the condition of the highway.

Following *Whren*, this court should find the stop of Campbell's car unconstitutional because there was no traffic violation. Because Campbell was following the car in front of him at a reasonable and prudent distance, the stop violated Campbell's right against unreasonable search and seizure. Because Campbell's fourth amendment right was violated by the stop and the agents would not have found the evidence if they had not first stopped the car on I-95, the evidence should be suppressed as the fruit of the poisonous tree.

Conclusion:

For the reasons set forth, defendant Campbell requests this court to grant his motion to suppress and to dismiss the charge against him for lack of evidence.

Respectfully submitted,

_____
Florida Attorney, Esq.
Florida Bar Number 000000
Law Firm
Main Street
Anytown, Fla.

SECOND SAMPLE MEMORANDUM OF LAW

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 6:09 - CR - 000 - ORL - 00CNN

LUIS BRIONES and CRUZ ESTRADA,

Defendants.
_____/

MEMORANDUM IN OPPOSITION
TO DEFENDANT'S MOTION TO SUPPRESS

Plaintiff the United States of America submits this memorandum of law in opposition to defendant's motion to suppress the methamphetamines seized from the defendant and the tape of her conversation.

Questions presented:

1. Was Officer Green's search of Defendant's purse permissible where the Defendant consented to the search?
2. Was Officer Green's search of Defendant's purse permissible where the officer had probable cause to search the car and the purse fell under the container exception to the search warrant requirement?
3. Where Officer Green had the defendant wait in his patrol car while he searched the car in which she had been riding, was it permissible for him to tape-record any statements defendant made?

Facts:

Officer Green was patrolling the southbound lanes of I-95 when he observed a car traveling at an excessive rate of speed. The radar in the patrol car showed that the car was traveling 80 in a 65 mile per hour speed zone.

Officer Green approached the driver's side of the car and requested the driver's license and car registration. While the driver searched his wallet for the documents, Officer Green looked through the open window and noticed a glass vial containing small kernels of an off-white substance in the driver's lap. Believing the vial to contain crack cocaine, Officer

Green announced that he was seizing it. He asked the driver and passenger to exit the car and asked the driver for his wallet. Officer Green identified the driver as Luis Briones from his driver's license.

As the passenger got out of the car, Officer Green struck up a conversation with her. She said that her name was Cruz Estrada. Officer Green explained that he would have to search their car but that they could wait in the patrol car for their comfort and safety. The defendant turned back to the car, explaining that she had to retrieve something. She reached into the car and pulled out her purse, which had fallen behind the front seat. As the defendant passed him on the way to the patrol car, Officer Green asked if he could search her purse. Without responding, the defendant held out her purse to him. Inside her purse, Officer Green found a brown paper envelope. When Officer Green asked her what was in the envelope, defendant claimed that she did not know, that someone had given it to her to give to a friend in Miami. When Officer Green opened the envelope, he found a quantity of white powder that he believed to be methamphetamines.

The two waited in the patrol car while Officer Green searched the car. The tape of their conversation contains several incriminating statements, including defendant's admission that the envelope was hers and that it contained illegal drugs.

Argument:

Over the years, courts have recognized a variety of exceptions to the search warrant requirement of the Fourth Amendment in recognition that exigent circumstances often do not allow an officer time to obtain a search warrant. This case illustrates the tension between the officer's duty to collect evidence of the illegal drug trade and the individual's privacy concerns. Consent has long enabled an officer to conduct a search, even without probable cause. Even without consent but upon probable cause, an officer may search a car and any containers within the car, without regard to their ownership. A standard law enforcement technique has been to ask suspects to wait in the officer's patrol car while the officer searches the suspects' car; to obtain evidence, the officer tape-records any statements the suspects unwisely make while in the patrol car.

The government argues that two exceptions to the search warrant requirement allowed Officer Green to search the defendant's purse. Defendant's motion to suppress the contents of her purse should be denied either because defendant consented to the search or because probable cause to search the car allows Officer Green to search containers found in the car. Defendant has argued that the tape containing her incriminating statements should be suppressed because the tape was made in violation of the federal eavesdropping statutes. There is no ground to suppress the tape under the statutes; the statutes prohibit taping only if there is a reasonable expectation that the conversation is private. Society would not recognize any conversation of suspects in a patrol car to be private. This memorandum will first explain why the methamphetamines found in Defendant's purse should not be suppressed and then why the tape of defendant's incriminating statements should not be suppressed.

A. Because it was objectively reasonable for Officer Green to believe that Defendant had consented to the search when she held out her purse to him, the methamphetamines found should not be suppressed.

Once a vehicle is stopped, the officer can search the car if there is probable cause of criminal activity. An occupant can consent to the search of the occupant's belongings. *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). Even without consent, the officer can search containers found in the car and suspected of holding the object of the officer's search, no

matter who owns the container. *Wyoming v. Houghton*, 526 U.S. 295, 300–01 (1999). An officer may not search someone's person without probable cause. *Id*. at 303.

The search of Cruz's purse is constitutional if she consented to the search or the container exception to the search warrant requirement extends to her purse. The United States Supreme Court has stated the standard for determining when an individual has consented to the search of a car. *Jimeno*, 500 U.S. at 251. This portion of the office memo will examine whether the consent standard has been met. As far as the container exception is concerned, the United States Supreme Court recently held that "police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search." *Houghton*, 526 U.S. at 307. The facts of *Jimeno, Houghton*, and *Estrada* will be compared to determine if the search of Cruz's purse was constitutional.

In *Jimeno*, Officer Trujillo overheard a telephone call from a public telephone in which Jimeno was discussing a drug deal. Trujillo followed Jimeno's car and stopped Jimeno for failure to stop when turning right on red. After informing Jimeno about the traffic violation, Trujillo

> went on to say that he had reason to believe that respondent was carrying narcotics in his car, and asked permission to search the car. He explained that respondent did not have to consent to a search of the car. Respondent stated that he had nothing to hide, and gave Trujillo permission to search the automobile.

500 U.S. at 249–50. Trujillo found drugs in a brown paper bag on the car floorboard. *Id*. at 250.

The Court then set forth the test for determining whether consent was given. "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical person have understood by the exchange between the officer and the suspect?" *Id*. at 251. Applying this standard, the Court found that Jimeno had consented to the search of the bag. *Id*.

The facts of *Jimeno* and *Estrada* are similar in that the two cars were stopped for alleged traffic violations, the two defendants consented to searches, and the officers searched containers. The facts surrounding the consent issue are substantially similar. Trujillo told Jimeno that he suspected that there were drugs in the car and explained that Jimeno did not have to consent to the search. When Trujillo asked Jimeno's permission, Jimeno claimed that he had nothing to hide and explicitly consented to the search. Officer Green made a statement, "you don't mind if I search, do you?" Officer Green did not have time to explain that the defendant did not have to consent before she held out her purse to him.

In *Jimeno*, the container was a brown paper bag located on the floor of the car. In *Estrada*, the container was defendant's purse, hanging from her shoulder. If anything, it was more objectively reasonable to believe that the defendant in this case had consented to the search of her purse than that Jimeno consented to the search of the brown paper bag. The defendant's implied consent of offering her purse to Officer Green made it clear that she was consenting to the search of that particular container. It was not as clear that Jimeno consented to the search of the brown paper bag when he consented to the search of the car. In *Jimeno*, the trial court had granted Jimeno's motion to suppress the contents of the brown paper bag. The Florida District Court of Appeal and the Florida Supreme Court affirmed. *Id*. at 250.

Applying the objective reasonableness standard, it is objectively reasonable to believe that the defendant in this case had consented to the search of her purse. Her overt action makes it objectively reasonable to believe that she consented.

B. Because the purse was found in a car that was searched upon probable cause that it contained illegal drugs, the container exception to the search warrant requirement applied and the methamphetamines should not be suppressed.

As far as the container exception is concerned, the United States Supreme Court in *Houghton* held that "police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search." 526 U.S. at 307. The facts of *Houghton* and *Estrada* will be compared to determine that the search of defendant's purse was constitutional.

In *Houghton*, David Young was stopped for speeding and a faulty brake light. After the officer saw a hypodermic syringe in Young's pocket, Young admitted that he used it to take drugs. The officer asked the two female passengers seated in the front seat to exit the car and the officer searched the car. The officer found Houghton's purse on the backseat of the car. Searching the purse, the officer found a brown pouch that contained drug paraphernalia and a syringe containing methamphetamine in a large enough quantity for a felony conviction. Houghton claimed that the brown pouch was not hers. The officer also found a black container that contained drug paraphernalia and a syringe containing a smaller amount of methamphetamine, insufficient for a felony conviction. Houghton's arms showed fresh needle marks. The officer arrested her. 526 U.S. at 297–98.

The issue in *Houghton* was "whether police officers violate the Fourth Amendment when they search a passenger's personal belongings inside an automobile that they have probable cause to believe contains contraband." *Id*. at 297. The Court held "that police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search." *Id*. at 307. The Court first relied on a 1982 case in which the Court had found that, where there was probable cause to search a car, it was constitutionally permissible to search containers found in the car that might hold the object of the search. *Id*. at 301–02.

The Court noted that an individual carrying a package in a vehicle traveling on the public roads has a reduced expectation of privacy. *Id*. at 303. The Court found no reason to afford more protection to a container owned by a passenger than a container owned by the driver. *Id*. at 305. The *Houghton* Court foresaw the circumstance in which law enforcement efforts "would be appreciably impaired without the ability to search the passenger's belongings" because a passenger "will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or evidence of their wrongdoing." *Id*. at 304–05. In addition, the driver "might be able to hide contraband in a passenger's belongings as readily as in other containers in the car." *Id*. at 305.

The facts of *Houghton* and this case are very similar in that the two cars were stopped for alleged traffic violations, the passengers exited the cars, leaving their purses in the backseat, and the officers searched a passenger's purse. The facts of the two cases differ slightly in that Houghton at first disclaimed ownership of the purse. In contrast, this defendant returned to the car to retrieve her purse and offered it to Officer Green.

Applying the holding in *Houghton* to *Estrada*, Officer Green's search of defendant's purse was constitutional. When Officer Green discovered the vial containing what he believed to be crack cocaine in the driver's possession, that gave Officer Green probable cause to search the car and all containers in the car that might contain illegal drugs. Defendant's purse was of the size that it might contain illegal drugs and it was initially found in the car. Either of the two occupants might have concealed illegal drugs in defendant's purse as Officer Green pulled them over. Because of the substantial similarities between *Houghton* and *Estrada*, this court should find that Officer Green's search was constitutional.

C. Because a patrol car is similar to an office in a police station, Defendant had no reasonable expectation of privacy while seated in the rear seat of a patrol car and the motion to suppress the tape containing Defendant's incriminating statements should be denied.

The federal eavesdropping statutes protect certain types of face-to-face conversations against interception; however, to be protected, the conversation must qualify as an "oral communication." Under the statutes, an "'oral communication' means any oral communications uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation . . . ." 18 U.S.C.A. § 2510 (2) (West 2000). Thus, a conversation is not an oral communication unless the conversants expect that the conversation is private and an objective third party would consider that expectation reasonable.

It is illegal to intercept an oral communication. "[A]ny person who . . . intentionally intercepts . . . any oral communication . . . shall be punished." 18 U.S.C.A. § 2511 (1) (West 2000). One exception to this prohibition involves a police officer; however, the police officer must be party to the conversation or one conversant must have consented to the taping for the exception to apply. "It shall not be unlawful under this chapter for a person acting under color of law to intercept [an] . . . oral . . . communication where such person is a party to the communication or one of the parties has given prior consent to the interception." 18 U.S.C.A. § 2511 (2)(c) (West 2000). If an oral communication is taped in violation of the eavesdropping statutes, the conversation cannot be used as evidence in court. "Whenever any . . . oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding . . . before any court . . . if the disclosure of that information would be in violation of this chapter." 18 U.S.C.A. § 2515 (West 2000).

Thus, if defendant's conversation was an oral communication, it should be suppressed. Whether the conversation is an oral communication turns on whether the defendant had a reasonable expectation of privacy while seated in the rear seat of the patrol car. One prong of the two-prong test is satisfied; defendant and the driver appear to have had an expectation of privacy or they would not have made incriminating statements. The other prong of the test is whether their expectation was reasonable. On one hand, the conversation was not audible outside the patrol car. The only way the officer could have heard the conversation was by taping it. On the other hand, they were not sitting in a privately-owned car. They were sitting in the officer's car. While an expectation of privacy in a privately-owned car would have been reasonable, it is unclear whether an expectation of privacy in the officer's car was reasonable. Some might equate the officer's car to the officer's office. If defendant and the driver were conversing in an office of a police station, it might not be reasonable to expect privacy.

In a case with similar facts, the issue before the United States Court of Appeals for the Eleventh Circuit was "whether the district court erred in denying the motion to suppress the tapes resulting from the secret recording of McKinnon's pre-arrest conversations while he sat in the back seat of the police car." *United States v. McKinnon*, 985 F.2d 525, 526 (11th Cir. 1993).

In *McKinnon*, police officers stopped a pick-up truck for failure to travel in a single lane on the Florida Turnpike. Theodore Pressley was driving and Steve McKinnon was the passenger. Pressley consented to the search of his vehicle. While the officers were searching, McKinnon and Pressley waited in the rear seat of the patrol car. There they made incriminating statements that were secretly recorded by the officers. The officers

arrested them after finding cocaine in the truck and they were placed in the rear seat of the patrol car. The officers again recorded McKinnon's and Pressley's incriminating statements. *Id*.

The *McKinnon* court considered the meaning of the term "oral communication" under the federal statutes. An oral communication is protected against taping. If a conversation is taped in violation of the statutes, the tape may be suppressed. A conversation is an oral communication only if the conversants exhibited a subjective expectation of privacy and the expectation of privacy was objectively reasonable. The court seemed to agree with the government's argument that a patrol car functions as the officer's office and the rear seat of the patrol car functions as a jail cell. *Id*. at 527. The court held "that McKinnon did not have a reasonable or justifiable expectation of privacy for conversations he held while seated in the back seat area of a police car." *Id*. at 528.

In examining the facts of *McKinnon* and *Estrada*, the facts concerning the taping seem virtually identical. In each case, an officer asked two individuals to wait in the patrol car prior to their arrest. The officer taped their conversation in the rear seat of the patrol car; the conversation contained incriminating statements. One difference between the two cases is that the officer in *McKinnon* also taped McKinnon's conversation following his arrest. This difference is not significant because an arrestee held in the back of a patrol car would have a lesser expectation of privacy than a person not under arrest.

A number of state and a number of federal courts, other than the *McKinnon* court, have faced the issue of whether an officer may secretly tape a conversation of individuals seated in the rear seat of a patrol car. In each case the court has said that taping is permissible. Carol M. Bast & Joseph B. Sanborn, Jr., *Not Just any Sightseeing Tour: Surreptitious Taping in a Patrol Car*, 32 Crim. L. Bull. 123, 130–31 (1996).

Although persuasive authority in other circuits, *McKinnon* is mandatory authority in this circuit. The facts concerning the taping are virtually identical in *McKinnon* and *Estrada*. A number of other state and federal courts have also held that there is no reasonable expectation of privacy for persons seated in the back of a patrol car. Therefore, a court should find that the defendants had no reasonable expectation of privacy while they were seated in the rear seat of the patrol car. Because they did not have a reasonable expectation of privacy, their conversation was not protected against taping as an oral communication. Therefore, a court would not suppress the tape under the federal eavesdropping statutes.

Defendant has also made the argument that the search of her purse tainted the tape recording. Obviously, were the court to deny the defendant's motion to suppress the illegal drugs, there would be no taint that could attach to the tape. Even were the court to grant the defendant's motion to suppress the methamphetamines, the court should not grant the motion to suppress the tape. In all probability, defendant would have made the incriminating statements even if Officer Green had not searched her purse.

Where a police officer obtains evidence in an unconstitutional manner, that evidence is excluded from use at trial. If that evidence leads the officer to other evidence, the other evidence is derivative of the first evidence. The derivative evidence is known as fruit of the poisonous tree and is also inadmissible. Generally, evidence that is tainted by the prior unconstitutional conduct is inadmissible; however, in some instances the second evidence is admissible because the connection between the unconstitutionally-seized evidence and the subsequently obtained evidence is marginal.

The tape is not derivative of the evidence the officer discovered searching Estrada's purse. The tape should not be suppressed.

Conclusion:
For the reasons set forth, the United States requests this court to deny defendant's motion to suppress the methamphetamines and the tape of her incriminating statements.

Respectfully submitted,

_____
Florida Attorney, Esq.
Florida Bar Number 000000
Law Firm
Main Street
Anytown, Fla.

SUMMARY

- In litigation, an attorney may be required by court rule, may be asked by the judge, or may feel the need to submit a memorandum of law to court.
  - The purposes of the memorandum of law are to explain the client's position in a lawsuit and to convince the judge to rule in the client's favor.
  - The tone of the memorandum of law is persuasive.
  - While the attorney has to represent the client's best interest, this duty is tempered by the attorney's ethical duty as "an officer of the court."
  - Build your credibility by stating the facts and the law accurately.
  - Use a format that makes your memorandum of law reader-friendly.
  - Organize the document to highlight important information and to obscure adverse information that you feel obligated to include.
  - Comply with any court rules and format customarily used for the particular court.
  - The parts of a standard memorandum of law are the caption, the question presented, the facts, the argument, the thesis paragraph, the rule of law, the application of law to the facts, and the conclusion.

EXERCISES

1. Pick one of the research problems from Appendix E.
2. Research the problem you have chosen.
3. Write a memorandum of law using your research.

CYBERLAW EXERCISES AND EXAMPLES

1. Materials concerning famous trials of the twentieth century can be accessed at the University of Missouri–Kansas City School of Law home page (‹http://www.law.umkc.edu›). The Web site was developed by Professor Douglas Linder and is accessible by clicking on "FACULTY & STAFF," then "Faculty Scholarship," and then Professor Linder's name. The famous trials include the Leopold and Loeb trial, the Scopes "monkey" trial, and the Mississippi burning trial. View some of the materials collected at this Web site.

2. When writing legal documents for the first time, it may be helpful to look at examples. This chapter provides some examples. Professor Colleen Barger at the University of Arkansas at Little Rock School of Law had a Web site that links to pages of other legal research and writing professors (<http://www.ualr.edu/cmbarger/>).
3. Access several memoranda of law from your state on WESTLAW and compare them to the examples in this chapter.

DISCUSSION POINTS

1. Which footnotes in the first sample memorandum of law seem to be the most helpful and why?
2. How does the second sample memorandum of law differ from the first?
3. What changes would you make to either of the sample memoranda of law to make them better?

Student CD-ROM
For additional materials, please go to the CD in this book.

Online Companion™
For additional resources, please go to http://www.paralegal.delmar.cengage.com.

CHAPTER 15

Appellate Brief

"*An ability to write clearly has become the most important prerequisite for an American appellate lawyer*."

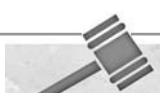
—William H. Rehnquist, Chief Justice of the United States Supreme Court, "From Webster to Word-Processing: The Ascendance of the Appellate Brief," 1 J. App. Prac. & Process 1, 3 (1999).

INTRODUCTION

When a case is appealed, the attorneys for the parties submit appellate briefs to the appellate court. This chapter explains the purpose, use, and format of the appellate brief and includes two sample appellate briefs.

Much of the substance of the sample appellate brief is similar to the sample memorandums of law from Chapter 14. To save space, the footnotes from the first memorandum of law are not repeated in the first appellate brief. You may want to go back later and reread the footnotes to the first sample memorandum of law from Chapter 14.

Because the appellate brief is so important in an appeals case, the substance of the appellate brief must be well researched. Sloppy research will cause the judge to lose faith in the argument presented. Research also includes being aware of court rules governing the format of the appellate brief. Although a judge usually will overlook minor failures to comply with requisite format, a judge may complain in writing about the attorney's failure to comply.



YOU BE THE JUDGE

What would you do if the presiding judge granted an attorney permission to exceed the page limitation but you felt that the attorney's brief was overly long?

In reaching your decision, consider the following information:

- The brief was 202 pages long.
- The attorney ignored the standard of review and misstated the record.
- The attorney failed to provide analysis to support arguments and failed to provide citation to relevant authority.

To see how a state court answered the question, see *In re S.C.*, 41 Cal. Rptr. 3d 453 (Cal. Ct. App. 2006) in Appendix K.

PURPOSE AND USE

When a party appeals a lower court ruling, the appellate court's job is to review what the lower court did to determine whether the lower court committed reversible error. In its review, the appellate court examines the "record" of the lower court proceedings and reads the appellate briefs. Once the record on appeal is transmitted to the appellate court and appellate briefs are filed, the appellate court may rule on the appeal solely on the strength of the documents filed with the appellate court, or the court may hear oral argument. During oral argument, the attorney for each party has an allotted period of time to argue the client's position in the case and to respond to questions posed by the appellate judges.

The appellate briefs play a major role in the appeal. You might think of the appellate briefs as guidebooks to the case. They contain the arguments of the parties, they assist the appellate court in determining the issues to be decided on appeal, and they explain the applicable law and facts. Of course, because the appellate briefs are designed to persuade the appellate court of the correctness of the respective parties' positions, the **appellant's brief** is written from the appellant's perspective and the **appellee's brief** is written from the appellee's perspective.

appellant's brief
A document filed by the appellant in an appellate court explaining why the lower court's decision was incorrect.

appellee's brief
A document filed by the appellee in an appellate court explaining why the lower court's decision was correct.

The appellant's brief is filed first and gives the appellant's reasons the appellate court should reverse or otherwise modify the lower court decision. Court rules give the appellee a certain period of time after the appellant's brief is filed to file the appellee's brief. The appellee's brief gives the appellee's reasons why the lower court decision should be affirmed.

In reviewing a lower court decision, the appellate court must follow a standard of review. A standard of review is the nature and extent of the action the appellate court may take in reviewing the lower court decision. The standard is different depending on whether the appellate court is reviewing a finding of fact, a ruling of law, or a ruling on a question involving law and fact. Because the trial court was in the best position to judge the credibility of the witnesses, the trial court's **findings of fact** are given great deference.

findings of fact
Determinations of the facts in a case.

The appellate court is bound to follow the trial court's findings of fact unless a jury finding was unreasonable or a trial judge's finding was clearly erroneous. When deciding a question of law or a question involving law and fact, the appellate court is free to reach a ruling different from that of the trial court.

Keep in mind the standard of review when writing the appellate brief. If you represent the appellee and the question for review is one of fact, emphasize that the trial court's finding of fact must be deferred to unless unreasonable or clearly erroneous. Whether the issue is one purely of fact, purely of law, or of fact and law is rarely clear-cut. If you represent the appellant, try to characterize the issue as one of law or of fact and law so that the appellate court will not have to defer to the decision of the trial court.

If you represent the appellee, use the lower court decision in the appellee's favor to your advantage. Do not hesitate to rely on the reasoning of the lower court. You may even want to quote particularly well-worded passages of the lower court's opinion. Although an appellate court is not bound by the trial court's ruling on a question of law or a mixed question of fact and law, sometimes it helps to remind the appellate court that after studying the issue, the lower court ruled in the appellee's favor.

Compare the appellate brief with the memorandum of law. Of the legal documents covered in this book, the appellate brief is most similar to the memorandum of law. Because both the memorandum of law and the appellate brief are persuasive in tone and

are designed to convince the reader of the correctness of the client's position, much of the substance of the two documents will be similar. Although similar in tone and purpose, the two documents differ in two respects. As explained, the appellate brief differs from the memorandum of law in the standard of review by the appellate court. The different standard of review in the appellate court will probably dictate some change in the wording of the issues and argument of the appellate brief from the questions presented and argument of the memorandum of law. Another difference is format. Aside from complying with page size and other such mundane requirements, attorneys writing memoranda of law generally follow the format customary in their area rather than having to follow a certain detailed format specified by court rule. In contrast, the format for appellate briefs is usually specified in detail in the applicable court rules.

At this point, it would be well for you to reread the preceding chapter on the memorandum of law (Chapter 14). Except for differences in the standard of review and format, assume that the explanation of the memorandum of law from that chapter applies to the appellate brief.

The next section of this chapter discusses format for appellate briefs.

FORMAT

The first step in writing an appellate brief is to check applicable court rules to determine the format required by the court. For a case being appealed to a federal circuit court you would check the Federal Rules of Appellate Procedure. The United States Supreme Court has its own set of rules that must be consulted for documents submitted to it. For a case being appealed to the intermediate appellate court of your state, check the rules of appellate procedure for your state. The court of last resort of your state may have its own set of rules that must be consulted for documents submitted to it, or it may use the same rules as the state intermediate appellate courts. In addition to the rules referred to in this paragraph, many courts have local rules that must be complied with.

Failure to follow court rules for appellate briefs may have serious consequences. The least serious of the consequences is attorney embarrassment if the failure to comply is pointed out by the clerk of the court, by opposing counsel, or by a judge. A judge may impose monetary sanctions on an attorney who fails to comply with the rules. The most serious consequence is the clerk's office refusing to file an appellate brief that fails to comply with applicable appellate rules. Another consequence no less serious to the attorney's reputation in the legal community is for the judge to chastise the attorney, or even the attorney's firm, in writing as part of the court's opinion. This written admonishment in a published case or a case included in an electronic database exists in perpetuity.

The rules for appellate briefs cover a number of matters. They usually specify the major sections required to be included in the appellate brief and may specify their content. The rules may also mandate certain more mundane matters such as paper size, type size, and maximum page length. For example, Rule 28 of the Federal Rules of Appellate Procedure states the sections required for the appellate brief and gives a brief explanation of the information to be included in each section. Rule 32 requires appellate briefs to be double-spaced on eight-and-one-half by eleven-inch paper with at least one-inch margins. The rule specifies the minimum size typeface, limits a brief to thirty pages, and limits a reply brief to fifteen pages. (To save space, the sample appellate brief contained in this chapter was single- rather than double-spaced.) Rule 32 also specifies the information required on the cover of the appellate brief and the color of the cover.

YOU BE THE JUDGE

What action might you take where neither attorney in a case seems to feel obliged to follow court rules as to the content and format of appellate briefs?

In reaching your decision, consider the following information:

- The facts section of each brief contains arguments, some facts are misstated, and some facts are unsupported by the record.
- The briefs contain an excessive number of footnotes and a number of the footnotes contain arguments.
- The briefs exceed the page limits.
- The record was organized poorly, some of the documents made part of the record were illegible, and the manner in which the record was bound made it difficult to read.

One method of dealing with the attorneys' noncompliance would be to strike the briefs and dismiss the appeal.

Another way to deal with the attorneys' noncompliance would be to admonish the attorneys and their law firms in writing in a portion of the court opinion.

To see how a state court answered the question, see *Technology Solutions Company v. Northrup Grumman Corporation*, 826 N.E.2d 1220 (Ill. App. Ct. 2005) in Appendix K.

The format used in this chapter complies with the Federal Rules of Appellate Procedure (except for being single-spaced rather than double-spaced). The following are the sections of an appellate brief required by Rule 28.

TABLE OF CONTENTS

The table of contents includes the titles of the sections of the brief and the wording of the point headings as well as the page references.

TABLE OF AUTHORITIES

This table of cases, statutes, and other authorities contains references to the pages of the brief on which the listed authorities are cited.

A JURISDICTIONAL STATEMENT

The statement must provide the basis for the trial court's or agency's subject matter jurisdiction, the basis for the appellate court's subject matter jurisdiction, the filing date indicating that the appeal is timely, and an assertion that the appeal is from a final order or there is other reason for the appellate court's jurisdiction.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issues are the questions you are suggesting the appellate court consider. Word the issues so the appellate court can easily reach the decision in your client's favor. Often the appellee will start an issue with the words, "Did the trial court properly find that" or "Did the trial court properly rule that." Such wording suggests that the trial court decision was correct. In contrast, the appellant would start the same issue with the words, "Did the trial court err in." That wording suggests that there was something wrong with the trial court's decision.

STATEMENT OF THE CASE

Rule 28 requires that the statement "briefly indicat[e] the nature of the case, the course of proceedings, and the disposition below."

STATEMENT OF THE FACTS

Rule 28 requires that the statement contain "the facts relevant to the issues submitted for review with appropriate references to the record." For ease of reference, the appellant's brief usually has an appendix attached to it, containing copies of the parts of the record referenced in appellant's brief. The abbreviation "(A. 3)" would reference page three of the appendix.

SUMMARY OF THE ARGUMENT

Rule 28 states that a summary of the argument, which precedes the argument, "must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings."

ARGUMENT

The argument must contain:

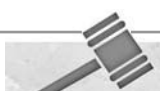
(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues)[.]

As in the memorandum of law, use point headings to make the brief reader-friendly. The brief should contain one or more major point headings for major sections and may contain subheadings within a major section to divide a major section into subsections. The major point headings should be equal in number to the issues presented, should answer the issues, and should appear in the same order as the issues presented.

LEGAL CONCLUSION

Rule 28 requires "a short conclusion stating the precise relief sought."



YOU BE THE JUDGE

What type of sanction would you impose for an attorney's failure to follow format or content of appellate briefs?

In reaching your decision, consider the following sanctions:

- The judge could impose monetary sanctions.
- The judge could chastise the attorney in writing.
- The judge could strike the noncomplying brief and dismiss the appeal.

To see how courts answered the question, see *In re McIntyre*, 181 B.R. 420 (B.A.P. 9th Cir. 1995); *N/S Corp. v. Liberty Mut. Ins. Co.*, 127 F.3d 1145 (9th Cir. 1997) in Appendix K.

FIRST SAMPLE APPELLATE BRIEF

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

CASE NO. 00-0000

UNITED STATES OF AMERICA,
Appellee,
v.

MICHAEL CAMPBELL and JOHN WRIGHT,
Appellants.

APPEAL OF A CRIMINAL CONVICTION FROM THE

UNITED STATES DISTRICT COURT

ORLANDO DIVISION

BRIEF FOR APPELLANT CAMPBELL

Florida Attorney, Esq.
Florida Bar Number 000000
Law Firm
Main Street
Anytown, Fla.

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Statement of Subject Matter Jurisdiction in the United States District Court

The defendant, Michael Campbell, was indicted in the United States District Court for the Middle District of Florida on April 6, 2009. The indictment charged him with violating 21 U.S.C.A. § 841 (a)(1) (West 2002) for possession with intent to distribute a quantity of cocaine. (A. 21). Defendant received a jury verdict of guilty on June 8, 2009 and was sentenced on June 15, 2009 to a term of three years. (A. 25).

Statement of Jurisdiction

This is an appeal from the final judgment of the United States District Court for the Middle District of Florida in a criminal case pursuant to a Motion under Rule 4(b) of the Federal Rules of Appellate Procedure. Jurisdiction in the United States Court of Appeals for the Eleventh Circuit is invoked under 28 U.S.C.A. § 1291 (West 2003), which provides that the Court of Appeals has jurisdiction from all final decisions of the United States District Court. Defendant was sentenced on June 15, 2009. On June 22, 2009, a timely Notice of Appeal was filed from which this appeal follows. (A. 25, 27).

Statement of the Issue

Did the trial court err in admitting evidence seized from defendant Mike Campbell's car where a law enforcement officer pursued the Campbell car after he observed Mike and his friend, two Afro-American college students in their twenties in beach attire, traveling on I-95 in the early evening at the speed limit in an out-of-state tagged Lincoln Continental and where the law enforcement officer pulled the Campbell car over for following too closely? (A. 3–4).

Statement of the Case

On April 1, 2009, United States Drug Enforcement Agents stopped the defendant, Michael Campbell, on I-95 because he fit their drug courier profile and for following too closely. (A. 3–4). After the agents found cocaine in the trunk of Campbell's car, he was arrested and taken into custody. (A. 5). He was provided an initial detention hearing on April 2, 2009. (A. 20). On April 7, 2009, an indictment was filed charging him with a violation of 21 U.S.C.A. § 841 (a)(1) for possession with intent to distribute a quantity of cocaine. He was arraigned the same day and he entered a plea of not guilty. (A. 21).

A trial date was set for June 8, 2009 for a jury trial. Prior to trial defendant filed a motion to suppress the cocaine found in the trunk of defendant's car. The district court denied the motion and the trial began on June 8, 2009. (A. 22). Defendant received a jury verdict of guilty on June 10, 2009. (A. 24). Defendant was sentenced on June 15, 2009 to a term of three years. (A. 25).

Statement of the Facts

Mike Campbell and his best friend had decided like thousands of other college students to enjoy a Florida spring break. After Mike promised to drive carefully, Mike's father let Mike borrow his car, a brand new Lincoln Continental. After arriving in Florida, they spent every waking moment of their break on the beach. In the early evening on the last day of vacation, they went straight from the beach to their car to begin the long trip back to school, calculating that they would have just enough driving time to make it back for their first class. (A. 1–2). Mike was driving north on I-95, thinking about the promise he had made to his father, when he saw patrol cars parked in the median, one with its lights shining across the northbound lanes. Almost immediately after driving through the arc of the patrol car's headlights, Mike looked in the rear view mirror and saw the patrol car pull out behind him. The patrol car followed Mike for a distance before pulling Mike over. (A. 3–4).

An officer got out of the patrol car, walked over to Mike's car and asked for Mike's driver's license and car registration. As Mike handed over his license and the registration he noticed the officer eyeing Mike's beach attire suspiciously. When Mike told the officer they were heading back to school from spring break, the officer commented, "We don't see too many blacks down here over spring

break." The officer added, "I stopped you for following the car in front of you too closely." Still holding the license and registration, the officer asked Mike whether the officer could search the car and said, "You don't have anything to hide, do you?" Hoping that if he refused they could be on their way, Mike answered, "No." The officer said, "Wait here," turned around, walked back to the patrol car, and got in. Mike could not have left even if the officer had not told him to "wait" because the officer still had Mike's license and car registration. (A. 3–4).

Forty-five minutes later another patrol car pulled up and an officer got out with a dog. The officer led the dog around the car. The dog circled the car once and then stopped and pawed the car's trunk. The officer motioned Mike to roll down his window. The officer told him that the dog had detected drugs in the trunk of Mike's car. The officer told Mike that Mike could either open the car trunk or wait there for whatever time was necessary for the officer to obtain a search warrant. Feeling that he had no choice, Mike opened the trunk. Both officers started pulling Mike's and his friend's belongings out of the trunk and tossing them on the ground. Wedged in a bottom corner of the trunk one of the officers found a brown paper bag containing cocaine. Mike and his friend were arrested and were charged with possession with intent to distribute. (A. 4–5).

Summary of Argument

The car driver and passengers expect that activities within the car will be private and not subject to the scrutiny of law enforcement officials. They may feel that their privacy is invaded if a law enforcement officer stops the car to investigate. A trained police officer may have a hunch that a car's occupants are engaged in illegal activity; however, a law enforcement officer may not constitutionally stop a car unless there is a reasonable suspicion of illegal activity or there is a traffic violation. The stop of Mike's car to investigate for criminal activity was not permissible because the agents did not have reasonable suspicion of illegal drug activity. The stop for a traffic violation was constitutionally justifiable only if Mike was following too closely.

The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures" and allows a search warrant to be issued only upon "probable cause." A search warrant requirement was spelled out in the amendment to safeguard this important right. Over the more than two hundred years since the amendment was adopted, the individual's right against unreasonable search and seizure has been jealously guarded.

Although the time and level of evidence needed to obtain a search warrant protects the individual's constitutional right, the courts have allowed two exceptions to the search warrant requirement, either of which the government argues is applicable here and allowed them to stop the Campbell car. The first exception requires a minimum of "reasonable suspicion" of illegal activity to stop a car and question its occupants. *Terry v. Ohio*, 392 U.S. 1, 27 (1968). *United States v. Smith*, 799 F.2d 704, 707 (11th Cir. 1986). The second exception allows an officer to stop a car to investigate a traffic violation. *Whren v. United States*, 517 U.S. 806, 818 (1996).

Defendant Campbell's motion to suppress should be granted because neither of the two exceptions to the search warrant requirement apply here. The officer stopped Campbell's car on a mere "hunch" and Campbell was following at a "reasonable and prudent" distance, as required by the Florida Statutes. Fla. Stat. Ch. 316.0895 (1) (2008). The argument section of this brief will first explain why there was not enough evidence to justify an investigatory stop and then why the alleged traffic violation did not justify the stop.

Argument

THE EVIDENCE FOUND IN THE TRUNK OF DEFENDANT CAMPBELL'S CAR SHOULD HAVE BEEN SUPPRESSED AS THE FRUIT OF AN UNCONSTITUTIONAL SEARCH AND SEIZURE BECAUSE THE DRUG COURIER PROFILE DID NOT SUPPORT THE REASONABLE SUSPICION NECESSARY FOR AN INVESTIGATORY STOP AND CAMPBELL DID NOT COMMIT A TRAFFIC VIOLATION.

A. Because the information the officer relied on to stop the Campbell car was no more than a mere "hunch," the evidence should be suppressed unless the officer had probable cause to stop the car for a traffic violation.

Terry was the landmark case that lowered the burden of proof necessary for a stop from probable cause to "reasonable suspicion." Such stops made on reasonable suspicion are often referred to as "Terry stops," after *Terry*, and the definition of Terry stops has been broadened to apply to car stops. The new reasonable suspicion standard allows a police officer to stop and briefly question someone but is still designed to protect the innocent traveler, singled out because of certain immutable personal characteristics such as race, sex, and age, from being subjected to "overbearing or harassing" law enforcement tactics. 392 U.S. at 14–15 n. 11. A stop made only on an "unparticularized suspicion or 'hunch' " is unconstitutional. *Id*. at 27. Assuming the officer has the requisite reasonable suspicion for a Terry stop, the officer would still need probable cause or consent to search a car.

Smith involved almost identical facts to those being considered here. In *Smith*, the government argued that a highway stop was constitutionally permitted based either on a drug courier profile or on Smith's alleged commission of a traffic violation. 799 F.2d at 705. Smith filed a motion to suppress, claiming that the evidence seized from his car should be suppressed because of the violation of his right against unreasonable search and seizure. *Id*. at 706. The United States Court of Appeals for the Eleventh Circuit found that the *Smith* drug courier profile did not support reasonable suspicion, reversed the lower court's denial of Smith's motion to suppress, and vacated Smith's conviction. *Id*. at 712.

The *Smith* facts are very similar to the *Campbell* facts. In *Smith*, one night in June of 1985, Trooper Robert Vogel, a Florida Highway Patrol trooper, and a DEA agent were observing cars traveling in the northbound lanes of I-95 with hopes of intercepting drug couriers. When Smith's car passed through the arc of the patrol car headlights, Vogel noticed the following factors that matched his drug courier profile:

1. The car was traveling at 3:00 a.m.;
2. The car was a 1985 Mercury, a large late-model car;
3. The car had out-of-state tags;
4. There were two occupants of the car who were around 30; and
5. The driver was driving cautiously and did not look at the patrol car as the Mercury passed through the arc of the patrol car headlights.

Id. at 705–06.

The *Smith* drug courier profile is almost identical to the profile in this case. In both *Smith* and this case, the cars were traveling after dark; the cars were large late models with out-of-state tags; the cars were being driven "cautiously"; and each car contained two passengers in their twenties or thirties. The differences between the two profiles are very minor. Campbell and his friend were dressed casually while it is not known how Smith and Swindell were dressed. Smith and Swindell did not look at Vogel as they passed. It is not known whether Campbell looked in the agents' direction as Campbell drove past. Campbell claims that race was a factor in the stop even though it was not listed as such by the agents. (A. 3–4). Smith and Swindell's race is unknown.

In *Smith*, Vogel followed the Mercury for a mile and a half and noticed that the Mercury "wove" several times, once as much as six inches into the emergency lane. Vogel pulled Smith over. When a drug dog alerted on the car, a DEA agent searched the trunk and discovered one kilogram of cocaine. Smith and his passenger, Swindell, were arrested and were charged with conspiracy to possess cocaine with the intent to distribute it. Smith and Swindell's motions to suppress the cocaine were denied and they were tried and convicted. *Id*. at 706.

The issue before the appellate court was whether the stop of Smith's car was reasonable. *Id*. This is the same basic question to be answered by this court in determining whether Campbell's motion to suppress should be granted. The *Smith* court held that the stop of Smith's car could not be upheld as a valid Terry stop, *id*. at 708, finding that "Trooper Vogel stopped the car because [Smith and Swindell] . . . matched a few nondistinguishing characteristics contained on a drug courier profile and, additionally, because Vogel was bothered by the way the driver of the car chose not to look at him." *Id*. at 707.

Just as there was nothing in the *Campbell* drug courier profile to differentiate Campbell and his friend from other innocent college students returning from spring break in Florida, there was

nothing in Vogel's drug courier profile to differentiate Smith and Swindell from other law-abiding motorists on I-95. (A. 3–4). It is usual to drive after dark to avoid heavy traffic or to complete an interstate trip. Although many motorists speed on the highways, motorists driving "cautiously" at or near the speed limit are simply obeying traffic laws. Many people other than drug couriers drive large late model cars with out-of-state tags. A motorist between the ages of twenty and forty is not unusual.

The contrast between the *Campbell* and *Smith* drug courier profiles, which do not support reasonable suspicion, and another courier profile which was held to support reasonable suspicion is marked. *United States v. Sokolow*, 490 U.S. 1, 3 (1989). In *Sokolow*, DEA agents found 1,063 grams of cocaine inside Sokolow's carry-on luggage when he was stopped in Honolulu International Airport based on the following profile:

1. He had paid $2,100 in cash for two airplane tickets from a roll of $20 which appeared to contain $4,000;
2. He was ticketed under a name other than his own;
3. He traveled to Miami, a known drug source, and back;
4. Although his round trip flight lasted 20 hours, he stayed in Miami only 48 hours;
5. He appeared nervous;
6. He was about 25 years old;
7. He was dressed in a black jumpsuit and was wearing gold jewelry which he wore during both legs of the round trip flight; and
8. Neither he nor his companion checked any luggage.

Id. at 3–5. The Court held that the *Sokolow* drug courier profile did support reasonable suspicion. *Id*. at 11.

The *Sokolow* dissent would have found that all of the factors even if "taken together" did not amount to reasonable suspicion. In criticizing the use of a drug courier profile to stop suspects, the dissent noted "the profile's 'chameleon-like way of adapting to any particular set of observations'" "subjecting innocent individuals to unwarranted police harassment and detention." *Id*. at 13 (Marshall, J., dissenting) (quoting *Sokolow v. United States*, 831 F.2d 1413, 1418 (9th Cir. 1987), *rev'd*, 490 U.S. 1 (1989)).

As predicted in the *Sokolow* dissent, Smith, Swindell, Campbell, and Campbell's friend were subjected to "unwarranted police harassment and detention" even though the factors in the respective drug courier profiles, even if "taken together" did not amount to reasonable suspicion. In contrast, several of the *Sokolow* factors, such as carrying such a large amount of cash and traveling a long distance to stay a relatively short period of time, are unusual or even suspicious in and of themselves. Each of the *Smith* and *Campbell* factors was not at all out of the ordinary alone and certainly taken together did not amount to reasonable suspicion. (A. 3–4).

B. Because Mike Campbell did not commit the traffic violation alleged by the officer, the evidence found in the trunk of Mike Campbell's car should be suppressed as the fruit of an unconstitutional search and seizure.

An examination of *Whren v. United States* is necessary to answer the question whether the officer stopping Campbell on an alleged traffic violation was constitutional. In *Whren*, Brown was driving a Pathfinder in which Whren was a passenger. Brown was stopped at a stop sign looking down into Whren's lap. Plain clothes police officers were patrolling this "high drug area" of the District of Columbia in an unmarked patrol car. The Pathfinder caught the attention of the officers because Brown remained stopped at the stop sign for approximately twenty seconds. When the patrol car made a U-turn to follow the Pathfinder, Brown turned right without signaling and started off at an "unreasonable speed." The patrol car stopped the Pathfinder. When one of the officers approached Brown's window and peered in, he saw that Whren had two plastic bags of crack cocaine on his lap. The officers arrested Whren and Brown. 517 U.S. at 808, 809.

Justice Scalia phrased the issue as "whether the temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth

Amendment's prohibition against unreasonable seizures unless a reasonable officer would have been motivated to stop the car by a desire to enforce the traffic laws." *Id*. at 808. The Court answered the question, "no." "[T]he district court found that the officers had probable cause to believe that petitioners had violated the traffic code. That rendered the stop reasonable under the Fourth Amendment, the evidence thereby discovered admissible, and the upholding of the convictions by the Court of Appeals for the District of Columbia Circuit correct." *Id*. at 819.

Prior to *Whren*, some courts, including the court deciding *Smith*, had decided that a car stop for a traffic violation was unconstitutional unless a reasonable officer would have made the stop. The *Smith* court found that the cocaine should have been excluded from evidence because a reasonable officer would not have stopped Smith's car for the alleged traffic violation. 799 F.2d at 711. However, in *Whren*, the United States Supreme Court rejected the argument that the reasonable officer standard should apply. 517 U.S. at 813.

After *Whren*, it would be very difficult to convince a court that a stop for an alleged traffic violation is unconstitutional. However, if the court finds that the driver did not violate any traffic regulation, then the stop would be unconstitutional.

The Florida motor vehicle statute identified by the *Campbell* officer states, "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon, and the condition of, the highway." Fla. Stat. Ch. 316.0895 (1) (2008). No simple test determines if Campbell violated the statute. The court must determine from any evidence presented whether the distance at which Campbell was following the car in front of him was reasonable and prudent.

The alleged driving irregularities in *Whren* and *Campbell* are dissimilar. While it was clear that Brown committed a traffic violation, the Florida statute cited in this case does not apply to Campbell. Determining whether one vehicle is following another vehicle too closely involved much more of a judgment call than determining whether the Pathfinder failed to signal when turning right and exceeded the speed limit. The position of the vehicles on the highway and the weather and road conditions must all be considered to determine if Campbell violated the statute.

The evidence presented at the hearing on the motion to suppress showed that Fla. Stat. Ch. 316.0895 (1) did not apply to Campbell because Campbell was following the car in front of him at more than the appropriate distance given the vehicles' speed, the traffic, and the condition of the highway.

Following *Whren*, this court should find the stop of Campbell's car unconstitutional because there was no traffic violation. Because Campbell was following the car in front of him at a reasonable and prudent distance, the stop violated Campbell's right against unreasonable search and seizure. Because Campbell's fourth amendment right was violated by the stop and the agents would not have found the evidence if they had not first stopped the car on I-95, the evidence should be suppressed as the fruit of the poisonous tree.

Conclusion

For the reasons set forth above, defendant Campbell requests this court to reverse the district court's denial of his motion to suppress, vacate his conviction and remand the case to the district court.

Respectfully submitted,

Florida Attorney, Esq.
Florida Bar Number 000000
Law Firm
Main Street
Anytown, Fla.

SECOND SAMPLE APPELLATE BRIEF

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

CASE NO. 00-0000

UNITED STATES OF AMERICA,
Appellant,
v.

CRUZ ESTRADA,
Appellee.

APPEAL OF A SUPPRESSION ORDER FROM THE

UNITED STATES DISTRICT COURT

ORLANDO DIVISION

BRIEF FOR APPELLANT THE UNITED STATES OF AMERICA

Florida Attorney, Esq.
Florida Bar Number 000000
Law Firm
Main Street
Anytown, Fla.

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MISCELLANEOUS

Statement of Subject Matter Jurisdiction in the United States District Court

The defendant was indicted in the United States District Court for the Middle District of Florida on March 16, 2009. The indictment charged her with violating 21 U.S.C.A. § 841 (a)(1) (West 2002) for possession with intent to distribute a quantity of methampetamines. (A. 21). On May 16, 2009, the trial court granted the defendant's motion to suppress the methamphetamines found in her possession and the tape recording of her incriminating statements. (A. 25).

Statement of Jurisdiction

This is an appeal from a suppression order of the United States District Court for the Middle District of Florida in a criminal case pursuant to a Motion under Rule 4(b) of the Federal Rules of Appellate Procedure. Jurisdiction in the United States Court of Appeals for the Eleventh Circuit is invoked under 28 U.S.C.A. § 1291 (West 2003), which provides that the Court of Appeals has jurisdiction from all final decisions of the United States District Court. Defendant's motion to suppress was granted on July 13, 2009. On July 20, 2009, a timely Notice of Appeal was filed from which this appeal follows. (A. 25, 27).

Statement of the Issues

1. Did the trial court err in granting the motion to suppress methamphetamines seized from defendant Estrada's purse after she gave the officer consent to search her purse? (A. 3–4).
2. Did the trial court err in granting the motion to suppress the tape recording of the defendants' conversation made while the defendants were seated in the rear seat of the patrol car? (A. 4).

Statement of the Case

On March 15, 2009, a highway patrol officer stopped the defendant and her driver on I-95 because the car was travelling 15 miles per hour over the speed limit. (A. 3–4). After the officer saw glass vials containing crack cocaine in the driver's lap, the officer asked them to wait in the patrol car while the officer searched the car. As she was walking toward the patrol car, defendant consented to a search of her purse. The officer found methamphetamine powder in a brown envelope in her purse. The officer recorded the defendant's statements while she was seated in the patrol car with the driver. The defendant was arrested and taken into custody. (A. 5). She was provided an initial detention hearing on March 16, 2009. (A. 20). On March 16, 2009, an indictment was filed charging her with a violation of 21 U.S.C.A. § 841 (a)(1) for possession with intent to distribute a quantity of methamphetamines. She was arraigned the same day and entered a not guilty plea. (A. 21).

A trial date was set for May 18, 2009 for a jury trial. Prior to trial defendant Estrada filed a motion to suppress the methamphetamines found in her purse and the defendants filed a motion to suppress the tape recording. The district court granted both motions at a suppression hearing on May 15, 2009. (A. 22).

Statement of the Facts

Officer Green was patrolling the southbound lanes of I-95 when he observed a car travelling at an excessive rate of speed. The radar in the patrol car showed that the car was travelling 80 in a 65 mile per hour speed zone. (A. 1–2).

After stopping the car, Officer Green approached the driver's side of the car and requested the driver's license and car registration. While the driver searched his wallet for the documents, Officer Green looked through the open window and noticed a glass vial containing small kernels of an off-white substance in the driver's lap. Believing the vial to contain crack cocaine, Officer Green announced that he was seizing it. He asked the driver and passenger to exit the car and asked the driver for his wallet. Officer Green identified the driver as Luis Briones from his driver's license. (A. 3–4).

As the passenger got out of the car, Officer Green struck up a conversation with her. She said that her name was Cruz Estrada. Officer Green explained that he would have to search their car but that they could wait in the patrol car for their comfort and safety. The defendant turned back to the car, explaining that she had to retrieve something. She reached into the car and pulled out her purse, which had fallen behind the front seat. As the defendant passed him on the way to the patrol car, Officer Green asked if he could search her purse. Without responding, the defendant held out her purse to him. Inside her purse, Officer Green found a brown paper envelope. When Officer Green asked her what was in the envelope, defendant claimed that she did not know, that someone had given it to her to give to a friend in Miami. When Officer Green opened the envelope, he found a quantity of white powder that he believed to be methamphetamines. (A. 4).

The two waited in the patrol car while Officer Green searched the car. The tape of their conversation contains several incriminating statements, including defendant's admission that the envelope was hers and that it contained illegal drugs. (A. 4–5).

Summary of Argument

Over the years, courts have recognized a variety of exceptions to the search warrant requirement of the Fourth Amendment in recognition that exigent circumstances often do not allow an officer time to obtain a search warrant. This case illustrates the tension between the officer's duty to collect evidence of the illegal drug trade and the individual's privacy concerns. Consent has long enabled an officer to conduct a search, even without probable cause. Even without consent but upon probable cause, an officer may search a car and any containers within the car, without regard to their ownership. A standard law enforcement technique has been to ask suspects to wait in the officer's patrol car while the officer searches the suspects' car; to obtain evidence, the officer tape records any statements the suspects unwisely make while in the patrol car.

The government argues that two exceptions to the search warrant requirement allowed Officer Green to search the defendant's purse. Defendant's motion to suppress the contents of her purse should be denied either because defendant consented to the search or because probable cause to search the car allows Officer Green to search containers found in the car. Defendant has argued that the tape containing her incriminating statements should be suppressed because the tape was made in violation of the federal eavesdropping statutes. There is no ground to suppress the tape under the statutes; the statutes prohibit taping only if there is a reasonable expectation that the conversation is private. Society would not recognize any conversation of suspects in a patrol car to be private.

Argument

I. THE MOTION TO SUPPRESS THE METHAMPHETAMINES FOUND IN DEFENDANT'S PURSE SHOULD HAVE BEEN DENIED EITHER BECAUSE DEFENDANT CONSENTED TO THE SEARCH OR THE PURSE FELL UNDER THE CONTAINER EXCEPTION TO THE SEARCH WARRANT REQUIREMENT.

A. Because it was objectively reasonable to believe that Defendant consented to the search of her purse, the motion to suppress the methamphetamines found in her purse should have been denied.

Once a vehicle is stopped, the officer can search the car with consent. An occupant can consent to the search of the occupant's belongings. *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). Even without consent, the officer can search the car if there is probable cause of criminal activity. The officer is entitled to search containers found in the car and suspected of holding the object of the officer's search, no matter who owns the container. *Wyoming v. Houghton*, 526 U.S. 295, 300–01 (1999). An officer may not search someone's person without probable cause. *Id*. at 303.

The search of defendant's purse is constitutional if she consented to the search or the container exception to the search warrant requirement extends to her purse. The United States Supreme Court has stated the standard for determining when an individual has consented to the search of a car. *Jimeno*, 500 U.S. at 251. This portion of this brief will explain why the consent standard has

been met. As far as the container exception is concerned, the United States Supreme Court held that "police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search." *Houghton*, 526 U.S. at 307. The facts of *Jimeno*, *Houghton*, and *Estrada* will be compared to show that the search of the defendant's purse was constitutional.

In *Jimeno*, Officer Trujillo overheard a telephone call from a public telephone in which Jimeno was discussing a drug deal. Trujillo followed Jimeno's car and stopped Jimeno for failure to stop when turning right on red. After informing Jimeno about the traffic violation, Trujillo

> went on to say that he had reason to believe that respondent was carrying narcotics in his car, and asked permission to search the car. He explained that respondent did not have to consent to a search of the car. Respondent stated that he had nothing to hide, and gave Trujillo permission to search the automobile.

500 U.S. at 249–50. Trujillo found drugs in a brown paper bag on the car floorboard. *Id*. at 250.

The Court then set forth the test for determining whether consent was given. "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical person have understood by the exchange between the officer and the suspect?" *Id*. at 251. Applying this standard, the Court found that Jimeno had consented to the search of the bag.

The facts of *Jimeno* and *Estrada* are similar in that the two cars were stopped for alleged traffic violations, the two defendants consented to searches, and the officers searched containers. The facts surrounding the consent issue are substantially similar. Trujillo told Jimeno that the officer suspected that there were drugs in the car and explained that Jimeno did not have to consent to the search. When Trujillo asked Jimeno's permission, Jimeno claimed that he had nothing to hide and explicitly consented to the search. Officer Green made a statement, "you don't mind if I search, do you?" Officer Green did not have time to explain that the defendant did not have to consent before she held out her purse to him.

In *Jimeno*, the container was a brown paper bag located on the floor of the car. In *Estrada*, the container was defendant's purse, hanging from her shoulder. If anything, it was more objectively reasonable to believe that the defendant in this case had consented to the search of her purse than that Jimeno consented to the search of the brown paper bag. The defendant's implied consent of offering her purse to Officer Green made it clear that she was consenting to the search of that particular container. It was not as clear that Jimeno consented to the search of the brown paper bag when he consented to the search of the car. In *Jimeno*, the trial court had granted Jimeno's motion to suppress the contents of the brown paper bag. The Florida District Court of Appeals and the Florida Supreme Court affirmed. *Id*. at 250.

Applying the objective reasonableness standard, it is objectively reasonable to believe that the defendant in this case had consented to the search of her purse. Her overt action makes it objectively reasonable to believe that she consented.

B. Because the purse was found in a car that was searched upon probable cause that it contained illegal drugs, the container exception to the search warrant requirement applied and the methamphetamines should not have been suppressed.

As far as the container exception is concerned, the United States Supreme Court held that "police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search." *Houghton*, 526 U.S. at 307. The facts of *Houghton* and *Estrada* will be compared to determine that the search of Cruz' purse was constitutional.

In *Houghton*, David Young was stopped for speeding and a faulty brake light. After the officer saw a hypodermic syringe in Young's pocket, Young admitted that he used it to take drugs. The officer asked the two female passengers seated in the front seat to exit the car and the officer searched the car. The officer found Houghton's purse on the backseat of the car. Searching the purse, the officer found a brown pouch that contained drug paraphernalia and a syringe containing methamphetamine in a large enough quantity for a felony conviction. Houghton claimed that the brown pouch was not hers. The officer also found a black container that contained drug paraphernalia and a syringe containing a smaller amount of methamphetamine, insufficient for

a felony conviction. Houghton's arms showed fresh needle-marks. The officer arrested her. 526 U.S. at 297–98.

The issue in *Houghton* was "whether police officers violate the Fourth Amendment when they search a passenger's personal belongings inside an automobile that they have probable cause to believe contains contraband." *Id*. at 297. The Court held "that police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search." *Id*. at 307. The Court first relied on a 1982 case in which the Court had found that, where there was probable cause to search a car, it was constitutionally permissible to search containers found in the car that might hold the object of the search. *Id*. at 301–02. The Court noted that an individual carrying a package in a vehicle travelling on the public roads has a reduced expectation of privacy. *Id*. at 303. The Court found no reason to afford more protection to a container owned by a passenger than a container owned by the driver. *Id*. at 305.

The facts of *Houghton* and this case are very similar in that the two cars were stopped for alleged traffic violations, the passengers exited the cars, leaving their purses in the backseat, and the officers searched a passenger's purse. The facts of the two cases differ slightly in that Houghton at first disclaimed ownership of the purse. In contrast, this defendant returned to the car to retrieve her purse and offered it to Officer Green.

Applying the holding in *Houghton* to *Estrada*, Officer Green's search of defendant's purse was constitutional. When Officer Green discovered the vial containing what he believed to be crack cocaine in the driver's possession, that gave Officer Green probable cause to search the car and all containers in the car that might contain illegal drugs. Defendant's purse was of the size that it might contain illegal drugs and it was initially found in the car. Either of the two occupants might have concealed illegal drugs in defendant's purse as Officer Green pulled them over. Because of the substantial similarities between *Houghton* and *Estrada*, this court should find that Officer Green's search was constitutional.

II. THE MOTION TO SUPPRESS THE DEFENDANT'S CONVERSATION TAPED IN THE REAR SEAT OF THE PATROL CAR SHOULD HAVE BEEN DENIED BECAUSE THE CONVERSATION WAS NOT PROTECTED AS AN ORAL COMMUNICATION UNDER 18 U.S.C.A. §§ 2510–2515 (West 2000 & Supp. 2004).

A. Because Defendant had no reasonable expectation of privacy while seated in the rear seat of a patrol car, the motion to suppress the tape containing Defendant's incriminating statements should have been denied.

The federal eavesdropping statutes protect certain types of face-to-face conversations against interception; however to be protected, the conversation must qualify as an "oral communication." Under the statutes, an "'oral communication' means any oral communications uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation. . . ." 18 U.S.C.A. § 2510 (2) (West 2000). Thus, a conversation is not an oral communication unless the conversants expect that the conversation is private and an objective third party would consider that expectation reasonable.

It is illegal to intercept an oral communication. "[A]ny person who . . . intentionally intercepts . . . any oral communication . . . shall be punished." 18 U.S.C.A. § 2511 (1) (West 2000). One exception to this prohibition involves a police officer; however, the police officer must be party to the conversation or one conversant must have consented to the taping for the exception to apply. "It shall not be unlawful under this chapter for a person acting under color of law to intercept [an] . . . oral . . . communication where such person is a party to the communication or one of the parties has given prior consent to the interception." 18 U.S.C.A. § 2511 (2)(c) (West 2000). If an oral communication is taped in violation of the eavesdropping statutes, the conversation cannot be used as evidence in court. "Whenever any . . . oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding . . . before any court . . . if the disclosure of that information would be in violation of this chapter." 18 U.S.C.A. § 2515 (West 2000).

Thus, if defendant's conversation was an oral communication, it should be suppressed. Whether the conversation is an oral communication turns on whether the defendant had a reasonable

expectation of privacy while seated in the rear seat of the patrol car. One prong of the two-prong test is satisfied; defendant and the driver appear to have had an expectation of privacy or they would not have made incriminating statements. The other prong of the test is whether their expectation was reasonable. They were not sitting in a privately-owned car. They were sitting in the officer's car. While an expectation of privacy in a privately-owned car would have been reasonable, an expectation of privacy in the officer's car was not reasonable. The officer's car is equivalent to the officer's office. If defendant and the driver were conversing in an office of a police station, it would not be reasonable to expect privacy.

In a case with similar facts, the issue before the United States Court of Appeals for the Eleventh Circuit was "whether the district court erred in denying the motion to suppress the tapes resulting from the secret recording of McKinnon's pre-arrest conversations while he sat in the back seat of the police car." *United States v. McKinnon*, 985 F.2d 525, 526 (11th Cir. 1993).

In *McKinnon*, police officers stopped a pick-up truck for failure to travel in a single lane on the Florida Turnpike. Theodore Pressley was driving and Steve McKinnon was the passenger. Pressley consented to the search of his vehicle. While the officers were searching, McKinnon and Pressley waited in the rear seat of the patrol car. There they made incriminating statements that were secretly recorded by the officers. The officers arrested them after finding cocaine in the truck and they were placed in the rear seat of the patrol car. The officers again recorded McKinnon's and Pressley's incriminating statements. *Id*.

The *McKinnon* court considered the meaning of the term "oral communication" under the federal statutes. An oral communication is protected against taping. If a conversation is taped in violation of the statutes, the tape may be suppressed. A conversation is an oral communication only if the conversants exhibited a subjective expectation of privacy and the expectation of privacy was objectively reasonable. The court seemed to agree with the government's argument that a patrol car functions as the officer's office and the rear seat of the patrol car functions as a jail cell. *Id*. at 527. The court held "that McKinnon did not have a reasonable or justifiable expectation of privacy for conversations he held while seated in the backseat area of a police car." *Id*. at 528.

In examining the facts of *McKinnon* and *Estrada*, the facts concerning the taping seem virtually identical. In each case, an officer asked two individuals to wait in the patrol car prior to their arrest. The officer taped their conversation in the rear seat of the patrol car; the conversation contained incriminating statements. One difference between the two cases is that the officer in *McKinnon* also taped McKinnon's conversation following his arrest. This difference is not significant because an arrestee held in the back of a patrol car would have a lesser expectation of privacy than a person not under arrest.

A number of state and a number of federal courts, other than the *McKinnon* court, have faced the issue of whether an officer may secretly tape a conversation of individuals seated in the rear seat of a patrol car. In each case the court has said that taping is permissible. Carol M. Bast & Joseph B. Sanborn, Jr., *Not Just any Sightseeing Tour: Surreptitious Taping in a Patrol Car*, 32 Crim. L. Bull. 123, 130–31 (1996).

Although persuasive authority in other circuits, *McKinnon* is mandatory authority in this circuit. The facts concerning the taping are virtually identical in *McKinnon* and *Estrada*. A number of other state and federal courts have also held that there is no reasonable expectation of privacy for persons seated in the back of a patrol car. Therefore, a court should find that Cruz and Luis had no reasonable expectation of privacy while they were seated in the rear seat of the patrol car. Because they did not have a reasonable expectation of privacy, their conversation was not protected against taping as an oral communication. Therefore, a court would not suppress the tape under the federal eavesdropping statutes.

Defendant has also made the argument that the search of her purse tainted the tape recording. Obviously, were the court to deny the defendant's motion to suppress the illegal drugs, there would be no taint that could attach to the tape. Even were the court to grant the defendant's motion to suppress the methamphetamines, the court should not grant the motion to suppress the tape. In all probability, defendant would have made the incriminating statements even if Officer Green had not searched her purse.

B. Because the officer followed standard procedure in requesting the defendants to wait in the patrol car, the defendants' incriminating statements were not related to the prior search of the car and the tape containing defendant's incriminating statements should not have been suppressed.

Where a police officer obtains evidence in an unconstitutional manner, that evidence is excluded from use at trial. If that evidence leads the officer to other evidence, the other evidence is derivative of the first evidence. The derivative evidence is known as fruit of the poisonous tree and is also inadmissible. Generally, evidence that is tainted by the prior unconstitutional conduct is inadmissible; however, in some instances the second evidence is admissible because the connection between the unconstitutionally-seized evidence and the subsequently obtained evidence is marginal.

The tape is not derivative of the evidence the officer discovered searching Estrada's purse. The tape should not have been suppressed.

Conclusion

For the reasons set forth above, the government requests this court to reverse the district court's order suppressing the methamphetamines and the tape recording and remand the case to the district court for trial.

Respectfully submitted,

_____

Florida Attorney, Esq.
Florida Bar Number 000000
Law Firm
Main Street

SUMMARY

- The appellate brief is a written statement submitted to an appellate court to persuade it of the correctness of one's position.
- When a party appeals, the appellate court's job is to review what the lower court did to determine whether the lower court committed reversible error.
- The standard of review is different depending on whether the appellate court is reviewing a finding of fact, a ruling of law, or a ruling on a question involving law and fact.
- The appellate court is bound to follow the trial court's finding of fact unless a jury finding was unreasonable or a trial judge's finding was clearly erroneous.
- When deciding a question of law or a question involving law and fact, the appellate court is free to reach a ruling different from that of the trial court.
- The appellate brief is persuasive in tone.
- Follow any applicable court rules (including local rules) governing the appellate brief.
- Rule 28 of the Federal Rules of Appellate Procedure requires:
  - A table of contents;
  - A table of authorities;
  - A statement of jurisdiction;
  - A statement of the issues;
  - A statement of the case;
  - A statement of the facts;
  - A summary of the argument;
  - An argument; and
  - A conclusion.

KEY TERMS

appellant's brief appellee's brief findings of fact

EXERCISES

1. Pick one of the research problems from Appendix E.
2. Research the problem you have chosen.
3. Write an appellate brief using your research.

CYBERLAW EXERCISES

1. Bryan Garner is an authority on legal writing and his company's Web site is located at <http://www.lawprose.org/>. In 2006–2007 he interviewed eight of the nine justices on the United States Supreme Court concerning legal writing and posted the video interviews linked to the Web site. Go to the Web site, watch the video of one of the justices, and list three legal writing tips the justice provides.
2. When writing legal documents for the first time, it may be helpful to look at examples. This chapter provides some examples. A number of law school professors have posted sample documents on the Internet. Professor Colleen Barger at the University of Arkansas at Little Rock School of Law had a Web site that links to pages of other legal research and writing professors (<http://www.ualr.edu/cmbarger/>).

3. In a written opinion, a judge may commend an attorney for the quality of the attorney's appellate brief and you may be able to access the brief on WESTLAW. Search for quality briefs using terms such as "commend," "quality," and "brief" within the same sentence.
4. LLRX-ResearchWire:Litigator's Internet Resource Guide, located at <http://www.llrx.com>, offers access to federal and state court rules at <http://www.llrx.com/courtrules/>. See if you can access the various court rules for your state. Find local federal and state court rules that apply to the area in which you are located.
5. Access several appellate briefs from your state on WESTLAW and compare them to the examples in this chapter.

DISCUSSION POINTS

1. Locate an appellate brief and compare it in substance and format to the two sample appellate briefs in this chapter. How do the documents differ?
2. What is the purpose of the table of contents and the table of authorities?
3. Why do court rules govern appellate briefs in detail?

Student CD-ROM
For additional materials, please go to the CD in this book.

Online Companion™
For additional resources, please go to http://www.paralegal.delmar.cengage.com.

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APPENDIX A

Search and Seizure

INTRODUCTION

You were introduced to Jennifer Weiss in Chapter 2. A fellow student was giving Jennifer a ride home. When almost to Jennifer's house, they were pulled over by a police officer who claimed the window tinting on their car was too dark. After the driver consented to a search of the car, the officer discovered that Jennifer's large bottle of OxyContin was a prescription for someone else, making the officer suspicious that Jennifer was a drug dealer. While the search was proceeding, Jennifer was seated in the backseat of the patrol car talking on her cell phone, with the police officer recording her side of the conversation. Jennifer was arrested after the name on her driver's license did not match the prescription. Jennifer wants to defend herself against the pending federal charges of possession of illegal drugs.

Jennifer wondered whether the car stop was constitutional because no violation of any traffic ordinance supported the stop. She wondered if she can challenge the constitutionality of the stop. Jennifer was unsure whether the police officer had the right to tape what she said in the back of the patrol car.

If you were to research Jennifer's case, you might discover primary sources such as *Brendlin v. California*, 127 S. Ct. 2400 (2007), federal case law discussing the constitutionality of a traffic stop unsupported by a traffic violation, and federal eavesdropping statutes. Research also discovered information from a secondary source concerning search and seizure. Appendix M contains this information.

In *Brendlin*, the issue was whether a passenger in the car could challenge the constitutionality of the traffic stop. A 2003 federal case discusses the constitutionality of an officer stopping a vehicle on the misimpression that the driver violated a traffic ordinance and whether the federal eavesdropping statutes allow a police officer to tape-record suspects' conversations while seated in the back of a patrol car. *United States v. Chanthasouxat*, 342 F.3d 1271 (11th Cir. 2003). Chapter 2 (page 36) contains the Jennifer Weiss Search and Seizure Problem; Chapter 2 also contains a discussion of federal case law on an officer's mistake as to a traffic violation. Chapter 4 (pages 109–117) contains *Brendlin v. California*. Chapter 5 contains an explanation of the eavesdropping statutes and Appendix L contains the text of the statutes.

Relevant Primary Sources

The following are potentially relevant primary sources for resolving the Jennifer Weiss search and seizure problem:

1. U.S. Const. amend. IV.
2. *Brendlin v. California,* 127 S. Ct. 2400 (2007).
3. 18 U.S.C.A. § 2510 (West 2007).
4. 18 U.S.C.A. § 2511 (West 2007).
5. 18 U.S.C.A. § 2515 (West 2000).
6. *United States v. Chanthasouxat,* 342 F.3d 1271 (11th Cir. 2003).

RESEARCH AND WRITING EXERCISES

1. Read *Chanthasouxat* and write a case brief of the case.
2. Use a citator to determine whether *Chanthasouxat* is still good law and whether there is any more recent case law on an officer's mistake of law and an officer's mistake of fact concerning the driver's alleged violation of a traffic ordinance.
3. Research to find the most recent case law in your federal circuit deciding how a court would treat an officer's mistake of law and an officer's mistake of fact concerning whether the driver violated a traffic ordinance. Write a case brief of the case.
4. Write a client opinion letter to Jennifer Weiss explaining her chances of prevailing in the lawsuit.
5. Write a law office memo concerning Jennifer Weiss and her chances of prevailing in the lawsuit.
6. Write a memorandum of law either in support of or in opposition to Jennifer Weiss' motion to suppress the evidence found in the car.
7. Imagine that the trial court judge suppressed the evidence found in the car and the government is appealing the decision. Write either the appellant's or the appellee's brief in the case.

APPENDIX B

Locating and Citing to Cases

This appendix gives you a summary of basic citation rules. For a more detailed explanation of the citation rule for a particular authority, refer back to the chapter in which the authority was discussed.

LOCATION OF CASES

Cases are generally found in the law library in **looseleaf publications**, **advance sheets**, or **reporters**. Libraries designated as government depositories may also have cases in slip opinion form. For the names of the looseleaf publications and reporters for federal court cases, refer to the following chart. You will need to obtain the names of the looseleaf publication (if any) and reporters for your state's cases from your professor or from your own research. You would use the looseleaf publication to read recently announced cases that are not yet contained in the advance sheets or reporters. Once a case is available in the advance sheets or the reporters, you would cite to the reporter rather than to the looseleaf publication.

Cases in looseleaf publications, advance sheets, and reporters are organized chronologically.

looseleaf publications
The legal sources appearing in looseleaf publication format include state annotated codes, state administrative codes, formbooks, and services providing a collection of source material in a particular subject area. The information in looseleaf services is stored in binders rather than formatted as hardbound volumes and paper pamphlet supplements.

advance sheets
"Hot off the press" unbound copies of case decisions that will later be printed with other cases in bound form.

reporters
Sets of books containing published court decisions.

Reporters and Looseleaf Services

Federal

United States Supreme Court

- *United States Law Week* (looseleaf)
- *United States Reports* (official)
- *Supreme Court Reporter* (unofficial—West)
- *United States Supreme Court Reports, Lawyers' Edition* (unofficial—LexisNexis)

United States Circuit Courts of Appeal

- *Federal Reporter* (unofficial—West)
- *Federal Appendix* (unofficial—West)

United States District Courts

- *Federal Supplement* (unofficial—West)

State

- (fill in for your state)
- Court of last resort
- Intermediate appellate court
- Trial court(s)

Cases from a particular court may be printed in more than one reporter. Where a case is published in more than one reporter, parallel citations are citations to the various reporters containing the authority being cited. For example, United States Supreme Court opinions are printed in three different reporters: *United States Reports*, *Supreme Court Reporter*, and *United States Supreme Court Reports, Lawyers' Edition*. The text of the court opinion is identical in each of the three reporters, but the material preceding the case, which is prepared by the publisher, is different. The reporter prepared by the government or under authority of the government is referred to as the "official reporter." The official reporter for United States Supreme Court opinions is *United States Reports*. Although *United States Reports* is considered the official reporter, many law libraries may only have one of the other two reporters. Because *United States Reports* is a government publication, it lags considerably behind the other two reporters in publication date and does not contain the headnotes and other material prepared by the commercial publisher of the other two reporters.

As shown in the box below, West publishes seven different regional reporters. A particular regional reporter will contain state cases from courts in a particular region of the country. For example, *North Eastern Reporter* contains cases from Illinois, Indiana, Ohio, New York, and Massachusetts. With the wide availability of the regional reporters, many states that used to have official reporters as well as the regional reporters no longer publish official reporters.

The West regional reporters and the states covered are:

Atlantic Reporter	Maine, New Hampshire, Rhode Island, Connecticut, New Jersey, Delaware, District of Columbia, Vermont, Pennsylvania, Maryland
North Eastern Reporter	Illinois, Indiana, Ohio, New York, Massachusetts
North Western Reporter	North Dakota, South Dakota, Nebraska, Minnesota, Iowa, Wisconsin, Michigan
Pacific Reporter	Alaska, Hawaii, Washington, Oregon, Nevada, California, Montana, Idaho, Wyoming, Utah, Arizona, New Mexico, Colorado, Kansas, Oklahoma
South Eastern Reporter	Georgia, South Carolina, North Carolina, Virginia, West Virginia
South Western Reporter	Texas, Arkansas, Missouri, Kentucky, Tennessee
Southern Reporter	Louisiana, Mississippi, Alabama, Florida

There are three important pieces of information you need to find a case. First, you need to know what series of what reporter it is in. You will find that many law books with multiple volumes are published in series. When the volume numbers of a reporter are so large that they become unmanageable, the publisher will start a new series of reporter beginning with volume 1. The series are designated by ordinal numbers with the highest series number containing the most recent information. For example, the most recent United States Supreme Court opinions are published in *United States Supreme Court Reports, Lawyers' Edition, Second Series*, abbreviated "L. Ed. 2d." Assume you wanted to find *Brown v. Board of Education* and you know the partial citation in *Lawyers' Edition* is "98 L. Ed. 873." First of all, "L. Ed." tells you that you would need to look in the first series rather than the second series of the reporter. Each time you write a citation or pull a case, make sure you have the correct series.

The second and third things you need to know are the volume number and the page on which the case begins. In a citation, the volume number precedes the abbreviation for the reporter and the page number follows it. In the citation for *Brown*, "98" is the volume number and "873" is the first page of the case.

PUBLISHED AND UNPUBLISHED CASES

Some courts differentiate between "published" and "unpublished" cases. Reasons for designating an opinion as unpublished include limiting the number of opinions produced, encouraging a more cohesive body of law, and conserving judicial time and resources. If a court deciding a case designates it as published, this means that the case will be published in a print reporter and the case is precedential.

If a court designates a case as unpublished, the court is indicating that the case is binding on the parties to the case but does not serve as precedent for other cases; however, designating a case as unpublished does not necessarily mean that it is unavailable as a print or digital publication, or both. A case designated as unpublished would not be printed in an official reporter but might be available in a reporter produced by a commercial publisher or online. An unpublished case is not considered binding authority except by the parties to the case and an attorney might choose to cite to an unpublished decision as persuasive authority.

Beginning in 2001, West differentiated published and unpublished opinions of the federal courts of appeals by publishing the two types of cases in different reporters. *Federal Reporter* contains cases that the federal courts of appeals designated as published, while *Federal Appendix* contains cases that the federal courts of appeals designated as unpublished. For example, a federal court of appeals might designate one case as published and a second case as unpublished. The court would make the first case available to West, which would publish the case in *Federal Reporter*. The court could also make the second case available to West, which would publish the case in *Federal Appendix*.

Some courts have court rules prohibiting an attorney from citing to an unpublished opinion. Until fairly recently, the federal courts of appeals were inconsistent in their treatment of unpublished cases and the restrictions on their use by attorneys. Rule 32.1 of the Federal Rules of Appellate Procedure was adopted to ensure consistency among the circuits. Under the rule, a court may not prohibit an attorney from citing to an unpublished opinion decided on or after January 1, 2007 and an attorney citing to a case not readily available online must file a copy of the case with the document in which the case is cited.

CASE CITATIONS

A citation is an abbreviation used to refer to a legal authority that allows the reader to find the legal authority in the law library. When you answer a research question or perform legal analysis, it is expected that your answer or analysis be backed up by a citation to your legal authority. It is important for you to learn correct citation form, because that form allows legal professionals to speak the same language. Correct usage is a sign of excellence.

Citations are integral to formal legal documents. Legal citations have several purposes. Legal writers use them to identify the source of a quotation or the authority for a statement. A legal researcher uses them to locate the cited source. The reader uses them to obtain information concerning the source. For example, case citations indicate the precedential authority by identifying the level of the deciding court and the year of the decision. A final purpose, perhaps more aspirational than realistic, is to allow the layperson access to the law.

Citation Manuals

The Bluebook: A Uniform System of Citation
The style guide for legal citation published by the Harvard Law Review Association in conjunction with the Columbia Law Review, the University of Pennsylvania Law Review, and The Yale Law Journal.

For years, ***The Bluebook: A Uniform System of Citation***, published by several prominent law reviews, has been the standard for citation. The eighteenth edition of *The Bluebook* was published in 2005. *The Bluebook* has been criticized for being too detailed and hard to learn; *The Bluebook* is over 400 pages long, with 41 pages of materials introductory to legal citation called "Bluepages," 21 multipart citation rules, and 187 pages of tables and lists of abbreviations.

Many states have their own citation rules, which may be found in state statutes or court rules; law school students usually do not study the state-specific citation rules and must learn them on their own after law school.

ALWD Citation Manual
The style guide for legal citation produced by the Association of Legal Writing Directors.

The ***ALWD Citation Manual*** was published in 2000, with a second edition published in 2003, and a third edition published in 2006. Although slightly longer in page length than *The Bluebook*, the *ALWD Citation Manual* is considerably more reader-friendly and is more easily used in the classroom as a teaching tool. The Association of Legal Writing Directors hoped that the *ALWD Citation Manual* would be adopted by enough law schools and practicing attorneys that the *ALWD Citation Manual* would gradually supplant *The Bluebook*. Information concerning the *ALWD Citation Manual* can be found at <http://www.alwd.org/publications/citation_manual.html>.

There is also a movement toward universal citation form. Traditional case citation form is tied to the print medium; it references a particular volume and page number. In addition, traditional citation form references the product of a particular publisher. Universal citation form is both medium and publisher neutral; it can be used with the CD-ROM, online, or print version of a case and does not reference any particular publisher's product.

Universal Citation Guide
The style guide for legal citation published by the American Association of Law Libraries. The legal citations in this guide are medium and publisher neutral.

The American Association of Law Libraries published its ***Universal Citation Guide*** in 1999. The *Universal Citation Guide* gives the recommended universal citation form for federal and state cases, constitutions, statutes, and administrative regulations. Because the *Universal Citation Guide* is relatively new, it is unclear what effect it will have on the legal community. Universal citation form had been adopted by a number of states prior to the publication of the *Universal Citation Guide*. If the trend continues, more states will adopt universal citation form.

Basic Citation Form

This section explains the basics of citation form for cases and then gives you sample citations for federal and state cases. The sample citation forms in this book approximate *Bluebook* form. The suggestion is to either learn citation forms from this book or learn the citation forms contained in your state's citation rule. Your professor can tell you which he or she prefers. Those citation forms will be the only ones you will need much of the time. If the form for something you need to cite is not in this book or in your state's citation rule, you can refer to *The Bluebook*.

CITATION TIP

Citation Form

Do not assume that the legal citations found when researching are in correct citation form. Citations, even those included in cases, may or may not comply with the citation rules your professor has asked you to use. Always check your citations against the appropriate citation rule for correct form.

There is a certain framework for case citations that is fairly consistent for cases from all courts. Look at the following citation and analyze its components.

Citation for *United States v. Walker*

United States v. Walker [Case name], 933 [Volume] F.2d [Abbreviation for Federal Reporter, Second Series] 812 [Initial page] (10th Cir. [Abbreviation for the United States Court of Appeals for the Tenth Circuit] 1991 [Year in which case was decided]).

The name of the case comes first, is italicized (or underlined), and is followed by a comma. Only the name of the first party on each side is given, with "v." (for versus) in between. The United States of America is the plaintiff-appellant. "Walker" is the last name of the defendant-appellee. The number "933" is the volume number, "F.2d" is the abbreviation for *Federal Reporter, Second Series*, and "812" is the page on which the case begins. If needed, the first information within the parentheses identifies the court deciding the case. *Walker* was decided by the United States Court of Appeals for the Tenth Circuit, but only the number of the circuit is stated in the citation. You know it is a United States court of appeals case because the *Federal Reporter* contains only United States court of appeals cases. The year within the parentheses is the year in which the case was decided. Make sure you put the year of the decision in your citation rather than the year in which the case was argued.

CITATION TIP

Case Names

In a reporter, a case begins with the full name of the case, a portion of the name appearing in all capital letters. Unless your reader requires *Bluebook* form for case names, use that portion of the case name that appears in all capitals, with the further modifications explained in this paragraph as the case name in your citation. You will have a very close approximation of *Bluebook* form without having to master a very complicated *Bluebook* rule.

Caveat: This does not give you an excuse not to follow the *Bluebook* if your instructor or your reader requires conformance with the *Bluebook*.

For case names, individuals are referred to only by their surnames. When the United States of America is a party to a case, the citation needs to show "United States" rather than "United States of America" or "U.S." If a state is a party to the case and the case is being decided by a court of the state, the citation should contain only "State," "Commonwealth," or "People." If a state is a party to the case but the case is being decided by a court other than a court of the state, then the citation should contain only the name of the state, for example "Minnesota," not "State of Minnesota."

CITATION TIP

Italics

Certain citations call for the use of italics. For example, in a case citation, the name of the case is in italics. You may substitute underlining for italics. Choose either italics or underlining; do not both underline and italicize.

CITATION TIP

Ordinal Numbers

In legal citations the ordinal numbers "second" and "third" are abbreviated to "2d" and "3d." For all other ordinal numbers, use the standard abbreviations.

CITATION TIP

Citations Contained in Hyperlinks

In an online database such as WESTLAW or LexisNexis, many citations are underlined and are presented in color. The underlining and color indicate that the citation is hyperlinked to the source referenced by the citation. The color is not part of the citation, nor is the underlining unless indicated by your citation rules.

Subsequent History

After the United States Court of Appeals for the Tenth Circuit decided *Walker*, the United States petitioned for a rehearing. The petition was denied in a four-page order. *United States v. Walker*, 941 F.2d 1086 (10th Cir. 1991). The United States then petitioned for writ of certiorari to the United States Supreme Court. In *United States v. Walker*, 502 U.S. 1093 (1992), the petition was denied. The denial of the rehearing and the denial of the petition for writ of certiorari are called subsequent history because they happened subsequent to or after the Tenth Circuit's decision in *Walker*.

CITATION TIP

Subsequent History

Connect subsequent history to the end of the citation of the lower court decision by explaining what the higher court did, underlining the explanation, and setting it off by commas. "Certiorari denied" should be abbreviated to "*cert. denied*," "affirmed" should be abbreviated to "*aff'd*," and "reversed" should be abbreviated to "*rev'd*." Otherwise the explanation should be written out, for example, "*vacated*." *The Bluebook* instructs you to omit information on denial of certiorari unless the case is less than two years old or there is a particular reason to include the information.

When citing to a case, you must give your reader all subsequent history except for denial of a rehearing, history on remand, and denial of certiorari or denial of review by a court with discretionary review unless the case for which certiorari or review is sought is less than two years old. The reason you would not give the citation for the denial of a rehearing is that many parties routinely petition for a rehearing and the rehearing is routinely denied. A denial of a rehearing is different from a court denying review or the United States Supreme Court denying a petition for certiorari. A rehearing is denied by the same court that has already rendered a decision. In contrast, only a higher court can deny review or deny a petition for certiorari. Therefore, a denial of review or a denial of a petition for certiorari is important enough to be given as subsequent history for two years after the case has been decided, whereas denial of rehearing is not. The two-year period was selected because the appeal of a case to a higher court is generally concluded within two years of the lower court decision. Subsequent history indicating denial of certiorari or denial of review

within the two-year period tells the reader the lower court decision is final. When citing to a case, you would not give subsequent history for the United States Supreme Court granting certiorari unless the Court has granted certiorari, but has not yet reached a decision in the case. The reason that you would not include the grant of certiorari is because it is obvious that the Court granted certiorari if the Court issued a decision in the case. By the same token when citing to a case, you would not give subsequent history for an appellate court granting review unless the court has granted review, but has not yet reached a decision in the case. The reason that you would not include the grant of review is because it is obvious that the court granted review if the court issued a decision in the case. When an appellate court remands a case, it sends it back to the lower court to redo something the lower court did incorrectly before. The appellate decision in which the appellate court lays down the rule of law to be followed by the lower court on remand, and not the lower court decision in which the rule of law is carried out, is more important for its precedential value. For that reason, history on remand is not usually cited in subsequent history.

The full citation of *Walker*, including subsequent history, is shown in the following box.

Full Citation of *United States v. Walker*

United States v. Walker, 933 F.2d 812 (10th Cir. 1991), *cert. denied* [Abbreviation for certiorari denied], 502 [Volume] U.S. [Abbreviation for United States Reports] 1093 [Page] (1992 [Year in which case was decided]).

Caveat: The subsequent history of certiorari being denied is included for the citation to *Walker* in this appendix as an example of citation form only. According to the rule explained previously, denial of certiorari would be included as subsequent history only for the two years after the 1991 decision by the Court of Appeals for the Tenth Circuit.

Notice that you place a comma after the first parentheses; italicize (or underline) the explanation of what happened in subsequent history ("*cert. denied*" explains that certiorari was denied); add a comma; identify the volume, reporter, and page at which certiorari was denied; and give the year of the denial. As explained earlier, the citation to subsequent history includes the citation to where the United States Supreme Court denied the petition for certiorari, but not the citation to where the Court of Appeals for the Tenth Circuit denied the petition for rehearing.

Page Numbers

When you are referring to specific information from a case or you are quoting from a case, you need to give a *pinpoint*, *locus*, or *jumpcite* page reference to the page or pages on which the material was found. Page references to material within a case can be made part of your full citation as shown in the following box.

Page Reference within *Walker*

United States v. Walker, 933 F.2d 812 [First page of case], 813–14, 816 [Material referred to found on pages 813 through 814 and page 816] (10th Cir. 1991), *cert. denied*, 502 U.S. 1093 (1992).

The page numbers in this citation mean that 812 is the first page of the case, and the material you are referring to is found on pages 813 through 814 and on page 816. If you

wanted to refer to material on the first page of the opinion, you would repeat the number of the first page and separate the numbers by a comma. Notice that where you are referring to pages inclusive, such as pages 813 through 814, you join the page numbers by an en dash or a hyphen and retain only the last two digits of the second number.

CITATION TIP

Pages

When citing to consecutive pages, give the first and the last page numbers or statutory numbers, joined by a hyphen. When citing to nonconsecutive pages or statutory sections, separate the pages and sections by commas. The first example illustrates the use of hyphens for consecutive pages (14 through 15). The second example illustrates the use of a comma for nonconsecutive pages (249 and 251).

Terry v. Ohio, 392 U.S. 1, 14–15 (1968).

Florida v. Jimeno, 500 U.S. 248, 249, 251 (1991).

United States Supreme Court cases

Cases appear in *United States Law Week* before they are printed in the reporters. The following box contains the citation for *Wyoming v. Houghton* in *United States Law Week*. The citation to *United States Law Week* is used only until the case is published in one of the three reporters containing decisions of the United States Supreme Court.

Citation to *Wyoming v. Houghton* in *United States Law Week*

Wyoming v. Houghton, 67 U.S.L.W. 4225 (1999).

If the case has been printed in a reporter you should give the citation to a reporter rather than to the looseleaf service. *The Bluebook* requires a citation to *United States Reports, Supreme Court Reporter*, or *United States Supreme Court Reports, Lawyers' Edition*, in that order of preference. At the time this book was being written, *Wyoming v. Houghton* was published in *United States Reports, Supreme Court Reporter*, and *United States Supreme Court Reports, Lawyers' Edition*. Because *The Bluebook* prefers *United States Reports* over *Supreme Court Reporter* and *United States Supreme Court Reports, Lawyers' Edition*, the citation would be to *United States Reports*. The following box shows *The Bluebook*-required citation to *United States Reports*.

Citation to *Wyoming v. Houghton* in *Bluebook* Form

Wyoming v. Houghton, 526 U.S. 295 (1999).

Although *The Bluebook* does not require you to give parallel citations to United States Supreme Court cases, you may give parallel citations to those cases, as shown in the following box; they are often helpful to readers with more limited library resources.

Citation to *Wyoming v. Houghton* with Parallel Citations

Wyoming v. Houghton, 526 U.S. 295, 119 S. Ct. 1297, 143 L. Ed. 2d 408 (1999).

If you are citing to only one reporter, cite to *United States Reports*, if the case is contained in it. If the case has not yet appeared in *United States Reports*, cite to *Supreme Court Reporter*. If the case has not yet appeared in *United States Reports* or *Supreme Court Reporter*, cite to *United States Supreme Court Reports, Lawyers' Edition*.

United States court of appeals cases

Federal Reporter contains cases decided by the United States courts of appeals that have been designated by the courts for publication. *Federal Appendix*, which started publication on September 1, 2001 for those cases decided after January 1, 2001, contains cases decided by the United States courts of appeals not designated for publication. The abbreviation for *Federal Appendix* is "F. App'x."

The following box shows a citation to a case reported in *Federal Reporter* from a United States court of appeals. A citation to a case in *Federal Appendix* would follow the same format, except for substituting "F. App'x" for "F.2d."

Citation to *United States v. Walker*

United States v. Walker, 933 F.2d 812 (10th Cir. 1991), *cert. denied*, 502 U.S. 1093 (1992).

United States district court cases

The following box contains a citation to a case from the United States District Court for the Northern District of Texas.

Citation to *Sexton v. Gibbs*

Sexton v. Gibbs, 327 F. Supp. 134 (N.D. Tex. 1970), *aff'd*, 446 F.2d 904 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972).

Notice that "Northern District of Texas" has been abbreviated to "N.D. Tex." You know from this citation that Texas has more than one district. Some federal districts are divided into divisions. The parenthetical information should identify the district, but not the division within the district. Some of the less populous or smaller states, such as New Jersey, have only one United States district court to cover the whole state. The abbreviation for the United States District Court for the District of New Jersey would be "D.N.J." After *Sexton* was decided by the United States District Court for the Northern District of Texas in 1970, it was affirmed by the United States Court of Appeals for the Fifth Circuit in 1971 and certiorari was denied by the United States Supreme Court in 1972. One might want to cite to the lower court opinion for an issue not considered by the higher court or for facts or procedural history of the case not described in the higher court opinion. Even so, citation rules require the citation to the lower court opinion to include information informing the reader that the case was later decided by a higher court.

State courts

In many states, decisions of the state courts are reported in more than one reporter. Often, one reporter is the official state reporter and the other reporter is a regional reporter prepared by West, a commercial publisher. As explained earlier in this chapter, the regional reporter contains state court decisions of a number of states. A state court rule or a local court rule may require a distinction in citation form between a state case cited in a document filed in

a court of the state and a state case from another state filed in state court. In many states, when citing to a case decided by a state court of the same state, the citation includes parallel citations, with the reference to the official reporter preceding the reference to the regional reporter; this information allows a researcher to easily locate the case in both reporters. In many states, when citing to a case decided by a state court of another state, the citation includes only the information allowing the reseacher to locate the case in the regional reporter.

The following box contains two citations to a case decided by the Supreme Court of Utah. The first citation would be used in a document filed in a Utah state court, and the second citation would be used in a document filed in a state court other than Utah.

Citation to *Peters v. Pine Meadow Ranch Home Ass'n*

Peters v. Pine Meadow Ranch Home Ass'n, 2007 UT 2, 151 P.3d 962.
Peters v. Pine Meadow Ranch Home Ass'n, 151 P.3d 962 (Utah 2007).

Notice that Utah uses public domain citation format, with "2007" identifying the year of the decision, "UT" identifying the Supreme Court of Utah, and "2" identifying the second decision of the year. Paragraphs within the decision are numbered consecutively, allowing the researcher to easily locate material referenced by pinpoint citation to the paragraph. Notice that the second citation is to a regional reporter. Because *Pacific Reporter* contains cases from a number of the states, the parenthetical information must identify that this is a case from Utah. You know that the case is from the highest court in the state, the Supreme Court of Utah, because there is no further identification of the court. If the case were from the Utah Court of Appeals, "Utah Ct. App." would appear in the parentheses preceding the year of the decision.

KEY TERMS

advance sheets
ALWD Citation Manual
looseleaf publications
reporters
The Bluebook: A Uniform System of Citation
Universal Citation Guide

APPENDIX C

Rules for Quotations and Short-Form Citations

INTRODUCTION

Many students have a mental block about using quotations and short-form citations in their legal writing. They have so convinced themselves that they will never master the rules of quotations and short-form citations that they structure their writing to avoid having to deal with quotations and short-form citations at all. This appendix is designed to help you through this "writer's block." First, it gives you the most basic rules for quotations and short-form citations and then it lets you practice applying the rules by working through some exercises. These basic rules should be sufficient for your writing assignments in a legal writing class. If you have questions not covered by the rules, refer to the *Bluebook* or the *ALWD Citation Manual*.

The Bluebook rules for law review articles differ in many respects from rules used in the other types of legal writing you will be doing. The rules discussed in this appendix can be used for all types of legal writing other than law review articles. If you have the occasion to write a law review article, you will need to follow either the *Bluebook* or the *ALWD Citation Manual*.

QUOTATIONS

To quote or not to quote

When your authority is constitutional or statutory provisions, it is a good idea to quote the relevant portions of those provisions. The reason is that each word in those provisions has been carefully selected and a court interpreting those provisions will use the wording of those provisions as a starting point. Focus your reader's attention by quoting only those portions that are relevant. You may want to make sure your reader understands a complicated provision you have quoted by pairing the quotation with a summary of the provision in your own words. You do not need to quote constitutional or statutory provisions if they are simple and you can put them in your own words.

For example, if you are discussing several federal statutes, you would want to quote the relevant portion of the statutes. Because the statutory language would be difficult for your reader to understand, you might also summarize several of the quoted portions of the statutes in your own words. The following paragraph illustrates this use of quotations.

> It is illegal to intercept an oral communication. "[A]ny person who . . . intentionally intercepts . . . any oral communication . . . shall be punished." 18 U.S.C.A. § 2511 (1) (West). One exception to this prohibition involves a police officer; however, the police officer must be party to the conversation or one conversant must have consented to the taping for the exception to apply. "It shall not be unlawful under this chapter for a person acting under color of law to intercept [an] . . . oral . . . communication where such person is a party to the communication or one of the parties has given prior consent to the interception." 18 U.S.C.A. § 2511 (2)(c) (West). If an oral communication is taped in violation of the eavesdropping statutes, the conversation cannot be used as evidence in court. "Whenever any . . . oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding . . . before any court . . . if the disclosure of that information would be in violation of this chapter." 18 U.S.C.A. § 2515 (West 2000).

This paragraph uses ellipses (. . .) and brackets ([ ]). The use of ellipses and brackets is explained later in this appendix.

Quoting from cases is a little different from quoting from constitutions or statutes. Your own personal writing style determines to a great extent whether you use quotations in your legal writing and how many you use. You do not have to use any quotations at all if you can state everything in your own words. On the other hand, if you like to quote, do not use so many quotations that your writing is mostly quotations with very little in between. A reader who is faced with a number of long block quotes may be tempted to skip over the block quotes and read only what is between the quotes. Your goal is to keep your reader interested in what you have written. Quotations should be reserved for well-stated passages that you would have trouble stating in your own words. You may want to quote a portion of the issues, the holdings, and the reasoning. Usually you would not quote the facts, the case history, or the results because you can state those portions of the case better yourself.

QUOTE ACCURATELY

When you quote, your quote must be accurate down to punctuation and case of letters. (An "uppercase" letter means a capital letter and a "lowercase" letter means a small letter.) If your reader happens to check your quotation against the original source and finds differences, the reader will know you have been sloppy. Then the reader will wonder how far the sloppiness extended. If the writer did not take the time to quote accurately, perhaps the writer did not take the time to research thoroughly. You will quickly lose your credibility and the reader's confidence by not quoting accurately.

AVOID PLAGIARISM

Be wary of the possibility of plagiarism. Plagiarism occurs when you use portions of someone else's writing without indicating that you are quoting. It also occurs when your paraphrasing of portions of a case differs little from the wording of the case except for word order. One way to avoid this is to quote. A second way is to spend enough time with the case that you know it intimately ("internalize" it) and can write about it as if you were telling someone a story. Test yourself to see whether you understand a case by explaining it out loud to someone else. If you have trouble, go back and read the case again until you understand it.

EXHIBIT C-1
Basic Quotation Rules.

Basic Quotation Rules

1. **Use of ellipses.** Delete any unnecessary wording. If the wording is in the middle of a quoted passage, indicate the deletion by using an ellipsis. Do not use an ellipsis when you are omitting something at the beginning of a quoted passage. Whether you use an ellipsis at the end of a quoted passage depends on whether you are quoting a complete sentence or a phrase used as part of your sentence. When quoting a complete sentence and omitting something at the end of the sentence, insert an ellipsis before the final punctuation of the sentence. When quoting a phrase, do not use an ellipsis at the end of the phrase.
2. **Use of brackets.** Add your own words to make the quotations easier to understand and place your words inside brackets. When you are changing a letter from upper to lowercase or from lower to uppercase, place the changed letter in brackets. You can replace a word in the quoted material with one of your own, so long as you bracket the word substituted for the original. Where a word is altered in this way, there is no need to include an ellipsis to indicate the omission.
3. **Omission of citations.** When you omit a citation, you do not need to replace it with an ellipsis if you use an explanatory parenthetical explaining this. (See 8 below.)
4. **Adding emphasis.** Add emphasis to quoted words by italicizing or underlining them and indicate this change in an explanatory parenthetical. (See 8 below.)
5. **Placement of punctuation and quotation marks.** Place periods and commas inside quotation marks and other punctuation outside the quotation marks unless the punctuation was part of the original quotation.
6. **Use of quotation marks.** Do not use quotation marks at the beginning and the end of a block quote; but do use quotation marks in block quotes when the passage you are quoting in turn quotes something else. For quotes other than block quotes, precede and follow the quoted language with quotation marks. Quotation marks for quotations within quotations alternate double and single quotation marks with the outermost quotation marks double.
7. **Placement of the citation to the quoted passage.** The citation to the quoted passage should be fairly close to the passage and may precede or follow it. The citation may appear in a textual sentence or in a citation sentence. A citation following a block quote should be placed back at the left-hand margin.
8. **Use of explanatory parentheticals.** When the case you are quoting in turn quotes a second case, identify the second case, including a page reference to the quoted material, by using an explanatory parenthetical. Explain you have underlined something or omitted citations by using an explanatory parenthetical.
9. **Paragraph structure.** In block quotes, indicate the paragraph structure by indenting the beginning of paragraphs; however, indent the beginning of the first paragraph only if there were no words omitted from the beginning of the paragraph. Indicate the omission of language from the beginning of subsequent paragraphs by an indented ellipse (. . .). Within the block quote, indicate the omission of one or more entire paragraphs from the quoted language by indented four periods (. . . .).

Rules for Block Quotations

1. Use if quotation is fifty words or more.
2. Indent left and right.
3. Do not enclose in quotation marks.
4. Place citation at left-hand margin.

TYPES OF QUOTATIONS

Quotations can appear:

1. as block quotations;
2. as complete sentences within your paragraph; or
3. as phrases within your sentence.

The following sections of this appendix will discuss the three types of quotations in that order.

Block Quotations

A "block quotation" is a long quotation that looks like a "block" on the page. It is set off from the rest of your writing by double-spacing and is indented left and right. Do not use quotation marks around the outside of the block quote. You may use quotation marks inside the block quote if the passage you are quoting in turn quotes something else. If your citation follows the block quote, place your citation back at the left-hand margin. *The Bluebook* tells you to use a block quote if the quotation contains at least fifty words. This is a good rule of thumb that is frequently violated by block quoting shorter passages. Unless your professor wants you to adhere strictly to this rule, use a block quote when the block quote format makes the quotation easier to understand.

Sample Block Quotation

The following is a sample block quotation from *United States v. McKinnon*, 985 F.2d 525, 527 (11th Cir. 1993). The superscript numbers, which indicate editing changes, correspond to the numbered basic quotation rules, and appear in the example to help you understand the changes from the original text.

> [9]McKinnon asserts that the tape recording of his pre-arrest conversations violates Title III and his Fourth Amendment right to privacy. . . .[1] The government argues that the recording of McKinnon's conversation does not constitute the recording of an "oral communication" as defined in 18 U.S.C. § 2510(2). . . .[1]
>
> The legislative history of Title III directs that we consider "oral communication"[6] in light of . . .[1] constitutional standards. . . .[1] The constitutional question is "whether the person invoking its [Fourth Amendment][2] protection can claim a 'justifiable,' a 'reasonable,'[6] or a 'legitimate expectation of privacy' that has been invaded by government action."[6] Hence, the statutory and constitutional test is whether a reasonable or justifiable[4] expectation of privacy exists.
>
> This test has two prongs. First, whether McKinnon's conduct exhibited a subjective expectation of privacy; second, whether McKinnon's subjective expectation of privacy is one that society is willing to recognize as reasonable.

United States v. McKinnon, 985 F.2d 525, 527 (11th Cir. 1993)[2] (quoting *Smith v. Maryland*, 442 U.S. 735, 740 (1979)[8] (referring to *Katz*)) (emphasis added)[4] (citations omitted)[3].

Now compare the block quote with the original case text:

> McKinnon asserts that the tape recording of his pre-arrest conversations violates Title III and his Fourth Amendment right to privacy. Title III prohibits unauthorized interception and disclosure of oral communications. 18 U.S.C. § 2511. The government argues that the recording of McKinnon's conversation does not constitute the recording of an "oral communication" as defined in 18 U.S.C. § 2510(2). Title III defines "oral communication" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such exception, but such term does not include any

electronic communication." 18 U.S.C. § 2510(2). Thus, we must decide the statutory question gleaned from Title III's language and the legislative history. That is, whether the person uttering the words has a reasonable or justifiable expectation of privacy. See 18 U.S.C. § 2510(2); S.Rep. No. 541, 99th Cong., 2d Sess. (1986), reprinted in 1986 U.S.C.C.A.N. 3555, 3567; *United States v. Harrelson*, 754 F.2d 1153, 1169 (5th Cir.), cert. denied, 474 U.S. 908, 106 S.Ct. 277, 88 L.Ed.2d 241 (1985) (framing the question as whether a reasonable expectation of privacy existed).

The legislative history of Title III directs that we consider "oral communication" in light of the constitutional standards expressed in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). S.Rep. No. 1097, 90th Cong., 2d Sess. (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2178. The constitutional question is "whether the person invoking its [Fourth Amendment] protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979) (referring to *Katz*); accord *United States v. Shields*, 675 F.2d 1152, 1158 (11th Cir.), *cert. denied*, 459 U.S. 858, 103 S.Ct. 130, 74 L.Ed.2d 112 (1982) (citing *Katz*, 389 U.S. at 353, 88 S.Ct. at 512 and *United States v. White*, 401 U.S. 745, 752, 91 S.Ct. 1122, 1126, 28 L.Ed.2d 453 (1971)). Hence, the statutory and constitutional test is whether a reasonable or justifiable expectation of privacy exists.

This test has two prongs. First, whether McKinnon's conduct exhibited a subjective expectation of privacy; second, whether McKinnon's subjective expectation of privacy is one that society is willing to recognize as reasonable. *Smith*, 442 U.S. at 740, 99 S.Ct. at 2580 (citing *Katz*, 389 U.S. at 361, 88 S.Ct. at 516).

Show Your Readers Changes from the Original Text

The first block quote is much more "reader-friendly" because it is not clogged with citations and unnecessary words. Omitting citations and unnecessary words allows the reader to focus on what the court was trying to communicate. The rules on the preceding page explain how to indicate any editing of quotations by using ellipses (. . .), brackets ([ ]), and explanatory parentheticals (explanations within parentheses). The rules apply to all types of quotations, not just block quotations. The rule numbers coincide with the superscript numbers in the first sample block quotation.

Quoting Complete Sentences and Quoting Phrases

When the passage you are quoting contains less than fifty words and can stand alone as one or more complete sentences, the passage should be part of a paragraph rather than being set apart as a block quote. Capitalize the first letter of the quoted passage and bracket the capital letter if this is a change. When the passage you are quoting is not a complete sentence, use it as a phrase in your sentence without capitalizing the first letter of the quoted phrase unless it begins your sentence. Remember to use the eight basic quotation rules when quoting complete sentences and phrases.

The following example contains both types of quotations—complete sentences and phrases. The superscript numbers appear in the example to help you understand the changes from the original text. The passage from which the quotations were taken follows the example. The explanation of the superscript numbers follows the original passage.

> In *Florida v. Jimeno,* 500 U.S. 248, 251 (1991)[1] the United States Supreme Court looked at the "expressed object"[2] of a search to determine "[t]he[3] scope of a search."[2] After the officer told the suspect that the officer suspected there were drugs in the suspect's car, the suspect consented to the search.[4] "[I]t[5] was objectively reasonable

> for the police to conclude that the general consent to search [the suspect's][6] car included consent to search containers within that car which might bear drugs. . . .[7] The authorization to search in this case therefore, extended beyond the surfaces of the car's interior to the paper bag . . .[8]." *Id.*[9]

Now compare the quotations contained in the preceding example with the text from which the quotations were taken:

> The scope of a search is generally defined by its expressed object. *United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982). In this case, the terms of the search's authorization were simple. Respondent granted Officer Trujillo permission to search his car, and did not place any explicit limitation on the scope of the search. Trujillo had informed respondent that he believed respondent was carrying narcotics, and that he would be looking for narcotics in the car. We think it was objectively reasonable for the police to conclude that the general consent to search respondent's car included consent to search containers within that car which might bear drugs. A reasonable person may be expected to know that narcotics are generally carried in some form of a container. "Contraband goods rarely are strewn across the trunk or floor of a car." *Id.*, at 820, 102 S. Ct., at 2170. The authorization to search in this case therefore, extended beyond the surfaces of the car's interior to the paper bag lying on the car's floor.

This is an explanation of the superscript numbers included in the first block quote above:

1. The citation to two quoted phrases precedes the phrases and gives the page reference to those phrases.
2. The quoted phrases are enclosed in quotation marks. Following basic quotation rule 1, because these are phrases, no ellipsis is needed to indicate omission of words preceding or following the phrases.
3. The "t" is changed from upper to lowercase because the phrase is in the middle of the author's sentence and the change is bracketed.
4. This sentence does not need quotation marks because it is stated in the author's own words. Even though the sentence is not a direct quote, it does need a page reference because the substance of the sentence is taken from the case. In this paragraph, the two citations, one at the beginning and one at the end, give the page reference and are close enough to this sentence so that no additional citation is needed. If the sentence were not so near the two citations, a reference to page 251 should have been given.
5. Following basic quotation rule 1, no ellipsis is needed to indicate omission of words at the beginning of the quoted complete sentence and the "i" is bracketed to indicate the letter was changed from lower- to uppercase.
6. The brackets indicate that the words "the suspect's" are added. "Suspect" is used instead of "respondent" because this reference makes it easier for the reader to understand who is being identified. There is no need to indicate the omission of "respondent" by inserting an ellipsis where the substituted wording is bracketed.
7. Following basic quotation rule 1, the ellipsis indicates that wording has been omitted. Here a textual sentence and a citation sentence were omitted.
8. Following basic quotation rule 1, the ellipsis indicates that wording was omitted from the end of this quoted sentence and the ellipsis is followed by the final punctuation (a period).
9. Here the citation follows the quoted complete sentences and is placed in a citation sentence.

EXERCISES ON QUOTATIONS

A. Review a sample document from Chapters 13, 14, or 15, noting the use of quotations.

B. Select a statute you might use in a legal document. Identify the relevant and irrelevant wording of the statute. Rewrite the statute to eliminate irrelevant wording, showing alterations from the original statutory wording. Write a paragraph containing the quoted statute.

C. Select a case you might use in a legal document. Identify significant wording, such as the issue, the holding, or a portion of the reasoning, that you might quote in your document. Imagine how you would show the alterations from the original passages. Write several paragraphs containing the quoted passages.

SHORT-FORM CITATIONS

The first time you refer to a case, you must give its full citation. If you refer to the case again, you should use an abbreviation to the citation rather than give the full citation. This abbreviated citation is called a "short-form citation." This section of the appendix uses the following citations in the examples and exercises:

Florida v. Jimeno, 500 U.S. 248 (1991).
Wyoming v. Houghton, 526 U.S. 295 (1999).
Whren v. United States, 517 U.S. 806 (1996).
United States v. McKinnon, 985 F.2d 525 (1993).

This section of the appendix reviews examples of full- and short-form citations. In the examples, the citations are all followed by periods as they would be in citation sentences. If you are using the citations in textual sentences, you would not need a period at the end of a citation unless it is the end of the sentence.

WRITING TIP

Distinguishing Textual Sentences from Citation Sentences

The two types of sentences in legal writing are textual sentences and citation sentences. A textual sentence is the type of sentence you have been writing all your life. It is a complete grammatical sentence with a subject and a verb. A citation sentence contains only citations. The four citations listed above are written as citation sentences. Each is appropriately ended with a period.

Suppose in an office memo you first cite to the holding in *Whren* on page 819 of the case. You must give the full citation to *Whren* because you have not cited the case before. In the full citation, you can indicate the page of the case holding by adding a comma and the page of the holding after the first page of the case:

Whren v. United States, 517 U.S. 806, 819 (1996).

Suppose you now want to give another citation to *Whren*, this time to the facts on pages 808 and 809. Use "*id.*" to indicate that you are citing to the immediately preceding authority. "*Id.*" is always italicized or underlined. It is capitalized when it begins a sentence, but is not when it appears in the middle of a sentence. If you were referring to the same page again, page 819, the complete citation would be "*Id.*" Because you are referring to different pages, you must indicate the new page numbers by adding "at" and the new page numbers:

Id. at 808, 809.

Suppose now you give the following string cite to *Jimeno* and *Houghton* (a string cite is a citation to more than one case with the cases separated by a semicolon):

Florida v. Jimeno, 500 U.S. 248 (1991); *Wyoming v. Houghton*, 526 U.S. 295 (1999).

Then you want to cite to *Houghton* again, this time to page 1304. You might think that you could use *id.* as a short-form citation for *Houghton* because you just cited it. However, if you used *id.*, you would be referring your reader back to the immediately preceding citation which is your string cite. Unless you want to refer to all the cases in the string cite, you must use another short-form citation to cite to *Houghton*. Any one of the following short citation forms for *Houghton* is acceptable:

Wyoming v. Houghton, 526 U.S. at 307.
Houghton, 526 U.S. at 307.
526 U.S. at 307.

When using short-form citations, try to use the shortest form possible so long as there is no confusion. If you had cited *Houghton* within the last few pages and there is no other United States Supreme Court case you had cited that is in volume 526 of United States Reports, use the third type of short citation form. If it had been several pages since you last cited *Houghton* or the reader might confuse *Houghton* with another case in the same volume of the reporter, use either the first or second versions of short form citations. When you are referring to a case by the name of only one of the parties, select a name that easily distinguishes the case from other cases. Because there are numerous case names that contain "*Wyoming*" but many fewer that contain "*Houghton*," you would use "*Houghton*" rather than "*Wyoming*."

If you wanted to refer to page 307 of *Houghton* again use:

Id.

If you want to refer to footnote 1 on page 303 of *Houghton*, use:

Id. at 303 n.1.

If you then wanted to refer to page 310 of *Houghton*, use:

Id. at 310 (Stevens, J., dissenting).

You must indicate the page number because it is not the same one referred to before. The explanatory parenthetical is needed because you are referring to something other than the majority opinion.

If you want to refer to pages 249 through 250 and 252 of *Jimeno*, you cannot use "*id.*" because *Jimeno* is not the immediately preceding citation. If you have recently cited *Jimeno*, use:

500 U.S. at 249–50, 252.

If you have not referred to *Jimeno* recently, precede the above short-form citation by either "*Florida v. Jimeno*" or by "*Jimeno*." Where material referred to spans more than one page, give the numbers of the first and last pages, joined by a hyphen. Retain only the last two digits of the second number. Where material appears on more than one page but does not span pages, separate the page numbers by a comma.

If you want to refer to *Jimeno* in general rather than to any specific material from *Jimeno*, use:

Jimeno.

When you are using *Jimeno* as an abbreviation to refer to the case, "*Jimeno*" is italicized or underlined. "Jimeno" would not be italicized or underlined if you are referring to the individual.

If you want to refer to pages 525 (the first page of the case), 526 and 528 of *McKinnon* and you had not given the full citation of *McKinnon* before, use:

United States v. McKinnon, 985 F.2d 525, 525, 526, 528 (1993).

Because you wanted to refer to the first page of the case in the full citation, the number "525" must be written twice, with the two numbers separated by a comma.

If you want to refer to pages 526 through 527 of *McKinnon*, use:

Id. at 526–27.

SHORT-FORM CITATIONS FOR STATUTES

Just as for cases, you must use the complete citation the first time you cite to a statute. For example, you may cite to a federal wiretapping statute as follows:

18 U.S.C.A. § 2511 (West 2000 & Supp. 2007).

Later, if you cite to the same statute you should use a short-form citation. If you are citing to the immediately preceding statute, you use "*id.*" If you are citing to a statute you cited to previously, but it is not the immediately preceding statute, use a short citation that sufficiently identifies the statute for your reader. For a federal statute, you can either give the title and section number of the United States Code ("18 U.S.C.A. § 2511"), or just the section number ("§ 2511").

EXERCISES ON SHORT-FORM CITATIONS

A. Review a sample document from Chapters 13, 14, or 15, noting the use of short-form citations.

B. Using the citations to 18 U.S.C.A. § 2511, *Jimeno*, *Houghton*, *Whren*, and *McKinnon*, give the correct citations called for by the following descriptions:

1. String cite to *Jimeno*, *Houghton*, and *Whren*.
2. Cite to pages 1302 and 1304 of *Houghton*.
3. Cite to pages 1299 through 1300 of *Houghton*.
4. Refer to *Jimeno* in general terms.
5. Cite to pages 1772 through 1773 of *Whren*.
6. Cite to page 251 of *Jimeno*.
7. Cite to page 252 of *Jimeno*.
8. Cite to note 1 on page 1302 of *Houghton*.
9. Cite to pages 526 and 528 of *McKinnon*.
10. Cite to 18 U.S.C.S. § 2511.
11. Cite to 18 U.S.C.S. § 2511.
12. Cite to pages 526 and 528 of *McKinnon*.
13. Cite to 18 U.S.C.A. § 2511.

C. If you have completed either of the exercises at the end of this appendix's section on quotations, insert citations as necessary.

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APPENDIX D

Mechanical Errors

INTRODUCTION

Elimination of mechanical errors is the tedious, though necessary, part of writing. You need to do your best to eliminate mechanical errors for two reasons. The first reason is that you want your reader to concentrate on your message and not be distracted by mechanical errors. The second reason is that a reader who spots a number of mechanical errors will begin to wonder if the writer is sloppy. If the writer failed to proof for typographical and spelling errors, perhaps the writer's sloppiness extended to legal research, too. Do not lose your credibility over a few easily eliminated mechanical errors.

You know your own writing and you probably know from past experience what types of mechanical errors give you problems. Keep in mind those types of mechanical errors that have given you problems in the past so you can eliminate them when editing and proofing your legal writing. If you have trouble spotting them yourself, ask a fellow student to help you proof your writing. Do the same for that student in return.

This appendix covers nine different mechanical errors. You have certainly been warned about a number of mechanical errors discussed in this appendix. They include incorrect use of apostrophes, sentence fragments, and run-on sentences. Problems with passive voice, parallel construction, and antecedents may be less familiar to you. Two other errors covered in this appendix are using excess words and changing tenses without reason.

Once you have mastered the material in this appendix and you are ready for a challenge, try completing the exercises in the last section of this appendix, which involve a combination of mechanical errors.

EXCESS WORDS

Do not tire your reader by making the reader wade through excess words to understand your point. Your message will be easier to understand if you delete unnecessary wording. At the editing stage, look at each sentence again. Identify the meaning of the sentence and then attempt to eliminate any excess words.

The following sentences contain excess words. Review each sentence, identifying any excess words. Then compare your results with the suggested answers. The suggested answers are only suggested answers. Your results may be better.

1. The United States Constitution provides for protection against unreasonable search and seizure.
2. The similarities among *Smith*, *Forfeiture*, and *Nelson* are almost identical.
3. The Court found that the factors taken together, as they were, amounted to reasonable suspicion.
4. In deciding the *Nelson* case, the court will have the difficult job of balancing Nelson's constitutional right against unreasonable search and seizure and society's interest in controlling drug trafficking on the nation's highways.
5. In regards to investigatory stops, there must be a balance between an individual's right to privacy and society's interest in being safe.

SUGGESTED ANSWERS

1. The United States Constitution prohibits unreasonable search and seizure.
2. *Smith*, *Forfeiture*, and *Nelson* are almost identical.
3. The Court found that the factors taken together amounted to reasonable suspicion.
4. In deciding *Nelson*, the court will have the difficult job of balancing Nelson's constitutional right against unreasonable search and seizure and society's interest in controlling drug trafficking on the nation's highways.
5. Investigatory stops must balance an individual's right to privacy and society's interest in enforcing the law.

Now, rewrite the following sentences to eliminate excess words:

1. These cases are similar to each other in many ways.
2. The expectation of privacy within the police car is not one society would consider as a reasonable expectation of privacy.
3. In the case of *Inciarrano v. State*, Inciarrano went to the office of the victim over a business deal between the two that had gone bad.
4. The case against Jane Doe and the case of *Inciarrano* are of similar nature.
5. In both of the cases there is a tape recorder involved that captured the murders on audiotape.
6. The taped conversation in the *Inciarrano* case was admissible as evidence.
7. The conversation taped in Jane Doe's home will not be suppressed as evidence due to the fact that Jane Doe had no reasonable expectation of privacy because she taped the conversation herself.
8. The judge will suppress the conversation based on the laws found in sections 934.02(2), 934.03(1), and 934.06, and the case law found in *Smith*.
9. The statute says that there are two requirements that must be true in order for the taped conversation to be inadmissible as evidence in court.
10. The court found that the tape recording in the *Inciarrano* case should not be suppressed.
11. The tape revealed a business deal between the victim and Inciarrano, in which the victim no longer wanted to be a part of the business deal.
12. The two cases also differ, too.
13. In the case of *Astaire*, there was probable cause to search the automobile for contraband.

14. The evidence against Dealer should be suppressed and not be allowed to be used against him.
15. People at home expect an expectation of privacy when having an intimate party with family and friends.
16. The courts in the *Stevenson* and *Brandin* cases did not suppress the evidence.
17. Under section 934.06, it states that a taped private conversation may not be used as evidence if playing the tape would violate Chapter 934.
18. In the *Blackheart* case, Laura taped a conversation without her husband's knowledge.
19. Inciarrano was a participant in a taped conversation in which a conversation between him and a murder victim was surreptitiously recorded.
20. Smith filed a motion with the court to suppress the tape from evidence.
21. They were having a private conversation of a business transaction involving drugs.
22. Did the detectives violate Bryce Cannon's constitutional right to privacy under sections 12 and 13 of the Florida Constitution when they intercepted phone calls of Bryce?
23. This particular stop was unconstitutional and any evidence seized as a product of this stop is deemed to be regarded as inadmissible in court.
24. The court will apply the exclusionary rule which prohibits the court from using at trial any evidence which was obtained through an unconstitutional search and seizure to be used.
25. According to the Fourth Amendment to the United States Constitution, individuals are guaranteed protection against unreasonable search and seizure.
26. Vogel proceeded to confiscate the amount of $6,003.00.

USE OF APOSTROPHES

Apostrophes have two uses. They tell your reader that something belongs to someone (possessive use) and that letters have been omitted (use in contractions). This section will deal primarily with the use of apostrophes in possessives because contractions are generally too informal to be used in legal writing. The following box contains rules for the use of apostrophes.

Rules for Use of Apostrophes in Possessives

1. To make a singular noun possessive, add an apostrophe and an "s." (If your noun already ends in an "s," refer to rule 2.)
   Example: the car of the officer = the officer's car
2. To make a plural noun (or a singular noun ending in "s") possessive, add an apostrophe.
   Example: the car of the officers = the officers' car
3. Do not, under pain of mortal embarrassment, use an apostrophe with a pronoun like "its" to make it possessive. "It's" means "it is."

   Examples:
   the speed of it (when it refers to a car) = its speed
   it is a speedy car = it's a speedy car

Now, rewrite the following sentences using the rules you have just read:

1. Should the tape seized from Jane Does home be suppressed?
2. In this case, and in the Jane Doe case, both defendant's were asked to sit in the back of a patrol car for "safety and comfort reasons."
3. Prior to her husbands arrival, Jane Doe decides to tape-record the meeting.
4. According to the courts ruling in Smith, there is no reasonable expectation of privacy in the back of a police car.
5. Carducci privacy rights were violated because her conversation was tape-recorded and later broadcast on television.
6. The Court gave three reasons why a strangers illegal conduct does not suffice to remove the First Amendment shield from speech.
7. The defendant's in both cases were not the ones who illegally taped the conversations.
8. Defendants General News and Chimino submit this memorandum of law in support of defendant's motion for summary judgment.
9. Without the parties awareness, an unidentified person recorded the call between Tine and Carducci.
10. For the reasons set forth above, defendants' request this court to grant their motion for summary judgment.
11. Officer Pyle instructed the defendants' to sit in the back of the patrol car.
12. The trial court denied Miss Houghton motion to suppress the evidence obtained from her purse.
13. Can the conversation in the back of the police car, recorded without the parties consent, be suppressed?
14. It was Officer Pyle right to insure that these young adults were not breaking any other laws.
15. Officer Pyle discovered the presence of cocaine in the defendants purse.
16. The court held that anything seized during the search of a passengers property was legal.
17. Because Rogers Fourth Amendment rights were not violated, her taped conversation should not be suppressed.
18. An officer who has probable cause can search a car and it's contents without consent.
19. We have laws that protect us from illegal invasions of privacy, such as occurred in James situation.
20. This memorandum of law is submitted in support of James Dealer motion to suppress.
21. The police officers illegally taped a private conversation because the tape was made with a bionic ear at the small gathering in a close friends residence.
22. The court would find that Dealer conversation at a wild party could not have been made with a reasonable expectation of privacy.
23. James Dealer was in an enclosed and secluded area of a close friends' home.
24. The state is trying to safeguard it's citizens from police officers illegally taping private conversations.

25. The police officers were listening to the conversation using a bionic ear, a device used to hear all conversations within it's range.
26. When they reached the jail, Laura met with her attorney's and began to ask many questions.

SENTENCE FRAGMENTS

A sentence fragment occurs when the writer attempts to write a sentence, but the thought is expressed incompletely. There are three common causes of sentence fragments. The first is omission of the verb; obviously, this can be easily corrected by supplying the verb. A second cause is beginning a sentence with a subordinating conjunction, such as "while" or "although," and not following the dependent clause with an independent clause. "While" and "although" tell the reader: "I'm going to tell you something less important before I tell you the really important information." The reader reads what he or she was cued to think was the less important information and is left hanging when the sentence does not supply the "important information" promised. This error can be corrected either by deleting the subordinating conjunction or adding the "important information." The third cause of sentence fragments is incorrect punctuation. This happens when the writer puts a period where a comma should be and capitalizes the next word in the sentence. Correct this error by putting the comma back in and changing the capital to lower case.

Rewrite the following sentences correcting any sentence fragments.

1. Also that she was seeing the neighbor.
2. Because Jane Doe and Joe did not have a reasonable expectation of privacy; the tape recording made by the officers in the patrol car would not be suppressed.
3. Which means anyone who knowingly tapes or discloses an illegally taped conversation is doing something illegal.
4. Because the tape contained information about marijuana and an extramarital affair of a public figure.
5. Whereas, in *Carducci*, the tape was played on the news and because Carducci was running for re-election, it affected the outcome.
6. The facts in *Houghton* and *Rogers* are similar; yet there are many differences.
7. Whereas, the officer only searched Ginger's purse.
8. Because the defendant was subject to reasonable suspicion.
9. That the recording came from the illegal search of her purse.
10. Although many types of drug paraphernalia could have reasonably been located in her purse.
11. Section 934.03(1). Prohibits the taping of private conversations.
12. If the conversation is not private; section 934.06 does not apply.
13. Which means that any conversation taped in a patrol car is not a private conversation.
14. Whereas in *Smith* a traffic violation never occurred.
15. Because we are protected by the Fourth Amendment to the United States Constitution.
16. A Terry stop based on an Ohio case which eventually went to the United States Supreme Court.

17. The Court reasoned that the totality of the circumstances must be considered in evaluating the stop and that any one of the factors by itself was not proof of any illegal conduct. But when taken together they amount to a reasonable suspicion.
18. In *United States v. Sokolow*, 490 U.S. 1 (1989). Andrew Sokolow was stopped by DEA agents while trying to leave Honolulu International Airport.

RUN-ON SENTENCES

Run-on sentences are usually caused by trying to pack too much information into a sentence. The solution is to break up the run-on sentence into several sentences. Another cause of run-on sentences is wording. The wording of a sentence may make the reader think the reader is reading a run-on sentence. The solution is to reword and reorganize the sentence so the reader can handle the information as a single sentence.

Another solution might be to place a semicolon between two sentences closely related in subject matter. You would replace the period at the end of the first sentence with a semicolon. The initial word in the second sentence should not be capitalized unless it is a proper noun or a word otherwise requiring capitalization.

Analyze the following passages, and rewrite them to eliminate run-on sentences.

1. These issues and answers are based on reasoning, the reasoning comes from the cases.
2. There was no oral communication therefore there was no felony committed.
3. Society would not believe the expectation was reasonable, therefore under this statute the tape recording would not be suppressed.
4. The officer asks if he can search Clark's house, she agrees.
5. Carducci can sue for civil remedies, she would have to sue the person who illegally taped her conversation.
6. Carducci's duty as a congresswoman is of public importance, therefore, if she participated in illegal activities, the public has the right to be informed.
7. There is no bright line test to determine what is protected as private in a public setting, the individual must determine what is appropriate to say.
8. Officer Pyle ran Fred's license and it came back suspended, therefore, the officer told Fred that his car was being impounded for violating the Florida Contraband Act.
9. The Florida Supreme Court found that the motorist and his passenger upon being placed in the rear of a patrol car had no reasonable expectation of privacy, therefore, the taped conversation was admissible.
10. Florida Statutes section 934.06 prohibits the use of taped private conversations as evidence, however, this statute does not apply because conversations taped in the back of a patrol car are not considered private.
11. The recorded conversation was the fruit of an unconstitutional search and seizure, therefore it should be suppressed.
12. Smith illustrates that persons in the back of a patrol car do not have a reasonable expectation of privacy, therefore conversations within the patrol car are not protected against being taped.
13. Rogers' Fourth Amendment right against unreasonable search and seizure was violated, therefore, the incriminating conversation must be excluded as the fruit of an unlawful search and seizure.

14. James had certain expectations of privacy, knowing that what he said could be taken out of context, he never would have told such false stories.
15. According to section 934.06 provides that a private conversation that has been illegally taped cannot be used as evidence.
16. The defendant did not exhibit an expectation of privacy, he was outside, boasting loudly, and was heard over all the other people at the party.
17. The deputy then radioed another deputy who then pulled over Brandin and had a canine who circled the vehicle alerted and the vehicle was searched and Brandin was subsequently arrested.
18. In *Inciarrano*, the taped conversation and the murder took place in a business office open to the public, therefore there was no reasonable expectation of privacy.
19. The taped conversation occurred in the privacy of Laura's home and she was aware of the taping, therefore she relinquished her expectation of privacy.
20. She threatened her husband with a gun and told him that she would get custody, then she shot him.

PARALLEL CONSTRUCTION

When you write about a series of items or activities, you must use parallel construction. This means that the wording of each item or activity must be similar in grammatical structure. For example, the following sentence discusses three different activities:

> The officers stopped the car, were questioning the occupants, and searched the car trunk.

The sentence is an example of poor parallel construction because the verb tense in the middle of the sentence does not match the verb tense at the beginning and at the end of the sentence. "Stopped" and "searched" are simple past tense while "were questioning" is past progressive tense. "Stopped" and "searched" describe two completed actions and "were questioning" describes an action in progress. The parallel construction problem can be corrected by changing the second verb to match the tense of the other two verbs in the sentence:

> The officers stopped the car, questioned the occupants, and searched the car trunk.

Now, rewrite the following sentence correcting any errors in parallel construction:

1. The issue is whether the utterances made by the defendant were made with a reasonable expectation of privacy and therefore inadmissible.
2. Accordingly, we are again confronted with a two-part analysis of the Fourth Amendment right to privacy which requires the person to (1) have a subjective expectation of privacy; and (2) that the expectation must be one that society recognizes as reasonable.
3. Both cases include a cellular phone conversation taped by unknown persons, the media playing this conversation, a conversation that is of great public concern, and statutes that allow the persons whose conversations were taped to sue for civil remedies.
4. The newscaster wanted to inform citizens about the person whom they trusted and received their vote to fulfill an important position.
5. Defendants submit this memorandum of law in support of their motion for summary judgment because they played no part in the illegal taping, that their access to the information was obtained lawfully, and that the conversation was a matter of public concern.

6. This memorandum will cover if the defendants took part in the illegal taping of the conversation, the way the information was obtained, if the subject matter is of public concern, and if the First Amendment protects defendant's right to publish the taped information.
7. Laura decided to tape the conversation in case her husband created a problem or to use against him at a later date.
8. Van Halen and Stevenson both deal with the use of bionic ears, drugs, both defendants were stopped by the police, and taping a conversation.
9. These statutes are intended to protect the private conversations of citizens, to allow for the government's taping of conversations after obtaining a court order, and inhibit the growth of organized crime.
10. She was a female basketball coach who worked the same hours, same season, and had the same amount of responsibility as the male coach.
11. Plaintiff engaged in a protected activity, suffered an adverse employment action, and there is a causal connection between the protected activity and the adverse employment action; therefore, plaintiff established a prima facie case.
12. The conversation taped on an answering machine was admitted because the taping was accidental, the taping was done by a child, and the child's unfamiliarity with the answering machine.
13. The officer asked Lyn whether she had been drinking because the officer noticed her stumbling, her eyes were bloodshot, and the smell of alcohol.
14. The statute states that an individual must display the license plate on the rear of the vehicle and must be visible within one hundred feet.
15. They were in her office, they were having a face-to-face conversation, and it was her home.
16. The order denying the motion to suppress reversed, the judgments of conviction were vacated, and the cases remanded to the district court.
17. For the reasons stated above, Defendant Canyon requests that his motion to suppress be granted and to dismiss the charge against him for lack of evidence.
18. Trooper Vogel had developed a reasonable suspicion of illegal activity based on the fact that the suspect, a thirty-year-old man, was driving at 3:00 a.m. on a known drug corridor highway and being very cautious by driving 50 miles per hour and did not look at the marked patrol car as the car went past.
19. The employer had told its employees to attend the trade show because of the business benefits, paid for and deducted the employees' expenses, and reimbursed the employee for mileage.
20. Such steps shall include: use of an alternative entrance for construction vehicles and equipment, requiring that all construction vehicles be cleaned of loose mud, gravel, dirt, and other debris prior to traversing the access road, and cleaning up any dirt gravel, construction materials, and other debris deposited on the road.
21. The profile consists of a late-model car, Florida rental tag, two persons about 35 years old, driver-male, car going Northbound on I-95, driving in a cautious manner, and not looking at the trooper while passing.
22. Did Vogel have reasonable suspicion that the suspects were committing, has committed, or is about to commit a crime?

ANTECEDENTS

To understand the problem with antecedents, look at the following example:

> The DEA agents made an investigative stop of the suspect and his companion because they fit the drug courier profile as well as other information they had obtained.

There are three pronouns in the sentence: "his," "they," and "they." Out of context the reader would not know what these pronouns refer to. The reader will determine to whom the pronoun refers by assuming that it refers to the last person or persons identified (the "antecedent"). In the example provided, "his" refers back to "suspect," "they" refers back to "the suspect and his companion," and "they" refers back to "the suspect and his companion." Do you see any problems? The problem is that the second "they" in the sentence should refer back to "the DEA agents" rather than to "the suspect and his companion." The way to correct this is to replace the second "they" with "the agents." Then the sentence would read:

> The DEA agents made an investigative stop of the suspect and his companion because they fit the drug courier profile as well as other information the agents had obtained.

The pronoun must agree in number with its antecedent. Many students have problems with antecedents and the word "court." Even though there are a number of judges making up the court, court is a singular noun. The proper pronoun to use with "court" would be "it" rather than "they."

Rewrite the following sentences correcting any antecedent problems:

1. Smith consented to be seated in the back of the officer's patrol car for safety reasons while the officer searched his car.
2. A person has a reasonable expectation of privacy in their house.
3. In *Inciarrano*, Inciarrano went to the victim's office building with the initial intention of informing him that he no longer wished to participate in a business deal and thus, was an invitee as he had initially entered for a lawful purpose.
4. The officers then placed the client and her neighbor in the police car while they searched the house.
5. A while after, the officers came out and told the suspects that they had just found the recording and had them on tape with everything they had just said in the back of the squad car.
6. The police officer placed her and Joe in the patrol car for comfort and safety while he searched the house.
7. Because General News disclosed information on the tape, they could be liable for civil damages.
8. Any person is capable of making this distinction and should conduct their conversations accordingly.
9. They both claim the drugs belonged to a friend and that it was not theirs.
10. The state believes that even without the evidence obtained from the search, they have the tape of the incriminating conversation between Ginger and Fred.
11. Inciarrano had every intention of murdering the victim when he chose to bring a gun to the meeting.

12. The legislature surely did not intend for the person who conducted the taping to use the statute to their benefit by having the taped conversation suppressed.
13. The court will distinguish between what they deem a private conversation and what can be used as evidence.
14. Smith appealed and the appellate court reversed and remanded the case. They found that the trial court erred when they failed to suppress the taped conversation.
15. Inciarrano had the intent to kill Phillips when he brought the gun to the meeting.
16. The police officer requested the driver and the passenger to sit in the back seat of the patrol car while he searched the automobile.
17. There was no consent by the two defendants to allow the police officers to record their conversation.
18. A person asked to sit in the back of a patrol car should not expect privacy because they are in a patrol car, an extension of a police station.
19. Society would agree that a person can reasonably expect privacy in their home and any conversation will not be subject to taping.
20. State statutes protect a person's right to privacy while talking on their cellular telephone.
21. The radio station had nothing to do with the taping of the conversation. They only broadcast what they were given.
22. The individual should feel free to speak to whomever they want with a reasonable expectation of privacy.

ACTIVE VERSUS PASSIVE VOICE

To understand active and passive voice, look at the following sentences:

The officer returned the money to the driver.

The money was returned to the driver by the officer.

The first sentence is written in active voice. "Officer" is the subject, "returned" is the verb, "money" is the object, and "driver" is the indirect object. The "officer" is also the person taking the action of "returning" the money. Sentences written in active voice have the "performer" as the subject of the sentence, with the subject preceding the verb. The second sentence is written in passive voice. In passive voice sentences, the object of the action (the thing or person performed on) comes first, then the verb, and then the "performer."

WRITING TIP

Locating the Direct and Indirect Objects

- To find the direct object in a sentence, ask "what" or "who."
- To find the indirect object in a sentence, ask "to whom" or "for whom."

So, to find the direct object in the first sentence, "what" or "who" did the officer return? The officer returned the money; thus "money" is the direct object.

To find the indirect object, "to whom" or "for whom" did the officer return the money? The officer returned the money to the driver; thus "driver" is the indirect object.

Active voice is preferable in legal writing because it makes the sentence more powerful and easier to understand. See whether this is true by reading the two sentences. Which do you prefer? Passive voice is fine for those instances when you do not know or do not want to identify the performer. In the example provided, if you did not know who returned the money you could write:

The money was returned to the driver.

When you edit your writing and you find a sentence in passive voice, rewrite it in active voice. Even if the "performer" is not specifically identified in the sentence, you may be able to identify the performer by the context of the sentence.

Now, rewrite the following sentences in active voice:

1. A conversation between Inciarrano and the murder victim was surreptitiously recorded by the victim.
2. The vehicle was searched and Brandin was subsequently arrested.
3. The decision to deny his motion to suppress was affirmed by the appellate court.
4. The defendant was charged with possession of cocaine.
5. The defendant's motion to suppress the taped conversation was denied by the trial court.
6. Defendant's car was stopped and searched by a canine and he was subsequently arrested.
7. Brandin stopped his vehicle in the middle of the street and was approached by two men.
8. Brandin was observed by a deputy of the Street Crimes Unit around 9:15 p.m. in a known narcotics area.
9. The defendant was heard discussing a drug deal and was searched and arrested based on the conversation.
10. The suspect was arrested.
11. The conversation was intercepted and taped illegally by the police officer.
12. The suspect's conversation was recorded by the police officer.
13. The defendant filed a motion to suppress the drugs but the motion was denied.
14. A warrant is issued by a judge only upon probable cause.
15. In *Sokolow*, it was held that all the factors as a whole were enough for reasonable suspicion.
16. The order denying the motion to suppress reversed, the judgments of conviction were vacated, and the cases remanded to district court.
17. The canine alerted, the vehicle was searched, and Brandin was subsequently arrested.
18. The Longs were informed by the Browns that they wanted to build a small toy store on the commercial lot and live in the residence next door.
19. All profits of the joint venture will be split evenly between Arctic and Marine.
20. It is the intention of each party to protect its confidential and proprietary information.

CHANGE IN TENSES

Usually sentences and paragraphs are written in a single tense unless there is a reason for changing tenses. Your reader will be distracted from what you are trying to communicate if you change tenses in midstream without a reason. The following sentence contains a distracting change in tenses:

> DEA agents arrested Smith and Swindell and charged them with conspiracy to possess cocaine with intent to distribute. Defendants file motions to suppress. The motions were denied.

Why did the writer change from past tense ("arrested" and "charged"), to present tense ("file"), and back to past tense ("were denied")? Your reader may be wondering about that more than the writer's message. Keep your tenses consistent unless you have a reason for changing tenses.

Rewrite the following sentences keeping the verb tense consistent:

1. Not remembering that the tape recorder was still on, she went next door and gets her neighbor.
2. They went back to Doe's house and begin to come up with a cover up story.
3. The police arrived and Jane and Joe tell the officer that there was a robbery and when Jane came in the house, she saw her husband dead.
4. An anonymous person taped a conversation between Congresswoman Carducci and her intern, Nico. In the conversation, they talk about Carducci's addiction to illegal drugs.
5. Congresswoman Carducci was unaware that her conversation was being taped. Nico tells Carducci that he is afraid that he will be exposed and he wanted to end their affair.
6. This information was being conveyed at a very crowded, wild party. A reasonable expectation of privacy cannot exist when Dealer took no precautions to keep this information private.
7. Because the conversation in *Inciarrano* took place in a business office open to the public, there is no reasonable expectation of privacy.
8. The victim was aware of Inciarrano's dark nature and had some suspicion that the meeting may turn violent.
9. The police found the tape recorder, which was still on at the time the police entered the house. In the patrol car the defendant tells Joe that she forgot to turn off the tape recorder.
10. Smith was not under arrest but was asked to sit in the patrol car for his safety and comfort. Smith expects that conversations within the patrol car will remain private.
11. Assuming that Inciarrano had a subjective expectation of privacy, the court concludes that once Inciarrano entered the business office with the intent to do harm, Inciarrano became a trespasser.
12. Nico no longer wanted to supply Carducci with drugs. Carducci threatens Nico, stating that she could take him down and ruin his career.
13. Carducci threatened Nico by telling him that if she goes down he will come with her. This conversation was taped by an unknown individual.

14. An unknown person using a scanner recognizes Carducci's voice. Knowing that it was an election year, the unknown person recorded the conversation between Carducci and her intern.
15. The wife filed a motion to suppress the taped telephone conversation. The court held that the husband does not have the right to invade his wife's right of privacy by taping the wife's telephone conversations.
16. Laura and Joe agree to meet at her home to discuss a private matter. Three days later Joe was found dead in his car.
17. Her husband secretly records this conversation and therefore violated these statutes.
18. Ms. Harker established a prima facie case; however, she fails to prove that the defendant's decision not to renew her contract was unrelated to her complaints.
19. The court denied the motion to suppress because the statutory exception does not apply.
20. In the majority opinion, the court held that cordless telephone conversations were not protected against recording at the time. The chief justice concurs in the result, yet not with the reasoning of the majority.

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APPENDIX E

Problems

The following four problems were designed to give students practice in research and writing. Students can be assigned one or more of the problems to research. Writing assignments on the problems can include:

1. A client opinion letter (written to one of the persons named in a problem).
2. An attorney-client contract (the agreement one of the persons named in the problem signs to retain an attorney).
3. An office memo to a senior partner concerning one of the problems.
4. A memorandum of law in support of a motion for summary judgment or other litigation motion filed in a lawsuit concerning one of the problems.
5. An appellate brief filed after a judgment was reached in a lawsuit concerning one of the problems.

WAS SWIMMING POOL AN ATTRACTIVE NUISANCE?

John and Mary Cooke own a home in Anytown, Your State, with a private swimming pool in their backyard. Pursuant to local ordinances, their backyard is completely fenced by a five-foot wooden fence and the gate is kept closed with a latch at the top of the fence.

The Cookes live next door to the Andersons, a family with a two-year-old son, Joseph. Joseph loved water and the Andersons had joined the Cookes swimming in the Cookes' pool on numerous occasions. Although not yet "swimming" on his own, Joseph greatly enjoyed splashing in the pool and looked forward to playing with the Cookes' dog, Rover. From the moment Joseph woke up in the morning until he went to bed at night, his favorite topics were "pool" and "dog." Rover spent most of his days in the pool enclosure, relaxing on the pool deck or swimming. Joseph would become extremely excited anytime he heard Rover bark from next door.

One Saturday morning Joseph was playing on the screened-in porch of his home. He seemed quite content playing with his toys while his parents completed some odd jobs around the house. Once, when his mother checked on him, he was gazing toward the Cookes' house and listening for Rover's bark. His mother told Joseph that they could go swimming and visit Rover later in the day.

The parents lost track of time, each assuming that the other had been checking on Joseph. All of a sudden, the Andersons realized that neither one of them had checked on Joseph for a while. When they went to the screened-in porch Joseph was nowhere to be found and the outside screen door was slightly ajar. They called to Joseph, but he didn't answer, even though he was usually very good about coming when called.

The Andersons immediately started looking outside for Joseph. He was not in the Anderson's yard. At that moment, they noticed that the gate to the Cookes' pool fence was wide open. Fearing the worst, they rushed through the gate calling for Joseph. Initially nothing appeared out of the ordinary except that Rover was dashing around the outside of the pool and barking as if to attract someone's attention. Then they noticed the pool blanket was slightly pulled back from the side of the pool at the deep end.

The Cookes always kept the pool covered with a pool blanket when the pool was not in use. The blanket kept the water from losing heat during the night and kept debris from falling into the water. The pool blanket was constructed of two layers of blue plastic material with small air pockets between the layers. The blanket, floating on the surface of the water, covered the entire pool surface except for a small area left open so Rover could swim.

When the Cookes heard the Andersons yelling, they rushed out to the pool to find out what was the matter. When they heard that Joseph was missing, the Cookes' first thought was that he might have fallen into the pool while following Rover. John Cooke called for Phil Smith so Phil could help remove the pool blanket. Phil was a fifteen-year-old neighbor who often came to play with Rover. Phil had been playing with Rover inside the pool fence that morning. Phil did not answer so the Cookes and the Andersons together started pulling back the pool blanket.

To their horror, they saw two bodies in the deep end of the pool. They all jumped into the pool and pulled out the bodies. The two women tried to revive Joseph and Phil while the two men called the police and fire departments. When they arrived, the police and firefighters joined the Andersons and the Cookes in trying to revive the two boys. The two boys were rushed to the hospital but died a few hours later.

The police report of the incident showed that Mr. Cooke remembered opening the gate early in the morning while he was doing work around the pool. Joseph must have opened the outside screened door to his house and entered the pool enclosure looking for Rover. He may have fallen into the deep end of the pool while chasing Rover. The pool blanket would have parted enough from the side of the pool to allow Joseph to fall into the water. Although not a very good swimmer, Phil apparently jumped in to rescue Joseph at the same place Joseph had fallen in. The police theorized that Phil became disoriented while trying to rescue Joseph and couldn't get out from under the pool blanket.

The Cookes have just been told that their neighbors are planning to file suit against them, holding them responsible for Joseph and Phil's deaths. The Cookes hired your firm to represent them. The senior partner in your firm has asked you to research the law of your state and answer the following questions:

1. Does your state follow the attractive nuisance doctrine and, if so, how does it apply to private swimming pools?
2. Can the Andersons hold the Cookes responsible for Joseph's death?
3. What duty did the Cookes owe Phil, and can the Smiths hold the Cookes liable for Phil's death?

DEFAMATION

Tom Harris and Jake Carson had been sports and political leaders and rivals ever since high school. They competed on the same sports teams and were of equal physical ability. In track and swimming races Tom would come in first in one race, Jake would come in first in

the next race, and then they would tie each other for first in a third race. Either Tom or Jake had been class president each of four years in high school. Jake had been class president of his freshman and senior classes while Tom had been class president of his sophomore and junior classes.

Their friends speculated that the rivalry would continue in college. They both were to attend Collegiate University in nearby University Town. As freshmen they pledged two rival fraternities. Tom pledged Collegiate Alphas and Jake pledged Collegiate Betas. What had been friendly rivalry in high school gradually turned nasty during their years at the University. The Alphas pulled all sorts of pranks on the Betas and tried to discredit the Betas in the university community. The Betas did the same to the Alphas.

In the fall of their senior year at the University, Tom and Jake both decided to run for student body president. There was a lot of mudslinging during the campaign. At one point in the campaign, it was rumored that Jake was gay. The rumors were traced back to the Alphas. Although no one seemed to believe the rumor, Jake and his fraternity brothers were very upset about it.

The night before the election, the candidates participated in skits in the football stadium. Everyone eagerly looked forward to the skits each year, with most of the students and faculty of Collegiate University attending. The skits were usually half serious and half in jest. On skit night, the crowd in the stadium enjoyed the first skits while they speculated about Tom and Jake's skits. Jake's skit was the next-to-the-last and Tom's was the last of the evening. In Jake's skit, Jake neatly poked fun at Tom and emphasized how he, Jake, was the better candidate.

Then came time for Tom's skit. The scene was Jake's doctor's office. Tom played Jake's doctor and one of the Alphas played Jake. In the skit "Jake" walked into the doctor's office and said, "Well, doctor, now that I've completed my executive physical, I feel ready to complete my duties as Collegiate University student body president and lead the University to great achievements. How did my tests come out?" The "doctor" replied, "Well, Jake, you better sit down. I have good news and bad news for you. The good news is that most of your tests came back negative and you should make a fine student body president. The bad news is that you and Magic Johnson have something in common. Both of you tested HIV-positive."

Those words were barely out of Tom's mouth when the stadium crowd gasped. A fight immediately broke out between the Alphas and Betas sitting near each other and the police were called in to clear the stands.

Although the student body president race had seemed almost even before the skits, Tom won with two-thirds of the vote. Jake was so outraged by Tom's skit that he hired your law firm to represent him. The senior partner in your firm has asked you to research the law of your state and answer the following questions:

1. Is it actionable per se as slander to announce that a person has tested HIV-positive where the statement is not true?
2. Although Tom claims that his statement that Jake was HIV-positive was made in jest, would the words give rise to an action for slander?
3. Could Jake be considered a public official or public figure in a slander action brought by him, and, if he is considered a public official or public figure, will it make any difference in the lawsuit?

THE NIGHTMARE PROPERTY

The Longs had purchased two adjoining lots on Nice Street in Anytown, Your State, as investment property. One of the lots was zoned residential and contained a three-bedroom, two-bathroom house that the Longs rented out. The other lot, zoned commercial, was vacant.

In September of 1988, the Longs rented the house to a 30-year-old business woman. Barely a month later the police called the Longs. A neighbor of the business woman had asked the police to investigate the Longs' Nice Street house. The neighbor reported he had heard a lot of yelling at the house and then a gun shot. The police found the front door open and the business woman dead, apparently shot by an intruder.

The Longs next rented the Nice Street house to a family. As soon as the family moved in, they reported that their television set repeatedly turned on and off, often in the middle of the night. The children claimed they had seen the ghost of the dead woman and were too terrified to sleep in their rooms. The neighborhood children started calling the Nice Street house the "haunted house" and refused to play with the children of the family renting the house. A few months later the family moved out complaining that they did not want to live with a ghost.

After that the Longs tried without success to rent the Nice Street house. At the same time the Longs posted a "For Sale" sign on the two lots. The Longs wanted to sell them for $250,000, the price at which the Longs had purchased them ten years earlier. The Longs received no offers until almost a year later. A retired couple, the Browns, called the Longs to ask the sale price on the two lots. The couple was looking to move to a warmer climate and open a small toy store. When the Browns heard the asking price of $250,000 they said they might be interested in purchasing the lots.

The Longs met the Browns at the lots and gave them a tour of the house. The Browns explained to the Longs that they wanted to build a small toy store on the vacant commercial property and live next door in the house. They said that they were attracted to the lots because of their location and because the asking price seemed reasonable. The Longs told the Browns that the only reason they had put such a low price on the property was because it had been on the market for a while. The Longs needed to sell the property quickly because they were in need of cash to pay for unexpected expenses.

The sale went through sixty days later and the Browns immediately started construction on the vacant lot. They hoped to have the construction finished by the time they moved to Anytown. Six months later the Browns moved into the Nice Street house and opened the then completed toy store. Business at the toy store seemed very slow. The Longs noticed that none of the children from the neighborhood came into the store. They did get some business from people vacationing in Anytown.

A week after the Browns moved into the house, their television turned on in the middle of the night. They didn't think anything of it until it happened the next two nights in a row. When Mr. Brown got up to turn off the television, he thought he saw something white and filmy at the other end of the room. Then the same thing started happening to the small television in the toy store. The Browns made sure they had turned off the television before locking the store for the evening but they found the television turned on when they opened the store the next morning. Before they turned on the store lights in the morning, the Browns thought they glimpsed something white moving at the other end of the store. They didn't see anything out of the ordinary when they turned the lights on.

A few days later Mr. Brown struck up a conversation with the teenage clerk at the local grocery store. The clerk asked Mr. Brown whether he had just moved to town. When Mr. Brown told him he owned the new toy store and lived next door, the clerk said, "I didn't think the Longs would ever sell the haunted house." Mr. Brown said, "What do you mean?" The clerk said, "Everybody around here knows the house is haunted. Why do you think you paid such a low price for it?"

Understandably shaken, Mr. Brown went home and told his wife the news. They immediately called the Longs and accused them of tricking the retired couple. The Browns demanded their money back and demanded to be reimbursed for the cost of construction

of the toy store. When the Longs refused, the Browns hired your law firm to represent them. The senior partner in your firm has asked you to research the law of your state and answer the following questions:

1. Did the Longs have a duty to disclose that the two lots were "haunted"?
2. What are the elements of fraud concerning the sale of real property?
3. Are there enough facts for the Browns to win if they sue the Longs for fraud?

I WONDER WHAT IS IN THE PACKAGE

Margie and Floyd Walker had been happily married for forty-five years. Even though past retirement age, Floyd continued to work for the railroad as a porter on its passenger trains. Margie was worried about Floyd's health and had been trying to get him to stop working for some time. She was concerned that the porter's job was too physically taxing for someone of Floyd's age.

One Monday morning as Floyd was getting ready for work, Margie had the uncomfortable feeling that something would happen to Floyd at work. Margie pleaded with Floyd to call in sick. Floyd said, "I feel fine. Why should I call in sick if I feel fine?" Floyd reported for work as usual. Margie tried to convince herself that she was worrying for nothing, but to no avail. She wandered through the house all day, not able to get anything done except worry.

At three o'clock in the afternoon the telephone rang. Margie was so frightened that her hand shook as she answered the telephone. Floyd's supervisor at the railroad said, "Margie, I think you better sit down. I have bad news for you. Floyd fell from the train as it was going full speed and was killed. It appears he became disoriented, opened the outside door of the train, and was pulled off the train step by a sudden gust of wind. Floyd's body is at the Near Town Funeral Home. I'll make arrangements if you'd like to have the body transferred to a funeral home in Any Town." Margie felt like she had been hit by a truck. She was glad that she was sitting down or she very likely would have fainted. She responded, "Please make the arrangements with Webury Funeral Home."

Margie's worst fear had come true. Somehow she made it through the funeral. She kept feeling that it must all be a bad dream. She kept imagining that she would wake up one morning with Floyd still alive. She did remember having to call the Near Town Funeral Home several times to have Floyd's personal effects forwarded to Webury. Webury delivered the personal effects to her the day after the funeral.

It was not until almost a week after Floyd's death when Margie went through Floyd's personal effects. To her horror, in a plastic bag labeled "personal effects" she found a kidney, teeth, and fingers. At the sight of her dead husband's body parts she fainted. A neighbor lady friend found Margie an hour later collapsed on the floor. She was hospitalized for extreme exhaustion for two days and her doctor put her on antidepressant medication.

When she had recovered sufficiently, she called Webury to complain. Webury's owner disclaimed all responsibility. The owner said that Webury had simply forwarded the plastic bag, at Margie's insistence, from the Near Town Funeral Home. The owner added that the Webury employees had no reason to check what was in the bag.

Margie still suffers from depression and has not had a good night's sleep since she opened the plastic bag. She keeps having nightmares about the employees of Near Town Funeral Home placing Floyd's body parts in the plastic bag and imagines them laughing as they labeled the bag "personal effects." It also makes her angry that Webury seemed so unconcerned and did not even offer an apology. Margie has hired your law firm to represent

her in a possible lawsuit against the funeral home. The senior partner in your firm has asked you to research the law of your state and answer the following questions:

1. What would Margie Walker have to prove to recover damages for the tort of interference with a dead body?
2. What are the elements of the tort of intentional infliction of emotional distress, sometimes called the "tort of outrage"?
3. Will Margie Walker be able to hold Near Town Funeral Home and Webury Funeral Home liable for the torts of interference with a dead body and intentional infliction of emotional distress?

APPENDIX F

Internet Technology

INTRODUCTION

Since its inception in the early 1960s as a concept of the United States Department of Defense, the Internet has developed into the world's largest information network, penetrating the globe and impacting nearly every aspect of our daily lives. While the Internet remained primarily text based until 1992, the World Wide Web now allows viewing of Web sites containing a combination of text, graphics, audio, and video.

INTERNET PROTOCOLS

Loosely defined, a **protocol** is a system of rules or standards for communicating over a network, in this case the Internet. Computers and the Internet interact according to a system of protocols that determine the behavior each side expects from the other in the transfer of information. The protocol tells Web **browser** software which Internet tool to use to interpret the electronic information being requesting.

The protocol used for accessing **hypertext** documents on Internet Web sites is http://. Secure servers requiring users to submit personal and/or financial data from a Web site use an "s" after the http protocol (https://). In general, Web browsers no longer require http:// when typing the address for most Web sites. The browser assumes the Web http:// protocol when receiving a delivery address beginning with "www." However, some Web sites are registered without the "www" (e.g., http://thomas.loc.gov). To access these sites, always include the http:// protocol as part of the Web address. For secure sites, always include the https:// protocol.

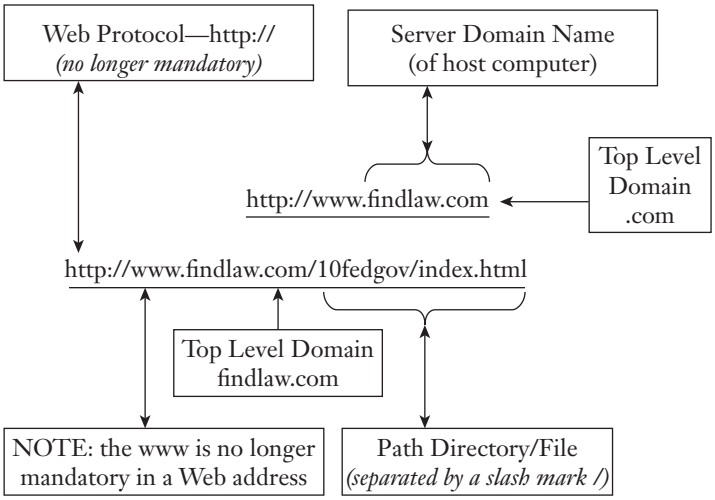
Internet protocols govern access to the network—how we communicate—not the content of information posted on Internet Web sites, chatrooms, or in electronic mail transmissions. Presently, there are no regulations or controls on what information can be posted on the Internet, and no private corporation or government agency charged with overseeing the content of information posted on the Internet. Refer to Exhibit F-1 for a graphic explanation of the various parts of a Web address.

protocol
A system of rules or standards for communicating over a network such as the Internet. The protocol tells Web browser software which Internet tool to use to interpret the electronic information being requesting.

browser
Computer software used to access information on the World Wide Web. Internet Explorer is the most popular commercial Internet browser.

hypertext
Highlighted text that, when selected, links to related topics or Web sites. Links can also be an icon or a graphic (*see* hyperlink).

EXHIBIT F-1
Dissecting a Web Address.



Protocol—How to communicate; a system of standards
Server Domain Name—Where on the Internet the "host" computer resides
Path—One or more subdirectories on the host computer pointing to file data
File—The electronic information you need; your ultimate goal!!

Original TLD Extensions:		*New TLD Extensions (2001):*	
.com	commercial "for profit" entities	.aero	air-transport industry
.edu	educational institutions	.biz	businesses
.gov	U.S. governmental site	.coop	cooperatives
.mil	U.S. military site	.info	unrestricted use
.net	network administrative site	.museum	museums of all types
.org	nonprofit organizations or associations	.name	individual or personal registration
		.pro	accountants, lawyers, and physicians

INTERNET DOMAIN NAMES

domain name
The name used in a web address to identify particular Web pages. For example, in the address http://www.microsoft.com the domain name is *microsoft.com*.

The **domain name** system (DNS) helps users navigate the Internet. Every computer on the Internet has a unique address, just like a telephone number only longer. Domain names can be registered through many different companies known as registrars. A listing of approved registrars is available from the Internet Network Information Center (InterNIC) at ‹http://www.Internic.net›, the private organization that coordinates Internet domain name registrations. Once registered, the new domain address is submitted to a central directory or registry and becomes public information. Refer to Exhibit F-1 for a complete list of currently approved generic top level domain (gTLD) name extensions. After years of discussion and thought, generic top-level domains (gTLDs) are being expanded in 2009 to allow for more innovation, choice, and change. For more information on the new gTLDs, consult the Internic Web site.

Often in the course of litigation or representation of a client, it may be necessary to research the ownership of Internet domain names. Basic information regarding a registered owner can be obtained from sites including InterNIC Whois at ‹http://www.whois.net› and Domain-Surfer at ‹https://www.domainsurfer.com›.

THE INTERNET

The Internet is comprised of several major components, each offering different access points to resources and information.

World Wide Web

One of the most common misconceptions is that the Internet and the World Wide Web are one and the same, fostered by these terms often being used interchangeably. The World Wide Web, commonly referred to as the "Web" or simply by its acronym "www," is the graphic component of the Internet.

Web Browsers

A Web browser is computer software used to access information on the World Wide Web. A Web site's unique address, or Uniform Resource Locator (URL), is typed into the browser's address location field. The most popular commercial Web browser is Microsoft Internet Explorer®.

Additional information can be accessed from a Web site's home page by clicking on various hyperlinks, which can be text or graphics. A **hyperlink** is a connection found in Web pages and other electronic documents that automatically opens a new file or Web page when clicked. Links can be text (*see* hypertext), an icon, an image, or a graphic.

hyperlink
An element in an electronic document or Web site that links to another place in the same document or to an entirely different source. A hyperlink may be a word, an icon, or a graphic.

Browser Plug-Ins

Plug-ins are software programs that extend the capabilities of a Web browser in a specific way, providing the ability to play audio files or view video movies. Popular plug-ins include Acrobat Reader® by Adobe, software used to view and print Portable Document Format (PDF) files, and Adobe Flash Player®, software used to view graphics and animation.

plug-ins
Software programs that extend the capabilities of a Web browser in a specific way, providing the ability to play audio files or view video movies. Acrobat Reader® by Adobe is a popular plug-in.

Electronic mail

Electronic mail, or e-mail, is one of the most commonly used Internet tools, providing the ability to electronically communicate with colleagues, clients, court personnel, witnesses, and experts—anyone worldwide with an e-mail address (‹yourname@domain.com›). It is important to keep in mind that just as with other forms of correspondence (letters, memoranda, faxes), e-mail messages are routinely subpoenaed in litigation and are considered discoverable material in most jurisdictions. Even after you delete a sent or received message, a "copy" may still remain on your computer's hard drive or on a network server. Therefore, it is a good idea to consult your systems administrator or an information technology (IT) specialist to help your employer develop appropriate electronic records retention policies. This is also an area where clients routinely consult attorneys for guidance. Paralegals knowledgeable in the field of electronic discovery can provide invaluable assistance to their supervising attorneys.

E-mail Alerts

News and up-to-the-minute information on a variety of topics, customized to your specific research needs, can be automatically delivered to your computer via e-mail. Many companies, online information providers, and Web sites provide regular electronic information briefs or "alerts," covering subjects ranging from pending legislation, business news (in general or on a specific company), health and wellness issues, and breaking news stories. LexisNexis Alerts® and WESTLAW WestClips® are examples of subscription e-mail alert services. Refer to Chapter 8 for a discussion of both products.

Discussion groups and listservs

Discussion groups link people with common interests and provide a format to discuss issues and share information related to a specific topic, theme, or area of expertise. These groups are often referred to by other names, including discussion lists, interest groups, or mailing lists. All communication in a discussion group is carried on by e-mail. Being

discussion group
A form of Internet communication linking people with common interests; provides a format to discuss issues and share information related to a specific topic, theme, or area of expertise. Often referred to by other names, including discussion lists, interest groups, or mailing lists. All communication in a discussion group is carried on by e-mail.

a member of a discussion group allows you to communicate with colleagues worldwide. However, always remember that the attorney-client privilege extends to paralegals and other support staff, and includes all forms of communication outside the office. When posting a question or comment to a listserv or discussion group, never refer to a client by name or make any statements that could in any way be construed as a breach of the privilege. Do not rely on information posted on a listserv or online discussion group when drafting legal documents; they are not intended as reliable sources of the law, and merely express the personal opinions of the participants.

There are many law-related discussion groups and listservs. Two focusing on paralegal issues are the National Federation of Paralegal Associations (NFPA) at <http://www.paralegals.org> and the National Association of Legal Assistants (NALA) at <http://www.nala.org>.

blog
A Web page serving as a publicly accessible personal journal for an individual or group. The word blog is a play on the words "web" and "log," as most blogs will be displayed in a journal or log entry format. Content is typically updated daily, and often reflects the personality or focus of the author.

RSS
Stands for Really Simple Syndication; a method to keep current with pertinent news and information. Often associated with updated content such as blog entries, news headlines or podcasts. Content users deem valuable is delivered directly to a user's computer screen; also referred to as a feed, web feed, or channel.

podcast
Similar to RSS (*see* RSS); allows users to subscribe to a set of feeds to view syndicated Web site content. With podcasting, subscribers receive regular updates with new content on an iPod or similar device rather than reading them on a computer screen.

intranet
An internal Web site accessible only by the organization's members, employees, or others with authorization. Company intranet sites look and function similar to external Web pages, and may even link out to the Internet.

extranet
A variation on the use of Internet technology to access and disseminate information; a private network that uses standard Internet technology and a public telecommunications system (e.g., telephone system) to securely share designated parts of a business's internal information or operations to designated persons via a password.

Blogs

A **blog** is a Web page that serves as a publicly accessible personal journal for an individual or group. The word blog is a play on the words "web" and "log," as most blogs will be displayed in a journal or log entry format. Content is typically updated daily, and often reflects the personality or focus of the author. The majority of legal blogs are used for commentary among colleagues, reviews on everything from high profile litigation to new technology, and for marketing. Blogs should not be relied on as authoritative sources of the law.

RSS feeds

RSS stands for Really Simple Syndication and is a way to keep current with pertinent news and information. It is often associated with updated content such as blog entries, news headlines, or **podcasts**. RSS technology helps busy professionals avoid the conventional methods of Web browsing or searching for valuable information on Web sites by automating the updating process rather than manually checking sites for new content. Content you deem valuable is delivered directly to your computer without cluttering your e-mail inbox. This content or RSS document, often called a "feed," "web feed," or "channel," contains either a summary of content from an associated Web site or the full text. In Internet coding language, RSS is known as XML (eXtensible Markup Language), which is why RSS buttons on Web sites are commonly labeled with the XML icon.

INTRANETS AND EXTRANETS

Intranets and **extranets** are simply variations on the use of Internet technology to access and disseminate information. Today, clients increasingly expect their attorneys and support staff to be technology savvy, which has motivated even smaller law firms to develop intranets and extranets to keep pace with the new way of practicing law.

Intranets

An intranet is defined as a private Internet network contained within a single organization. The main purpose for having an intranet is to provide a cost-effective way to timely share company information and resources among employees, regardless of their physical location. The information available on a company intranet is as varied as the organizations themselves. Examples of information contained on a law firm intranet might include:

- internal policies and procedures manuals
- company directories
- office locations, maps, and directions
- news and press releases

- library and research services
- online library catalog
- administrative departments and services
- accounting forms
- online expert witness banks and forms files
- materials specifically related to the firm's various practice groups

Extranets

While similar in concept to an intranet, an extranet is a private network that uses standard Internet technology and a public telecommunications system (e.g., telephone system) to securely share designated parts of a business's internal information or operations with suppliers, vendors, customers, clients, or other businesses and colleagues. An extranet can be viewed as part of a company's internal intranet—that portion extended to users outside the company.

Law firms set up extranets as a secure, centralized repository to disseminate information to specific clients and co-counsel on major cases, or to allow certain clients to access information that would be inappropriate to post on the company's external public Web site. Available twenty-four hours a day, an extranet can eliminate telephone tag and the delays associated with traditional correspondence. Efficient use of extranets can save legal practitioners valuable time, and result in a higher quality of service to clients.

Extranets can help build stronger relationships with clients by providing an online workplace to share and collaborate on work in progress, and may include the following kinds of information relating to a specific client, matter or case:

- relevant statutory or case law
- online articles and legal research database
- legal dictionaries and encyclopedias
- answers to "Frequently Asked Questions"
- current awareness/breaking news
- background information and biographical data on the opposing parties and their counsel, judges, expert witnesses, and other key people in a case
- briefs, motions, and other pleadings
- deposition transcripts
- correspondence
- litigation calendar
- message boards or online chat rooms

KEY TERMS

blog
browser
discussion group
domain name
extranet
hyperlink
hypertext
intranet
plug-ins
podcast
protocol
RSS

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APPENDIX G

Legal Research Starting Points and Web Search Tools

INTRODUCTION

Appendix G highlights some of the best Web sites and search tools designed to make locating legal and government information on the Internet faster and more cost-effective. Savvy Web researchers often rely on specialized search engines and directories over sites such as Yahoo! and Google. Specialized search tools allow for more precise searching in a smaller universe of searchable resources dedicated to a particular subject or discipline, such as law.

American Bar Association's LawLink
<http://www.abanet.org/>

Maintained by the American Bar Association (ABA), Lawlink® provides quick access to important legal information from the ABA and other resources. Each site is selected and evaluated by a member of the ABA's Legal Technology Resource Center staff. Lawlink links to a wide range of legal research and government information resources on the Internet, which are organized under major categories and can be accessed from the main ABA page under "Lawyer Resources: Technology."

Cornell Law School Legal Information Institute
<http://www.law.cornell.edu/>

The Legal Information Institute (LII) is a free research and electronic publishing activity of the Cornell Law School, providing electronic versions of core legal materials in numerous areas of the law, both online and as free downloads. Popular online collections of information include the full text of the *United States Code* and United States Supreme Court opinions. A directory links to hundreds of legal resources, arranged by legal topic.

FindLaw for Legal Professionals
<http://lp.findlaw.com/>

A popular legal search engine and Web directory, this FindLaw site, devoted exclusively to information for legal professionals, includes hundreds of links to primary and secondary law resources. Topics include legal resources, law schools, consultants and experts, state and federal law, legal news, and more.

FindLaw LawCrawler
<http://lawcrawler.findlaw.com/>

FindLaw, the highest-trafficked legal Web site, is the most comprehensive set of legal resources on the Internet, including LawCrawler, a legal Web and database search engine.

By using simple keyword or phrase searching, LawCrawler will search the entire Web for legal information sites matching your query. Limiting the searchable universe to only law-related sites greatly increases the accuracy and reliability of your search results. Further limit your query by searching only a small, well-defined database of Web sites (e.g., United States federal and state government sites, the *United States Code*, or United States Supreme Court decisions, 1893–present). Users can also limit a Web search to FindLaw's legal dictionary, legal news, or law reviews and journals.

Global Legal Information Network
<http://www.glin.gov>

The Global Legal Information Network (GLIN) is a public database of official texts of laws, regulations, judicial decisions, and other complementary legal sources contributed by governmental agencies and international organizations, in their original languages. Each document is accompanied by a summary in English and, in many cases in additional languages, plus subject terms selected from the multilingual index to GLIN. All summaries are available free to the public. Free public access to full text information is also available for most jurisdictions.

Hieros Gamos Comprehensive Legal Site
<http://www.hg.org/>

A commercial Web directory providing easy access to United States law, international law for over 230 countries, government information for all fifty states, uniform laws, law-related organizations and bar associations, and online journals.

Internet Legal Research Group
<http://www.ilrg.com>

PublicLegal, a product of the Internet Legal Research Group (IRLG), is a categorized directory index of more than 4,000 select Web sites from over 238 nations. While the content emphasizes United States legal resources, many international resources are included in the categorized index. Once you get past the commercial aspect of the site, with a limited amount of advertising, there is a lot of helpful information. The site includes an extensive collection of free downloadable legal forms and statistical data on law schools and the legal profession.

lexisONE
<http://www.lexisone.com>

lexisONE, a registered service mark of LexisNexis, is a Web-based database offering a wide variety of free resources, including case law, forms, and legal news. Additional content is available to paid subscribers. While geared toward small law firms, this should be one of the first Web sites legal researchers turn to for free access to recent court decisions. Users can run a free case law search for United States Supreme Court decisions from 1790 to the present, as well as judicial opinions issued in most federal and state jurisdictions within the last five years. A list of available documents, jurisdictions, and courts is provided. The site also includes an extensive Legal Web Site Directory, with links to thousands of law-related Web resources.

Meta-Index for U.S. Legal Research
<http://gsulaw.gsu.edu/>

The Meta-Index for U.S. Legal Research maintained by the Georgia State University College of Law is a highly-rated index, arranged under major topics including judicial opinions from the United States Supreme Court and federal appellate courts, and federal legislation. Other legal sources include law reviews and links to legal Web sites. Each topic

includes a separate search tool with a "default" entry as an example. If you want to see the kind of information returned by each tool, simply select the search button. If you have a specific search in mind, enter the term in the space provided, and then hit the search button.

University Law Review Project
<http://www.lawreview.org>

The University Law Review Project is a collaborative effort of FindLaw and several large United States and international law schools. The site allows users to type a query once and simultaneously search all law reviews, electronic law journals, and legal periodicals published on the Web. With increasingly more law-related publications available fulltext on the Web, this is a real time-saver, and a very efficient, cost-effective research tool.

USAGov.com
<http://www.usa.gov/>

USAGov.com, formerly FirstGov, is the official gateway to all United States government information. It is designed to connect all of the federal government's online resources. Launched in September 2000, this interagency initiative, currently administered by the United States General Services Administration, boasts the most comprehensive collection of government information anywhere on the Internet. Users can browse a growing collection of topical links, arranged in a directory format, or use the powerful search engine to search millions of federal and state government Web pages.

WashLaw: Legal Information on the Web
<http://www.washlaw.edu>

Maintained by the Washburn University School of Law, WashLawWEB™ links to hundreds of law-related resources on the Internet using the Master Legal Index, which includes dozens of specialized legal subject areas. Users can also access information about law schools and law libraries and search law library catalogs. The site includes a table of contents and a separate search option for locating pertinent full text materials.

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APPENDIX H

Federal Law Web Resources

INTRODUCTION

Appendix H highlights several highly-rated Web sites for locating United States federal government information on the Internet, including federal agencies, federal legislative materials, federal courts and judicial opinions, and statistical data.

Emory Law School Federal Courts Finder

<http://www.law.emory.edu>

Located under the "Law Library: Research" tabs from the main law school Web site, this page contains links to full text decisions from the United States Supreme Court, all eleven United States Circuit Courts of Appeal, and the Circuit for the District of Columbia. Opinions for most jurisdictions are generally available from November 1994 forward and are published in cooperation with the Federal Courts Publishing Project, which seeks to electronically publish federal court decisions and make them available free to the public over the Internet.

Federal Agency Index

<http://www.lib.lsu.edu>

Hosted by the Louisiana State University (LSU) libraries and located under the "Government Information" tab on the main library page, this is an extensive directory listing of federal government agencies on the Internet. The index is a good place to locate information and resources related to, or issued by, federal agencies and their respective departments and divisions.

Federal Government Legal Resources

<http://law.sc.edu>

Maintained by the Coleman Karesh Law Library at the University of South Carolina School of Law, this is one of the most comprehensive Web directories for locating primary sources of law from all branches of the federal government. The site is well organized, concise, and regularly updated. To access, select the "Law Library" link on the main law school Web site and then "Legal Research: Research Guides."

FedWorld.com

<http://www.fedworld.gov>

Maintained as a service of the United States Department of Commerce, FedWorld.com has compiled a directory of links to United States federal government Web sites, arranged

by subject/topic, including executive branch agencies and departments, and independent federal agencies and commissions. Other important federal government information includes links to legislative branch materials such as the *United States Code*, *Code of Federal Regulations*, and the *Federal Register*.

GPO*Access* on the Web

<http://www.gpoaccess.gov>

The GPO*Access* Web site is maintained as a service of the Superintendent of Documents of the United States Government Printing Office (GPO). There are quick links from the main page to the *Code of Federal Regulations*, *Federal Register*, *Congressional Record* and the *United States Code*. In addition, links to other official federal government documents are arranged under the three branches of the federal government (legislative, executive, and judicial), as well as federal regulatory agencies and administrative regulations. There is also a special group of important historical documents including the *Articles of Confederation*, *Bill of Rights*, and *The Federalist Papers*, and a section covering executive orders and presidential proclamations.

Thomas Legislative Information

<http://thomas.loc.gov>

A service of the United States Congress, offered through the Library of Congress, this site contains the full text of federal laws (arranged by public law number), and bill summaries and status of pending legislation. Additional information includes the full text of the *Congressional Record*, Senate and House committee reports, and Congressional roll call votes on key legislation. THOMAS is also a good resource on how the legislative process works, as well as the status of federal funding and appropriations bills. There are also links to key historical federal documents and the full text of historical Congressional debates and documents from 1774 to 1873.

Launched in 2000 as FirstGov, the enhanced USA.gov is the official Web portal to United States government, designed to make it easy for the public to access government information and services on the Internet. The site includes an A–Z directory of United States government agencies and departments, and separate pages for federal, state, local, and tribal government information and resources.

Yahoo! Government Information Directory

<http://dir.yahoo.com/Government/>

Select the "Government" category from the main Yahoo! Directory page to access links to accurate and current legal and government information. Categories include federal agencies, citizenship, United States foreign embassies and consulates, all branches of the United States federal government, and the military.

APPENDIX I

State and Municipal Government Law Web Resources

INTRODUCTION

Appendix I summarizes some of the best Web sites providing free access to state and local government law and related legal resources on the Internet.

Administrative Codes and Registers

<http://nass.org>

Maintained as a service of the National Association of Secretaries of State (NASS), this site links directly to the official administrative codes and registers for all fifty states and the District of Columbia, plus various federal administrative law resources on the Web. From the NASS home page, select the "ACR Members" quick link, and then "Internet Rules" on the top menu bar of the Members page to access this information.

Findlaw's State Resources Index

<http://lp.findlaw.com>

From the main Findlaw for Legal Professionals page, use the "Browse by Jurisdiction" option to select a particular state from an alphabetical index. Each state page includes links to state primary law, legal forms, and the official Web sites for state, county, and local governments.

Guide to Online Law: U.S. States and Territories

<http://www.loc.gov>

A product of the Law Library of Congress, this comprehensive Web directory includes links to hundreds of state and local government resources, arranged alphabetically by state. It takes a few mouse clicks to find this page, but it is well worth the time. From the Law Library of Congress home page, select "Resources for Researchers" and then the "Law Researchers" link. Clicking on the "Guide to Online Law" will take you to a page with several "guide" options, including one for United States and Territories.

Municipal Code Corporation Online Library

<http://www.municode.com>

The Municipal Code Corporation (MCC) is a private sector host for city and county codes and ordinances. From the Online Codes Library, select a state from the graphic United States map to obtain an alphabetical list of available documents for that jurisdiction. While the searchable database includes codes, ordinances, and other documents, content varies by

jurisdiction. If you are unable to locate the information you need by performing a keyword search on the site or by browsing the alphabetical directory for a specific state, you may need to contact the local municipality or city/county clerk's office to obtain assistance specific to your research needs. Due to licensing agreements with MCC, some municipalities choose not to publish their documents here, but rather on their own official Web site.

National Center for State Courts
<http://www.ncsconline.org>

The National Center for State Courts (NCSC) is an independent, nonprofit organization founded in 1971 to provide assistance, information, and support to the state courts. The site includes information on court technology programs and a comprehensive listing of state courts and law-related Internet sites.

National Conference of State Legislatures
<http://www.ncsl.org>

Under the "Legislatures" tab on the National Conference of State Legislatures (NCSL) home page is a "Web Sites" option, linking to a database containing information gleaned from the home pages and Web sites of the fifty state legislatures, the District of Columbia, and the United States Territories. Users can select to view specific state legislative materials (e.g., bills, statutes) from all states, one state, or a selected list of states.

State and Local Government Comprehensive Legal Site
<http://www.hg.org>

From the main Hieros Gamos page, select "States' Law" under the heading "United States Law." The site provides easy access to state and local government information for all fifty states and the District of Columbia, arranged alphabetically, and includes links to organizations dealing with state and municipal governments, and to uniform laws adopted and proposed by states.

APPENDIX J

International Law Web Resources

INTRODUCTION

There are many Web sites providing free access to primary and secondary legal and government information for foreign countries. Appendix J annotates a few of the best resources for locating international law resources on the Web.

Electronic Information System for International Law
<http://www.eisil.org>

The Electronic Information System for International Law (EISIL) was developed by the American Society of International Law (ASIL), a scholarly association known as a leader in the analysis, dissemination, and development of international law since 1906. The site includes a PowerPoint presentation on how to use EISIL for international legal research. Information is arranged in a directory format under main categories including international organizations, general international law, international criminal law, and international economic law.

Embassy.org
<http://embassy.org>

Maintained as a resource for the Washington, DC foreign embassy community, this site includes links to information on foreign embassies in the United States, including country profiles and data. Detailed reports on over 190 countries can be ordered online for a nominal fee.

Global Legal Information Network
<http://www.glin.gov>

The Global Legal Information Network (GLIN) is a public database containing the official texts of laws, regulations, judicial decisions, and other legal sources contributed by governmental agencies and international organizations. Full text published documents are submitted to the database in their original languages. Each document contains subject terms selected from the GLIN multilingual index and is accompanied by a summary in English and, in many cases, in additional languages. All summaries are available to the public, with access to full text information available for most jurisdictions. Select "More Search Options" for more precise searching.

Guide to Foreign and International Legal Databases
<http://www.law.nyu.edu>

Maintained and hosted by the New York University School of Law Library, this is a simple, yet comprehensive, directory listing of links to foreign and international legal materials and law-related information. Links are arranged under major categories including constitutions, foreign databases arranged by jurisdiction, international trade, international treaties, and foreign tax laws. From the Library's main page (a direct link on the law school's main Web page), select the "Foreign and International Legal Databases" option under the "Research" heading.

Legal Information Institute: Global Resources
<http://www.law.cornell.edu>

From the main Cornell Law School's Legal Information Institute (LII) page, select "World Law" under the law by jurisdiction category. The LII extensive collection of international legal materials gathers Internet-accessible sources of constitutions, statutes, judicial opinions, and related legal materials from around the globe.

United Nations
<http://www.un.org>

The United Nations Web site is a good place to start a search for foreign laws and treaties, or to obtain demographic or statistical data on a foreign country. Maintained by the United Nations Department of Public Information, this site provides original data as well as links to reliable Web resources around the world containing related content. There is also a good selection of official United Nations documents, maps, and geographic information. Information found under the "Documents and Maps" tab and the "Member States" category on the main page are particular helpful.

APPENDIX K

Cases

MENU OF CASES

All cases in Appendix K are reprinted with permission of Thomson Reuters/West.

Balthazar v. Atlantic City Medical Center

Bowles v. Russell

Bradshaw v. Unity Marine Corporation, Inc.

Duran v. St. Luke's Hospital

Ernst Haas Studio, Inc. v. Palm Press, Inc.

In re Disciplinary Action against Hawkins

Jungle Democracy v. USA Government

Kentucky Bar Association v. Brown

U.S. v. Le

In re McIntyre

McBoyle v. United States

Miles v. City Council of Augusta, Georgia

State v. Nelson

State v. Opperman

Precision Specialty Metals, Inc. v. United States

In re S.C.

In re Shepperson

Technology Solutions Company v. Northrop Grumman Corporation

United Stars Industries, Inc. v. Plastech Engineered Products, Inc.

United States v. Vastola

Western Wisconsin Water, Inc. v. Quality Beverages of Wisconsin, Inc.

Enez BALTHAZAR, Plaintiff,

v.

ATLANTIC CITY MEDICAL CENTER, Atlantic City Medical Center Community Health Services, Barbara Henderson, M.D., Joseph DeStefano, M.D., Allan Feldman, M.D., Phillip Korzeniowski, M.D., DeStefano, Feldman & Kaufman, P.A., DeStefano, Feldman, Kaufman, & Korzeniowski, P.A. University of Medicine and Dentistry of New Jersey, School of Osteopathic Medicine And Richard Cooper, D.O., Defendants.

Civ.A. No. 02-1136.

United States District Court,
D. New Jersey.
Aug. 15, 2003.

Patient sued physicians and hospital under Racketeer Influenced and Corrupt Organizations Act (RICO), alleging that they engaged in scheme to pervert administration of justice, and conspired to defraud patient, by impairing patient's ability to litigate her malpractice action in state court. Patient moved to amend complaint, and physicians and hospital moved to dismiss, and for Rule 11 sanctions. The District Court, Orlofsky, J., held that: (1) action was barred by res judicata; (2) patient lacked standing to assert claim under RICO; (3) patient failed to state claim under § 1985; (4) attorney violated Rule 11 by asserting claims on patient's behalf; and (5) violation warranted nonmonetary sanction.

Defendants' motions granted in part and denied in part.

1. Federal Civil Procedure ⚿ 834

Prejudice to nonmoving party is touchstone for denial of motion to amend pleading. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

2. Judgment ⚿ 828.4(1)

When prior case has been adjudicated in state court, federal courts are required to give full faith and credit to state judgment. 28 U.S.C.A. § 1738.

3. Federal Courts ⚿ 420

Federal court must give state court judgment the same effect as courts of state which rendered judgment. 28 U.S.C.A. § 1738.

4. Judgment ⚿ 540

For res judicata to apply under New Jersey law, there must be valid, final judgment on the merits in prior action, parties in second action must be identical to, or in privity with, those in first action, and claim in subsequent action must arise out of same transaction or occurrence as claim in first action.

5. Courts ⚿ 509

Rooker–Feldman doctrine generally prohibits lower federal courts from reviewing final judgments of state courts.

6. Federal Courts ⚿ 29.1, 30

Challenge under *Rooker–Feldman* doctrine is for lack of subject matter jurisdiction and may be raised at any time by either party or sua sponte by the court.

7. Courts ⚿ 509

Rooker–Feldman doctrine's prohibition of district court review of judgment of state court of any level extends to constitutional claims which are inextricably intertwined with state court's decision.

8. Courts ⚿ 509

Rooker–Feldman doctrine applies when, in order to grant federal plaintiff the relief sought, federal court must determine that state court judgment was erroneously entered or must take action that would render judgment ineffectual.

9. Judgment ⚿ 828.9(7), 828.14(1), 828.15(1)

Patient's action under Racketeer Influenced and Corrupt Organizations Act (RICO), alleging that physicians and hospital engaged in scheme to pervert administration of justice, and conspired to defraud patient, by impairing patient's ability to litigate her malpractice action in state court, was barred by res judicata under New Jersey law; state appellate court's judgment that there was no evidence that physicians and hospital fraudulently concealed their alleged medical malpractice was valid, final, and on the merits, parties were identical to those named in state action, and patient advanced same allegations that she litigated in state court proceeding. 18 U.S.C.A. § 1961 et seq.

10. Racketeer Influenced and Corrupt Organizations ⚿ 62

Patient lacked standing to assert claim under Racketeer Influenced and Corrupt Organizations Act (RICO) that physicians and hospital perpetrated extrinsic fraud on her to prevent her from presenting medical malpractice case against them to state court, since alleged fraud was not cause of her injury; patient's attorney failed to file affidavit of merit required under New Jersey law. 18 U.S.C.A. § 1961 et seq.

11. Federal Civil Procedure ⚿ 636

Patient's allegations that physicians and hospital encouraged her to apply for Medicaid benefits to pay for surgeries necessary to repair uretal tear allegedly resulting from medical malpractice during hysterectomy, and that hospital either failed to provide Medicaid with certificate of necessity or provided certificate with material misrepresentations, failed to plead mail fraud with specificity required to assert claim for

violation of Racketeer Influenced and Corrupt Organizations Act (RICO). 18 U.S.C.A. § 1961 et seq.; Fed. Rules Civ.Proc. Rule 9(b), 28 U.S.C.A.

12. Conspiracy ⚿ 18

Patient's allegations that she was an indigent, African–American woman, and that physicians and hospital conspired against her in attempt to deprive her of Medicaid benefits, did not provide factual basis for allegations that conspiracy was motivated by racial or class-based animus, as required to support claim for discrimination in violation of § 1985. 42 U.S.C.A. § 1985.

13. Attorney and Client ⚿ 36(2)

District court has authority to examine allegations that attorney appearing before court has violated his moral and ethical responsibility, and to fashion appropriate remedy, if warranted.

14. Federal Civil Procedure ⚿ 2768, 2790

Rule 11 requires attorney who signs complaint to certify both that it is not interposed for improper purposes, such as delay or harassment, and that there is reasonable basis in law and fact for the claim. Fed.Rules Civ.Proc.Rule 11(b), 28 U.S.C.A.

15. Federal Civil Procedure ⚿ 2769

Legal standard to be applied when evaluating conduct allegedly violative of Rule 11 is reasonableness under the circumstances. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

16. Federal Civil Procedure ⚿ 2769

Reasonableness in context of Rule 11 is objective knowledge or belief at time of filing of challenged paper that claim therein was well-grounded in fact and law. Fed.Rules Civ.Proc. Rule 11, 28 U.S.C.A.

17. Federal Civil Procedure ⚿ 2769

Bad faith is not required to establish violation of Rule 11. Fed.Rules Civ.Proc. Rule 11, 28 U.S.C.A.

18. Federal Civil Procedure ⚿ 2783(1)

To comply with Rule 11, counsel is required to conduct reasonable inquiry into both facts and law supporting a particular pleading. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

19. Federal Civil Procedure ⚿ 2828

Before court can impose sanctions against attorney under Rule 11, attorney must have received particularized notice of possible sanction, sufficient to inform him of particularized factors that he must address if he is to avoid sanctions. Fed. Rules Civ.Proc.Rule 11, 28 U.S.C.A.

20. Federal Civil Procedure ⚿ 2771(5, 11)

Attorney violated Rule 11 by asserting, on behalf of patient, claim under Racketeer Influenced and Corrupt Organizations Act (RICO) that physicians and hospital engaged in scheme to deprive patient of opportunity to present malpractice action to state court, since claim was barred by res judicata, and claim under § 1985 that physicians and hospital conspired to deprive patient of Medicaid benefits, since there were no allegations of racial or class-based animus. 18 U.S.C.A. § 1961 et seq.; 41 U.S.C.A. § 1985; Fed. Rules Civ.Proc.Rule 11(b)(2), 28 U.S.C.A.

21. Federal Civil Procedure ⚿ 2820

Nonmonetary sanction requiring attendance and completion of continuing legal education courses dealing with federal practice and procedure and with attorney professionalism and rules of professional conduct was appropriate for attorney's assertion, on behalf of patient, of claims under Racketeer Influenced and Corrupt Organizations Act (RICO) and § 1985, unsupported by law or facts, against physicians and hospital. 18 U.S.C.A. § 1961 et seq.; 41 U.S.C.A. § 1985; Fed.Rules Civ. Proc.Rule 11(b)(2), (c)(2), 28 U.S.C.A.

Frank D. Branella, Philadelphia, PA, for Enez Balthazar.

Sean Robins, Gold, Butkovitz & Robins, P.C., Elkins Park, PA, for Atlantic City Medical Center and Atlantic City Medical Center Community Health Services.

Sharon K. Galpern, John A. Talvacchia, Stahl & DeLaurentis, P.C., Voorhees, NJ, for Barbara Henderson, M.D., and Phillip Korzeniowski, M.D.

Joseph A. Martin, Kerri E. Chewning, Archer & Greiner, P.C., Haddonfield, NJ, for Joseph DeStefano, M.D., Allan Feldman, M.D., DeStefano, Feldman & Kaufman, P.A., and DeStefano, Feldman, Kaufman & Korzeniowski, P.A.

Thomas F. Marshall, Mount Holly, NJ, for University of Medicine and Dentistry of New Jersey, School of Osteopathic Medicine and Richard Cooper, D.O.

OPINION

ORLOFSKY, District Judge.

Once again, this Court is confronted with the painful and difficult duty of determining whether to impose sanctions against an attorney pursuant to Rule 11 of the Federal Rules of Civil Procedure. In this case, an attorney who failed to file an Affidavit of Merit in a medical malpractice case in state court, thereby causing his client's case to be dismissed, has attempted under the guise of the federal RICO statute, to relitigate the merits of his client's state law claims in this Court. Moreover, Plaintiff's counsel has persisted in pursuing an action in this Court despite a letter from this Court warning him in advance of the risk of Rule 11 sanctions, should he do so, and the issuance of an Order to Show Cause as to why such sanctions should not be imposed. For the reasons that follow, I find that Plaintiff's counsel, Frank D. Branella, Esq., has violated Rule 11. Accordingly, I shall order Mr. Branella to complete continuing legal education courses in: (1) Federal Practice and Procedure; and (2) Professionalism and the Rules of Professional Conduct; (3) within one year from the date of this Opinion and Order.

I. FACTUAL AND PROCEDURAL BACKGROUND

The following factual recitation is based upon the allegations set forth in Plaintiff's Complaint filed with this Court on March 14, 2002. On January 27, 1998, Enez Balthazar ("Balthazar"), a resident of Ocean City, New Jersey, underwent a total abdominal hysterectomy at Atlantic City Medical Center ("ACMC"), a medical facility located in Pomona, New Jersey. Compl. ¶¶ 3, 5, 15. The procedure was performed by Defendants, Dr. Barbara Henderson ("Henderson") and Dr. Phillip Korzeniowski ("Korzeniowski"), physicians who specialize in obstetrics and gynecology, and was attended by Dr. Richard Cooper ("Cooper"), who was then a resident at ACMC working under the supervision of University of Medicine and Dentistry of New Jersey, School of Osteopathic Medicine ("UMDNJ"). *Id.* ¶¶ 6, 9, 15. On January 30, 1997, a board certified urologist, Dr. Barry Kimmel ("Kimmel"), discovered that Balthazar was suffering from a left uretal obstruction. Kimmel testified in a deposition that he believed Balthazar's left ureter had been lacerated during the hysterectomy performed on January 27, 1998. *Id.* ¶¶ 16, 18. Subsequently, on January 31, 1998, Kimmel, assisted by Henderson and Dr. Allan Feldman ("Feldman"), conducted an exploratory laparotomy, in which Kimmel discovered several stitches on and around Balthazar's left ureter. *Id.* ¶ 17.

A. The State Court Proceedings

On June 21, 1999, Balthazar commenced a medical malpractice suit in the Superior Court of New Jersey, Law Division, Camden County ("Superior Court") against ACMC, Atlantic City Medical Center Community Health Services (the "Community"), Henderson, Dr. Joseph DeStefano ("DeStefano"), Feldman, Korzeniowski, DeStefano, Feldman & Kaufman, P.A., DeStefano, Feldman, Kaufman, & Korzeniowski, P.A. (collectively, "the Associations"), UMDNJ, and Cooper.[1] Compl., *Balthazar v. Atlantic City Medical Ctr. et al.*, No. L–4527–99 (N.J.Super.Ct. Law Div. June 21, 1999). In her complaint, Balthazar alleged that she sustained injuries as a result of the Defendants' allegedly negligent performance of the hysterectomy. *Id.* Specifically, she contended that "Henderson, Korzeniowski, and Cooper used medically unacceptable procedures which prevented their ability to identify, isolate and/or protect the Plaintiff's left ureter from being transected." *Id.* ¶ 19.

The Superior Court dismissed the action with prejudice against Henderson, DeStefano, Feldman, and Korzeniowski, because of Balthazar's failure to provide an Affidavit of Merit, pursuant to N.J. Stat. Ann. §§ 2A:53A–26, *et seq.* Order, *Balthazar,* No. L–4192–99 (N.J.Super.Ct. Law Div. May 14, 2001). Following discovery, Defendants, ACMC, UMDNJ, and Cooper, filed a motion for summary judgment, and Balthazar filed a motion for leave to amend the complaint to add allegations of common law battery, fraud, and fraudulent concealment. *See* Cert. of Thomas F. Marshall at Ex. F. On May 14, 2001, after hearing oral arguments, the Honorable Carol E. Higbee, J.S.C., granted Defendants' motion for summary judgment, denied Balthazar's motion for leave to amend the complaint, and dismissed the case as to all parties. *Id.* Judge Higbee explained her reasoning for this decision as follows:

> The fact of the matter is we don't know what exactly what Cooper did. . . . Plaintiff suggests that the defendants are trying to forget on purpose, conceal what happened, and that because the patient's unconscious—and we do have a methodology for dealing with this . . . If, in fact, a person's asleep in the operating room, negligence occurs, if you name everybody in the operating room bring them all in, have them all named defendants, the burden of proof's going to shift to them. That's your *Anderson v. Sondberg* [sic], that's your res ipsa in the operating room, that's your shifting of proofs that occur in those situations, but you have to have all the doctors in. You can't have—could have been one of the three doctors. We don't know which one, and two of them aren't in the case.
>
> If you've got all three doctors in the case then the defendants darn well better start remember [sic] who did what or they've got a problem. . . . Proving that nobody knows what happened is not sufficient proof to carry against the one defendant that's in this case.

See 5/14/01 Hr'g Tr. from Superior Court at 14–15. On June 26, 2001, Balthazar filed a notice of appeal to the Superior Court of New Jersey, Appellate Division ("Appellate Division"). Notice of Appeal, Balthazar, No. A–5661–00T3 (N.J.Super.Ct.App.Div. June 26, 2001).

On March 5, 2003, the Appellate Division affirmed Judge Higbee's decision. *See Balthazar v. Atlantic City Med. Ctr.*, 358 N.J.Super. 13, 816 A.2d 1059 (App.Div. 2003). In addition to holding that Balthazar failed to "substantially comply" with the statutory requirements of providing an Affidavit of Merit, *see id.* at 23–24, 816 A.2d 1059, the Appellate Division found no evidence of fraud or fraudulent concealment in the record. *Id.* at 21–22, 816 A.2d 1059.

> We do not find patent the "fraud" that plaintiff claims to exist, and find no other evidence to suggest that it occurred. Dr. Henderson presented a perfectly reasonable and essentially uncontroverted explanation for the existence of the two operative reports in Balthazar's hospital chart. Moreover, the second report was clearly designated "REDICTATION," thereby providing notice to anyone viewing the chart that another version had previously been given by her to the transcriber. Neither report contained overly exculpatory or inculpatory material. Both were dictated before damage to the ureter was discovered. Thus, this is not a case in which there is evidence of

1. At some point in time following the filing of the Complaint in the Superior Court of New Jersey, Law Division, Camden County, the state court case was transferred to the Superior Court of New Jersey, Law Division, Atlantic County.

> deliberate destruction or alteration of medical records in anticipation of the suit. Both operative reports existed in the chart essentially from the outset, and both were available to Balthazar for her analysis and use.

Id. at 21, 816 A.2d 1059. Balthazar has purportedly filed a Petition for Certification with the New Jersey Supreme Court. See Proposed Am. Compl. ¶ 49.

B. The Federal Court Proceedings

On March 14, 2002, Balthazar filed a Complaint in this Court, in which she alleged that Defendants, ACMC, the Community, Henderson, DeStefano, Feldman, Korzeniowski, the Associations, UMDNJ, and Cooper,[2] engaged in a pattern of racketeering activity as part of "an ongoing scheme to deprive Plaintiff of her property and . . . an attempt to deprive the Plaintiff of due process of law in that the Defendants intentionally and maliciously sought to pervert the administration of justice." Compl. ¶ 36. According to Balthazar, Defendants engaged in an illegal campaign to cover up Henderson, Korzeniowski, and Cooper's allegedly negligent behavior during the January 27, 1998 hysterectomy. Specifically, Balthazar maintained that Defendants "provided false and fraudulent medical records . . . with forged signatures," as well as "conspired to hide the whereabouts" of Cooper as she attempted to litigate her claims in state court. *Id.* ¶¶ 21–22.[3]

Accordingly, Balthazar alleged that Defendants conspired to defraud her "by impairing [her] ability to litigate the Malpractice Case and increasing the cost of litigation thereby wasting Plaintiff's assets," in violation of the federal RICO statute, 18 U.S.C. § 1962, and New Jersey's RICO statute, N.J. Stat. Ann. § 2C:41–4, Compl. ¶¶ 50, 59,[4] as well as "conspired and agreed to commit fraudulent practices" against her and deprived her of her right to due process of law and equal protection in violation of 42 U.S.C. § 1985, *id.* ¶ 71. Finally, Balthazar alleged that Defendants engaged in fraud, deceit, and misrepresentation by altering, falsifying, destroying, and concealing material records and documents in violation of N.J. Stat. Ann. §§ 2C:21–4.1, 8:43G– 15.3, 13:35–6.5 and New Jersey common law.

Before the Appellate Division had determined that Balthazar had failed to provide evidence of either fraud or fraudulent concealment, Defendants, UMDNJ and Cooper, moved in this court to dismiss Balthazar's Complaint for failure to state a claim upon which relief can be granted, pursuant to Fed.R.Civ.P. 12(b)(6), on the basis of res judicata, New Jersey's "entire controversy doctrine," and the *Rooker–Feldman* doctrine. In an unpublished Order dated July 19, 2002, I denied Defendants' motion, holding that Balthazar's claims of litigation fraud, which formed the basis of her federal RICO action, were not "inextricably intertwined" with the medical malpractice claim she brought before the Superior Court. Order, *Balthazar v. Atlantic Med. Ctr.*, Civ. A. No. 02–1136 (D.N.J. July 19, 2002).

On August 22, 2002, Defendants, ACMC and the Community, also moved to dismiss Balthazar's Complaint for failure to state a claim upon which relief can be granted, pursuant to Fed.R.Civ.P. 12(b)(6). In an unpublished Opinion and Order dated March 3, 2003, I granted the motion of ACMC and the Community to dismiss the claims brought against all Defendants under federal law, however, I granted Plaintiff leave to move to amend the Complaint within 30 days. *See* Opinion & Order, *Balthazar,* Civ. A. No. 02–1136 (D.N.J. Mar. 3, 2003). As to Balthazar's claim that Defendants violated the Federal RICO statute, I held that Balthazar had failed to allege that Defendants participated in a pattern of racketeering activity that included at least two racketeering, or predicate acts. More specifically, I held that the exchanges of correspondence between Defendants and Balthazar's attorneys could not be considered "predicate acts" under the federal RICO statute because "they constitute legitimate conduct of attorneys acting on behalf of [clients] in the course of a pending litigation." *Id.* at 11.

Moreover, as to Balthazar's claim that Defendants violated her civil rights under 42 U.S.C. § 1985, I held that "[a]lthough Balthazar has alleged that Defendants conspired against her in an attempt to injure her and deprive her of her civil rights, the Complaint does not contain a single allegation that would suggest that the alleged conspiracy was motivated by 'racial . . . or otherwise class-based' animus". *Id.* at 15. Finally, I declined to exercise supplemental jurisdiction over Balthazar's remaining state law claims. *Id.* at 15–16.

In a letter dated March 12, 2003, I informed Mr. Branella that I had reviewed the recent decision of the Superior Court of New Jersey, Appellate Division, *Balthazar v. Atlantic City Med. Ctr.*, 358 N.J.Super. 13, 816 A.2d 1059 (App.Div.2003), and I placed him on notice that should he "move to amend the Complaint to assert a RICO claim based on those same facts and circumstances described in the Appellate Division's Opinion, that I [would] carefully scrutinize any such pleading for potential Rule 11 violations." *See* Letter to Sean Robins, Esq., *Balthazar,* Civ. A. No. 02– 1136 (D.N.J. Mar.12, 2003).

Shortly thereafter, on April 2, 2003, Mr. Branella, on behalf of Balthazar, moved for leave to file an amended complaint.

2. According to Balthazar's Complaint, Henderson, DeStefano, Feldman, and Korzeniowski, physicians who specialize in the field of obstetrics and gynecology, maintain medical offices at ACMC, as well as the Associations, and Cooper was a resident at ACMC, and the Associations. *See* Compl. ¶¶ 6–11.

3. Balthazar alleged that in 1999, ACMC and the Community claimed that Cooper "was not one of its attending physicians, staff physicians, or residents at any time during 1998." Compl. ¶ 22. However, in 2000, the Director of Medical Education of ACMC admitted that Cooper had been a resident in 1998. *Id.* Moreover, Balthazar contends that UMDNJ stated that Cooper might have been a resident during 1998, but that UMDNJ had no record of his current address. *Id.*

4. More specifically, Balthazar alleges that Defendants' racketeering activities violated the mail fraud statute, 18 U.S.C. § 1341, and the wire fraud statute, 18 U.S.C. § 1343, because, in order to carry out their scheme to defraud her of her property, Defendants used the United States Postal Service and interstate wire systems. *See* Compl. ¶ 50.

Balthazar's Proposed Amended Complaint—a rambling narrative, which is organized and drafted so poorly that it is often difficult to comprehend—contains essentially the same federal claims as her Original Complaint, namely, that Defendants' actions violate the federal RICO statute, 18 U.S.C. § 1962, as well as 42 U.S.C. § 1985.[5] Balthazar, however, has attempted to "shore up" the Proposed Amended Complaint with additional allegations that consume approximately fifteen pages of the Proposed Amended Complaint.[6] These additional allegations, which purportedly support Balthazar's assertion that Defendants engaged in a pattern of racketeering activity, comprise the following three categories of claims: (1) Defendants, and specifically the UMDNJ, concealed the fact that Cooper, a resident physician employed by UMDNJ, was not licensed in the State of New Jersey in violation of the requirements of the American Osteopathic Association ("AOA"), *see* Proposed Am. Compl. ¶ 79(d)–(e); [7] (2) Defendants engaged in a pattern of activities in violation of Title XIX of the Social Security Act, 79 Stat. 343, as amended 42 U.S.C. §§ 1396, *et seq.* ("the Medicaid Act"), *see id.* ¶ 79(a), (b), (e)–(g); [8] and (3) Defendants concealed Korzeniowski's narcotics addiction, *id.* ¶ 79(f).[9] Moreover, Balthazar now claims, in addition to being deprived "maliciously and intentionally" of "due process of law," that she has been deprived of "the right to honest services and federally funded medical assistance" because Defendants have billed her in excess of $50,000.

On the same day that he filed this motion on behalf of Balthazar, I issued an Order to Show Cause as to why Mr. Branella "should not be sanctioned for violating Rule 11(b) of the Federal Rules of Civil Procedure. . . ." Order to Show Cause, *Balthazar*, Civ. A. No. 02–1136 (D.N.J. Apr. 2, 2003). As promised, I have carefully scrutinized Balthazar's Proposed Amended Complaint for Rule 11 violations. Thereafter, the Defendants filed several additional motions: (1) Defendants, ACMC and the Community, filed a Motion for Sanctions; (2) Defendants, UMDNJ and Cooper, filed a Motion for Sanctions; (3) Defendants, ACMC and the Community, filed a Motion to Disqualify Plaintiff's Counsel; and (4) Balthazar filed a Cross– Motion to Disqualify Defendant's Counsel. Before I determine whether sanctions are warranted in this instance, however, I shall first address Balthazar's Motion for Leave to File an Amended Complaint.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1343 and 18 U.S.C. § 1964. I have considered

5. Balthazar also maintains that Defendants' actions constitute fraud, deceit, and misrepresentation in violation of New Jersey common law.

6. Balthazar also includes four additional Defendants in her Proposed Amended Complaint. Specifically, she adds as Defendants: (1) William Frese, the Risk Management Coordinator for ACMC; (2) Harry Knorr, the Vice President of Medical Education at ACMC, and the prior Coordinator for Family Practice at UMDNJ; (3) Richard Liszewski, D.O., Program Director for UMDNJ; and (4) David Keller, Risk Manager for UMDNJ. *See* Proposed Am. Compl. ¶¶ 6–7, 15–16.

7. More specifically, Balthazar maintains that the UMDNJ "offers a four-year program in General Surgery, which provides the basic requirements for eventual certification in General Surgery of the [AOA] through the American Board of Surgery." Proposed Am. Compl. ¶ 17. According to Balthazar, the UMDNJ provided her with an altered "Residency Training Program" booklet via the United States Postal Service, which stated that "all candidates for residency in surgery . . . shall apply for or be licensed to practice medicine and surgery in the State of New Jersey." *Id.* ¶¶ 20–21. Balthazar contends that the same booklet that the UMDNJ had sent to the AOA stated that such residents must actually "possess a New Jersey medical license." *Id.* ¶ 19. Because Cooper was not licensed in New Jersey, Balthazar alleges that the UMDNJ concealed this fact in furtherance of "a deliberate ongoing scheme to defraud Plaintiff, others similarly situated, the federal government and the several states. . . ." *Id.* ¶ 79. Moreover, Balthazar maintains that "UMDNJ, Cooper and Lisewski each falsified certain compliance with all applicable laws, regulations and codes." *Id.* ¶ 33.

8. Balthazar makes the following allegations in support of this general claim:
   1. "Upon the advice of the ACMC and Henderson and in conjunction with Doctors [sic] Association, Plaintiff applied for Medicaid for the purpose of reimbursing her medical care costs to the providers. . . ." Proposed Am. Compl. ¶ 42.
   2. On January 22, 1998, Defendant Henderson, in conjunction with Defendants ACMC, the Associations, "submitted Plaintiff's request for medical benefits to Medicaid and Jersey Care describing the medical necessity for the hysterectomy. These forms were submitted through the U.S. mail and/or interstate wire services and are in the exclusive control of Defendants." *Id.* ¶ 50.
   3. Federal approval was pending on January 27, 1998, the date that Henderson, Korzeniowski and Cooper performed a total abdominal hysterectomy on Balthazar. *Id.* ¶ 52.
   4. Sometime after that date, a financial counselor advised Balthazar that she must provide income and asset documentation in order to receive medical benefits. Balthazar maintains that she provided the proper information. *Id.* ¶ 53. Despite this, Balthazar contends that ACMC misrepresented to her that she had not been approved for Medicaid benefits because she had not filed the proper paperwork. *Id.* ¶ 54.
   5. As a result, Balthazar alleges that she has been improperly billed over $50,000 "for the services rendered as a result [of] the hysterectomy and subsequent complications. . . . These are attempts to collect an illegal debt and are regularly transmitted through the U.S. mail. . . ." *Id.* ¶¶ 43, 55.
   6. "Defendants Henderson, Korzeniowski, DeStefano, Cooper, Doctors' Association, Association Two and/or ACMC failed to provide Medicaid with a Certificate of Medical Necessity, for the surgeries involving the ureteral repair, which is required before payment is approved." *Id.* ¶ 56. However, Balthazar maintains that "[i]n the alternative, Defendants Henderson, Korzeniowski, DeStefano, Cooper, Association One, Association Two and/or ACMC provided Medicaid with a Certificate of Medical Necessity, misrepresenting the true cause and nature of plaintiff's complications and failing to identify a responsible third party." *Id.* ¶ 57.

9. Specifically, Balthazar maintains that "[d]uring the period between March 26, 2001 and April 23, 2001, Defendant Korzeniowski illegally obtained over (400) units of Lortab, a controlled dangerous substance." Proposed Am. Compl. ¶ 59. As a result, "Korzeniowski surrendered his medical license for a minimum of (6) months and entered an in-patient treatment facility on or before May 4, 2001." *Id.* ¶ 60. Additionally, Balthazar alleges that on February 7, 2001, someone who identified himself as Korzeniowski gave a deposition in Balthazar's state medical malpractice action. *Id.* ¶ 63. However, according to Balthazar, a physician identified as Korzeniowski "appeared on television for the purpose of discussing women's health issues." *Id.* ¶ 64. Balthazar maintains that "[t]he man on television, identified as Philip A. Korzeniowski, M.D., was not the same gentleman identified as Philip A. Korzeniowski at his deposition on February 7, 2001." *Id.*

the submissions of the parties and decided the motion on the papers without oral argument pursuant to Fed.R.Civ.P. 78. For the reasons set forth below, I shall: (1) deny Balthazar's Motion for Leave to File an Amended Complaint; (2) impose sanctions on Balthazar's counsel, Mr. Branella, pursuant to Fed.R.Civ.P. 11(b)(1); (3) order Mr. Branella to attend and complete both a course in Federal Practice and Procedure and a course in Attorney Professionalism and the Rules of Professional Conduct within twelve months from the date of this Opinion and accompanying Order; (4) require that Mr. Branella file an affidavit with this Court attesting to his attendance at and satisfactory completion of the required courses; (5) deny UMDNJ and Cooper's Motion for Sanctions; (6) deny ACMC and the Community's Motion for Sanctions; (7) dismiss ACMC and the Community's Motion to Disqualify Plaintiff's Counsel as moot; and (8) dismiss Balthazar's Motion to Disqualify Defendants' Counsel as moot.

II. BALTHAZAR'S MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

A. Legal Standards Governing Motions For Leave to Amend a Complaint Pursuant to Fed.R.Civ.P. 15

[**1**] In general, leave to file an amended pleading "shall be freely given as justice so requires." Fed.R.Civ.P. 15(a). The United States Supreme Court has held that leave to amend under Rule 15 should be denied only in certain circumstances:

> In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.—the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). *See also Harrison Beverage Co. v. Dribeck Importers, Inc.*, 133 F.R.D. 463, 468 (D.N.J.1990) (citing *Heyl & Patterson Int'l, Inc. v. F.D. Rich Housing of the Virgin Islands, Inc.*, 663 F.2d 419, 425 (3d Cir.1981), *cert. denied sub nom. F.D. Rich Housing of the Virgin Islands, Inc. v. Gov't of the Virgin Islands*, 455 U.S. 1018, 102 S.Ct. 1714, 72 L.Ed.2d 136 (1982)). The United States Court of Appeals for the Third Circuit has demonstrated a strong liberality in allowing amendments under Rule 15(a) in order to ensure that claims will be decided on the merits, rather than on legal technicalities. *Dole v. Arco Chemical Co.*, 921 F.2d 484, 487 (3d Cir.1990); *Bechtel v. Robinson*, 886 F.2d 644, 652 (3d Cir.1989). Likewise, the Third Circuit has held that "prejudice to the non-moving party is the touchstone for the denial of an amendment." *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1414 (3d Cir.1993) (quoting *Cornell & Co. v. Occupational Safety & Health Review Comm'n*, 573 F.2d 820, 823 (3d Cir.1978)).

B. The Futility of Balthazar's Proposed Amended Complaint

In the various moving papers they have filed with this Court, Defendants contend that Balthazar should not be granted leave to file an amended complaint because the Proposed Amended Complaint contains futile claims that would not survive a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). More specifically, they maintain that Balthazar's proposed allegations would be barred under the doctrine of res judicata and the New Jersey "entire controversy doctrine." Moreover, Defendants, ACMC and the Community, argue that Balthazar has alleged a wholly separate claim under RICO—namely, that Defendants conspired to engage in Medicaid fraud. Such a claim, according to ACMC and the Community, would be barred under the two-year statute of limitations governing personal injury claims.

In response, Balthazar contends that her claims should not be precluded because she did not learn of the alleged RICO violations until her state court negligence action had been dismissed. Pl.'s Reply Br. at 10. Balthazar further argues that New Jersey's "entire controversy doctrine" is inapplicable to actions predicated upon federal questions. *Id.* at 9. Finally, Balthazar maintains that because the statute of limitations governing civil RICO claims is four years, her claims are not time-barred.

1. The Doctrines of Res Judicata and *Rooker–Feldman*

In light of the Appellate Division's holding in the State Court case, I agree with Defendants that under the doctrine of res judicata, Balthazar's civil RICO and § 1985 claims are futile because they are merely a recasting of Balthazar's previously adjudicated state court claims. Moreover, because I also find that Balthazar's civil RICO claims are "inextricably intertwined" with the claims she brought in state court, I now conclude that I lack subject matter jurisdiction to consider them under the *Rooker–Feldman* Doctrine.

(a) *Res Judicata*

[**2–4**] "When a prior case has been adjudicated in a state court, federal courts are required by 28 U.S.C. § 1738 to give full faith and credit to the state judgment. . . ." *Urrutia v. Harrisburg County Police Dep't*, 91 F.3d 451, 461 (3d Cir.1996) (citing *Edmundson v. Borough of Kennett Square*, 4 F.3d 186, 189 (3d Cir.1993)). Pursuant to 28 U.S.C. § 1738,[10]

10. 28 U.S.C. § 1738 provides, in relevant part:

> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form. Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. 28 U.S.C. § 1738 (2003).

a federal court must give a state court judgment the same effect as the courts of the state which rendered the judgment. *See Assisted Living Assoc. of Moorestown v. Moorestown Twp.*, 996 F.Supp. 409, 429 (D.N.J.1998). Res judicata bars relitigation by a party of a cause of action or issue that has already been determined on the merits by a court of competent jurisdiction. *See Velasquez v. Franz*, 123 N.J. 498, 589 A.2d 143 (1991). In order for *res judicata* to apply, there must be a valid, final judgment on the merits in the prior action, the parties in the second action must be identical to, or in privity with, those in the first action, and the claim in the subsequent action must arise out of the same transaction or occurrence as the claim in the first action. *See Watkins v. Resorts Int'l Hotel and Casino, Inc.*, 124 N.J. 398, 412, 591 A.2d 592 (1991).[11]

(b) *Rooker–Feldman*

[**5, 6**] The *Rooker–Feldman* Doctrine generally prohibits lower federal courts from reviewing final judgments of state courts. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923); *Dist. of Columbia Ct. of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). "A challenge under the *Rooker–Feldman* doctrine is for lack of subject matter jurisdiction and may be raised at any time by either party or *sua sponte* by the court." *Moccio v. N.Y. State Office of Ct. Admin.*, 95 F.3d 195, 198 (2d Cir.1996); *see Steel Valley Auth. v. Union Switch and Signal Div.*, 809 F.2d 1006, 1010 (3d Cir.1987) (holding that a "lack of subject matter jurisdiction voids any decree entered in a federal court and the continuation of litigation in a federal court without jurisdiction would be futile"), *cert. dismissed*, 484 U.S. 1021, 108 S.Ct. 739, 98 L.Ed.2d 756 (1988).

[**7**] According to the *Rooker–Feldman* Doctrine, a United States District Court may not review the judgment of a state court of any level. *See E.B. v. Verniero*, 119 F.3d 1077, 1090 (3d Cir.1997). This principle extends to constitutional claims which are "inextricably intertwined" with a state court's decision. *See FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 840 (3d Cir.1996).

[**8**] At its heart, the *Rooker–Feldman* Doctrine prohibits federal courts, other than the United States Supreme Court, from hearing any case which "is a functional equivalent of an appeal from a state court judgment." *Ernst v. Child & Youth Servs. of Chester County*, 108 F.3d 486, 491 (3d Cir.), *cert. denied*, 522 U.S. 850, 118 S.Ct. 139, 139 L.Ed.2d 87 (1997). Therefore, the Doctrine applies "when in order to grant the federal plaintiff the relief sought, the federal court must determine that the state court judgment was erroneously entered or must take action that would render the judgment ineffectual." *FOCUS*, 75 F.3d at 840.

In addition, a federal plaintiff "may not seek a reversal of a state court judgment simply by casting his complaint in the form of a civil rights action." *Hunter v. Supreme Court of New Jersey*, 951 F.Supp. 1161, 1170 (D.N.J.1996), *aff'd*, 118 F.3d 1575 (3d Cir.1997). Nor can a federal plaintiff "be allowed to escape *Rooker– Feldman* by raising a new constitutional theory in federal court" where there was a full and fair opportunity to litigate such a claim in state court. *See Valenti v. Mitchell*, 962 F.2d 288, 298 (3d Cir.1992); *Guarino v. Larsen*, 11 F.3d 1151, 1157 (3d Cir. 1993).

(c) *Discussion*

[**9**] Even if asserted under the auspices of a federal statute, Balthazar is barred by res judicata from asserting the same claims that were adjudicated in the state court. Here, the elements of res judicata are satisfied. First, the Appellate Division's judgment—that there was no evidence that Defendants fraudulently concealed their alleged medical malpractice— is valid, final, and on the merits. Second, the parties in Balthazar's federal action are identical to those named in the state action.[12] Finally, Balthazar advances the same allegations in her Proposed Amended Complaint that she litigated in the state court proceeding. Specifically, Balthazar contends that Korzeniowski and Cooper, rather than Henderson, performed the hysterectomy, and Defendants concealed that fact in "fraudulent operative reports" and "medical records with forged signatures." Proposed Am. Compl. at ¶¶ 70–71. Similarly, the federal claims in Balthazar's Proposed Amended Complaint are "inextricably intertwined" with Balthazar's state claim that Defendants perpetrated a fraud upon her in order to conceal their alleged medical malpractice.

In *Sutton v. Sutton*, 71 F.Supp.2d 383 (D.N.J.1999), my colleague, the Honorable Jerome B. Simandle, held that the doctrine of res judicata barred Plaintiff's federal civil RICO claims that were simply a "rehash" of claims previously adjudicated in federal and state court. Moreover, Judge Simandle held that he lacked jurisdiction to hear those claims under the *Rooker–Feldman* Doctrine. In so holding, Judge Simandle determined that Plaintiff was attempting to "trump[ ] up federal jurisdiction over state law claims for strategic reasons." *Id.* at 391. Judge Simandle analyzed the plaintiff's efforts in *Sutton* as follows:

> Looking through his artful pleading to the substance of the allegations themselves, it is clear that plaintiff continues to express his distress over the accounting and

11. Because this Court has held that New Jersey's entire controversy doctrine does not "bar a judgment rendered by a federal court in a case where jurisdiction was premised upon a federal question," I shall not consider it here. *See Morris v. Paul Revere Ins. Group*, 986 F.Supp. 872, 885 (D.N.J.1997) (Orlofsky, J.) (citing *Fioriglio v. City of Atlantic City*, 963 F.Supp. 415, 424 (D.N.J.1997)) ("Uniform authority dictates that federal law governs the issue and claim preclusion effects of a federal judgment in a federal question case.").

12. Balthazar names the same Defendants in her federal claim—ACMC, the Community, Henderson, DeStefano, Feldman, Korzeniowski, the Associations, UMDNJ, and Cooper—as she did in the Complaint she filed in the Superior Court of New Jersey, Law Division. *See* Compl., *Balthazar v. Atlantic City Medical Ctr. et al.*, No. L–4527–99 (N.J.Super.Ct. Law Div. June 21, 1999).

> distribution of his father's estate. Plaintiff alleges one problem after another with the legality and propriety of the accounting of the Estate, including alleged wrongful handling of a wrongful death suit, a supposedly fraudulent consent order, and alleged improper approval of the liquor license transfer as a part of the Estate, and he states that defendants' representations to the various courts throughout the years that the accounting was proper constituted fraud perpetrated through the filing of false statements in briefs through the mail system. This is not a RICO claim; it is, once again, an attempt to get federal review of the handling of the Estate in a circumstance where each essential component of the "new" federal claim was previously adjudicated adverse to plaintiff in the courts of New Jersey.

Id. at 392.

Like the plaintiff in *Sutton*, Balthazar is dissatisfied with the dismissal of her state court claims. As a result of this dissatisfaction, she has simply recast her state law claims as violations of federal civil RICO and § 1985. Her efforts, however, are unavailing. Every allegation she advances in the Proposed Amended Complaint either arises from or is "inextricably intertwined" with the purported medical malpractice that she believes was committed by Henderson, Korzeniowski, and Cooper, as well as the alleged fraudulent concealment of that act.

For example, Balthazar contends that Henderson, Korzeniowski, and Cooper gave false testimony in depositions regarding who performed the surgery and whether the ureter had been cut. Proposed Am. Compl. ¶¶ 72–77. These allegations, however, are predicated upon a finding that Korenziowski and/or Cooper performed the hysterectomy on Balthazar, and that Henderson fraudulently misrepresented that fact in the original and redictated operative reports.

In addition, Balthazar alleges that Defendants concealed the fact that Cooper was not licensed in the State of New Jersey in violation of the requirements, *see* Proposed Am. Compl. ¶¶ 17–37, as well as participated in a scheme to defraud her by concealing Korzeniowski's narcotics addiction, *see id*. ¶¶ 61–64.[13] By advancing such allegations, Balthazar has made a thinly veiled attempt to shed unfavorable light on the individual she believes committed medical malpractice upon her, and to provide support for her allegation that all named Defendants participated in a conspiracy to conceal that malpractice. Thus, in order for me to determine that these allegations have any relevance to Balthazar's alleged injuries, I would have to review the decision of the Appellate Division, and find that decision to be erroneous. As explained above, the *Rooker–Feldman* Doctrine clearly bars my review of the state court's decision in this court.

2. Balthazar Has Failed to Allege a Civil RICO Claims

To remove all doubt that Balthazar's RICO claims under 18 U.S.C. § 1962 are indeed futile, I shall now address those claims on their merits. From what I can discern from the Proposed Amended Complaint—which as I have mentioned is hardly a model of organization, clarity, or draftsmanship—Balthazar has essentially alleged two separate claims of civil RICO violation under 18 U.S.C. § 1962:(1) Defendants participated in a fraudulent scheme to impede her from litigating her medical malpractice and fraud claims in state court; and (2) Defendants, ACMC, Henderson, and the Associations, engaged in a pattern of activities violative of the Medicaid Act. In both of these claims, Balthazar has alleged that Defendants participated in predicate acts in violation of the mail fraud statute, 18 U.S.C. § 1341.

(a) *Legal Standards Governing Civil RICO Claims*

Congress enacted the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1962,[14] or RICO as it is more commonly known, in an attempt to ferret out organized crime in the United States. The federal civil RICO statute provides for treble damages where an enterprise is involved in a pattern of racketeering activity. The Senate Report explained that: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern." S.Rep. No. 91–617, p. 158 (1969). *See also Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n. 14, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985).

To have standing to assert a RICO claim, an individual must show that: (1) he or she has been injured in his or her business or property; and (2) the injury was proximately caused by a violation of 18 U.S.C. § 1962. *See Mruz v. Caring, Inc.*, 991 F.Supp. 701, 711 (D.N.J.1998) (Orlofsky, J.). "Standing to assert RICO claims requires that the alleged RICO violation proximately caused a plaintiff's injury— i.e., the violation is not too remote from the injury." *Allegheny General Hosp. v. Philip Morris, Inc.*, 228 F.3d 429, 443 (3d Cir.2000) (citing *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992)).

13. Although Balthazar contends that this conduct has somehow deprived her of "due process and equal protection," and has prevented her ability "to obtain federal funded medical assistance for her outstanding medical bills," *see id*. ¶ 39, these allegations have absolutely no relevance to any claim that Balthazar has somehow been deprived of medical benefits. *See Sutton*, 71 F.Supp.2d at 391 ("[A] claim may be dismissed on jurisdictional grounds where it is immaterial and made solely to attain jurisdiction.") (quoting *Bell v. Hood*, 327 U.S. 678, 682–83, 66 S.Ct. 773, 90 L.Ed. 939 (1946)).

14. 18 U.S.C. § 1962 provides, in pertinent part:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of . . . this section.

18 U.S.C.1962(c)–(d).

Once standing is established, a plaintiff must advance four separate elements in order to state a cause of action under RICO: (1) the existence of an enterprise affecting interstate commerce; (2) that the defendants were employed by or associated with the enterprise; (3) that defendants participated, either directly or indirectly, in the conduct or the affairs of the enterprise; and (4) that the defendants participated through a "pattern" of racketeering activity that included at least two racketeering acts. *Annulli v. Panikkar,* 200 F.3d 189, 198 (3d Cir.1999) (citing *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 496, 105 S.Ct. 3275 (1985)). *See also Mundy v. City of Phila.,* Civ. A. No. 00–1627, 2000 WL 1912727, *3 (E.D.Pa.2000).[15]

When a plaintiff alleges predicate acts of mail fraud in violation of 18 U.S.C. § 1341—as is the case here—he or she must establish: (1) a scheme to defraud; and (2) the use of the mail in furtherance of that scheme. 18 U.S.C. § 1341; *United States v. Dreer,* 457 F.2d 31 (3d Cir.1972). The Third Circuit has observed that "the actual violation is the mailing, although the mailing must relate to the underlying fraudulent scheme." *Id.* "Moreover, each mailing that is 'incident to an essential part of the scheme' constitutes a new violation." *Id.* (quoting *Pereira v. United States,* 347 U.S. 1, 8, 74 S.Ct. 358, 98 L.Ed. 435 (1954)).

> The mailing element is not very helpful in examining the sufficiency of a RICO pattern allegation. The relatedness test will nearly always be satisfied in cases alleging at least two acts of mail fraud stemming from the same fraudulent transaction—by definition the acts are related to the same "scheme or artifice to defraud." But the continuity test requires us to look beyond the mailings and examine the underlying scheme or artifice. Although the mailing is the actual criminal act, the instances of deceit constituting the underlying fraudulent scheme are more relevant to the continuity analysis.

Id. at 1414.

With these standards in mind, I turn to address whether Balthazar has sufficiently alleged a claim under civil RICO.

(b) *Balthazar's Claim that Defendants Impeded Her Ability to Litigate Her State Court Claims*

[10] In her moving papers, Balthazar contends that Defendants perpetrated an "extrinsic fraud" on her "so as to prevent [her] from presenting all of her case to the court." Pl.'s Reply Br. at 19. Thus, according to Balthazar, the judgment of the state court is subject to collateral attack. Because I find that any injury Balthazar has sustained as a result of the outcome of the state court proceedings has been the result of her own counsel's legal malpractice, rather than any alleged fraudulent scheme of the Defendants, Balthazar lacks standing to bring a claim under civil RICO.

As I previously noted, in order to demonstrate standing to bring a RICO claim, Balthazar must allege that: (1) she has been injured in her business or property; and (2) the injury was by reason of the RICO violation. *See Mruz v. Caring, Inc.,* 991 F.Supp. at 711. According to Balthazar, she has been injured because, in addition to being billed $50,000 for medical procedures, she has been denied "due process of law in that Defendants intentionally sought to pervert the administration of justice." *See* Proposed Am. Compl. ¶ 80. However, inasmuch as Balthazar has been injured in her failed pursuit of medical malpractice claims in state court, she cannot attribute that injury to the conduct of the Defendants. Even if—as Balthazar alleges—that Cooper, an unqualified resident, and/or Korzeniowski, a narcotics addict, did indeed transect Balthazar's ureter during the January 27, 1998 hysterectomy, and thereafter all Defendants participated in a conspiracy to impede Balthazar's attempts to bring a claim of medical malpractice in state court, these actions are not the proximate cause of her alleged injuries. Instead, the principal cause of Balthazar's inability to litigate her claims in state court is the failure of her counsel, Mr. Branella, to file the required Affidavits of Merit, pursuant to N.J. Stat. Ann. §§ 2A:53A–26, *et seq. See* Counsel's Resp. to Defs.' Mot. to

15. What constitutes a "pattern" of racketeering activity has been the subject of much debate over the last two decades. Without providing further clarity, the RICO statute requires a "pattern" to include the commission of at least two predicate acts over a ten-year period. *See* 18 U.S.C. § 1961(5). Providing its most comprehensive guidance to date, the Supreme Court in *H.J., Inc. v. Northwestern Bell Tel. Co.,* 492 U.S. 229, 239, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989), held that in order to establish a "pattern of racketeering activity" under RICO, a plaintiff must satisfy both a "relatedness" requirement and a "continuity" requirement. *Id.* at 239, 109 S.Ct. 2893 ("[T]o prove a pattern of racketeering activity a plaintiff must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity.") *See also Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 496 n. 14, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985) (holding that in order to establish a "pattern," a nexus must exist between criminal acts); *Tabas v. Tabas,* 47 F.3d 1280, 1292 (3d Cir.1995); *Kehr Packages, Inc. v. Fidelcor, Inc.,* 926 F.2d 1406, 1412 (3d Cir.1991).

The Supreme Court in *H.J.* explained that predicate acts are "related" if they "have the same or similar purposes, results, participants, victims, or methods of commission, *and* that they amount to or pose a threat of continued criminal activity." *Id.* Moreover, the Court determined that "continuity" can be established through related predicate acts in furtherance of either multiple criminal schemes or a single criminal scheme that "constitute[s] or present[s] a threat of long-term continuous criminal activity." *Kehr Packages, Inc.,* 926 F.2d at 1412 (citing *H.J.,* 492 U.S. at 240, 109 S.Ct. 2893).

The Court further described "continuity" as "both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *H.J.,* 492 U.S. at 242, 109 S.Ct. 2893. A plaintiff alleging closed-ended continuity must demonstrate "a series of related predicates extending over a substantial period of time." *Id.* "Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement. . . ." *Id.* Open-ended continuity, on the other hand, refers to "conduct that by its nature projects into the future with a threat of repetition." *Tabas,* 47 F.3d at 1292. For purposes of continuity, a court must look to the underlying scheme rather than to the predicate acts themselves. *Kehr,* 926 F.2d at 1414.

Disqualify Pl.'s Counsel & Cross–Mot. to Disqualify Defs.' Counsel at 4 ("[Mr. Branella] has readily admitted he did not file an Affidavit of Merit and did so in open court. . . .").

(c) *Balthazar's Claim that Defendants Defrauded Her of Medicaid Benefits*

[**11**] Finally, although Balthazar contends that Defendants fraudulently impeded her "ability to obtain federally funded medical assistance for her outstanding medical bills" in violation of the Medicaid Act, *see* Proposed Am. Compl. ¶ 39, she has failed to advance a sufficient factual basis for that claim. The following four allegations comprise the crux of Balthazar's purported "Medicaid conspiracy:" (1) Defendants, namely ACMC, Henderson, and the Associations, encouraged her to apply for Medicaid benefits and advised her to submit certain documents concerning her income and assets; (2) after her various medical procedures, ACMC informed her that because Medicaid had not received certain papers, she had not been approved for benefits; (3) ACMC either failed "to provide Medicaid with a Certificate of Necessity, for surgeries involving the ureteral repair," or provided a Certificate of Necessity with material misrepresentations; and (4) ACMC and the Associations billed her in excess of $50,000 from February, 1998 to December, 1998.[16]

Even assuming the truth of these allegations, I find that Balthazar has not pled the necessary elements of mail fraud. Specifically, Balthazar has failed to establish that ACMC, Henderson, and the Associations participated in a scheme to defraud her or others similarly situated. Fraud, by definition, is "a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her injury." Black's Law Dictionary 267 (Pocket Ed.1999). *See also Morganroth & Morganroth v. Norris, McLaughlin & Marcus, P.C.*, 331 F.3d 406, 411 (3d Cir.2003) (noting that the elements of common law fraud include: (1) a misrepresentation to the plaintiff; (2) detrimental reliance; and (3) cognizable damages).

Fed.R.Civ.P. 9(b) requires a plaintiff to plead fraud with particularity. *See Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d Cir.1984), *cert. denied*, 469 U.S. 1211, 105 S.Ct. 1179, 84 L.Ed.2d 327 (1985). This requirement is "particularly important in civil RICO pleadings in which the predicate racketeering acts are critical to the sufficiency of the RICO claim." *Data Comm Communications, Inc. v. The Caramon Grp., Inc.*, Civ. A. No. 97–0735, 1997 WL 792998, *6 (E.D.Pa. Nov. 26, 1997) (quoting *Alfaro v. E.F. Hutton & Co., Inc.*, 606 F.Supp. 1100, 1117–18 (E.D.Pa.1985)).

Balthazar has hardly pled fraud with particularity as required under Fed. R.Civ.P. 9(b). In fact, Balthazar's allegations simply defy logic. It is implausible that ACMC and the Associations would purposely avoid legitimately collecting medical expenses from Medicaid and/or Jersey Care in order to burden Balthazar, an admittedly indigent patient, with a huge debt as part of some grand scheme to cover up alleged medical malpractice. The fact that Balthazar has included such illogical, preposterous allegations in the Proposed Amended Complaint only serves to underscore the weakness of her claims.

Nevertheless, I must look beyond the implausible, and consider the merits of Balthazar's claim. First, Balthazar claims that she relied on Defendants' advice to apply for Medicaid benefits, but she does not allege that this advice amounted to a "misrepresentation." Moreover, she does not maintain that she relied on Defendants' advice to her detriment. Had Defendants not advised her to apply for Medicaid benefits, Balthazar would have been billed in the same amount for the services she did in fact receive.

Second, Balthazar contends that Defendants made a material misrepresentation by informing her that she had not been approved for Medicaid benefits. Balthazar has not, however, explained the nature of the misrepresentation, nor has she claimed detrimental reliance. Had Balthazar, for example, alleged that Defendants told her that she had been denied Medicaid benefits when, in fact, she had been approved, and then billed her in excess of $50,000, Balthazar would have sufficiently pled a violation of the mail fraud statute, 18 U.S.C. § 1341. Balthazar, however, advances no such allegations. *See Palmer v. Nationwide Mut. Ins. Co.*, 945 F.2d 1371, 1374–75 (6th Cir.1991) (holding that "vague and conclusory [allegations] about fraud or concealment or false statements" that "could hardly be said to be criminal activity" cannot form the basis for predicate acts under civil RICO).

Finally, if Defendants did indeed fail to provide a Certificate of Necessity for several of Balthazar's medical procedures, Balthazar has, at most, stated a claim of negligence, not fraud. Accordingly, I find that Balthazar has failed to allege that Defendants, ACMC, Henderson, and the Associates participated in a predicate act of mail fraud.

3. Balthazar Has Failed to State a Claim under 42 U.S.C. § 1985

[**12**] To the extent that Balthazar alleges that these same acts were predicated on a "racial, or perhaps otherwise class-based, invidiously discriminatory animus" in violation of

16. Balthazar baldly maintains that these acts violate the Medicaid Act without explaining how or why they do. The Medicaid Act authorizes the federal government to transfer large sums of money to the States to help finance medical care for the indigent. In return for federal funding, the Act requires participating states "to provide financial assistance to the 'categorically needy' with respect to five general areas of medical treatment: (1) inpatient hospital services, (2) outpatient hospital services, (3) other laboratory and X-ray services, (4) skilled nursing facilities services, periodic screening and diagnosis of children, and family planning services, and (5) services of physicians." *Harris v. McRae*, 448 U.S. 297, 301, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980) (citing 42 U.S.C. §§ 1396a(a)(13)(B), 1396d(a)(1)–(5)). Because the Medicaid Act governs the relationship between the federal government and the states, I fail to see how it has any relevance to Balthazar's allegations that private entities and individuals fraudulently deprived her of benefits. Balthazar may have intended to allege that Defendants committed Medicaid fraud under 42 U.S.C. § 1320a–7b, but her Proposed Amended Complaint does not assert such an allegation.

42 U.S.C. § 1985, *Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971), Balthazar has failed to cure the deficiencies of her Original Complaint.

As I explained in my unpublished opinion dated March 3, 2003, *Balthazar*, Civ. A. No. 02–1136 (D.N.J. Oct. 3, 2003), to state a claim under § 1985(3), the plaintiff must allege: (1) a conspiracy; (2) motivated by racial or class based discriminatory animus designed to deprive, directly or indirectly, any persons or class of persons of the equal protection of the law; (3) an act in furtherance of the conspiracy; and (4) an injury to person or property or the deprivation of any right or privilege of a citizen of the United States. *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 253–54 (3d Cir.1999) (quoting *Lake v. Arnold*, 112 F.3d 682, 685 (3d Cir.1997)).

Here, Balthazar has alleged that: (1) she is an indigent, African–American woman; and (2) Defendants conspired against her in an attempt to deprive her of Medicaid benefits. The Proposed Amended Complaint, like the Original Complaint, does not provide a factual basis for her claims that the alleged conspiracy was motivated by "racial . . . or otherwise class-based" animus. Stated differently, Balthazar has failed to allege that Defendants have deprived her of any right or privilege because she is African–American.

In sum, Balthazar's federal claims brought under civil RICO and § 1985 are barred under the doctrines of res judicata and *Rooker–Feldman*. Alternatively, Balthazar has failed to state a cause of action under civil RICO and § 1985. Accordingly, I shall deny Balthazar's Motion for Leave to File an Amended Complaint.

III. SANCTIONS PURSUANT TO FED. R. CIV. P. 11

A. Legal Standard Governing Motions for Sanctions Pursuant to Fed. R.Civ.P. 11

On April 2, 2003, I entered an Order to Show Cause as to why sanctions should not be imposed against Balthazar's counsel, Mr. Branella, based on his recent filing of a Motion for Leave to Amend Plaintiff's Complaint. On April 28, 2003 and April 30, 2003, respectively, Defendants, UMDNJ and Cooper, and Defendants, ACMC and the Community, also filed Motions for Sanctions pursuant to Fed. R. Civ. 11.[17]

[**13**] As I stated in *Thomason v. Lehrer*, 183 F.R.D. 161, 170 (D.N.J.1998) (Orlofsky, J.), *aff'd*, 189 F.3d 465 (3d Cir. 1999), *abrogated on other grounds by U.S. Express Lines, Ltd. v. Higgins*, 281 F.3d 383 (3d Cir.2002), "[a] District Court has the authority and, indeed, the duty to examine allegations that an attorney appearing before the court 'has violated his moral and ethical responsibility[,]' and to fashion an appropriate remedy, if warranted". *Id.* (quoting *Richardson v. Hamilton Intern Corp.*, 469 F.2d 1382, 1385 (3d Cir.1972), and citing Fed.R.Civ.P. 11(c); 28 U.S.C. § 1927). Courts have been given broad discretion "to control the conduct of those who appear before them[,]" with "an arsenal of sanctions they can impose for unethical behavior." *Id.* (quoting *Erickson v. Newmar Corp.*, 87 F.3d 298, 303 (9th Cir. 1996)).

Rule 11 of the Federal Rules of Civil Procedure provides in relevant part as follows:

> (b) **Representations to Court.** By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . [that] (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. . . .
>
> (c) **Sanctions.** If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for their violation. . . .

Fed.R.Civ.P. 11(b) & (c). Moreover, "[o]n its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause as to why it has not violated subdivision (b) with respect thereto." Fed.R.Civ.P. 11(c)(1)(B).

[**14**] In practice, Rule 11 "requires an attorney who signs a complaint to certify both that it is not interposed for improper purposes, such as delay or harassment, and that there is a reasonable basis in law and fact for the claim." *Napier v. Thirty or More Unidentified Federal Agents, Employees or Officers*, 855 F.2d 1080, 1090 (3d Cir.1988) (footnote omitted); *see also Carlino v. Gloucester City High School*, 57 F.Supp.2d 1, 37 (D.N.J.1999) (Orlofsky, J.), *aff'd*, 44 Fed.Appx. 599, No. 00–5262, 2002 WL 1877011 (3d Cir. Aug.14, 2002). In construing Rule 11, the United States Court of Appeals for the Third Circuit has explained that this Rule "imposes on counsel a duty to look

17. Mr. Branella contends that these motions were served on him in violation of the "Safe Harbor" provision of Rule 11. This so-called "Safe Harbor" provision of Rule 11 provides that a party filing a motion for sanctions must file such a motion separately from other motions "and shall describe the specific conduct alleged to violate subdivision (b)." Fed. R.Civ.P. 11(c)(1)(A). Moreover, "[i]t shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion . . . the challenged . . . claim . . . is not withdrawn or appropriately corrected. . . ." *Id.* Although I am mindful that Defendants did file their respective motions with the Court without providing Mr. Branella 21 days to withdraw the Motion for Leave to File an Amended Complaint, I find that, in light of the Court's own Order to Show Cause filed weeks prior, Mr. Branella's allegation that Defendants' violation of the "Safe Harbor" provision of Rule 11 is irrelevant because of this Court's issuance of an Order to Show Cause which is not governed by the "Safe Harbor" provision of Rule 11.

before leaping and may be seen as a litigation version of the familiar railroad admonition to 'stop, look, and listen.'" *Brunner v. AlliedSignal, Inc.*, 198 F.R.D. 612, 616 (D.N.J.2001) (quoting *Lieb v. Topstone Indus., Inc.*, 788 F.2d 151, 157 (3d Cir.1986)).

[**15–17**] According to the Third Circuit, "[t]he legal standard to be applied when evaluating conduct allegedly violative of Rule 11 is reasonableness under the circumstances." *Ford Motor Co. v. Summit Motor Prods., Inc.*, 930 F.2d 277, 289 (3d Cir.1991) (*citing Bus. Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 546–47, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991)), *cert. denied sub. nom. Altran Corp. v. Ford Motor Co.*, 502 U.S. 939, 112 S.Ct. 373, 116 L.Ed.2d 324 (1991). The Third Circuit has defined "reasonableness" in the context of Rule 11 as "an 'objective knowledge or belief at the time of the filing of a challenged paper' that the claim was well-grounded in fact and law." *Id.* (citation omitted). A finding of "bad faith is not required." *Martin v. Brown*, 63 F.3d 1252, 1264 (3d Cir.1995). Thus, the standards under Rule 11 "eliminate any 'empty-head pure-heart' justification for patently frivolous arguments." Fed.R.Civ.P. 11, adv. cmte. notes.

[**18, 19**] To comply with Rule 11, counsel is required to conduct "a reasonable inquiry into both the facts and the law supporting a particular pleading." *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 278 F.3d 175, 187 n. 7 (3d Cir.2002); *Schering Corp. v. Vitarine Pharm., Inc.*, 889 F.2d 490, 496 (3d Cir. 1989). "At a minimum, Rule 11 requires 'unambiguously that any signer must conduct a reasonable inquiry or face sanctions.'" *Business Guides, Inc.*, 498 U.S. at 547, 111 S.Ct. 922. Pursuant to Rule 11, counsel who submit pleadings that are "frivolous, legally unreasonable, or without factual foundation," may appropriately be sanctioned by the court. *Slater v. Sky-hawk Transp. Inc.*, 187 F.R.D. 185, 199–200 (D.N.J.1999) (Orlofsky, J.). Before a court can impose sanctions, the attorney must have received "particularized" notice of the possible sanction, sufficient to inform him or her of "the 'particularized factors that he [or she] must address if he [or she] is to avoid sanctions.'" *Anjelino v. N.Y. Times Co.*, 200 F.3d 73, 100 (3d Cir.1999) (quoting *Jones v. Pittsburgh Nat'l Corp.*, 899 F.2d 1350, 1357 (3d Cir. 1990)).

B. Sanctions are Warranted in This Case Pursuant to Fed.R.Civ.P. 11(b)(2)

[**20**] With these legal standards in mind, the threshold question which I must decide in determining whether to impose Rule 11 sanctions is whether Balthazar's counsel, Mr. Branella, "conducted a reasonable inquiry into both the facts and the law" supporting his Motion for Leave to File an Amended Complaint, and the Proposed Amended Complaint attached thereto, which he filed on behalf of Balthazar. Specifically, I must determine whether Mr. Branella had an "objective knowledge or belief" that Balthazar's federal claims were "well-grounded in fact and law" in light of both the Appellate Division's finding of no evidence of fraud or fraudulent concealment in the state court record, and in light of my March 3, 2003 Opinion and Order dismissing his claims for failure to state a claim upon which relief can be granted.

For the following reasons, I find that a sanction is warranted under Fed.R.Civ.P. 11(b)(2). Rule 11(b)(2) precludes the filing of papers where the claims contained therein are not "warranted by the existing law or a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." There can be little doubt—for the reasons set forth in my discussion of the futility of the Proposed Amended Complaint—that the claims which Mr. Branella advances on behalf of Balthazar in the Proposed Amended Complaint have no basis in law or fact. Indeed, Mr. Branella has blatantly disregarded my warning that, should he move for leave to amend complaint, I would carefully scrutinize any proposed amended pleading to determine if Mr. Branella was merely attempting to relitigate claims brought unsuccessfully in state court.[18] Rather, he advances the same claims in the Proposed Amended Complaint that were unequivocally rejected and decided by the Appellate Division. The following allegations in the Proposed Amended Complaint, which are by no means an exhaustive list, leave no question that Mr. Branella is seeking to relitigate identical state law claims in federal court:

> (3) "All defendants knowingly agreed to conceal the fact that Cooper and Korzeniowski performed the surgery . . .," Proposed Am. Compl. ¶ 69;
>
> (4) "Defendant Henderson redictated the Operative Report naming herself as the primary surgeon, Korzeniowski as assisting, and Cooper as ancillary personnel . . ." Id. ¶ 70;
>
> (5) "Misrepresentations regarding Plaintiff's uretal obstructions include, without limitation, the following: the existence of fraudulent operative reports, provided false and fraudulent records with forged signatures . . ." Id. ¶ 71;
>
> (6) "On February 1, 2001, Henderson testified during her deposition, that she performed the hysterectomy from Plaintiff's left side, with Korzeniowski and Cooper assisting." Id. ¶ 72;
>
> (7) "Defendants altered, destroyed, falsified and/or concealed the medical records, reports and/or bills of the Plaintiff with the intent to deceive the Plaintiff, others similarly situated, the federal government and the several States." Id. ¶ 137; and
>
> (8) "The Defendants deliberately altered, destroyed, falsified and/or concealed the medical records, reports

18. *See* Letter to Sean Robins, Esq., *Balthazar,* Civ. A. No. 02–1136 (D.N.J. Mar. 12, 2003) (placing Mr. Branella on notice that should he "move to amend the Complaint to assert a RICO claim based on those same facts and circumstances described in the Appellate Division's Opinion, that I [would] carefully scrutinize any such pleading for potential Rule 11 violations").

and/or bills of the Plaintiff to protect their own interests at the expense of the Plaintiff's interest." Id. ¶ 140.

Moreover, despite the fact that on March 3, 2002, I dismissed Balthazar's Complaint for failure to state a claim upon which relief can be granted, Mr. Branella has advanced identical claims in the Proposed Amended Complaint without curing the deficiencies. As I previously noted, Mr. Branella has failed to allege any basis for Balthazar's claim that Defendants violated either civil RICO or § 1985.

Because the claims contained in the Proposed Amended Complaint lack legal support, and in light of the fact that Mr. Branella had ample opportunity to correct the deficiencies noted in the Original Complaint, I cannot conclude that Mr. Branella has conducted a reasonable inquiry into both the facts and the law in moving for leave to file an amended complaint. Instead, he has continued to relitigate allegations that are patently unmeritorious and frivolous. *See* Fed.R.Civ.P. 11 adv. cmte. notes (stating that litigants are subject to potential sanctions when they insist upon "a position after it is no longer tenable"). Accordingly, I find that a sanction is warranted under Fed.R.Civ.P. 11(b)(2).

Under Rule 11, the appropriate sanction is one which "is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Fed. R.Civ.P. 11(c)(2). "The sanctions may consist of, or include, directives of a nonmonetary nature, or an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." *Id*. Among the nonmonetary sanctions contemplated by the rule is to order the offending attorney to attend courses or other educational programs. *See, e.g., Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 482 (3d Cir.1987); *Carlino*, 57 F.Supp.2d at 39; *Thomason v. Lehrer*, 182 F.R.D. 121, 131–32 (D.N.J. 1998) (Orlofsky, J.); Fed.R.Civ.P. 11 adv. cmte notes.

[**21**] I find that a nonmonetary sanction is appropriate in this case. Specifically, I shall order Mr. Branella to attend and complete two continuing legal education courses within the next twelve months.[19] One course must deal with Federal Practice and Procedure. The other course must deal with Attorney Professionalism and the Rules of Professional Conduct. Mr. Branella shall file an affidavit or declaration with this Court attesting to his attendance at and satisfactory completion of the required courses. As a result of attending these continuing legal education courses, hopefully Mr. Branella will become familiar with the legal principles that have apparently escaped him during the course of this litigation.

In sum, I find that Mr. Branella violated Rule 11(b)(2) of the Federal Rules of Civil Procedure, and I shall impose the nonmonetary sanction described above pursuant to the Order to Show Cause issued by this Court on April 2, 2003. Because the Defendants did not comply with the "Safe Harbor" provision of Rule 11, I shall deny their motions for sanctions.

IV. CROSS–MOTIONS TO DISQUALIFY COUNSEL

As a result of my rulings in this Opinion and the accompanying Order, this case is now concluded. Accordingly, I shall dismiss the parties' cross motions to disqualify their respective counsel as moot. Nevertheless, I would be remiss if I did not point out the inherent conflict of interest which exists between Balthazar and her counsel, Mr. Branella, as a result of Mr. Branella's admitted legal malpractice during the state proceedings.[20] First, Mr. Branella's interest in avoiding a legal malpractice action is manifestly adverse to Balthazar's interest in pursuing such a claim against him. Thus, in the present litigation, it is unclear whether Mr. Branella is representing Balthazar, or attempting to avoid a malpractice claim against him.

Recognizing this apparent conflict, Mr. Branella has filed an affidavit signed by Balthazar. *See* 4/15/03 Aff. of Enez Balthazar. In that affidavit, Balthazar states that she understands that her case was dismissed in state court as the result of Mr. Branella's failure to file an Affidavit of Merit, pursuant to N.J. Stat. Ann. §§ 2A:53A–26, *et seq*. However, she maintains that she does not wish to pursue a legal malpractice claim against him. *Id*. ¶¶ 9, 11.

The validity of this so-called "affidavit" and purported "client waiver" is questionable at best. First, the affidavit lacks the seal of a Notary Public, and is therefore an unsworn and unreliable statement. Moreover, it is unclear on this record that Balthazar, an admitted illiterate, can knowingly and intelligently waive her right to pursue a legal malpractice claim against Mr. Branella, when it is Mr. Branella who is representing her in this action. Because Mr. Branella does not contend that Balthazar sought independent legal advice, I can only assume that Mr. Branella prepared this "affidavit" on her behalf and informed her of the statements contained therein. Under these circumstances, I have grave reservations that Mr. Branella, who has an interest in avoiding a legal malpractice lawsuit, can represent Balthazar with the independence and zeal required by the Rules of Professional Conduct.

V. CONCLUSION

For the reasons set forth above, I shall: (1) deny Balthazar's Motion for Leave to File an Amended Complaint; (2) impose sanctions on Balthazar's counsel, Mr. Branella, pursuant to

19. These courses must be sponsored or offered by a law school accredited by the American Bar Association or a reputable provider of continuing legal education.

20. *See* Counsel's Resp. to Defs.' Mot. to Disqualify Pl.'s Counsel & Cross–Mot. to Disqualify Defs.' Counsel at 4 ("[Mr. Branella] has readily admitted he did not file an Affidavit of Merit and did so in open court. . . .");.

Fed.R.Civ.P. 11(b)(2); (3) order Mr. Branella to attend and complete both a course in Federal Practice and Procedure and a course in Attorney Professionalism and the Rules of Professional Conduct within twelve months from the date of this Opinion and accompanying Order; (4) require that Mr. Branella file an affidavit with this Court attesting to his attendance at and satisfactory completion of the required courses; (5) deny UMDNJ and Cooper's Motion for Sanctions; (6) deny ACMC and the Community's Motion for Sanctions; (7) dismiss ACMC and the Community's Motion to Disqualify Plaintiff's Counsel as moot; and (8) dismiss Balthazar's Motion to Disqualify Defendants' Counsel as moot. The Court shall enter an appropriate form of Order.

ORDER

This matter having come before the Court on the Motion of Plaintiff, Enez Balthazar, for Leave to File an Amended Complaint, the Order to Show Cause Why Sanctions Should Not Issue Pursuant to Fed.R.Civ.P. 11(b), the Motion of the Defendants, Atlantic City Medical Center and Atlantic City Medical Center Community Health Services, for Sanctions, the Motion of Defendants, University of Medicine and Dentistry of New Jersey, School of Osteopathic Medicine and Richard Cooper, D.O., for Sanctions, the Motion of Defendants, Atlantic City Medical Center and Atlantic City Medical Center Community Health Services, to Disqualify Plaintiff's Counsel, and the Cross–Motion of Plaintiff, Enez Balthazar, to Disqualify Defendants' Counsel, Frank D. Branella, Esq., appearing on behalf of Plaintiff, Enez Balthazar, Sean Robins, Esq., GOLD, BUTKOVITZ & ROBINS, P.C., appearing on behalf of Defendants, Atlantic City Medical Center and Atlantic City Medical Center Community Health Services, Sharon K. Galpern, Esq., John A. Talvacchia, Esq., STAHL & DELAURENTIS, P.C., appearing on behalf of Defendants, Barbara Henderson, M.D., and Phillip Korzeniowski, M.D., Joseph A. Martin, Esq., Kerri E. Chewning, Esq., ARCHER & GREINER, P.C., appearing on behalf of Defendants, Joseph DeStefano, M.D., Allan Feldman, M.D., DeStefano, Feldman & Kaufman, P.A., and DeStefano, Feldman, Kaufman & Korzeniowski, P.A., and Thomas F. Marshall, Esq., appearing on behalf of Defendants, University of Medicine and Dentistry of New Jersey, School of Osteopathic Medicine and Richard Cooper, D.O.; and,

The Court having considered the submissions of the parties without oral arguments pursuant to Fed.R.Civ.P. 78;

For the reasons set forth in the Opinion filed concurrently with this Order;

IT IS, on this 15th day of August, 2003, hereby ORDERED that:

(1) The Motion of Plaintiff, Enez Balthazar, for Leave to File an Amended Complaint is DENIED;

(2) Frank D. Branella, Esq. is sanctioned pursuant to Fed.R.Civ.P. 11(b)(2);

(3) Frank D. Branella, Esq. must attend and complete both a course in Federal Practice and Procedure and a course in Attorney Professionalism and the Rules of Professional Conduct within twelve months from the date of this Order;

(4) Frank D. Branella, Esq. must file an affidavit with this Court attesting to his attendance at and satisfactory completion of the required courses;

(5) The Motion of the Defendants, Atlantic City Medical Center and Atlantic City Medical Center Community Health Services, for Sanctions is DENIED;

(6) The Motion of Defendants, University of Medicine and Dentistry of New Jersey, School of Osteopathic Medicine and Richard Cooper, D.O., for Sanctions is DENIED;

(7) The Motion of Defendants, Atlantic City Medical Center and Atlantic City Medical Center Community Health Services, to Disqualify Plaintiff's Counsel is DENIED AS MOOT; and

(8) The Cross–Motion of Plaintiff, Enez Balthazar, to Disqualify Defendants' Counsel is DENIED AS MOOT.

BOWLES V. RUSSELL
U.S., 2007.

Supreme Court of the United States
Keith BOWLES, Petitioner,
v.
Harry RUSSELL, Warden.
No. 06-5306.
Argued March 26, 2007.
Decided June 14, 2007.

Background: State prisoner whose petition for habeas corpus, and subsequent motion for new trial or to amend judgment, had been denied moved to reopen appeal period. The United States District Court for the Northern District of Ohio, Donald C. Nugent, J., granted motion, and prisoner appealed. After initially issuing show-cause order questioning timeliness of appeal, the Court of Appeals granted in part and denied in part a certificate of appealability (COA). The United States Court of Appeals for the Sixth Circuit, 432 F.3d 668, dismissed. Petition for certiorari was granted.

Holdings: The Supreme Court, Justice Thomas, held that:
(1) Court of Appeals lacked jurisdiction over appeal, and
(2) Court would no longer recognize the unique circumstances exception to excuse an untimely filing of a notice of appeal, overruling *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 83 S.Ct. 283, 9 L.Ed.2d 261, and *Thompson v. INS*, 375 U.S. 384, 84 S.Ct. 397, 11 L.Ed.2d 404.

Affirmed.

Justice Souter, filed dissenting opinion, with which Justices Stevens, Ginsburg, and Breyer joined.

West Headnotes

[1] Habeas Corpus 197 ⊜ 819

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)1 In General
197k817 Requisites and Proceedings for Transfer of Cause
197k819 k. Time for Proceeding. Most Cited Cases

Court of Appeals lacked jurisdiction over state prisoner's appeal from order denying his motion for new trial or to amend judgment denying his habeas corpus petition, which was filed outside of 14-day extension period for filing appeal authorized by federal rule of appellate procedure after period for appeal has been reopened, but within 17-day period granted by District Court for filing notice of appeal; the 14-day rule was authorized by statute, so it was mandatory and jurisdictional, and District Court could not authorize a longer time period. 28 U.S.C.A. § 2107(c); F.R.A.P.Rule 4(a)(6), 28 U.S.C.A.

[2] Federal Courts 170B ⊜ 5

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk3 Jurisdiction in General; Nature and Source
170Bk5 k. Limited Jurisdiction; Dependent on Constitution or Statutes. Most Cited Cases

Because Congress decides, within constitutional bounds, whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them.

[3] Federal Courts 170B ⊜ 652.1

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(E) Proceedings for Transfer of Case
170Bk652 Time of Taking Proceeding
170Bk652.1 k. In General. Most Cited Cases

When an appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction.

[4] Limitation of Actions 241 ⊜ 175

241 Limitation of Actions
241IV Operation and Effect of Bar by Limitation
241k175 k. Waiver of Bar. Most Cited Cases

A litigant may not rely on forfeiture or waiver to excuse his lack of compliance with a statute's jurisdictional time limitations.

[5] Habeas Corpus 197 ⊜ 819

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)1 In General
197k817 Requisites and Proceedings for Transfer of Cause
197k819 k. Time for Proceeding. Most Cited Cases

Habeas petitioner could not rely on the unique circumstances exception to excuse an untimely filing of a notice of appeal, outside a statutory time limit, as such time limits were jurisdictional; overruling *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 83 S.Ct. 283, 9 L.Ed.2d 261, and *Thompson v. INS*, 375 U.S. 384, 84 S.Ct. 397, 11 L.Ed.2d 404.

[6] Federal Courts 170B ⊜7

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk7 k. Equity Jurisdiction. Most Cited Cases

A federal court has no authority to create equitable exceptions to jurisdictional requirements.

[7] Federal Courts 170B ⊜ 670

170B Federal Courts

170BVIII Courts of Appeals
170BVIII(E) Proceedings for Transfer of Case
170Bk665 Notice, Writ of Error or Citation
170Bk670 k. Effect of Delay. Most Cited Cases

The timely filing of a notice of appeal in a civil case is a jurisdictional requirement.

*2361 *Syllabus*[FN*]

Having failed to file a timely notice of appeal from the Federal District Court's denial of habeas relief, petitioner Bowles moved to reopen the filing period pursuant to Federal Rule of Appellate Procedure 4(a)(6), which allows a district court to grant a 14-day extension under certain conditions, see 28 U.S.C. § 2107(c). The District Court granted Bowles' motion but inexplicably gave him 17 days to file his notice of appeal. He filed within the 17 days allowed by the District Court, but after the 14-day period allowed by Rule 4(a)(6) and § 2107(c). The Sixth Circuit held that the notice was untimely and that it therefore lacked jurisdiction to hear the case under this Court's precedent.

Held: Bowles' untimely notice of appeal-though filed in reliance upon the District Court's order-deprived the Sixth Circuit of jurisdiction. Pp. 2362–2367.

(a) The taking of an appeal in a civil case within the time prescribed by statute is "mandatory and jurisdictional." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61, 103 S.Ct. 400, 74 L.Ed.2d 225*(per curiam)*. There is a significant distinction between time limitations set forth in a statute such as § 2107, which limit a court's jurisdiction, see, *e.g.*,*Kontrick v. Ryan*, 540 U.S. 443, 453, 124 S.Ct. 906, 157 L.Ed.2d 867, and those based on court rules, which do not, see, *e.g.*,*id*. at 454, 124 S.Ct. 906. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 505, 126 S.Ct. 1235, 163 L.Ed.2d 1097, and *Scarborough v. Principi*, 541 U.S. 401, 414, 124 S.Ct. 1856, 158 L.Ed.2d 674, distinguished. Because Congress decides, within constitutional bounds, whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them. See *United States v. Curry*, 6 How. 106, 113, 12 L.Ed. 363. And when an "appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction." *Id*. at 113. The resolution of this case follows naturally from this reasoning. Because Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period in § 2107(c), Bowles' failure to file in accordance with the statute deprived the Court of Appeals of jurisdiction. And because Bowles' error is one of jurisdictional magnitude, he cannot rely on forfeiture or waiver to excuse his lack of compliance. Pp. 2363–2366.

(b) Bowles' reliance on the "unique circumstances" doctrine, rooted in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 83 S.Ct. 283, 9 L.Ed.2d 261*(per curiam)* and applied in *Thompson v. INS*, 375 U.S. 384, 84 S.Ct. 397, 11 L.Ed.2d 404*(per curiam)*, is rejected. Because this Court has no authority to create equitable exceptions to jurisdictional requirements, use of the doctrine is illegitimate. *Harris Truck Lines* and *Thompson* are overruled to the extent they purport to authorize an exception to a jurisdictional rule. Pp. 2366–2367.

432 F.3d 668, affirmed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and ALITO, JJ., joined. SOUTER, J., filed a dissenting *2362 opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined.

Paul Mancino, Jr., Cleveland, Ohio, for Petitioner.

William P. Marshall, Chapel Hill, NC, for Respondent.

Malcolm L. Stewart, for United States as amicus curiae, by special leave of the Court, supporting the Respondent.

William P. Marshall, Chapel Hill, NC, Marc Dann, Attorney General of Ohio, Elise W. Porter, Acting Solicitor General, Stephen P. Carney, Robert J. Krummen, Elizabeth T. Scavo, Columbus, OH, for Respondent Harry Russell, Warden.

Paul Mancino, Jr., Paul Mancino, III, Brett Mancino, Cleveland, Ohio, for Petitioner.For U.S. Supreme Court briefs, see:2007 WL 215255 (Pet.Brief)2007 WL 626901 (Resp.Brief)

Justice THOMAS delivered the opinion of the Court.

In this case, a District Court purported to extend a party's time for filing an appeal beyond the period allowed by statute. We must decide whether the Court of Appeals had jurisdiction to entertain an appeal filed after the statutory period but within the period allowed by the District Court's order. We have long and repeatedly held that the time limits for filing a notice of appeal are jurisdictional in nature. Accordingly, we hold that petitioner's untimely notice-even though filed in reliance upon a District Court's order-deprived the Court of Appeals of jurisdiction.

I

In 1999, an Ohio jury convicted petitioner Keith Bowles of murder for his involvement in the beating death of Ollie Gipson. The jury sentenced Bowles to 15 years to life imprisonment. Bowles unsuccessfully challenged his conviction and sentence on direct appeal.

Bowles then filed a federal habeas corpus application on September 5, 2002. On September 9, 2003, the District Court denied Bowles habeas relief. After the entry of final judgment, Bowles had 30 days to file a notice of appeal. Fed. Rule App. Proc. 4(a)(1)(A); 28 U.S.C. § 2107(a). He failed to do so. On December 12, 2003, Bowles moved to reopen the period during which he could file his notice of appeal pursuant to Rule 4(a)(6), which allows district courts to extend the filing period for 14 days from the day the district court grants the order to reopen, provided certain conditions are met. See § 2107(c).

On February 10, 2004, the District Court granted Bowles' motion. But rather than extending the time period by 14 days, as Rule 4(a)(6) and § 2107(c) allow, the District Court inexplicably gave Bowles 17 days-until February 27-to file his notice of appeal. Bowles filed his notice on February 26-within

[FN*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

the 17 days allowed by the District Court's order, but after the 14-day period allowed by Rule 4(a)(6) and § 2107(c).

On appeal, respondent Russell argued that Bowles' notice was untimely and that the Court of Appeals therefore lacked jurisdiction to hear the case. The Court of Appeals agreed. It first recognized that this Court has consistently held the requirement of filing a timely notice of appeal is "mandatory and jurisdictional." 432 F.3d 668, 673 (C.A.6 2005) (citing *Browder v. Director, Dept. of Corrections of Ill.*, 434 U.S. 257, 264, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978)). The court also noted that courts of appeals have uniformly held that Rule 4(a)(6)'s 180-day period for filing ***2363** a motion to reopen is also mandatory and not susceptible to equitable modification. 432 F.3d, at 673 (collecting cases). Concluding that "the fourteen-day period in Rule 4(a)(6) should be treated as strictly as the 180-day period in that same Rule," *id.* at 676, the Court of Appeals held that it was without jurisdiction. We granted certiorari, 549 U.S. —, 127 S.Ct. 763, 166 L.Ed.2d 590 (2006), and now affirm.

II

[**1**] According to 28 U.S.C. § 2107(a), parties must file notices of appeal within 30 days of the entry of the judgment being appealed. District courts have limited authority to grant an extension of the 30-day time period. Relevant to this case, if certain conditions are met, district courts have the statutory authority to grant motions to reopen the time for filing an appeal for 14 additional days. § 2107(c). Rule 4 of the Federal Rules of Appellate Procedure carries § 2107 into practice. In accord with § 2107(c), Rule 4(a)(6) describes the district court's authority to reopen and extend the time for filing a notice of appeal after the lapse of the usual 30 days:

"**(6) Reopening the Time to File an Appeal.**

"The district court may reopen the time to file an appeal *for a period of 14 days after the date when its order to reopen is entered*, but only if all the following conditions are satisfied:

> "(A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier;
>
> "(B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and
>
> "(C) the court finds that no party would be prejudiced." (Emphasis added.)[FN1]

It is undisputed that the District Court's order in this case purported to reopen the filing period for more than 14 days. Thus, the question before us is whether the Court of Appeals lacked jurisdiction to entertain an appeal filed outside the 14-day window allowed by § 2107(c) but within the longer period granted by the District Court.

A

This Court has long held that the taking of an appeal within the prescribed time is "mandatory and jurisdictional." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982)(*per curiam*) (internal quotation marks omitted);[FN2] accord, ***2364** *Hohn v. United States*, 524 U.S. 236, 247, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314–315, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988); *Browder*,*supra*, at 264, 98 S.Ct. 556. Indeed, even prior to the creation of the circuit courts of appeals, this Court regarded statutory limitations on the timing of appeals as limitations on its own jurisdiction. See *Scarborough v. Pargoud*, 108 U.S. 567, 568, 2 S.Ct. 877, 27 L.Ed. 824 (1883) ("[T]he writ of error in this case was not brought within the time limited by law, and we have consequently no jurisdiction"); *United States v. Curry*, 6 How. 106, 113, 12 L.Ed. 363 (1848) ("[A]s this appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction"). Reflecting the consistency of this Court's holdings, the courts of appeals routinely and uniformly dismiss untimely appeals for lack of jurisdiction. See, *e.g.*,*Atkins v. Medical Dept. of Augusta Cty. Jail*, No. 06–7792, 2007 WL 1048810 (C.A.4, Apr.4, 2007)(*per curiam*) (unpublished); see also 15A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3901, p. 6 (2d ed. 1992) ("The rule is well settled that failure to file a timely notice of appeal defeats the jurisdiction of a court of appeals"). In fact, the author of today's dissent recently reiterated that "[t]he accepted fact is that some time limits are jurisdictional even though expressed in a separate statutory section from jurisdictional grants, see, *e.g.*, … § 2107 (providing that notice of appeal in civil cases must be filed 'within thirty days after the entry of such judgment')." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 160, n. 6, 123 S.Ct. 748, 154 L.Ed.2d 653 (2003) (majority opinion of SOUTER, J., joined

FN1. The Rule was amended, effective December 1, 2005, to require that notice be pursuant to Fed. Rule Civ. Proc. 77(d). The substance is otherwise unchanged.

FN2. *Griggs* and several other of this Court's decisions ultimately rely on *United States v. Robinson*, 361 U.S. 220, 229, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960), for the proposition that the timely filing of a notice of appeal is jurisdictional. As the dissent notes, we have recently questioned *Robinson's* use of the term "jurisdictional." *Post*, at 2367 (opinion of SOUTER, J.) Even in our cases criticizing *Robinson*, however, we have noted the jurisdictional significance of the fact that a time limit is set forth in a statute, see *infra*, at 2364–2365, and have even pointed to § 2107 as a statute deserving of jurisdictional treatment. *Infra*, at 2364–2365. Additionally, because we rely on those cases in reaching today's holding, the dissent's rhetoric claiming that we are ignoring their reasoning is unfounded.

Regardless of this Court's past careless use of terminology, it is indisputable that time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century. Consequently, the dissent's approach would require the repudiation of a century's worth of precedent and practice in American courts. Given the choice between calling into question some dicta in our recent opinions and effectively overruling a century's worth of practice, we think the former option is the only prudent course.

by STEVENS, GINSBURG, and BREYER, JJ., *inter alios*) (citation omitted).

Although several of our recent decisions have undertaken to clarify the distinction between claims-processing rules and jurisdictional rules, none of them calls into question our longstanding treatment of statutory time limits for taking an appeal as jurisdictional. Indeed, those decisions have also recognized the jurisdictional significance of the fact that a time limitation is set forth in a statute. In *Kontrick v. Ryan*, 540 U.S. 443, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004), we held that failure to comply with the time requirement in Federal Rule of Bankruptcy Procedure 4004 did not affect a court's subject-matter jurisdiction. Critical to our analysis was the fact that "[n]o statute . . . specifies a time limit for filing a complaint objecting to the debtor's discharge." 540 U.S., at 448, 124 S.Ct. 906. Rather, the filing deadlines in the Bankruptcy Rules are "'procedural rules adopted by the Court for the orderly transaction of its business'" that are "'not jurisdictional.'" *Id*. at 454, 124 S.Ct. 906 (quoting *Schacht v. United States*, 398 U.S. 58, 64, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970)). Because "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction,"540 U.S., at 452, 124 S.Ct. 906 (citing U.S. Const., Art. III, § 1), it was improper for courts to use "the term 'jurisdictional' to describe emphatic time prescriptions in rules of court,"540 U.S., at 454, 124 S.Ct. 906. See also *Eberhart v. United States*, 546 U.S. 12, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005)(*per curiam*). As a point of contrast, we noted that § 2107 ***2365** contains the type of statutory time constraints that would limit a court's jurisdiction. 540 U.S., at 453, and n. 8, 124 S.Ct. 906.[FN3] Nor do *Arbaugh v. Y & H Corp*., 546 U.S. 500, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006), or *Scarborough v. Principi*, 541 U.S. 401, 124 S.Ct. 1856, 158 L.Ed.2d 674 (2004), aid petitioner. In *Arbaugh*, the statutory limitation was an employee-numerosity requirement, not a time limit. 546 U.S., at 505, 126 S.Ct. 1235.*Scarborough*, which addressed the availability of attorney's fees under the Equal Access to Justice Act, concerned "a mode of relief . . . ancillary to the judgment of a court" that already had plenary jurisdiction. 541 U.S., at 413, 124 S.Ct. 1856.

This Court's treatment of its certiorari jurisdiction also demonstrates the jurisdictional distinction between court-promulgated rules and limits enacted by Congress. According to our Rules, a petition for a writ of certiorari must be filed within 90 days of the entry of the judgment sought to be reviewed. See this Court's Rule 13.1. That 90-day period applies to both civil and criminal cases. But the 90-day period for civil cases derives from both this Court's Rule 13.1 and 28 U.S.C. § 2101(c). We have repeatedly held that this statute-based filing period for civil cases is jurisdictional. See, *e.g.*, *Federal Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 90, 115 S.Ct. 537, 130 L.Ed.2d 439 (1994). Indeed, this Court's Rule 13.2 cites § 2101(c) in directing the Clerk not to file any petition "that is *jurisdictionally* out of time." (Emphasis added.) On the other hand, we have treated the rule-based time limit for criminal cases differently, stating that it may be waived because "[t]he procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion. . . ."*Schacht*,*supra*, at 64, 90 S.Ct. 1555.[FN4]

[2] Jurisdictional treatment of statutory time limits makes good sense. Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider. Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them. See *Curry*, 6 How., at 113, 12 L.Ed. 363. Put another way, the notion of "'subject-matter'" jurisdiction obviously extends to "'classes of cases . . . falling within a court's adjudicatory authority,'" ***2366***Eberhart*,*supra*, at 16, 126 S.Ct. 403 (quoting *Kontrick*,*supra*, at 455, 124 S.Ct. 906), but it is no less "jurisdictional" when Congress forbids federal courts from adjudicating an otherwise legitimate "class of cases" after a certain period has elapsed from final judgment.

[3][4] The resolution of this case follows naturally from this reasoning. Like the initial 30-day period for filing a notice of appeal, the limit on how long a district court may reopen that period is set forth in a statute, 28 U.S.C. § 2107(c). Because Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period in § 2107(c), that limitation is more than a simple "claim-processing rule." As we have long held, when an "appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction." *Curry*,*supra*, at 113. Bowles' failure to file his notice of appeal in accordance with the statute therefore

FN3. At least one federal court of appeals has noted that *Kontrick* and *Eberhart* "called . . . into question" the "longstanding assumption" that the timely filing of a notice of appeal is a jurisdictional requirement. *United States v. Sadler*, 480 F.3d 932, 935 (C.A.9 2007) That court nonetheless found that "[t]he distinction between jurisdictional rules and inflexible but not jurisdictional timeliness rules drawn by *Eberhart* and *Kontrick* turns largely on whether the timeliness requirement is or is not grounded in a statute." *Id*. at 936.

FN4. The dissent minimizes this argument, stating that the Court understood § 2101(c) as jurisdictional "in the days when we used the term imprecisely." *Post*, at 2369, n. 4. The dissent's apathy is surprising because if our treatment of our own jurisdiction is simply a relic of the old days, it is a relic with severe consequences. Just a few months ago, the Clerk, pursuant to this Court's Rule 13.2, refused to accept a petition for certiorari submitted by Ryan Heath Dickson because it had been filed one day late. In the letter sent to Dickson's counsel, the Clerk explained that "[w]hen the time to file a petition for a writ of certiorari in a civil case . . . has expired, the Court no longer has the power to review the petition." Letter from William K. Suter, Clerk of Court, to Ronald T. Spriggs (Dec. 28, 2006). Dickson was executed on April 26, 2007, without any Member of this Court having even seen his petition for certiorari. The rejected certiorari petition was Dickson's first in this Court, and one can only speculate as to whether denial of that petition would have been a foregone conclusion.

deprived the Court of Appeals of jurisdiction. And because Bowles' error is one of jurisdictional magnitude, he cannot rely on forfeiture or waiver to excuse his lack of compliance with the statute's time limitations. See *Arbaugh,supra*, at 513–514, 126 S.Ct. 1235.

B

[5] Bowles contends that we should excuse his untimely filing because he satisfies the "unique circumstances" doctrine, which has its roots in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 83 S.Ct. 283, 9 L.Ed.2d 261 (1962)(*per curiam*). There, pursuant to then-Rule 73(a) of the Federal Rules of Civil Procedure, a District Court entertained a timely motion to extend the time for filing a notice of appeal. The District Court found the moving party had established a showing of "excusable neglect," as required by the Rule, and granted the motion. The Court of Appeals reversed the finding of excusable neglect and, accordingly, held that the District Court lacked jurisdiction to grant the extension. *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 303 F.2d 609, 611–612 (C.A.7 1962). This Court reversed, noting "the obvious great hardship to a party who relies upon the trial judge's finding of 'excusable neglect.'" 371 U.S., at 217, 83 S.Ct. 283.

[6][7] Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement. Because this Court has no authority to create equitable exceptions to jurisdictional requirements, use of the "unique circumstances" doctrine is illegitimate. Given that this Court has applied *Harris Truck Lines* only once in the last half century, *Thompson v. INS*, 375 U.S. 384, 84 S.Ct. 397, 11 L.Ed.2d 404 (1964)(*per curiam*), several courts have rightly questioned its continuing validity. See, *e.g.*, *Panhorst v. United States*, 241 F.3d 367, 371 (C.A.4 2001) (doubting "the continued viability of the unique circumstances doctrine"). See also *Houston v. Lack*, 487 U.S. 266, 282, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988) (SCALIA, J., dissenting) ("Our later cases . . . effectively repudiate the *Harris Truck Lines* approach . . ."). See also *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 170, 109 S.Ct. 987, 103 L.Ed.2d 146 (1989) (referring to "the so-called 'unique circumstances' exception" to the timely appeal requirement). We see no compelling reason to resurrect the doctrine from its 40-year slumber. Accordingly, we reject Bowles' reliance on the doctrine, and we overrule *Harris Truck Lines* and *Thompson* to the extent they purport to authorize an exception to a jurisdictional rule.

*2367 C

If rigorous rules like the one applied today are thought to be inequitable, Congress may authorize courts to promulgate rules that excuse compliance with the statutory time limits. Even narrow rules to this effect would give rise to litigation testing their reach and would no doubt detract from the clarity of the rule. However, congressionally authorized rulemaking would likely lead to less litigation than court-created exceptions without authorization. And in all events, for the reasons discussed above, we lack present authority to make the exception petitioner seeks.

III

The Court of Appeals correctly held that it lacked jurisdiction to consider Bowles' appeal. The judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice SOUTER, with whom Justice STEVENS, Justice GINSBURG, and Justice BREYER join, dissenting.

The District Court told petitioner Keith Bowles that his notice of appeal was due on February 27, 2004. He filed a notice of appeal on February 26, only to be told that he was too late because his deadline had actually been February 24. It is intolerable for the judicial system to treat people this way, and there is not even a technical justification for condoning this bait and switch. I respectfully dissent.

I

"'Jurisdiction,'" we have warned several times in the last decade, "'is a word of many, too many, meanings.'" *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 90, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (quoting *United States v. Vanness*, 85 F.3d 661, 663, n. 2 (C.A.D.C.1996)); *Kontrick v. Ryan*, 540 U.S. 443, 454, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004) (quoting *Steel Co.*); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) (quoting *Steel Co.*); *Rockwell Int'l Corp. v. United States*, 549 U.S. —, —, 127 S.Ct. 1397, 1405, 167 L.Ed.2d 190 (2007) (quoting *Steel Co.*). This variety of meaning has insidiously tempted courts, this one included, to engage in "less than meticulous," *Kontrick,supra*, at 454, 124 S.Ct. 906, sometimes even "profligate … use of the term," *Arbaugh,supra*, at 510, 126 S.Ct. 1235.

In recent years, however, we have tried to clean up our language, and until today we have been avoiding the erroneous jurisdictional conclusions that flow from indiscriminate use of the ambiguous word. Thus, although we used to call the sort of time limit at issue here "mandatory and jurisdictional," *United States v. Robinson*, 361 U.S. 220, 229, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960), we have recently and repeatedly corrected that designation as a misuse of the "jurisdiction" label. *Arbaugh,supra*, at 510, 126 S.Ct. 1235 (citing *Robinson* as an example of improper use of the term "jurisdiction"); *Eberhart v. United States*, 546 U.S. 12, 17–18, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005)(*per curiam*) (same); *Kontrick,supra*, at 454, 124 S.Ct. 906 (same).

But one would never guess this from reading the Court's opinion in this case, which suddenly restores *Robinson's* indiscriminate use of the "mandatory and jurisdictional" label to good law in the face of three unanimous repudiations of *Robinson's* error. See *ante*, at 2363–2364. This is puzzling, the more so because our recent (and, I repeat, unanimous) efforts to confine jurisdictional rulings to jurisdiction proper were

obviously sound, and the majority makes no attempt to show they were not.[FN1]

*2368 The stakes are high in treating time limits as jurisdictional. While a mandatory but nonjurisdictional limit is enforceable at the insistence of a party claiming its benefit or by a judge concerned with moving the docket, it may be waived or mitigated in exercising reasonable equitable discretion. But if a limit is taken to be jurisdictional, waiver becomes impossible, meritorious excuse irrelevant (unless the statute so provides), and *sua sponte* consideration in the courts of appeals mandatory, see *Arbaugh*,*supra*, at 514, 126 S.Ct. 1235.[FN2] As the Court recognizes, *ante*, at 2364–2365, this is no way to regard time limits set out in a court rule rather than a statute, see *Kontrick*,*supra*, at 452, 124 S.Ct. 906 ("Only Congress may determine a lower federal court's subject-matter jurisdiction"). But neither is jurisdictional treatment automatic when a time limit is statutory, as it is in this case. Generally speaking, limits on the reach of federal statutes, even nontemporal ones, are only jurisdictional if Congress says so: "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Arbaugh*, 546 U.S., at 516, 126 S.Ct. 1235. Thus, we have held "that time prescriptions, however emphatic, 'are not properly typed "jurisdictional,"' "*id*. at 510, 126 S.Ct. 1235 (quoting *Scarborough v. Principi*, 541 U.S. 401, 414, 124 S.Ct. 1856, 158 L.Ed.2d 674 (2004)), absent some jurisdictional designation by Congress. Congress put no jurisdictional tag on the time limit here.[FN3]

*2369 The doctrinal underpinning of this recently repeated view was set out in *Kontrick:* "the label 'jurisdictional' [is appropriate] not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." 540 U.S., at 455, 124 S.Ct. 906. A filing deadline is the paradigm of a claim-processing rule, not of a delineation of cases that federal courts may hear, and so it falls outside the class of limitations on subject matter jurisdiction unless Congress says otherwise.[FN4]

The time limit at issue here, far from defining the set of cases that may be adjudicated, is much more like a statute of limitations, which provides an affirmative defense, see Fed. Rule Civ. Proc. 8(c), and is not jurisdictional, *Day v. McDonough*, 547 U.S. 198, 205, 126 S.Ct. 1675, 164 L.Ed.2d 376 (2006). Statutes of limitations may thus be waived, *id*. at 207–208, 126 S.Ct. 1675, or excused by rules, such as equitable tolling, that alleviate hardship and unfairness, see *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95–96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990).

Consistent with the traditional view of statutes of limitations, and the carefully limited concept of jurisdiction explained in *Arbaugh*,*Eberhart*, and *Kontrick*, an exception to the time limit in 28 U.S.C. § 2107(c) should be available when there is a good justification for one, for reasons we recognized years ago. In *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 217, 83 S.Ct. 283, 9 L.Ed.2d 261 (1962)(*per curiam*), and *Thompson v. INS*, 375 U.S. 384, 387, 84 S.Ct. 397, 11 L.Ed.2d

FN1. The Court thinks my fellow dissenters and I are forgetful of an opinion I wrote and the others joined in 2003, which referred to the 30-day rule of 28 U.S.C. § 2107(a) as a jurisdictional time limit. See *ante*, at 2364 (quoting *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 160, n. 6, 123 S.Ct. 748, 154 L.Ed.2d 653 (2003)). But that reference in *Barnhart* was a perfect example of the confusion of the mandatory and the jurisdictional that the entire Court has spent the past four years repudiating in *Arbaugh*,*Eberhart*, and *Kontrick*. My fellow dissenters and I believe that the Court was right to correct its course; the majority, however, will not even admit that we deliberately changed course, let alone explain why it is now changing course again.

FN2. The requirement that courts of appeals raise jurisdictional issues *sua sponte* reveals further ill effects of today's decision. Under § 2107(c), "[t]he district court may . . . extend the time for appeal upon a showing of excusable neglect or good cause." By the Court's logic, if a district court grants such an extension, the extension's propriety is subject to mandatory *sua sponte* review in the court of appeals, even if the extension was unopposed throughout, and upon finding error the court of appeals must dismiss the appeal. I see no more justification for such a rule than reason to suspect Congress meant to create it.

FN3. The majority answers that a footnote of our unanimous opinion in *Kontrick v. Ryan*, 540 U.S. 443, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004), used § 2107(a) as an illustration of a jurisdictional time limit. *Ante*, at 2364–2365 ("[W]e noted that § 2107 contains the type of statutory time constraints that would limit a court's jurisdiction. 540 U.S., at 453, and n. 8, 124 S.Ct. 906"). What the majority overlooks, however, are the post-*Kontrick* cases showing that § 2107(a) can no longer be seen as an example of a jurisdictional time limit. The jurisdictional character of the 30-(or 60)-day time limit for filing notices of appeal under the present § 2107(a) was first pronounced by this Court in *Browder v. Director, Dept. of Corrections of Ill.*, 434 U.S. 257, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978). But in that respect *Browder* was undercut by *Eberhart v. United States*, 546 U.S. 12, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005)(*per curiam*), decided after *Kontrick*. *Eberhart* cited *Browder* (along with several of the other cases on which the Court now relies) as an example of the basic error of confusing mandatory time limits with jurisdictional limitations, a confusion for which *United States v. Robinson*, 361 U.S. 220, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960), was responsible. Compare *ante*, at 2363–2364 (citing *Browder*,*Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982) (*per curiam*), and *Hohn v. United States*, 524 U.S. 236, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998)), with *Eberhart*,*supra*, at 17–18, 126 S.Ct. 403 (citing those cases as examples of the confusion caused by *Robinson's* imprecise language). *Eberhart* was followed four months later by *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006), which summarized the body of recent decisions in which the Court "clarified that time prescriptions, however emphatic, are not properly typed jurisdictional," *id*. at 510, 126 S.Ct. 1235 (internal quotation marks omitted). This unanimous statement of all Members of the Court participating in the case eliminated the option of continuing to accept § 2107(a) as jurisdictional and it precludes treating the 14-day period of § 2107(c) as a limit on jurisdiction.

FN4. The Court points out that we have affixed a "jurisdiction" label to the time limit contained in § 2101(c) for petitions for writ of certiorari in civil cases. *Ante*, at 2364–2366 (citing *Federal Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 90, 115 S.Ct. 537, 130 L.Ed.2d 439 (1994); this Court's Rule 13.2). Of course, we initially did so in the days when we used the term imprecisely. The status of § 2101(c) is not before the Court in this case, so I express no opinion on whether there are sufficient reasons to treat it as jurisdictional. The Court's observation that jurisdictional treatment has had severe consequences in that context, *ante*, at 2365, n. 4, does nothing to support an argument that jurisdictional treatment is sound, but instead merely shows that the certiorari rule, too, should be reconsidered in light of our recent clarifications of what sorts of rules should be treated as jurisdictional.

404 (1964)(*per curiam*), we found that "unique circumstances" excused failures to comply with the time limit. In fact, much like this case, *Harris* and *Thompson* involved district court errors that misled litigants into believing they had more time to file notices of appeal than a statute actually provided. Thus, even back when we thoughtlessly called time limits jurisdictional, we did not actually treat them as beyond exemption to the point of shrugging at the inequity of penalizing a party for relying on what a federal judge had said to him. Since we did not dishonor reasonable reliance on a judge's official word back in the days when we *2370 uncritically had a jurisdictional reason to be unfair, it is unsupportable to dishonor it now, after repeatedly disavowing any such jurisdictional justification that would apply to the 14-day time limit of § 2107(c).

The majority avoids clashing with *Harris* and *Thompson* by overruling them on the ground of their "slumber," *ante*, at 2366, and inconsistency with a time-limit-as-jurisdictional rule.[FN5] But eliminating those precedents underscores what has become the principal question of this case: why does today's majority refuse to come to terms with the steady stream of unanimous statements from this Court in the past four years, culminating in *Arbaugh*'s summary a year ago? The majority begs this question by refusing to confront what we have said: "in recent decisions, we have clarified that time prescriptions, however emphatic, 'are not properly typed "jurisdictional."'" *Arbaugh*, 546 U.S., at 510, 126 S.Ct. 1235 (quoting *Scarborough*, 541 U.S., at 414, 124 S.Ct. 1856). This statement of the Court, and those preceding it for which it stands as a summation, cannot be dismissed as "some dicta," *ante*, at 2363–2364, n. 2, and cannot be ignored on the ground that some of them were made in cases where the challenged restriction was not a time limit, see *ante*, at 2364–2365.By its refusal to come to grips with our considered statements of law the majority leaves the Court incoherent.

In ruling that Bowles cannot depend on the word of a District Court Judge, the Court demonstrates that no one may depend on the recent, repeated, and unanimous statements of all participating Justices of this Court. Yet more incongruously, all of these pronouncements by the Court, along with two of our cases,[FN6] are jettisoned in a ruling for which the leading justification is *stare decisis*, see *ante*, at 2363–2364 ("This Court has long held . . .").

II

We have the authority to recognize an equitable exception to the 14-day limit, and we should do that here, as it certainly seems reasonable to rely on an order from a federal judge.[FN7] Bowles, though, does not have to convince us as a matter of first impression that his reliance was justified, for we only have to look as far as *Thompson* to know that he ought to prevail. There, the would-be appellant, Thompson, had filed post-trial motions 12 days after the District Court's final order. Although the rules said they should have been filed within 10, Fed. Rules Civ. Proc. 52(b) and 59(b) (1964), the trial court nonetheless had "specifically declared that the 'motion for a new trial' was made 'in ample time.'" *Thompson*, 375 U.S., at 385, 84 S.Ct. 397. Thompson relied on that statement in filing a notice of appeal within 60 days of the denial of the post-trial motions but not within 60 days of entry of the original judgment. Only timely post-trial motions affected the 60-day time limit for filing a *2371 notice of appeal, Rule 73(a) (1964), so the Court of Appeals held the appeal untimely. We vacated because Thompson "relied on the statement of the District Court and filed the appeal within the assumedly new deadline but beyond the old deadline." *Id*. at 387, 84 S.Ct. 397.

Thompson should control. In that case, and this one, the untimely filing of a notice of appeal resulted from reliance on an error by a district court, an error that caused no evident prejudice to the other party. Actually, there is one difference between *Thompson* and this case: Thompson filed his post-trial motions late and the District Court was mistaken when it said they were timely; here, the District Court made the error out of the blue, not on top of any mistake by Bowles, who then filed his notice of appeal by the specific date the District Court had declared timely. If anything, this distinction ought to work in Bowles' favor. Why should we have rewarded Thompson, who introduced the error, but now punish Bowles, who merely trusted the District Court's statement?[FN8]

Under *Thompson*, it would be no answer to say that Bowles' trust was unreasonable because the 14-day limit was clear and counsel should have checked the judge's arithmetic. The 10-day limit on post-trial motions was no less pellucid in

FN5. With no apparent sense of irony, the Court finds that "'[o]ur later cases . . . effectively repudiate the *Harris Truck Lines* approach.'" *Ante*, at 2366 (quoting *Houston v. Lack*, 487 U.S. 266, 282, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988) (SCALIA, J., dissenting); omission in original). Of course, those "later cases" were *Browder* and *Griggs*, see *Houston*,*supra*, at 282, 108 S.Ct. 2379, which have themselves been repudiated, not just "effectively" but explicitly, in *Eberhart*. See n. 3, *supra*.

FN6. Three, if we include *Wolfsohn v. Hankin*, 376 U.S. 203, 84 S.Ct. 699, 11 L.Ed.2d 636 (1964)(*per curiam*).

FN7. As a member of the Federal Judiciary, I cannot help but think that reliance on our orders is reasonable. See O. Holmes, Natural Law, in Collected Legal Papers 311 (1920). I would also rest better knowing that my innocent errors will not jeopardize anyone's rights unless absolutely necessary.

FN8. Nothing in *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 109 S.Ct. 987, 103 L.Ed.2d 146 (1989), requires such a strange rule. In *Osterneck*, we described the "unique circumstances" doctrine as applicable "only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done." *Id*. at 179, 109 S.Ct. 987. But the point we were making was that *Thompson* could not excuse a lawyer's original mistake in a case in which a judge had not assured him that his act had been timely; the Court of Appeals in *Osterneck* had found that no court provided a specific assurance, and we agreed. I see no reason to take *Osterneck's* language out of context to buttress a fundamentally unfair resolution of an issue the *Osterneck* Court did not have in front of it. Cf. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 515, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) ("[W]e think it generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code").

Thompson, which came out the other way. And what is more, counsel here could not have uncovered the court's error simply by counting off the days on a calendar. Federal Rule of Appellate Procedure 4(a)(6) allows a party to file a notice of appeal within 14 days of "the date when [the district court's] order to reopen is entered." See also 28 U.S.C. § 2107(c)(2) (allowing reopening for "14 days from the date of entry"). The District Court's order was dated February 10, 2004, which reveals the date the judge signed it but not necessarily the date on which the order was entered. Bowles' lawyer therefore could not tell from reading the order, which he received by mail, whether it was entered the day it was signed. Nor is the possibility of delayed entry merely theoretical: the District Court's original judgment in this case, dated July 10, 2003, was not entered until July 28. See App. 11 (District Court docket). According to Bowles' lawyer, electronic access to the docket was unavailable at the time, so to learn when the order was actually entered he would have had to call or go to the courthouse and check. See Tr. of Oral Arg. 56–57. Surely this is more than equity demands, and unless every statement by a federal court is to be tagged with the warning "Beware of the Judge," Bowles' lawyer had no obligation to go behind the terms of the order he received.

I have to admit that Bowles' counsel probably did not think the order might have been entered on a different day from ***2372** the day it was signed. He probably just trusted that the date given was correct, and there was nothing unreasonable in so trusting. The other side let the order pass without objection, either not caring enough to make a fuss or not even noticing the discrepancy; the mistake of a few days was probably not enough to ring the alarm bell to send either lawyer to his copy of the federal rules and then off to the courthouse to check the docket.[FN9] This would be a different case if the year were wrong on the District Court's order, or if opposing counsel had flagged the error. But on the actual facts, it was reasonable to rely on a facially plausible date provided by a federal judge.

I would vacate the decision of the Court of Appeals and remand for consideration of the merits.

U.S.,2007.

Bowles v. Russell

127 S.Ct. 2360, 168 L.Ed.2d 96, 75 USLW 4428, 68 Fed.R.Serv.3d 190, 07 Cal. Daily Op. Serv. 6807, 2007 Daily Journal D.A.R. 8736, 20 Fla. L. Weekly Fed. S 352

FN9. At first glance it may seem unreasonable for counsel to wait until the penultimate day under the judge's order, filing a notice of appeal being so easy that counsel should not have needed the extra time. But as Bowles' lawyer pointed out at oral argument, filing the notice of appeal starts the clock for filing the record, see Fed. Rule App. Proc. 6(b)(2)(B), which in turn starts the clock for filing a brief, see Rule 31(a)(1), for which counsel might reasonably want as much time as possible. See Tr. of Oral Arg. 6. A good lawyer plans ahead, and Bowles had a good lawyer.

John W. BRADSHAW, Plaintiff,

v.

UNITY MARINE CORPORATION, INC.; Coronado, in rem; and Phillips Petroleum Company, Defendants.

No. CIV. A. G-00-558.

United States District Court,
S.D. Texas,
Galveston Division.
June 27, 2001.

Seaman brought action against dock owner for personal injuries sustained while working aboard vessel using the dock. Upon dock owner's motion for summary judgment, the District Court, Kent, J., held that since maritime law did not impose a duty on the dock owner to provide a means of safe ingress or egress to crew member of a vessel using the dock, Texas' two-year statute of limitations for personal injury cases, rather than three-year federal statute for maritime personal injuries, applied to crew member's action against dock owner for failure to provide a means of safe ingress or egress to crew member of a vessel using the dock.

Motion granted.

1. Admiralty ⚿ 1.20(5)

Absent a maritime status between the parties, a dock owner's duty to crew members of a vessel using the dock is defined by the application of state law, not maritime law.

2. Wharves ⚿ 21

Maritime law did not impose a duty on the dock owner to provide a means of safe ingress or egress to crew member of a vessel using the dock.

3. Seamen ⚿ 29(5.6)

Since maritime law did not impose a duty on the dock owner to provide a means of safe ingress or egress to crew member of a vessel using the dock, Texas' two-year statute of limitations for personal injury cases, rather than three-year federal statute for maritime personal injuries, applied to crew member's action against dock owner for failure to provide a means of safe ingress or egress to crew member of a vessel using the dock. V.T.C.A., Civil Practice & Remedies Code § 16.003; 46 App.U.S.C.A. § 763a.

Harold Joseph Eisenman, Attorney at Law, Houston, TX, for plaintiff.

Ronald L White, White Mackillop et al, Houston, TX, for Coronado, and Unity Marine Corporation, Inc.

Charles Wayne Lyman, Giessel Barker & Lyman, Houston, TX, for Phillips Petroleum Company.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

KENT, District Judge.

Plaintiff brings this action for personal injuries sustained while working aboard the M/V CORONADO. Now before the Court is Defendant Phillips Petroleum Company's ("Phillips") Motion for Summary Judgment. For the reasons set forth below, Defendant's Motion is **GRANTED**.

I. DISCUSSION

Plaintiff John W. Bradshaw claims that he was working as a Jones Act seaman aboard the M/V CORONADO on January 4, 1999. The CORONADO was not at sea on January 4, 1999, but instead sat docked at a Phillips' facility in Freeport, Texas. Plaintiff alleges that he "sustained injuries to his body in the course and scope of his employment." The injuries are said to have "occurred as a proximate result of the unsafe and unseaworthy condition of the tugboat CORONADO and its appurtenances while docked at the Phillips/Freeport Dock." Plaintiff's First Amended Complaint, which added Phillips as a Defendant, provides no further information about the manner in which he suffered injury. However, by way of his Response to Defendant's Motion for Summary Judgment, Plaintiff now avers that "he was forced to climb on a piling or dolphin to leave the vessel at the time he was injured." This, in combination with Plaintiff's Complaint, represents the totality of the information available to the Court respecting the potential liability of Defendant Phillips.[1]

Defendant now contends, in its Motion for Summary Judgment, that the Texas two-year statute of limitations for personal injury claims bars this action. *See* Tex. Civ. Prac. & Rem.Code § 16.003 (Vernon Supp.2001). Plaintiff suffered injury on January 4, 1999 and filed suit in this Court on September 15, 2000. However, Plaintiff did not amend his Complaint to add Defendant Phillips until March 28, 2001, indisputably more than two-years after the date of his alleged injury. Plaintiff now responds that he timely sued Phillips, contending that the three-year federal statute for maritime personal injuries applies to his action. *See* 46 U.S.C. § 763a.

Before proceeding further, the Court notes that this case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston, an effort which leads the Court to surmise but one plausible explanation. Both attorneys have obviously entered into a secret pact—complete with hats, handshakes and cryptic words—to draft their pleadings

1. Six days after filing his one-page Response, Plaintiff filed a Supplemental Opposition to Phillips Petroleum Company's Motion for Summary Judgment. Although considerably lengthier, the Supplement provides no further illumination of the factual basis for Plaintiff's claims versus Phillips.

entirely in crayon on the back sides of gravy-stained paper place mats, in the hope that the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed. Whatever actually occurred, the Court is now faced with the daunting task of deciphering their submissions. With Big Chief tablet readied, thick black pencil in hand, and a devil-may-care laugh in the face of death, life on the razor's edge sense of exhilaration, the Court begins.

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552–53, 91 L.Ed.2d 265 (1986). When a motion for summary judgment is made, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Therefore, when a defendant moves for summary judgment based upon an affirmative defense to the plaintiff's claim, the plaintiff must bear the burden of producing some evidence to create a fact issue some element of defendant's asserted affirmative defense. *See Kansa Reinsurance Co., Ltd. v. Congressional Mortgage Corp. of Texas*, 20 F.3d 1362, 1371 (5th Cir.1994); *F.D.I.C. v. Shrader & York*, 991 F.2d 216, 220 (5th Cir.1993).

Defendant begins the descent into Alice's Wonderland by submitting a Motion that relies upon only one legal authority. The Motion cites a Fifth Circuit case which stands for the whopping proposition that a federal court sitting in Texas applies the Texas statutes of limitations to certain state and federal law claims. *See Gonzales v. Wyatt*, 157 F.3d 1016, 1021 n. 1 (5th Cir.1998). That is all well and good— the Court is quite fond of the *Erie* doctrine; indeed there is talk of little else around both the Canal and this Court's water cooler. Defendant, however, does not even cite to *Erie*, but to a mere successor case, and further fails to even begin to analyze why the Court should approach the shores of *Erie*. Finally, Defendant does not even provide a cite to its desired Texas limitation statute.[2] A more bumbling approach is difficult to conceive—but wait folks, There's More!

Plaintiff responds to this deft, yet minimalist analytical wizardry with an equally gossamer wisp of an argument, although Plaintiff does at least cite the federal limitations provision applicable to maritime tort claims. *See* 46 U.S.C. § 763a. Naturally, Plaintiff also neglects to provide any analysis whatsoever of why his claim versus Defendant Phillips is a maritime action. Instead, Plaintiff "cites" to a single case from the Fourth Circuit. Plaintiff's citation, however, points to a nonexistent Volume "1886" of the Federal Reporter Third Edition and neglects to provide a pinpoint citation for what, after being located, turned out to be a forty-page decision. Ultimately, to the Court's dismay after reviewing the opinion, it stands simply for the bombshell proposition that torts committed on navigable waters (in this case an alleged defamation committed by the controversial G. Gordon Liddy aboard a cruise ship at sea) require the application of general maritime rather than state tort law. *See Wells v. Liddy*, 186 F.3d 505, 524 (4th Cir.1999) (What the . . .)?! The Court cannot even begin to comprehend why this case was selected for reference. It is almost as if Plaintiff's counsel chose the opinion by throwing long range darts at the Federal Reporter (remarkably enough hitting a nonexistent volume!). And though the Court often gives great heed to dicta from courts as far flung as those of Manitoba, it finds this case unpersuasive. There is nothing in Plaintiff's cited case about ingress or egress between a vessel and a dock, although counsel must have been thinking that Mr. Liddy *must* have had *both* ingress and egress from the cruise ship at some docking facility, before uttering his fateful words.

Further, as noted above, Plaintiff has submitted a Supplemental Opposition to Defendant's Motion. This Supplement is longer than Plaintiff's purported Response, cites more cases, several constituting binding authority from either the Fifth Circuit or the Supreme Court, and actually includes attachments which purport to be evidence. However, this is all that can be said positively for Plaintiff's Supplement, which does *nothing* to explain why, on the facts of *this* case, Plaintiff has an admiralty claim against Phillips (which probably makes some sense because Plaintiff doesn't). Plaintiff seems to rely on the fact that he has pled Rule 9(h) and stated an admiralty claim versus the vessel and his employer to demonstrate that maritime law applies to Phillips. This bootstrapping argument does not work; Plaintiff must properly invoke admiralty law versus each Defendant discretely. *See Debellefeuille v. Vastar Offshore, Inc.*, 139 F.Supp.2d 821, 824 (S.D.Tex.2001) (discussing this issue and citing authorities). Despite the continued shortcomings of Plaintiff's supplemental submission, the Court commends Plaintiff for his vastly improved choice of crayon—Brick Red is much easier on the eyes than Goldenrod, and stands out much better amidst the mustard splotched about Plaintiff's briefing. But at the end of the day, even if you put a calico dress on it and call it Florence, a pig is still a pig.

[**1, 2**] Now, alas, the Court must return to grownup land. As vaguely alluded to by the parties, the issue in this case turns upon which law—state or maritime—applies to each of Plaintiff's potential claims versus Defendant Phillips. And despite Plaintiff's and Defendant's joint, heroic efforts to obscure it, the answer to this question is readily ascertained. The Fifth Circuit has held that "absent a maritime status between the parties, a dock owner's duty to crew members of a vessel using the dock is defined by the application of state law, not maritime law." *Florida Fuels, Inc. v. Citgo Petroleum Corp.*, 6 F.3d 330, 332 (5th Cir.1993) (holding that Louisiana

2. Defendant submitted a Reply brief, on June 11, 2001, after the Court had already drafted, but not finalized, this Order. In a regretful effort to be thorough, the Court reviewed this submission. It too fails to cite to either the Texas statute of limitations or any Fifth Circuit cases discussing maritime law liability for Plaintiff's claims versus Phillips.

premises liability law governed a crew member's claim versus a dock which was not owned by his employer); *accord Forrester v. Ocean Marine Indem. Co.*, 11 F.3d 1213, 1218 (5th Cir.1993). Specifically, maritime law does not impose a duty on the dock owner to provide a means of safe ingress or egress. *See Forrester,* 11 F.3d at 1218. Therefore, because maritime law does not create a duty on the part of Defendant Phillips *vis-a-vis* Plaintiff, any claim Plaintiff does have versus Phillips must necessarily arise under state law.[3] *See id.*; *Florida Fuels*, 6 F.3d at 332–34.

[**3**] The Court, therefore, under *Erie*, applies the Texas statute of limitations. Texas has adopted a two-year statute of limitations for personal injury cases. *See* Tex. Civ. Prac. & Rem.Code § 16.003. Plaintiff failed to file his action versus Defendant Phillips within that two-year time frame. Plaintiff has offered no justification, such as the discovery rule or other similar tolling doctrines, for this failure. Accordingly, Plaintiff's claims versus Defendant Phillips were not timely filed and are barred. Defendant Phillips' Motion for Summary Judgment is **GRANTED** and Plaintiff's state law claims against Defendant Phillips are hereby **DISMISSED WITH PREJUDICE**. A Final Judgment reflecting such will be entered in due course.

II. CONCLUSION

After this remarkably long walk on a short legal pier, having received no useful guidance whatever from either party, the Court has endeavored, primarily based upon its affection for both counsel, but also out of its own sense of morbid curiosity, to resolve what it perceived to be the legal issue presented. Despite the waste of perfectly good crayon seen in both parties' briefing (and the inexplicable odor of wet dog emanating from such) the Court believes it has satisfactorily resolved this matter. Defendant's Motion for Summary Judgment is **GRANTED**.

At this juncture, Plaintiff retains, albeit seemingly to his befuddlement and/or consternation, a maritime law cause of action versus his alleged Jones Act employer,

Defendant Unity Marine Corporation, Inc. However, it is well known around these parts that Unity Marine's lawyer is equally likable and has been writing crisply in ink since the second grade. Some old-timers even spin yarns of an ability to type. The Court cannot speak to the veracity of such loose talk, but out of caution, the Court suggests that Plaintiff's lovable counsel had best upgrade to a nice shiny No. 2 pencil or at least sharpen what's left of the stubs of his crayons for what remains of this heart-stopping, spine-tingling action.[4]

IT IS SO ORDERED.

3. Take heed and be suitably awed, oh boys and girls—the Court was able to state the issue and its resolution in one paragraph . . . despite dozens of pages of gibberish from the parties to the contrary!

4. In either case, the Court cautions Plaintiff's counsel not to run with a sharpened writing utensil in hand—he could put his eye out.

DURAN v. ST. LUKE'S HOSP.
Cal.App. 1 Dist., 2003.

Court of Appeal, First District, California.
Celina DURAN et al., Plaintiffs and Appellants,
v.
ST. LUKE'S HOSPITAL et al., Defendants and Respondents.
No. A102182.
Division 4.
Dec. 16, 2003.
Review Denied March 17, 2004.

Background: Parents brought medical malpractice action against hospital related to death of their infant child. The Superior Court, San Francisco County, No. 414369,David A. Garcia, J., dismissed action on ground that complaint was barred by statute of limitations. Parents appealed.

Holding: The Court of Appeal, Kay, P.J., held that complaint could not be deemed filed prior to expiration of limitations period as full amount of mandatory filing fee was not submitted in a timely fashion.

Affirmed.

West Headnotes

[1] **Clerks of Courts 79 ⚿ 17**

79 Clerks of Courts
79k10 Compensation and Fees of Clerks of State Courts
79k17 k. Filing Papers. Most Cited Cases

Clerks of Courts 79 ⚿ 18

79 Clerks of Courts
79k10 Compensation and Fees of Clerks of State Courts
79k18 k. Entries and Records in General. Most Cited Cases

It is mandatory for court clerks to demand and receive the fee required by statute before documents or pleadings are filed. West's Ann.Cal.Gov.Code §§ 6100, 24350.5, 26820

[2] **Limitation of Actions 241 ⚿ 118(2)**

241 Limitation of Actions
241II Computation of Period of Limitation
241II(H) Commencement of Proceeding; Relation Back
241k117 Proceedings Constituting Commencement of Action
241k118 In General
241k118(2) k. Filing Pleadings. Most Cited Cases

Malpractice complaint would not be deemed filed when initially delivered to court clerk, prior to expiration of limitations period, where check tendered for filing fee was three dollars less than full amount of mandatory filing fee. West's Ann.Cal.Gov.Code §§ 6100, 24350.5, 26820

See 2 Witkin, Cal. Procedure (4th ed. 1997) Courts, § 376; Cal. Jur. 3d, Clerks of Court, § 10.

[3] **Pleading 302 ⚿ 335**

302 Pleading
302XIII Filing and Service
302k335 k. Requisites and Sufficiency of Filing. Most Cited Cases

It is not a jurisdictional defect if the precise statutorily required filing fee is not collected by the court clerk upon the filing of pleadings. West's Ann.Cal.Gov.Code §§ 6100, 24350.5, 26820

****1*458** Kenneth M. Sigelman & Associates, Kenneth M. Sigelman, Penelope A. Phillips, San Diego, for Appellants.

Hassard Bonnington, James M. Goodman, B. Thomas French, Rebecca L. Cachia-Riedl, San Francisco, for Respondent St. Luke's Hospital.

Galloway, Lucchese & Everson, Patrick Galloway, Maureen H. Loftis, Walnut Creek, for Respondent Vicki Cordts.

Bonne, Bridges, Mueller, O'Keefe & Nichols, Gerhard O. Winkler, San Francisco, for Respondent Women's Health Center.

KAY, P.J.

Benjamin Franklin described the snowballing consequences of inattention to a small detail-"For want of a nail, the shoe was lost; for want of a shoe the horse was lost; and for want of a horse the rider was lost." (Oxford Dict. of Quotations (2d ed.1955) p. 211.) In this case the missing nail is a check that was $3 short of the amount required to file a complaint for medical malpractice that allegedly caused the death of the plaintiffs' infant child. The harsh but unavoidable result is that we affirm the trial court's dismissal of the complaint because it was not filed before the statute of limitations ran.

There is no dispute as to what happened in 2002. The parties agree that the final day for filing the complaint was October 9. On October 7 plaintiffs' San ***459** Diego attorney sent the complaint and summons by ****2** Federal Express to the filing clerk of the San Francisco Superior Court. Also sent was a check for $203. On October 8 the clerk received the complaint but did not file it because the filing fee was $206, $3 more than the amount of the check. By the time plaintiffs' attorney learned of the situation and tendered the correct filing fee, the statute of limitations had expired. Plaintiffs filed a petition for "an Order *Nunc Pro Tunc* declaring that the Complaint ... shall be deemed filed on October 8. ..." On November 4 the trial court granted the petition but expressly made its order "subject to a motion to strike by defendants." Defendants duly filed motions to strike, as well as general demurrers, all based on the ground that the limitation period had run. The trial court, although "very sympathetic" to plaintiffs' situation, which it described as "a horror story. ... [¶] ... [N]onpayment of ... that $3 is very very minimal," nevertheless believed the authorities cited by defendants required it to grant the motions. A judgment of dismissal was entered in due course, from which plaintiffs perfected this timely appeal.

The parties approach the problem from different directions. Plaintiffs claim to have the support of our Supreme Court and the Ninth Circuit for analyzing this situation from the perspective of the party attempting to file a document. Plaintiffs also view the amount of the filing fee as governed by local court rules, which do not require the strict compliance demanded of state court rules. Finally, they argue that their complaint "should have been deemed filed on the date initially presented to the clerk for filing, because the $3 discrepancy in the filing fee is an insubstantial defect" and because dismissal solely by reason of discrepancy is "unreasonably drastic." Even though the amount of the filing fee may have a local component, defendants see the issue as one of state law, maintaining that the clerk had the ministerial duty to reject the complaint for filing. What the clerk did was not only statutorily mandated, it was also jurisdictional.

A number of provisions in the Government Code address the topic of court filing fees. Section 6100 states that "Officers … of a . . . judicial district [ ] shall not perform any official service unless upon the payment of the fees prescribed by law for the performance of the services. . . ." Section 24350.5 states that "County officers shall . . . demand the payment of all fees in civil cases, in advance." Section 26820 directs that "The county clerk shall charge and collect the fees fixed in this article . . . for service performed by the clerk. . . ."

[1][2] An unbroken line of decisions by our Supreme Court holds that it is mandatory for court clerks to demand and receive the fee required by statute before documents or pleadings are filed. (*I.X.L. Lime Co. v. Superior Court* (1904) 143 Cal. 170, 173, 76 P. 973 ["Where a fee is required by the law to ***460** be prepaid for any official service," payment of the fee is "a condition precedent to the performance of the service"]; *Davis & Son v. Hurgren & Anderson* (1899) 125 Cal. 48, 50–51, 57 P. 684 [clerk refused to file new trial motion submitted without statutory fee; "the mere fact that the clerk received it . . . did not constitute a filing; it was not his duty to file it without the fee; he did not file it; and he could not have been compelled to file it"]; *Boyd v. Burrel* (1882) 60 Cal. 280, 283, 1882 WL 1723 ["The law gave to the Clerk the right to refuse to perform any particular service except upon the condition that his fees therefor should be paid in advance. Plaintiffs and appellants cannot claim that he performed an official act, by legal construction, which he in fact refused to perform, having the legal right so to ****3** refuse"]; *Tregambo v. Comanche M. and M. Co.* (1881) 57 Cal. 501, 506, 1881 WL 1687 ["When the demurrers were placed in the custody of the clerk, he had a legal right to refuse to file them, unless the fees for that service were paid to him"].) As one Court of Appeal summarized: "[The Government Code statutes] make it clear that the Legislature has mandatorily required that filing fees in civil actions must be paid in advance. Not only do they declare that they shall be so paid and that the clerk shall so collect them before he shall perform any official act, that is to say, receive for filing and file any document for the filing of which the payment of a fee is required, but the Legislature has also provided, by way of interpretation of its own language, that the word 'shall is mandatory.' . . . Under the plain code provisions it must be held that the clerk properly refused to perform the official service of filing the notice until he received the fees therefor." (*Kientz v. Harris* (1953) 117 Cal.App.2d 787, 790, 257 P.2d 41.) As Division Five of this District has noted, it is "[i]mplicit . . . that the filing fee must be paid in full before the clerk can accept the pleading for filing." (*Mirvis v. Crowder* (1995) 32 Cal.App.4th 1684, 1686–1687, 38 Cal. Rptr.2d 644.)

[3] But while it is mandatory for the court clerks to demand and receive statutorily required filing fees, it is not, as defendants maintain, a jurisdictional defect if the precise fee is not collected. Thus, if the clerk misadvises an out-of-state party as to the amount of the required fee, payment of the incorrectly quoted amount may be deemed sufficient for the filing. (See *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 35 Cal. Rptr.2d 669, 884 P.2d 126.) If a clerk advises an attorney that a pleading submitted with a check for less than the correct fee will be filed, with the attorney to pay the balance of the fee, the pleading will be deemed filed when submitted. (See *Mirvis v. Crowder, supra*, 32 Cal.App.4th 1684, 1687–1688, 38 Cal. Rptr.2d 644.) Or, if a clerk does file without receiving the fee, the filing is nevertheless valid. (*Tregambo v. Comanche M. and M. Co., supra*, 57 Cal. 501, 506; *Bauer v. Merigan* (1962) 206 Cal.App.2d 769, 771, 24 Cal.Rptr. 203;*Foley v. Foley* (1956) 147 Cal.App.2d 76, 77–78, 304 P.2d 719.) Finally, if the clerk files a pleading accompanied by a check subsequently not honored for insufficient funds, the ***461** filing remains valid if the fee is paid within 20 days. (Code Civ. Proc., § 411.20.) None of these exceptions, however, are available to plaintiffs.

It is true, as plaintiffs argue, that in one instance the California Supreme Court did state that in evaluating the timeliness of a petition for a writ of review "it is the filer's actions that are scrutinized"(*United Farm Workers of America v. Agricultural Labor Relations Bd.* (1985) 37 Cal.3d 912, 918, 210 Cal.Rptr. 453, 694 P.2d 138), but the context is clearly distinguishable because the court was considering a statute (i.e., Lab.Code, § 1160.8) that did not require a filing fee, and the issue was not the commencement, but the continuation of litigation already under way. The remainder of the California authorities cited by plaintiffs for the proposition that insubstantial or technical defects of form do not disqualify a submitted pleading from being filed are likewise inapposite because they too do not involve the issue of failure to pay a filing fee. *Carlson v. Department of Fish & Game* (1998) 68 Cal.App.4th 1268, 80 Cal.Rptr.2d 601 involved a complaint returned without filing because it was not accompanied by a "certificate of assignment" as required by local rule; in *Rojas v. Cutsforth* (1998) 67 Cal.App.4th 774, 79 Cal.Rptr.2d 292, the complaint was returned because a "declaration for court assignment" required by local rule was not ****4** signed by the attorney and the summons had the address of the wrong branch of the court; while in *Litzmann v. Workmen's Comp. App. Bd.* (1968) 266 Cal.App.2d 203, 71 Cal.Rptr. 731, the

Court of Appeal clerk refused to file a petition for a writ of review because it was not prepared in "the proper form" and on "proper size sheets." Lastly, the Ninth Circuit decision does not aid plaintiffs because there the pleading submitted for filing was accompanied by a check for *more* than the required filing fee. (*Cintron v. Union Pacific R. Co.* (9th Cir.1987) 813 F.2d 917.) In any event, no scrutiny of plaintiffs' actions can ignore the fact that the full amount of the mandatory filing fee was not submitted in a timely fashion.

Plaintiffs' state-rule-versus-local-rule argument is based on *Carlson v. Department of Fish & Game, supra*, 68 Cal.App.4th 1268, 1270, 80 Cal.Rptr.2d 601, where the Court of Appeal stated that a trial court "may not condition the filing of a complaint on local rule requirements." We are not dealing here with conflicting court rules but with state statutes of unambiguous language and meaning, which make the payment of fees the condition precedent to the filing of court documents or pleadings. (E.g., *I.X.L. Lime Co. v. Superior Court, supra*, 143 Cal. 170, 173, 76 P. 973;*Boyd v. Burrel, supra*, 60 Cal. 280, 283;*Kientz v. Harris, supra*, 117 Cal.App.2d 787, 790, 257 P.2d 41.) As for their argument that upon receipt of a pleading by the clerk the pleading will be deemed filed, it is based upon this sentence from *United Farm Workers of America v. Agricultural Labor Relations Bd., supra*, 37 Cal.3d 912, 918, 210 Cal.Rptr. 453, 694 P.2d 138: "[W]e conclude that 'filing' for purposes of compliance with the time limits of Labor Code section 1160.8 means what it does in all other contexts: actual delivery of the petition to the ***462** clerk at his place of business during office hours." We have already noted that this decision is clearly distinguishable because it addresses a different statutory filing where no filing fee is required. In a situation where a fee is required, the substance of plaintiffs' argument was long ago rejected by our Supreme Court (*Davis & Son v. Hurgren & Anderson, supra*, 125 Cal. 48, 51, 57 P. 684 ["the mere fact that the clerk received it ... did not constitute a filing"]), and is contrary to the clear import of the authorities quoted above that are applicable to the situation presented here.

The judgment of dismissal is affirmed.

We concur: SEPULVEDA and RIVERA, JJ.
Cal.App. 1 Dist.,2003.
Duran v. St. Luke's Hosp.
114 Cal.App.4th 457, 8 Cal.Rptr.3d 1, 03 Cal. Daily Op. Serv. 10,868, 2003 Daily Journal D.A.R. 13,671

The ERNST HAAS STUDIO, INC.,
Plaintiff–Appellant/Cross–Appellee,
v.
PALM PRESS, INC., Defendant–Appellee/Cross–Appellant.
Docket Nos. 97-9259, 97-9329.
United States Court of Appeals, Second Circuit.
Argued Sept. 24, 1998.
Decided Jan. 5, 1999.

Studio which purportedly held copyright in photograph of Albert Einstein brought infringement action against distributor of note cards bearing image of that photograph. The United States District Court for the Southern District of New York, Loretta A. Preska, J., 1997 WL 566151, dismissed complaint for failure to state a claim upon which relief can be granted. Studio appealed, and distributor cross-appealed. The Court of Appeals held that: (1) studio's appeal was frivolous because it failed, in its main brief, to state reasoned arguments based on cited authority setting out grounds for reversal, and (2) distributor was entitled to sanctions, which would be imposed solely on studio's counsel.

Affirmed and sanctions ordered.

1. Federal Civil Procedure ⚿ 2840

Plaintiff's appeal from dismissal of its copyright infringement complaint for failure to state a claim was frivolous, in that plaintiff failed, in its main brief, to state reasoned arguments based on cited authority setting out grounds for reversal, and defendant was thus entitled to sanctions in amount of its reasonable attorney's fees, which would be imposed solely on plaintiff's counsel. F.R.A.P.Rule 38, 28 U.S.C.A.

2. Federal Courts ⚿ 714

New arguments may not be made in a reply brief.

Stephen A. Weingrad, Weingrad & Weingrad, New York, New York, for Plaintiff–Appellant/Cross–Appellee.

Jeffrey A. Berchenko, Berchenko & Korn, San Francisco, California, for Defendant–Appellee/Cross–Appellant.

Before: WINTER, Chief Judge, MESKILL, and LEVAL, Circuit Judges.

PER CURIAM:

The Ernst Haas Studio, Inc., appeals from the dismissal of its complaint by Judge Preska for failure to state a claim upon which relief can be granted. Palm Press cross-appeals from the district court's holding in abeyance a decision on Palm Press's motion for sanctions and costs. In addition, Palm Press has moved in this court for an award of sanctions for pursuing this appeal. Because appellant failed to advance any argument in its main Brief that would provide grounds for reversal, we affirm the judgment of the district court and order counsel for Haas to pay attorney's fees as a sanction pursuant to Fed. R.App. P. 38. We affirm the cross-appeal without reaching the merits.

The pertinent facts may be briefly stated. In 1953, a photograph of Albert Einstein taken by Ernst Haas, the father of the president of the Studio, was published in the June issue of Vogue, a Condé Nast Publication. The Copyright Office registered the entire issue of Vogue to Condé Nast in 1953, and Condé Nast renewed this copyright on July 24, 1981. In 1988 the photograph was published in a collage by the artist Joan Hall. Upon agreement with Hall, Palm Press reproduced and distributed this image on note cards.

On May 21, 1996, the Studio filed suit against Palm Press for copyright infringement for its use of the photograph. The complaint based its claim of copyright ownership on the fact that it was awaiting registration from the Register of Copyrights. On January 18, 1997, the Register of Copyrights rejected the Studio's copyright application, and, on September 11, 1997, the district court dismissed appellant's complaint. *See Ernst Haas Studio, Inc. v. Palm Press, Inc.*, No. 96 Civ. 3811 LAP, 1997 WL 566151 (S.D.N.Y. Sept.11, 1997).

Appellant appeals from this order. We affirm on the ground that the main Brief filed by appellant articulates no grounds for reversal of the judgment, and we decline to entertain arguments made for the first time in the Reply Brief. We order an award of reasonable attorney's fees as a sanction under Fed. R.App. P. 38. Appellant's counsel is solely liable for the award of attorney's fees.

[**1**] The district court dismissed the complaint on the ground that ownership of a valid copyright had not been adequately alleged. Although the issues raised are complex, appellant's main Brief is only nine pages long and does not cite a single statute or court decision related to copyright. Nor does it present a coherent legal theory, even one unsupported by citation to authority, that would sustain the complaint.

The complaint alleges that the author, and appellant as successor to the author, owned the copyright at all times. Nevertheless, the Brief states that appellant obtained proof of valid copyright only after the suit was filed. This statement is accompanied by two citations to the appendix. The first citation is to the 1953 copyright registration in the name of Condé Nast. The second is to a letter dated April 29, 1996, in which Condé Nast, after a broad reservation of rights, "reverts" the copyright to appellant. Although the Brief then states that "[p]laintiff, however, did not possess this proof of that copyright at the time the suit was filed . . . ," both documents bear fax dates showing that appellant received them well before the commencement of this lawsuit.

The Brief also states, "[p]laintiff then sought permission to amend the pleadings to rely upon [the Condé Nast] registration." This latter statement is not accompanied by a citation to the record of a motion to amend the complaint or to a proposed amended complaint.

The Brief cites two errors of the district court as calling for reversal. The first claimed error is that the court stated in its opinion that "subsequent to the initiation of this suit, Condé Nast confirmed the reverter of the copyright. . . . " It is true that the district court was incorrect as to the timing of the "confirm[ation] of the reverter" because the reverter reflects that it was faxed to appellant some three weeks before the lawsuit was filed. The Brief makes no attempt, however, to explain its prior assertion that "[p]laintiff . . . did not possess this proof . . . at the time the suit was filed," a statement entirely consistent with the claimed error of the district court. Nor does it explain why any of these matters—the district court's mistake of fact, the reverter, or the 1953 registration in Condé Nast's name—are of legal relevance.

Some measure of explanation might have been achieved in the second claim of error—that permission to amend the pleadings was denied. Again, however, the Brief contains no citation to a motion to amend the complaint or to a proposed amended complaint. After once again stating that the plaintiff did not have the reverter when the action was filed, the Brief states only that plaintiff's obtaining of "the assignment to the 44 old year [sic] copyright and its renewal" was "a transaction . . . necessitating supplementing the pleading." The record indicates, however, that, as Palm Press had not yet filed a responsive pleading, appellant could have amended the complaint as of right up to the date of the dismissal of the complaint. *See* Fed.R.Civ.P. 15(a). (At oral argument, we were told that appellant's reply brief on a motion for reconsideration filed after the complaint had been dismissed mentioned for the first time the possibility of amending the complaint.)

This infringement action began with a claim that appellant, or its predecessors, had always owned the copyright and that the Register of Copyrights would soon issue a certificate of registration to appellant. Obviously, the prior registration by Condé Nast and the reverter with a very broad reservation of rights has radically undermined the legal theory of the complaint and required the development of a new theory if appellant was to prevail. The new legal theory (like the old) is not so self-evident that no explanation or citation to authority is necessary.

Fed. R.App. P. 28 requires, *inter alia*, that an appellant's main brief must contain "the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on." Appellant's brief utterly fails to comply with this mandatory direction. A reasonable reader of the Brief is left without a hint of the legal theory proposed as a basis for reversal. The Brief creates utter confusion by repeatedly stating that the Condé Nast's registration and reverter were not in appellant's possession when the lawsuit was commenced—the fax dates clearly show that appellant had them—and by failing to explain why it matters that the district court accepted counsel's invitation to state that Condé Nast's "confirm[ation]" of the registration and reverter occurred subsequent to the initiation of the lawsuit.

Although the second claim of error is the perceived denial of permission to amend the complaint, the Brief offers no explanation of why permission was needed prior to dismissal of this complaint. Whether or not permission was needed, there is no designation in the Brief of where in the record such permission was sought, the precise content of the proposed amendment, or an exposition of the legal theory on which the proposed amendment is based. Appellant's Brief is at best an invitation to the court to scour the record, research any legal theory that comes to mind, and serve generally as an advocate for appellant. We decline the invitation.

[**2**] An attempt is made in the Reply Brief to supply what was conspicuously omitted in the main Brief. The Reply Brief is almost three times as long as the main Brief and contains some citations to pertinent legal authority. However, new arguments may not be made in a reply brief, *see Knipe v. Skinner*, 999 F.2d 708, 711 (2d Cir.1993), and we decline to entertain the theories so proffered.

Palm Press has moved for sanctions pursuant to Fed. R.App. P. 38, 28 U.S.C. § 1912, and 28 U.S.C. § 1927, on the ground that this appeal is frivolous and has also cross-appealed from the district court's holding in abeyance its decision to award fees and costs pursuant to 17 U.S.C. § 505. We hold that the appeal as presented in appellant's main Brief is indeed frivolous; we need not and do not decide whether a meritorious appeal could have been presented; and we decline to express an opinion as to the merits of the district court opinion.

We do hold that appellee should recover under Rule 38 its reasonable attorney's fees in connection with this appeal. By failing in its main Brief to state reasoned arguments based on cited authority setting out grounds for reversal, appellant's counsel forced appellee to anticipate, research, and argue the issues in the case without knowing what issues appellant intended to raise. *See Knipe*, 999 F.2d at 711. An award of attorney's fees is thus appropriate as a sanction. Because the frivolous nature of the Brief is due to counsel, he should bear sole liability for these fees. *See id*. The district court should determine the appropriate amount of such fees when it addresses the issue of fees for the proceedings in that court.

With regard to the cross-appeal, appellee asks us to provide "guidance" to the district court regarding appellee's motions for a fee award pursuant to 17 U.S.C. § 505 for proceedings in the district court. The district court held defendant's motion in abeyance pending our decision on the merits of plaintiff's

appeal. We believe that the issue is one best left to the sound discretion of the district court and affirm on the cross-appeal without addressing the merits.

We therefore affirm the dismissal of the complaint. We grant the motion for sanctions under Rule 38 to the extent that an award of reasonable fees for this appeal should be made, and appellant's counsel shall be solely liable for such an award. We affirm the cross-appeal without reaching the merits.

In re Petition for DISCIPLINARY ACTION AGAINST Patrick W. HAWKINS, an Attorney at Law of the State of Minnesota.

No. C1-92-1261.
Supreme Court of Minnesota.
July 9, 1993.

In disciplinary proceeding, the Supreme Court held that attorney's disregard of court rules and lack of writing skills warrant public reprimand but do not warrant suspension.

So ordered.

1. Attorney and Client ⚿ 57

In attorney disciplinary proceedings, referee's findings of fact are deemed conclusive when transcript of hearing is not provided.

2. Attorney and Client ⚿ 58

Attorney's repeated disregard of local bankruptcy rules coupled with incomprehensibility of his correspondence and documentation due to numerous spelling, grammatical, and typographical errors, is not "competent representation," within meaning of Rules of Professional Conduct and warrants public reprimand, even if clients have not been harmed; public confidence in legal system is shaken when lawyers disregard rules of court and when lawyer's legal correspondence and documents are virtually incomprehensible. 52 M.S.A., Rules of Prof.Conduct, Rule 1.1.

See publication Words and Phrases for other judicial constructions and definitions.

3. Bankruptcy ⚿ 3341

Compliance with rules of bankruptcy court ensures discharge of dischargeable debt.

Marcia A. Johnson, Director of the Office of Lawyers Professional Responsibility, Candice M. Hojan, Sr. Asst. Director, St. Paul, for appellant.

Patrick W. Hawkins, pro se.

Heard, considered, and decided by the court en banc.

OPINION

PER CURIAM.

The Director of the Office of Lawyers Professional Responsibility has twice admonished Patrick W. Hawkins. On Hawkins' appeal from the second admonition, a panel of three members of the Lawyers Professional Responsibility Board found probable cause for public discipline and directed the filing of a petition addressed to this court.

[1] On November 23 and 24, 1992 a hearing on the original petition and two supplementary petitions was held before our appointed referee, and on December 30, 1992 the referee issued his findings of fact, conclusions of law and a recommendation for suspension. Inasmuch as a transcript of the hearing has not been provided, the referee's findings are deemed conclusive.

[2] The referee found that the Director had failed to prove the allegations of either the original or the first supplementary petition, although the written exhibits admitted in connection with those charges demonstrated respondent Hawkins' lack of skill as a communicator. With respect to the allegations of the second supplementary petition, however, the referee found that respondent's failure to comply with the Local Bankruptcy Rules of the United States Bankruptcy Court, District of Minnesota, and his repeated filing of documents rendered unintelligible by numerous spelling, grammatical, and typographical errors were sufficiently serious that they amounted to incompetent representation.

On five occasions between January 13 and June 15, 1992 respondent failed to file amended lists of creditors as required by Rule 304(c), Local Bankruptcy Rules. On four occasions respondent failed to include the proof of service required by Rule 304(b), Local Bankruptcy Rules, when filing amended lists of creditors, and at least twice respondent filed amended schedules of exempt property that did not comply with Rule 304(c).

Respondent also failed to comply with Rule 103, Local Bankruptcy Rules, in attempting to withdraw from representation. Although respondent filed a motion asking for permission to withdraw from a chapter 13 bankruptcy, it was untimely; and the bankruptcy trustee obtained a dismissal for failure of the debtor and respondent to appear at the creditors' meeting.

In short, the referee found that by regularly filing substandard bankruptcy documents containing numerous errors of various kinds, the respondent failed to represent his bankruptcy clients competently. The referee concluded, however, that respondent was well-versed in bankruptcy law and that his incompetence with respect to documentation had not harmed his clients. Nevertheless, the seriousness of respondent's noncompliance with the Local Bankruptcy Rules and respondent's attitude toward his shortcomings prompted the referee to recommend a three-month suspension followed by two years' supervised probation and completion of educational requirements.

[3] It is apparent to us that Hawkins' repeated disregard of the Local Bankruptcy Rules, coupled with the incomprehensibility of his correspondence and documentation, constitutes a violation of Rule 1.1, Minnesota Rules of Professional Conduct.[1] Although it is quite true that the deficiencies in the

1. Rule 1.1, Minnesota Rules of Professional Conduct, provides as follows:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

documents submitted to the bankruptcy court did not, as the referee concluded, cause harm to Hawkins' clients, the lack of harm is fortuitous. Compliance with the rules of the bankruptcy court ensures discharge of dischargeable debt. Even though Hawkins might be able to prove that a creditor who claims he did not receive notice of the bankruptcy proceedings was in fact notified, in the absence of appropriate documentation of service of proper notification, he might not. Therefore, Hawkins' contention that because there has been "no harm," there is "no foul" is unacceptable.

Moreover, harm has occurred: even though Hawkins' clients have not been harmed, administration of the law and the legal profession have been negatively affected by his conduct. Public confidence in the legal system is shaken when lawyers disregard the rules of court and when a lawyer's correspondence and legal documents are so filled with spelling, grammatical, and typographical errors that they are virtually incomprehensible.

We are of the opinion, however, that respondent's misconduct does not warrant suspension at this time. That is not to discount the seriousness of Hawkins' misconduct but only to recognize that suspension does not appear to be required for the protection of the public because, despite Hawkins' disregard of rules of court and lack of writing skill, he does—as the referee concluded—appear knowledgeable of the substantive law of bankruptcy. Hawkins' misconduct does, however, require the public reprimand we now issue, together with the admonition that there must be some changes in his attitude—blame for his misconduct cannot be laid at the feet of his clients. Neither can this disciplinary proceeding be characterized as persecution.

Respondent Patrick W. Hawkins is hereby publicly reprimanded for unprofessional conduct. He is ordered to pay costs and disbursements incurred in this proceeding in the amount of $250. Within two years after issuance of this opinion respondent shall successfully complete the following described CLE or other educational programs and shall report quarterly to the Director his progress in complying with these educational requirements:

(1) A program on bankruptcy rules, or if none is available, on the law of bankruptcy;
(2) A program of at least 10 hours in legal writing; and
(3) A program of at least 5 hours on law office management.

Public reprimand with conditions imposed.

JUNGLE DEMOCRACY v. USA GOVERNMENT AT WASHINGTON, DC & AT DENVER
C.A.10 (Colo.), 2006.

This case was not selected for publication in the Federal Reporter. Please use FIND to look at the applicable circuit court rule before citing this opinion. Tenth Circuit Rule 36.3. (FIND CTA10 Rule 36.3.)

United States Court of Appeals,Tenth Circuit.
JUNGLE DEMOCRACY; Kamal K.K. Roy, Plaintiffs-Appellants,
v.
USA GOVERNMENT AT WASHINGTON DC & AT DENVER; God/s all over the US, Defendants-Appellees.
No. 06-1281.
Nov. 17, 2006.

Kamal K.K. Roy, New York, NY, pro se.

Jungle Democracy, New York, NY, pro se.

William J. Leone, Office of the United States Attorney, Denver, CO, for Defendants-Appellees.

Before MURPHY, SEYMOUR, and McCONNELL, Circuit Judges.

ORDER AND JUDGMENT[FN*]

****1** Appellant Jungle Democracy, a/k/a Kamal K.K. Roy, a/k/a Joseph Geronimo, Jr. filed a 115-page complaint, a 144-page amended complaint, and a 40-page second amended complaint against over sixty defendants, including among many others President Bush, God as U.S.-based divine benefactor, several government agencies, The New York Times, and Kentucky Fried Chicken. In addition to pages of rambling discourse, the complaint contains numerous illegible handwritten remarks. The district court dismissed the complaint because it failed to comply with Rule 8 of the Federal Rules of Civil Procedure. We affirm.

Rule 8 requires that the parties file "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). A pleading also must be specific enough to "give the defendant fair notice of what the plaintiff's claim is and the ground upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). In this case, no discernible claim is apparent from the complaint, and it does not give fair ***757** notice to the defendants regarding the grounds upon which the plaintiff's claims rest. We also strongly suspect at least one defendant was not properly served.

Jungle Democracy's appeal is as unintelligible as its complaint and also states no grounds for relief. We agree with the district court that Jungle Democracy's complaint fails to meet the "short and plain" requirements of Rule 8(a). Because Jungle Democracy failed to raise any nonfrivolous argument in support of its appeal, *see McIntosh v. U.S. Parole Comm'n*, 115 F.3d 809, 812 (10th Cir.1997), we also deny his Motion for Leave to Proceed In Forma Pauperis.

The Plaintiff's Motion for Leave to Proceed In Forma Pauperis is **DENIED**, and the appeal is **DISMISSED**.

C.A.10 (Colo.), 2006.

Jungle Democracy v. USA Government at Washington, DC & at Denver

206 Fed.Appx. 756, 2006 WL 3334510 (C.A.10 (Colo.))

[FN*]After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R.App. P. 34(a)(2); 10th Cir. R. 34.1(G). This case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.MICHAEL W. McCONNELL, Circuit Judge.

KENTUCKY BAR ASSOCIATION, Complainant,

v.

James Henry BROWN, Respondent.

No. 1999-SC-1043-KB.

Supreme Court of Kentucky.

April 20, 2000.

Disciplinary proceedings were brought. Attorney sought review of Kentucky Bar Association's recommendation of suspension. The Supreme Court, Lambert, C.J., held that attorney's filing of inadequate appellate brief amounted to failure to provide competent representation to his client, warranting suspension for 60 days.

Suspension ordered.

Attorney and Client ⚿58

Attorney's filing of appellate brief that did not comply with rule governing form and content for briefs amounted to failure to provide competent representation to his client, warranting suspension for 60 days. Sup.Ct.Rules, Rule 3.130, Rules of Prof.Conduct, Rule 1.1; Rules Civ.Proc., Rule 76.12(4)(c)(i–v).

OPINION AND ORDER

The respondent, Brown, represented a client in an appeal to the Kentucky Court of Appeals from a decision of the Jefferson Circuit Court. The Court of Appeals dismissed the appeal because of the substantial deficiencies contained in Brown's one and one-half page brief. While the style of the brief substantially conformed with the Kentucky Rules of Civil Procedure, the rest of the brief read:

INTRODUCTION

This is a second appeal in that the Appellee wasted the subject matter of the first appeal[handwritten line]prior to this Court's opinion.

FACTS

All references are to Video Tape Number 95–046. Appellee stated that the house had been torn down (1606). Appellant stated that the house was torn down on May 13, 1994, and that the Court of Appeals did not affirm the trial judgment until October 28, 1994. (1613) Appellant asked the trial court if an appeal stops everything. (1608) Trial judge stated that since the appeal went against the Appellant then no harm no foul. (1617) Appellant stated that a lien of $4800.00 has been placed against the property and this his redemption rights has been destroyed. (1610) The City of Louisville even stated by affidavit that a diligence search had been made for the owner of the property in question. (1611) Appellant stated that the real estate and improvements were tax ed at $10,000. (1615)

Appellee stated that the City would put the property on the docket and *let the City buy it*. (Emphasis added) (1619) The Court stated that it did not feel that the City acted maliciously or fraudulently (1621) and was not going to reopen the case. (1619) Trial Court stated that the Supreme Court deny revi[handwritten "e"]w April 13, 1994. (1619)

LAW

Section 13 of the Kentucky Constitution requires compensation for private property taken for public use. (1615) Furthermore Section two of the Kentucky Constitution prohibits injustices such as supra.

CONCLUSION

There is nothing in the record to show that the Appellant's property was destroyed because of emergency reasons and no order from the trial court permitting same, therefore Appellee has violated the laws of the land.

/s/ James Henry Brown

In an order which described a portion of the brief as "virtually incomprehensible," the Court of Appeals dismissed the appeal and found that Brown's pleading failed to meet the basic requirements of CR 76.12(4)(c)(i), (iii), (iv) and (v) because it failed to contain a brief introduction, failed to include a statement of the case consisting of the chronological summary of facts and procedural events with ample reference to the record, failed to contain an argument with supporting references to the record and citations of authority and failed to contain a conclusion setting forth the specific relief sought from the court.

When Brown's brief was brought to the attention of the Inquiry Tribunal, it investigated the matter and issued a one-count Charge alleging that Brown violated SCR 3.130–1.1 when he filed the deficient brief:

COUNT I

1. Respondent represented [his client] in an appeal to the Court of Appeals of Kentucky from a decision of the Jefferson Circuit Court, the said appeal being identified as Court of Appeals Case No. 95–CA–001904–MR.
2. On or about December 6, 1996, the Court of Appeals entered an Opinion and Order dismissing the appeal because the brief submitted by the Respondent failed to comply with the basic requirements of CR 76.12.
3. SCR 3.130–1.1 states as follows:

   A lawyer must provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

4. The Inquiry Tribunal charges that the Respondent violated SCR 3.130–1.1 when the Respondent filed the aforesaid brief with the Court of Appeals of Kentucky, for all of the reasons set forth in [the Opinion and Order of the Court of Appeals which dismissed the action]

Brown responded to the Charge by asserting that his client had lost interest in the case before Brown filed the appeal and that, in any event, the client was satisfied with the representation he received. Brown also maintained that the Court of Appeals elevated "form over substance," alleged that the proper course of action might have been to seek "a mandamous [sic] from the Court of Appeals," and cited to authority interpreting RCr 11.42 to support his premise that "where the lawyer's client does not claim foul," disciplinary action is inappropriate.

At an evidentiary hearing on April 20, 1999, the Kentucky Bar Association introduced both a copy of Brown's pleading and Brown's testimony that he believed the claim involved in this appeal to be meritorious, that he believed his brief was adequate and substantially complied with the requirements of CR 76, and that the Court of Appeals adopted an overly technical view of pleadings which amounted to "We don't care if you've got the best case in the world, if you didn't dot all of your i's and cross all of your t's. . . ." Brown not only testified on his own behalf and introduced the testimony of his client regarding the client's opinion of Brown's efforts on his behalf, but also questioned three members of the Kentucky Judiciary whom he had subpoenaed before the Trial Commissioner. Brown focused much of his examination of these witnesses on the merits of actions which he had previously litigated before them, and the Trial Commissioner appropriately found that Brown's examination of the three judges "failed to produce any evidence that is relevant, material, and admissible in this proceeding." The Trial Commissioner found that "the Court's decision to strike the brief and dismiss the appeal was a foreseeable result of these serious deficiencies," and concluded that Brown had failed to provide competent representation to his client, and was therefore guilty as charged.

The Board of Governors agreed with the Trial Commissioner and recommended that Brown receive a suspension of sixty (60) days. Brown now petitions this Court to Review the KBA's recommendation and argues (1) that he provided competent representation to his client; and (2) that he has been found to be honest and trustworthy by his peers. Brown "does admit that the Court of Appeals would have been better served if he had styled his brief as a 'Writ of Mandamous [sic].'"

Brown cites his client's testimony from the evidentiary hearing before the Trial Commissioner to support his argument that he provided the client competent representation and specifically references the client's declaration that he would retain Brown in the future if he needed legal services performed on his behalf. In the face of such a grossly inadequate pleading, however, we find this testimony unpersuasive, and a close review of the record suggests to us that, after KBA counsel's cross-examination fully explained to the client why the Court of Appeals dismissed his case, this client would think twice before again seeking legal assistance from Brown. The fact remains that Brown filed a pleading in the Court of Appeals which the KBA correctly describes as "a little more than fifteen unclear and ungrammatical sentences, slapped together as two pages of unedited text with an unintelligible message." This "brief" would compare unfavorably with the majority of the handwritten pro se pleadings prepared by laypersons which this Court reviews on a daily basis. Despite the pleading's patent inadequacies, Brown continues to maintain that he prepared it in substantial compliance with the Civil Rules and in the course of competently representing his client.

We are mystified by Brown's conclusion that "the Court of Appeals would have been better served if he had styled his brief as a 'Writ of Mandamous [sic],'" and believe Brown's statement further demonstrates his unfamiliarity with the Rules of Civil Procedure.

Brown's contention that his peers consider him honest and trustworthy merely highlights his continued inability to grasp the concept of relevance which he demonstrated during the evidentiary hearing before the Trial Commissioner. As a preliminary matter, however, this Court must note that the equivocal testimony Brown cites to support his honesty comes from witnesses subpoenaed by Brown to testify in an unrelated evidentiary hearing before another Trial Commissioner in a disciplinary proceeding which is not a part of the record of this matter. Even if this testimony were properly before us, however, this Court believes it would be completely irrelevant. It appears that Brown may be trustworthy and honest, but we are convinced that he violated SCR 3.130–1.1 by failing to provide competent representation to this client.

WHEREFORE, IT IS ORDERED that the respondent be, and he is, hereby suspended from the practice of law in the Commonwealth of Kentucky for a period of sixty (60) days.

We further order the respondent to pay the costs of this action in the amount of $1,090.95, for which execution may issue.

This order shall constitute a public record.

All concur.

JOHNSTONE, J., not sitting.

Entered: April 20, 2000. /s/ Joseph E. Lambert
CHIEF JUSTICE

U.S. V. LE
C.A.10 (WYO.), 2007.

This case was not selected for publication in the Federal Reporter. Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Tenth Circuit Rule 32.1. (Find CTA10 Rule 32.1)

United States Court of Appeals, Tenth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Vinh V. LE, Defendant-Appellant.
No. 06-8040.
April 9, 2007.

Background: Defendant was convicted by jury in the United States District Court for the District of Wyoming of possession of marijuana with intent to distribute. Defendant appealed.

Holding: The Court of Appeals, Neil M. Gorsuch, Circuit Judge, held that jury could find that defendant knowingly possessed 142 pounds of marijuana found in moving van that he was driving.

Affirmed.

West Headnotes

Controlled Substances 96H ⚿ 81

96H Controlled Substances
96HIII Prosecutions
96Hk70 Weight and Sufficiency of Evidence
96Hk81 k. Possession for Sale or Distribution. Most Cited Cases

Jury could find that defendant knowingly possessed 142 pounds of marijuana found in moving van that he was driving, supporting conviction for possession of marijuana with intent to distribute, given defendant's exclusive possession and control of van, for which he was renter, driver, and sole occupant, manner in which marijuana was loaded into van, near front of cargo area and behind defendant's furniture, strong smell of dryer sheets in cargo area, defendant's excessively nervous appearance during traffic stop for speeding violation, and improbability of defendant's story that he traveled by plane from Texas to Washington and then rented van for $1,549.22 to drive load of furniture back to Texas. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

***827** Jason Morlin Conder, Office of the United States Attorney, Lander, WY, for Plaintiff-Appellee.

James H. Barrett, Office of the Federal Public Defender, Cheyenne, WY, for Defendant-Appellant.

Before LUCERO, McKAY, and GORSUCH, Circuit Judges.

ORDER AND JUDGMENT*

****1** Following a trial in February 2006 in the United States District Court for the District***828** of Wyoming, Vinh v. Le was convicted by a jury of one count of possession of marijuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). Specifically, the jury found Mr. Le guilty of possessing 142 pounds of marijuana with intent to distribute. In May 2006, the district court imposed a sentence of forty-one months imprisonment and three years of supervised release. Mr. Le is now appealing his conviction, arguing that the evidence presented at his trial was insufficient to find him guilty beyond a reasonable doubt of knowingly possessing marijuana with intent to distribute. Exercising jurisdiction under 28 U.S.C. § 1291, we conclude that Mr. Le's conviction is supported by sufficient evidence. We therefore affirm.

I.

We commend defense counsel and counsel for the government for the quality of the briefs they submitted to this court. We also appreciate the parties' thorough factual statements summarizing the evidence that was presented at trial. Further, because defense counsel has succinctly and accurately summarized that evidence, we will adopt the following portions of appellant's opening brief as our background statement:

On February 2, 2005, Wyoming Highway Patrol trooper Timothy Boumeester stopped a U-Haul van traveling eastbound on Interstate 80 in Albany County, Wyoming. The U-Haul (hereinafter van) had been clocked by radar as speeding 81 in a 75 mile per hour zone. The van, driven by Vinh v. Le, was stopped without incident.

Trooper Boumeester contacted the driver, Mr. Le, and obtained the van rental agreement as well as Le's driver's license. During the course of the . . . contact with Mr. Le, the Trooper was told that Le had flown [from his home in Beaumont, Texas] to Seattle, Washington to pick up a sofa and chairs from his brother and that the van contained the furniture he had obtained in Seattle. During the course of this conversation Trooper Boumeester noticed that Le was sweating, wouldn't make eye contact and his hands were shaking. After being advised that Mr. Le's driver's license was valid the Trooper issued a warning for speeding and asked him if he had any questions. Mr. Le indicated he had no questions and the Trooper told him to have a safe trip and Mr. Le exited the patrol vehicle.

* After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See*Fed. R.App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R.App. P. 32.1 and 10th Cir. R. 32.1.NEIL M. GORSUCH, Circuit Judge.

Trooper Boumeester also exited his patrol vehicle and asked Le if he could ask some more questions. Mr. Le nodded his head affirmatively and said "yes." The Trooper asked Mr. Le if he had any drugs or anything illegal in the van. Mr. Le said "no." Mr. Le was then asked if there was any marijuana in the van and Le shook his head "no" but said "yes." Trooper Boumeester repeated the question and received the same response. Mr. Le shook his head "no" but said "yes." Boumeester asked if he could search the van and Mr. Le reached into his pocket, revealed a key and unlocked the padlocked cargo area of the van.

**2 When the Trooper opened the cargo area of the van he immediately noticed what he characterized as an overwhelming*829 odor of dryer sheets.[FN1] When asked why the cargo area of the van smelled like dryer sheets, Le gave no response. As indicated earlier by Mr. Le, there was furniture in the van and the Trooper also noticed a portion of a bag beneath and behind the furniture in the cargo area nearest the cab of the van. Trooper Boumeester closed the cargo area and advised Mr. Le that he would be calling for another Trooper and his K-9.

Trooper Chatfield arrived with his K-9 who deployed around the exterior of the van and positively alerted. As a result, the Troopers opened the back of the van and crawled inside and over the furniture to where the bags were located in the cargo area nearest the cab and farthest from the rear of the van. Trooper Chatfield unzipped one of the bags and found a number of clear plastic bags containing suspected marijuana. Mr. Le, who was now seated in Trooper Boumeester's patrol car was, again, approached and asked if there was marijuana in the van. He answered "no."

Mr. Le was arrested, the van was unloaded and two other bags containing suspected marijuana were [found], as well as, a black plastic trash bag in a cardboard box containing a dining room chair. In total there were determined to be 142 bags of marijuana located in the 3 duffle bags and the plastic trash bag.

On February 4, 2005, Mr. Le was charged by Criminal Complaint with violation of Title 21 U.S.C. 841(a)(1) possession with intent to distribute marijuana. . . . On March 18, 2005, the Federal Grand Jury for the District of Wyoming indicted Mr. Le charging the same offense as in the previous Criminal Complaint. . . .

Trial to a jury commenced in Casper, Wyoming on February 21, 2006, and on February 24, 2006, the jury returned its verdict and found Mr. Le guilty of possession of marijuana with the intent to distribute as charged in the indictment.

Aplt. Opening Br. at 1–4 (footnote added).[FN2]

FN1. Trooper Boumeester testified that dryer sheets are often used to mask the odor of drugs in a vehicle. *See* R., Vol. 3 at 53.

FN2. The pages in Mr. Le's opening brief are not numbered, but we will assume that page one is the page containing Mr. Le's "Statement of Jurisdiction" and that the pages are numbered in sequential order thereafter.

II.

Mr. Le contends that there was insufficient evidence to support his conviction. He argues that the government failed to present sufficient evidence to prove beyond a reasonable doubt that he knowingly possessed the marijuana that was found in the U-Haul van. Instead, according to Mr. Le, the government proved only that he had possession and control of the van in which the marijuana was located, and he argues that "it is not the position of this court and never has been that control of a vehicle containing contraband-absent other evidence-is sufficient to prove guilt beyond a reasonable doubt" for purposes of a conviction under 21 U.S.C. § 841(a)(1). Aplt. Opening Br. at 16.

"We review the sufficiency of the evidence de novo." *United States v. Triana*, 477 F.3d 1189, 1194 (10th Cir.2007). "We ask only whether, taking any evidence-both direct and circumstantial, together with the reasonable inferences to be drawn therefrom-in the light most favorable to the government, a reasonable jury could find the defendant guilty beyond a reasonable doubt." *Id.* (quotation omitted); *see also* *830 *United States v. Gurule*, 461 F.3d 1238, 1243 (10th Cir.2006) (stating that "[t]his court will reverse [for insufficient evidence] only if no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt") (quotation omitted). It is also well established that the evidence necessary to support a criminal conviction "need not conclusively exclude every other reasonable hypothesis and need not negate all possibilities except guilt." *United States v. Wilson*, 182 F.3d 737, 742 (10th Cir.1999) (quotation omitted). "Furthermore, we do not question the jury's credibility determinations or its conclusions about the weight of the evidence." *United States v. Lauder*, 409 F.3d 1254, 1259 (10th Cir.2005) (quotation omitted).

**3 To support a conviction for possession of a controlled substance with intent to distribute in violation of 21 U.S.C. § 841(a)(1), the evidence must prove beyond a reasonable doubt that: "(1) the defendant knowingly possessed the illegal drug; and (2) the defendant possessed the drug with the specific intent to distribute it." *United States v. Reece*, 86 F.3d 994, 996 (10th Cir.1996) With regard to the first element, we have explained that

[p]ossession may be either actual or constructive: "constructive possession may be found if a person knowingly has ownership, dominion or control over the narcotics and the premises where the narcotics are found." *United States v. Jones*, 49 F.3d 628, 632 (10th Cir.1995) (citation omitted). "Dominion, control, and knowledge, in most cases, may be inferred if a defendant has exclusive possession of the premises." *United States v. Mills*, 29 F.3d 545, 549 (10th Cir.1994) . . . The jury may draw reasonable inferences from direct or circumstantial evidence, yet an inference must amount to more than speculation or conjecture. [*United States v. Jones*, 44 F.3d 860, 865 (10th Cir.1995)].

Id.: *see alsoUnited States v. Hooks*, 780 F.2d 1526, 1531 (10th Cir.1986) ("Possession may be actual or constructive

and may be proved by circumstantial evidence."). With regard to the second element, we have held that a jury "may infer intent to distribute from the possession of large quantities of drugs." [FN3] *Triana*, 477 F.3d at 1194 (quotation omitted).

Mr. Le's sufficiency of the evidence challenge involves only the first element. He argues that "[a] number of cases have affirmed convictions for possession ... based upon possession and control of the vehicle where the contraband was found. These cases did not, however, approve conviction based upon presence and control of the vehicle as the sole factor leading to conviction." Aplt. Opening Br. at 14. Mr. Le also relies on our statement in *Hooks* that "proof of dominion or control, without the requisite showing of knowledge, is insufficient to sustain a conviction." *Id*. at 15 (quoting *Hooks*, 780 F.2d at 1531).

Having conducted the required de novo review of the evidence presented at trial, and having viewed that evidence in the light most favorable to the government, we agree with the government that "the totality of circumstances prove [Mr. Le's] knowing possession beyond a reasonable doubt." Aplee. Br. at 11. To begin with, the evidence at trial proved that Mr. Le was the renter, driver, and sole occupant of the U-Haul, and Mr. Le does not dispute that the vehicle was loaded with his furniture and 142 pounds of marijuana. In addition, the three duffle bags and the black garbage bag containing the marijuana were located ***831** behind Mr. Le's furniture near the front of the U-Haul's cargo area, and the jury could reasonably infer from this evidence that the marijuana was loaded into the cargo area before Mr. Le's furniture. Moreover, the duffle bags were not hidden or concealed; Mr. Le's furniture was loaded on top of one of the duffle bags; the black garbage bag was found inside one of the boxes that contained Mr. Le's furniture; and it is undisputed that the cargo area smelled strongly of dryer sheets. Mr. Le also appeared to be excessively nervous during his encounter with Trooper Boumeester, and the jury could reasonably infer that Mr. Le's nervousness was caused by his fear that Trooper Boumeester would search the U-Haul and find the marijuana. Finally, as argued by the government, "it [was] reasonable for the jury to infer that the expense of traveling by plane from Texas to Washington, renting a U-Haul for $1,549.22, and then driving from Seattle, Washington, to Beaumont, Texas, with only a load of furniture makes little sense." *Id*. at 17.

****4** In sum, the evidence showing Mr. Le's exclusive possession and control of the U-Haul, the manner in which the marijuana was loaded into the U-Haul, and the surrounding circumstances and reasonable inferences to be drawn therefrom, provided sufficient evidence for a reasonable jury to find Mr. Le guilty beyond a reasonable doubt of knowingly possessing the marijuana that was found in the U-Haul.

Mr. Le's conviction is AFFIRMED.

C.A.10 (Wyo.),2007.

U.S. v. Le

228 Fed.Appx. 827, 2007 WL 1041429 (C.A.10 (Wyo.))

FN3. Although Mr. Le has not specifically challenged the jury's finding that he intended to distribute the marijuana that was found in the U-Haul van, given the large quantity of marijuana that was found in the van, this element was easily satisfied.

In re Ronald C. MacINTYRE; Mary M. Pikus, Debtors.
Philip A. DeMASSA, APC; Philip A. DeMassa, Appellants,
v.
Lyle BUTLER; Ronald MacIntyre; Mary Pikus;
Prudential California Realty, Appellees.
BAP No. SC-93-2071-RHJ.
Bankruptcy No. 92-02840-M7.
Adv. No. 92-90403-M7.
United States Bankruptcy Appellate Panel of the Ninth Circuit.
Argued and Submitted Jan. 18, 1995.
Decided Feb. 22, 1995.

Complaint was filed objecting to debtors' discharge based on their alleged fraudulent conduct. The United States Bankruptcy Court for the Southern District of California, James W. Meyers, Chief Judge, entered judgment in favor of debtors, and complainant appealed. At proceeding to determine whether sanctions should be imposed on claimant for attempting to circumvent page limits for appellate briefs, the Bankruptcy Appellate Panel, Russell, J., held that monetary sanctions in amount of $250 were appropriate for claimant's misconduct.

So ordered.

1. Bankruptcy ⚿2187

Monetary sanction of $250 would be imposed on party appealing bankruptcy court's discharge determination and party's professional corporation for attempting to circumvent page limits on appellate briefs by reducing type size of footnotes and for cramming, into footnotes, legal argument which should have been included in main text of brief. F.R.A.P.Rule 32(a), 28 U.S.C.A.

2. Bankruptcy ⚿3777

Page limits on appellate briefs are important to maintain judicial efficiency and to insure fairness to opposing parties.

Philip A. DeMassa, San Diego, CA, for appellants.

Charles D. Christopher, San Diego, CA, for appellees.

Before RUSSELL, HAGAN and JONES, Bankruptcy Judges.

OPINION

RUSSELL, Bankruptcy Judge:

This appeal arises from a complaint seeking to have the debtors' discharge denied based on alleged fraudulent conduct by the debtors. The bankruptcy court ruled in favor of the debtors and granted the debtors a discharge.[1]

The appellants, Philip A. DeMassa and his professional corporation ("DeMassa") moved to file an oversize brief exceeding the normal page limits set forth in BAP Rule 5(b).[2] Attached with that motion was a copy of DeMassa's oversized brief, which was sixty pages in length and contained twenty-eight footnotes. The motion was denied.

[**1**] The present opening brief filed by DeMassa is thirty-one pages in length and contains twenty-six footnotes. The present brief was printed in the same type size as the earlier brief, with the one exception that DeMassa changed the type size of his footnotes. In the first brief, the footnotes were printed in a type font similar to "courier 10," which contains ten characters per inch. In the present brief, DeMassa used a type font similar to "courier 12," which contains twelve characters per inch. This results in a minuscule type size which is much more difficult to read than the required type size. In addition, the reduced type size is in violation of our Rule 5(a) and Fed.R.App.P. 32(a).[3] Ironically, DeMassa's reply brief, which is twenty-one pages, contains the proper size footnotes.

It is clear that DeMassa is utilizing the minuscule type size for the sole purpose of circumventing our page limits on opening briefs. Had DeMassa used the correct type size for the footnotes in his opening brief, he would have undoubtedly exceeded the thirty page limit by several pages.

It is also worth noting that DeMassa's use of footnotes is excessive and attempts to squeeze additional argument into his brief by utilizing the single spacing found in footnotes. The majority of his footnotes add additional argument which should have been included in the main text of DeMassa's brief. *See* Robert M. Tylar, Jr., *Practices and Strategies For a Successful Appeal*, 16

1. We affirmed the bankruptcy court on the merits of this case in an unpublished memorandum decision. In this opinion, we consider only one issue, whether appellants should be sanctioned for attempting to circumvent page limits by reducing the type size of footnotes in his brief in violation of BAP Rule 5 and Fed.R.App.P. 32(a).

2. BAP Rule 5(b) provides that "[e]xcept with leave of a panel, the appellant's and the appellee's opening briefs shall not exceed thirty (30) pages, and reply briefs shall not exceed twenty (20) pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or similar material."

3. BAP Rule 5(a) provides that "[b]riefs shall be submitted in general conformance with Bankruptcy Rule 8010 and Rule 32(a) of the Federal Rules of Appellate Procedure."

Fed.R.App.P. 32(a) in turn provides in relevant part, "**(a) Form of Briefs and the Appendix** . . . All printed matter must appear in at least 11 point type . . . ."

Am.J.Trial Advoc. 617, 619 (Spring 1993) ("Footnotes are used effectively for several purposes, including citation to the clerk's record and reporter's transcript, citation of case authority from other jurisdictions, distinguishing opponent's authorities, contradicting the opponent's authorities, and cross-referencing other portions of a brief."); Alex Kozinski, *The Wrong Stuff*, 1992 B.Y.U.L.Rev. 325, 327 (commenting humorously on how to lose an appeal by changing the size of type); Ruggero J. Aldisert, *Opinion Writing*, §§ 12.1, 12.2 (West 1990) (listing guidelines for proper footnote use).

[**2**] Because page limits are important to maintain judicial efficiency and ensure fairness to opposing parties, we IMPOSE SANCTIONS in the amount of $250 upon DeMassa, which is payable to the United States Bankruptcy Appellate Panel of the Ninth Circuit. *See Kano v. National Consumer Cooperative Bank*, 22 F.3d 899 (9th Cir.1994) (imposing $1,500 sanctions for failure to comply with Fed.R.App.P. 32(a) by not double spacing and reducing the size of footnotes).

(283 U. S. 25)

McBOYLE v. UNITED STATES.

No. 552

Argued Feb. 26, 27, 1931.

Decided March 9, 1931.

1. Automobiles ⊶341.

Airplane *held* not "motor vehicle" within law relating to transportation in interstate or foreign commerce of motor vehicle knowing the same to have been stolen (National Motor Vehicle Theft Act [18 USCA § 408]).

> National Motor Vehicle Theft Act, Oct. 29, 1919, c. 89, § 2, 41 Stat. 324 (18 USCA § 408), provides that, when used in the act, the term "motor vehicle" shall include an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle not designed for running on rails.
>
> [Ed. Note.—For other definitions of "Motor Vehicle," see Words and Phrases.]

2. Automobiles ⊶341.

"Vehicle" as used in law relating to transportation of stolen automobiles in interstate or foreign commerce is limited to vehicles running on land (National Motor Vehicle Theft Act [18 USCA § 408]).

> [Ed. Note.—For other definitions of "Vehicle," see Words and Phrases.]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

William W. McBoyle was convicted of transporting between states an airplane known to have been stolen, judgment being affirmed by the Circuit Court of Appeals [43 F.(2d) 273], and he brings certiorari.

Reversed.

Mr. Harry F. Brown, of Guthrie, Okl., for petitioner.

The Attorney General and Mr. Claude R. Branch, of Providence, R. I., for the United States.

Mr. Justice HOLMES delivered the opinion of the Court.

[**1**] The petitioner was convicted of transporting from Ottawa, Illinois, to Guymon, Oklahoma, an airplane that he knew to have been stolen, and was sentenced to serve three years' imprisonment and to pay a fine of $2,000. The judgment was affirmed by the Circuit Court of Appeals for the Tenth Circuit. 43 F.(2d) 273. A writ of certiorari was granted by this Court on the question whether the National Motor Vehicle Theft Act applies to aircraft.

***26**

*Act of October 29, 1919, c. 89, 41 Stat. 324, U. S. Code, title 18, § 408 (18 USCA § 408). That Act provides: "Sec. 2. That when used in this Act: (a) The term 'motor vehicle' shall include an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails. * * * Sec. 3. That whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000, or by imprisonment of not more than five years, or both."

[**2**] Section 2 defines the motor vehicles of which the transportation in interstate commerce is punished in Section 3. The question is the meaning of the word "vehicle" in the phrase "any other self-propelled vehicle not designed for running on rails." No doubt ctymologically it is possible to use the word to signify a conveyance working on land, water or air, and sometimes legislation extends the use in that direction, e. g., land and air, water being separately provided for, in the Tariff Act, September 21, 1922, c. 356, § 401 (b), 42 Stat. 858, 948 (19 USCA § 231(b). But in everyday speech "vehicle" calls up the picture of a thing moving on land. Thus in Rev. St. § 4 (1 USCA § 4) intended, the Government suggests, rather to enlarge than to restrict the definition, vehicle includes every contrivance capable of being used "as a means of transportation on land." And this is repeated, expressly excluding aircraft, in the Tariff Act, June 17, 1930, c. 497, § 401 (b), 46 Stat. 590, 708 (19 USCA § 1401). So here, the phrase under discussion calls up the popular picture. For after including automobile truck, automobile wagon and motor cycle, the words "any other self-propelled vehicle not designed for running on rails" still indicate that a vehicle in the popular sense, that is a vehicle running on land is the theme. It is a vehicle that runs, not something, not commonly called a vehicle, that flies. Airplanes were well known in 1919 when this statue was passed, but it is admitted that they were not mentioned in the reports or in the debates in Congress.

***27**

*It is impossible to read words that so carefully enumerate the different forms of motor vehicles and have no reference of any kind to aircraft, as including air-planes under a term that usage more and more precisely confines to a different class. The counsel for the petitioner have shown that the phraseology of the statute as to motor vehicles follows that of earlier statutes of Connecticut, Delaware, Ohio, Michigan and Missouri, not to mention the late Regulations of Traffic for the District of Columbia, title 6, c. 9, § 242, none of which can be supposed to leave the earth.

Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the

law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely broader words would have been used. United States v. Bhagat Singh Thind, 261 U. S. 204, 209, 43 S. Ct. 338, 67 L. Ed. 616.

Judgment reversed.

Carl M. MILES, et al.,
Plaintiffs-Appellants,
v.
CITY COUNCIL OF AUGUSTA, GEORGIA, et al., Defendants-Appellees.
No. 82-8766
Non-Argument Calendar.
United States Court of Appeals, Eleventh Circuit.
Aug. 4, 1983.

Plaintiffs attacked municipal ordinance imposing business license tax. The United States District Court for the Southern District of Georgia, Dudley H. Bowen, Jr., J., 551 F.Supp. 349, granted summary judgment in favor of defendant city council, and plaintiffs appealed. The Court of Appeals held that: (1) promotion of talking cat was "occupation" or "business" within meaning of ordinance requiring payment of $50 license fee by any "Agent or Agency not specifically mentioned;" (2) attack on vagueness of ordinance provision which council did not seek to enforce was not properly before Court of Appeals; (3) plaintiffs failed to make case of overbreadth with respect to ordinance provision at issue; and (4) plaintiffs' activities in promoting talking cat were within legitimate exercise of city's taxing power.

Affirmed.

1. Licenses ⚿ 11(1)

Promotion of talking cat was "occupation" or "business" within meaning of city business ordinance provision requiring payment of $50 license fee by any "Agent or Agency not specifically mentioned."

See publication Words and Phrases for other judicial constructions and definitions.

2. Municipal Corporations ⚿ 121

Attack on vagueness of provision of city business ordinance was not properly before court where city council sought only to enforce other provision of such ordinance.

3. Licenses ⚿ 7(1)

City business ordinance provision requiring payment of $50 license fee by any "Agent or Agency not specifically mentioned" was not unconstitutionally overbroad. U.S.C.A. Const.Amend. 1.

4. Constitutional Law ⚿ 82(2)

Talking cat could not be considered a "person" and therefore was not protected by Bill of Rights.

5. Constitutional Law ⚿ 82(4)

Overbreadth of statute must be judged in relation to statute's plainly legitimate sweep.

6. Municipal Corporations ⚿ 966(1)

Promotion of talking cat was within legitimate exercise of city's taxing power.

N. Kenneth Daniel, Augusta, Ga., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Georgia.

Before TJOFLAT, JOHNSON and HATCHETT, Circuit Judges.

PER CURIAM:

Plaintiffs Carl and Elaine Miles, owners and promoters of "Blackie the Talking Cat," brought this suit in the United States District Court for the Southern District of Georgia, challenging the constitutionality of the Augusta, Georgia, Business License Ordinance. Their complaint alleged that the ordinance is inapplicable in this case or is otherwise void for vagueness and overbroad, and that the ordinance violates rights of speech and association. The district court granted summary judgment in favor of the defendant City Council of Augusta. *Miles v. City of Augusta*, 551 F.Supp. 349 (S.D.Ga.1982). We affirm.

The partnership between Blackie and the Mileses began somewhat auspiciously in a South Carolina rooming house. According to the deposition of Carl Miles:

> Well, a girl come around with a box of kittens, and she asked us did we want one. I said no, that we did not want one. As I was walking away from the box of kittens, a voice spoke to me and said, "Take the black kitten." I took the black kitten, knowing nothing else unusual or nothing else strange about the black kitten. When Blackie was about five months old, I had him on my lap playing with him, talking to him, saying I love you. The voice spoke to me saying, "The cat is trying to talk to you." To me, the voice was the voice of God.

Mr. Miles set out to fulfill his divination by developing a rigorous course of speech therapy.

> I would tape the sounds the cat would make, the voice sounds he would make when he was trying to talk to me, and I would play those sounds back to him three and four hours a day, and I would let him watch my lips, and he just got to where he could do it.

Blackie's catechism soon began to pay off. According to Mr. Miles:

> He was talking when he was six months old, but I could not prove it then. It was where I could understand him, but you can't understand him. It took me altogether a year and a half before I had him talking real plain where you could understand him.

Ineluctably, Blackie's talents were taken to the marketplace, and the rest is history. Blackie catapulted into public prominence when he spoke, for a fee, on radio and on television shows such as "That's Incredible." Appellants capitalized on Blackie's linguistic skills through agreements with agents in South Carolina, North Carolina, and Georgia. The public's affection for Blackie was the catalyst for his success, and Blackie loved his fans. As the District Judge observed in his published opinion, Blackie even purred "I love you" to him when he encountered Blackie one day on the street.[1]

Sadly, Blackie's cataclysmic rise to fame crested and began to subside. The Miles family moved temporarily to Augusta, Georgia, receiving "contributions" that Augusta passersby paid to hear Blackie talk. After receiving complaints from several of Augusta's ailurophobes, the Augusta police—obviously no ailurophiles themselves[2]—doggedly insisted that appellants would have to purchase a business license. Eventually, on threat of incarceration, Mr. and Mrs. Miles acceded to the demands of the police and paid $50 for a business license.

The gist of appellant's argument is that the Augusta business ordinance contains no category for speaking animals. The ordinance exhaustively lists trades, businesses, and occupations subject to the tax and the amount of the tax to be paid, but it nowhere lists cats with forensic prowess. However, section 2 of Augusta's Business Ordinance No. 5006 specifies that a $50 license shall be paid by any "Agent or Agency not specifically mentioned." Appellants insist that the drafters of section 2 could not have meant to include Blackie the Talking Cat and, if they did, appellants assert that section 2, as drafted, is vague and overbroad and hence unconstitutional.

[**1**] Upon review of appellants' claims, we agree with the district court's detailed analysis of the Augusta ordinance. The assertion that Blackie's speaking engagements do not constitute an "occupation" or "business" within the meaning of the catchall provision of the Augusta ordinance is wholly without merit. Although the Miles family called what they received for Blackie's performances "contributions," these elocutionary endeavors were entirely intended for pecuniary enrichment and were indubitably commercial.[3] Moreover, we refuse to require that Augusta define "business" in order to avoid problems of vagueness. The word has a common sense meaning that Mr. Miles undoubtedly understood.[4]

[**2**] Appellants' attack on the vagueness of section 4 of the Augusta ordinance, which permits the mayor, in his discretion, to require a license, is not properly before this Court. As the district court indicated, defendants sought to enforce only section 2 of the ordinance in this case. 551 F.Supp. at 354.

[**3–6**] Finally, we agree with the district court that appellants have not made out a case of overbreadth with respect to section 2 of the ordinance. Appellants fail to show any illegal infringement of First Amendment rights of free speech[5] or assembly. The overbreadth of a statute must be "judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908, 2918, 37 L.Ed.2d 830 (1973). Appellants' activities plainly come within the legitimate exercise of the city's taxing power.

AFFIRMED.

1. We note that this affectionate encounter occurred before the Judge ruled against Blackie. *See Miles, supra*, 551 F.Supp. at 350 n. 1.

2. *See* 551 F.Supp. at 351 n. 2.

3. This conclusion is supported by the undisputed evidence in the record that appellants solicited contributions. Blackie would become catatonic and refuse to speak whenever his audience neglected to make a contribution.

4. As found by the district court, Mr. Miles had previously inquired as to the necessity of obtaining a business license in Charlotte, North Carolina, and in Columbia, South Carolina. 551 F.Supp. at 353.

5. This Court will not hear a claim that Blackie's right to free speech has been infringed. First, although Blackie arguably possesses a very unusual ability, he cannot be considered a "person" and is therefore not protected by the Bill of Rights. Second, even if Blackie had such a right, we see no need for appellants to assert his right *jus tertii*. Blackie can clearly speak for himself.

STATE of Minnesota, Respondent,
v.
Tammie NELSON, Appellant.
No. C5-92-1490.
Court of Appeals of Minnesota.
May 4, 1993.
Review Denied June 22, 1993.

Defendant was convicted in the District Court, Ramsey County, Salvador Rosas, J., for keeping pet rooster. Defendant appealed. The Court of Appeals, Schumacher, J., held that chickens, roosters, and other poultry are not "livestock," within meaning of an ordinance criminalizing raising or handling livestock.

Reversed.

1. Zoning and Planning ⚿279

Chickens, roosters, and other poultry are not "livestock," within meaning of zoning ordinance criminalizing raising or handling livestock.

See publication Words and Phrases for other judicial constructions and definitions.

2. Zoning and Planning ⚿279

Zoning ordinance criminalizing raising or handling livestock is to be strictly construed in favor of property owners and accused.

Syllabus by the Court

A pet rooster is not "livestock" under the provisions of Maplewood, Minn. Zoning Ordinance § 36–66(c)(1) (1988).

Hubert H. Humphrey, III, Atty. Gen., Martin J. Costello, Hughes & Costello, St. Paul, for respondent.

Tammie Nelson, pro se.

Considered and decided by ANDERSON, P.J., and SCHUMACHER and HARTEN, JJ.

OPINION

SCHUMACHER, Judge.

Tammie Nelson appeals her conviction under a Maplewood zoning ordinance, arguing that her pet rooster is not livestock prohibited by the ordinance. We reverse.

FACTS

Nelson keeps Jerry, an eight-year-old adult rooster, at her Maplewood residence as a pet. Jerry is housed in a cage in Nelson's yard and is prone to herald the breaking of dawn each day with a resounding cock-a-doodle-doo. The city alleges that neighbors have frequently complained about the rooster's crowing.[1] In June of 1992, Nelson was cited by the city's environmental health officer for violation of Maplewood, Minn. Zoning Ordinance § 36–66(c)(1) (1988), which prohibits the "raising or handling of livestock or animals causing a nuisance."[2] The ordinance also provides that violations are misdemeanor offenses. Maplewood, Minn. Zoning Ordinance § 36–8 (1988).

At trial, the environmental health officer was the only witness called by the prosecution. Nelson testified on her own behalf. The trial court found Nelson guilty of violating the ordinance and imposed a fine of $100, which was stayed provided Jerry was removed from the city within 10 days.[3] Nelson admits that Jerry does, in fact, perform each morning in conformity with his nature but claims that the statute does not apply to her pet rooster because he is neither livestock nor an animal causing a nuisance under the ordinance.

ISSUE

[1] Did the trial court correctly determine that Nelson's keeping a rooster as a pet violates Maplewood, Minn. Zoning Ordinance § 36–66(c)(1) (1988)?

ANALYSIS

The interpretation of a zoning ordinance is a question of law which this court reviews de novo. *BBY Investors v. City of Maplewood*, 467 N.W.2d 631, 634 (Minn. App.1991), *pet. for rev. denied* (Minn. May 23, 1991).

The ordinance in dispute clearly prohibits (1) all livestock, and (2) any animal causing a nuisance. We acknowledge that a crowing rooster may well constitute a nuisance, but at trial the city expressly waived this issue and prosecuted its case solely on a theory that, under the ordinance, a rooster is livestock as a matter of law.

Since "livestock" is not defined in the ordinance, Maple wood relies on a dictionary definition of the term as "domestic

1. This is not Jerry's, nor his owner's first appearance before this tribunal. In 1987, this court upheld Nelson's misdemeanor conviction for keeping her rooster in violation of a St. Paul ordinance. *See City of St. Paul v. Nelson*, 404 N.W.2d 890 (Minn.App.1987). The earlier adjudication is not relevant here because the St. Paul ordinance, unlike the Maplewood code, expressly prohibited the keeping of a chicken without a permit. *See* St. Paul, Minn., Legislative Code § 198.02, subd. 2 (3d ed. 1985).

2. Maplewood, Minn. Zoning Ordinance § 36–66(c)(1) provides:
(c) *Prohibited uses*. The following uses are prohibited:
(1) The raising or handling of livestock or animals causing a nuisance, except for licensed kennels.

3. Although the ordinance provides that violations are misdemeanors, the Maplewood attorney stated in his brief that he certified the alleged violation as a petty misdemeanor pursuant to Minn.Stat. § 609.131 (1990). Nothing in the record, however, indicates that a motion to certify was made by the prosecutor or, if a motion was made, that the court either acknowledged or approved a certification as required by the statute. The court did, however, impose a petty misdemeanor sentence.

animals kept for use on a farm or raised for sale and profit." *Webster's New Twentieth Century Dictionary* 1059 (2d ed. 1979). Other authorities have also defined livestock broadly enough to encompass roosters. *See, e.g., Meader v. Unemployment Compensation Div.*, 64 Idaho 716, 136 P.2d 984, 987 (1943) ("Livestock" in its generic sense includes all domestic animals.).

At least as commonly, however, the term livestock is defined as separate from chickens. Minnesota's own statutes consistently define "livestock" as "cattle, sheep, swine, horses, mules and goats." *See, e.g.*, Minn. Stat. § 17A.03, subd. 5 (1990). When the legislature intends to reach chickens, it uses the term poultry, often in conjunction with livestock. *See* Minn. Stat. § 169.81, subd. 8 (1990) (regulating "livestock or poultry loading chute trailers"); Minn.Stat. § 343.21, subd. 8 (1990) (cruelty to animals provision referring to "livestock or poultry exhibitions"). Clearly the lawmakers of this state understand livestock to be a category of animal distinct from poultry.

Other state statutes also define livestock to include four-legged animals, but not chickens or other poultry. *See, e.g.*, Colo. Rev.Stat. § 35–46–101(2) (1984) ("livestock" defined as "horses, cattle, mules, asses, goats, sheep, swine, buffalo, and cattalo"); Neb.Rev.Stat. § 54–101(15) (1988) ("livestock" means "any domestic cattle, horses, mules, donkeys, sheep, or swine").

[**2**] Because the meaning of livestock is not entirely certain, we turn to rules of construction to resolve the ambiguity. Minnesota courts have often recognized that because zoning ordinances restrict common law rights, they should be strictly construed against the governmental unit and in favor of property owners. *Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn.1980); *see also Farmington Tp. v. High Plains Coop.*, 460 N.W.2d 56, 58 (Minn.App.1990). In light of this principle, we give "livestock" a less inclusive meaning than does the city and conclude that the term as used in the Maplewood Zoning Ordinance does not reach chickens or other poultry.

Our conclusion is further supported by the fact that the ordinance expressly establishes that violations will be misdemeanors and therefore punishable by up to $700 in fines and 90 days incarceration. *See* Minn. Stat. § 609.02, subd. 3 (1990). The criminal consequences which attend violations of the ordinance also obligate us to construe its provisions strictly in favor of the accused. *See State v. Larson Transfer & Storage, Inc.*, 310 Minn. 295, 246 N.W.2d 176 (1976) (penal provisions of statutes and ordinances are strictly construed such that person subject to criminal liability is reasonably certain that conduct is a criminal offense).

Nelson should not bear the penal consequences of an ordinance the terms of which are reasonably capable of different meanings. Because a pet rooster does not plainly fall under the definition of livestock as used in the ordinance, we reverse Nelson's conviction.

DECISION

We reverse the trial court and hold that a pet rooster does not clearly constitute livestock for purposes of sustaining a conviction under the Maplewood Zoning Ordinance.

Reversed.

STATE v. OPPERMAN
Cite as 247 N.W.2d 673

STATE of South Dakota, Plaintiff and Respondent,
v.
Donald OPPERMAN, Defendant and Appellant.
No. 11440.
Supreme Court of South Dakota.
Nov. 12, 1976.

Defendant was convicted before the District Country Court, Second Judicial District, Clay Country, Donald Erickson, J., of possession of less than one ounce of marijuana, and he appealed. The South Dakota Supreme Court, 228 N.W.2d 152, reversed, and certiorari was granted. The United States Supreme Court, Burger, Chief Justice, 96 S.Ct. 3092, reversed and remanded. On remand, the Supreme Court, Winans, J., held that inventory search of closed console in car which was towed for mere parking violation was unreasonable search under State Constitution.

Reversed decision of trial court.

Wollman, J., dissented and filed statement.

1. Searches and Seizures ⚿ 7(10)

Inventory search of closed console in car which was towed for mere parking violation, which search could not be justified as incident to arrest, was not based on probable cause to believe that vehicle contained contraband and was not justified by nature of police custody involved, nor existence of exigent circumstances, was unreasonable search under State Constitution. Const. art. 6, § 11.

2. Courts ⚿ 97(6)

Although United States Supreme Court decision that inventory search of closed console in car which was towed for mere parking violation did not amount to unreasonable search in violation of Fourth Amendment was binding on the South Dakota Supreme Court as matter of federal constitutional law, mainfestly question remained for the South Dakota Supreme Court to decide whether search offended any provision of State Constitution and Court was under no compulsion to follow the United States Supreme Court in that regard. Const. art. 6, § 11; U.S.C.A.Const. Amend. 4.

3. Courts ⚿ 97(6)

State Supreme Court has power to provide individual with greater protection under State Constitution than does United States Supreme Court under Federal Constitution.

4. Courts ⚿ 97(6)

State Supreme Court is final authority on interpretation and enforcement of State Constitution.

5. Searches and Seizures ⚿ 3.3(6)

As matter of protection under State Constitution, requirement of "minimal interference" with citizen's constitutional rights in order for inventory search to be reasonable, absent warrant or circumstances constituting exception to warrant requirement, means that noninvestigative police inventory searches of automobiles with out warrant must be restricted to safeguarding those articles which are within plain view of officer's vision. Const. art. 6, § 11.

6. Criminal Law ⚿ 1133

Although petitioner failed to brief or argue on appeal before the State Supreme Court applicability of the State Constitution in determining validity of inventory search of petitioner's car, the State Supreme Court granted rehearing to consider that question and afforded both sides opportunity to brief and argue that point and accordingly matter was properly before the State Supreme Court on remand from the United States Supreme Court.

7. Criminal Law ⚿ 1133, 1192

Where petition for rehearing was filed late through no fault of petitioner, petition would be deemed timely filed, but, in any event, the Supreme Court had inherent power on remand to hear issue of such importance, i. e., whether inventory search of closed console in petitioner's car which was towed for mere parking violation was unreasonable search under State Constitution. Const. art. 6, § 11; SDCL 15–30–4.

William J. Janklow, Atty. Gen., Peter H. Lieberman and John P. Guhin, Asst. Attys. Gen., Pierre, for plaintiff and respondent.

Lee M. McCahren, Vermillion, for defendant and appellant.

WINANS, Justice.

[1] On April 15, 1975, this court reversed a judgment against petitioner because we found that the contraband used to convict petitioner had been seized pursuant to an inventory search which was unreasonable under the Fourth Amendment to the United States Constitution. *State v. Opperman*, 1975, S.D., 228 N.W.2d 152. On November 3, 1975, the United States Supreme Court granted certiorari; in a 5–4 decision it reversed the judgement of this court and remanded for further proceedings not inconsistent with its opinion. *South Dakota v. Opperman*, 1976, ____ U.S. ____, 96 S.Ct. 3092, 49 L.Ed.2d 1000. On August 26, 1976, this court granted a rehearing to ascertain whether the inventory search of petitioner's automobile was in violation of his rights under Article VI, § 11 of the South Dakota Constitution. We find that the inventory procedure followed in this instance constitutes an unreasonable search under our state constitution; accordingly we reverse the decision of the trial court.[1]

[2] We are mindful that the United States Supreme Court found that the inventory procedure followed in this case did not

1. The facts of this case are set out at 228 N.W.2d 152 and will not be repeated here.

amount to an "unreasonable search" in violation of the Fourth Amendment. *South Dakota v. Opperman, supra*. That decision is binding on this court as a matter of federal constitutional law. *Herb v. Pitcarin*, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789. "However, mainfestly the question remains for us to decide whether it offends any of the provisions of our own constitution and we are under no compulsion to follow the United States Supreme Court in that regard." *House of Seagram v. Assam Drug Co.*, 1970, 85 S.D. 27, 32, 176 N.W.2d 491, 494.

[**3, 4**] There can be no doubt that this court has the power to provide an individual with greater protection under the state constitution than does the United States Supreme Court under the federal constitution. *Oregon v. Hass*, 1975, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570.[2] This court is the final authority on interpretation and enforcement of the South Dakota Constitution.[3] We have always assumed the independent nature of our state constitution regardless of any similarity between the language of that document and the federal constitution. Admittedly the language of Article VI, § 11 is almost identical to that found in the Fourth Amendment;[4] however, we have the right to construe our state constitutional provision in accordance with what we conceive to be its plain meaning. We find that logic and a sound regard for the purpose of the protection afforded by S.D.Const., Art. VI, § 11 warrant a higher standard of protection for the individual in this instance than the United States Supreme Court found necessary under the Fourth Amendment.

Article VI, § 11 of our state constitution guarantees our citizens the right to be free from "unreasonable searches and seizures." We have held that a determination of reasonableness requires a balancing of the need for a search in a particular case against the scope of the particular intrusion. *State v. Catlette*, 1974, S.D., 221 N.W.2d 25. In that opinion we relied on *United States v. Lawson*, 8 Cir., 1973, 487 F.2d 468, and held that an inventory was a search, but found that it was not an unreasonable search as long as it was conducted without investigative motive and its scope was limited to things within plain view.

[**5**] We also find persuasive the reasoning in *Lawson* that for an inventory search to be reasonable, absent a warrant or circumstances constituting an exception to the warrant requirement, there must be a "minimal interference" with an individual's protected rights. 487 F.2d at 475. We now conclude that as a matter of protection under S.D.Const., Art. VI, § 11, "minimal interference" with a citizen's constitutional rights means that noninvestigative police inventory searches of automobiles without a warrant must be restricted to safeguarding those articles which are within plain view of the officer's vision. We therefore affirm the rationale of our original decision as a matter of state constitutional law. *State v. Opperman, supra*.

[**6,7**] Respondent argues that because petitioner failed to brief or argue the applicability of the state constitution before this court on the first appeal, this issue should be deemed abandoned.[5] See *Schumacher v. R–B Freight Lines, Inc.*, 1950, 73 S.D. 535, 45 N.W.2d 458. Admittedly petitioner did not contend that our state provision should be interpreted as giving greater individual protection than does the federal constitution; this court, however, granted a rehearing to consider that question and afforded both sides the opportunity to brief and argue that point. We find that this matter is properly before the court.[6] Accordingly, we reserve the judgment of the trial court as a matter of state constitutional law.

DUNN, C. J., and COLER and ZASTROW, JJ., concur.

WOLLMAN, J., dissents.

WOLLMAN, Justice (dissenting).

For the reasons set forth in my dissenting opinion issued when this case was first before us, *State v. Opperman*, S.D., 228 N.W.2d 152, 159, I would affirm the judgement of the trial court on the ground that the inventory of defendant's automobile did not constitute an unreasonable search within the meaning of Article VI, § 11 of the South Dakota Constitution.

2. See also *People v. Disbrow*, 1976, 16 Cal.3d 101, 127 Cal.Rptr. 360, 545 P.2d 272; *State v. Hehman*, 1976, Wash.App., 544 P.2d 1257; *State v. Johnson*, 1975, 68 N.J. 349, 346 A.2d 66; *People v. Brisendine*, 1975, 13 Cal.3d 528, 119 Cal.Rptr. 315, 531 P.2d 1099; *State v. Kaluna*, 1974, 55 Haw, 361, 520 P.2d 51; *Commonwealth v. Campana*, 1974, 455 Pa. 622, 314 A.2d 854, *cert. den*. 417 U.S. 969, 94 S.Ct. 3172, 41 L.Ed.2d 1139; *State v. Taylor*, 1973, 60 Wis.2d 506, 210 N.W.2d 873.

3. See *State v. Gallagher*, 1976, 46 Ohio St.2d 225, 348 N.E.2d 336; *People v. Beavers*, 1975, 393 Mich. 554, 227 N.W.2d 511, *cert. den*. 423 U.S. 878, 96 S.Ct. 152, 46 L.Ed.2d 111; *Snyder's Drug Stores, Inc, v. North Dakota State Board of Pharmacy*, 1974, N.D., 219 N.W.2d 140; *Davenport Water Co. v. Iowa State Commerce Commission*, 1971, Iowa, 190 N.W.2d 583; *Zale-Las Vegas, Inc. v. Bulova Watch Co.*, 1964, 80 Nev. 483, 396 P.2d 683; *Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros. Gaint Super Markets*, 1956, 231 La. 51, 90 So.2d 343; *State v. Stockert*, 1976, N.D., 245 N.W.2d 266; *Cox v. General Electric Co.*, 1955, 211 Ga. 286, 85 S.E.2d 514.

4. S.D.Const., Art. VI, § 11 provides:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause supported by affidavit, particularly describing the place to be searched and the person or thing to be seized."

U.S.Const., Amend. 4 provides:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

5. The applicability of the state constitution was raised at the suppression hearing below. The assignment of error on this point alleges only unconstitutionality of the search without a designation of which constitution was relied upon.

6. The state asserts that we should not have heard this matter because the petition for rehearing was not timely filed pursuant to SDCL 15–30–4. This case was remanded by the United States Supreme Court on August 3, 1976. This court received the petition for rehearing on August 9, 1976. Admittedly this petition was not filed until August 26, 1976, but that was through no fault of petitioner. We find the petition timely. In any event, this court has the inherent power on remand to hear an issue of such importance to the citizens of this state.

PRECISION SPECIALTY METALS, INC., Plaintiff,

v.

UNITED STATES, Defendant,

and

Mikki Graves Walser, Sanctioned Party–Appellant.

No. 02-1233.

United States Court of Appeals, Federal Circuit.

Jan. 13, 2003.

Department of Justice attorney sought review of ruling by the United States Court of International Trade (CIT), Wallach, J., formally reprimanding attorney for misquoting judicial opinions in a brief. The Court of Appeals, Friedman, Senior Circuit Judge, held that: (1) reprimand was reviewable, and (2) attorney committed sanctionable violation of CIT Rule 11 by selectively quoting passages from precedents, which had effect of changing meaning of quotes.

Affirmed.

1. Customs Duties ⚿ 85(1)

Court of International Trade's explicit and formal reprimand of Justice Department attorney, imposed as Rule 11 sanction for misquoting judicial opinions in government's brief, was "final decision" immediately reviewable by Court of Appeals; monetary sanction was not required for review. 28 U.S.C.A. § 1295(5); U.S.Ct. Int.Trade Rule 11, 28 U.S.C.A.

2. Federal Courts ⚿ 813

Court of Appeals reviews for abuse of discretion all aspects of Rule 11 determination. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

3. Customs Duties ⚿ 84(1)

Court of International Trade, which on its own initiative had issued order to show cause why attorney should not be held in contempt for making specified misrepresentations to court, and had heard arguments and read brief opposing contempt order, did not have to issue second show-cause order or hold second hearing upon deciding that possible sanction would be under Rule 11 rather than for contempt; attorney had ample notice of court's specific allegations. U.S.Ct.Int. Trade Rule 11, 28 U.S.C.A.

4. Customs Duties ⚿ 84(1)

Justice Department attorney engaged in misrepresentations to Court of International Trade (CIT) and thereby committed sanctionable violation of CIT Rule 11, where attorney, in arguing as part of motion for reconsideration that she had complied with Court's order to "forthwith" file response to summary judgment motion, used selective quotations and omissions that changed context and broadened meaning of United States Supreme Court Justice's statement concerning meaning of "forthwith," concealed existence of relevant Supreme Court case damaging to her argument, and changed emphasis of quoted passage. U.S.Ct.Int.Trade Rule 11, 28 U.S.C.A.

5. Federal Civil Procedure ⚿ 2757

Inherent power of court to control and specify standards of lawyers who appear before it can be invoked even if procedural rules exist which sanction same conduct addressed by court's specifications.

Mikki Graves Walser, of Brooklyn, NY, argued pro se as sanctioned party-appellant.

Sheryl L. Floyd, Senior Trial Attorney, Commercial Liti gation Branch, Civil Division, Department of Justice, of Washington, DC, for amicus curiae Mikki Graves Walser, sanctioned party-appellant. With her on the brief were Robert D. McCallum, Assistant Attorney General; and David M. Cohen, Director.

Before CLEVENGER, Circuit Judge, FRIEDMAN, Senior Circuit Judge, and PROST, Circuit Judge.

FRIEDMAN, Senior Circuit Judge.

In an unpublished opinion, the Court of International Trade formally reprimanded the appellant Mikki Graves Walser, a Department of Justice attorney, for misquoting and failing to quote fully from two judicial opinions in a motion for reconsideration she signed and filed. We hold that we have jurisdiction to review that action, and affirm the reprimand.

I

In the underlying case, Precision Specialty Metals, Inc. ("Precision") contested the decision of the United States Customs Service denying it drawback (the refund of duties paid on imported products upon their subsequent export, *see* 19 U.S.C. § 1313(b) (2000)). Walser represented the United States in that case. Precision filed a motion for summary judgment. Under the court's scheduling order, the government's response and any cross-motion were required to be filed by May 5, 2000. At 5:51 p.m. on May 4, the government moved for a 30–day extension of time for such filing. Walser stated during a subsequent court hearing that when she filed the extension motion, she had not started preparing the government's cross-motion for summary judgment.

On May 10, the court denied the extension motion and ordered that the government's response to Precision's motion be filed "forthwith." Twelve days later, on May 22, the government filed its opposition to and its cross-motion for summary judgment. Two days later, the court struck from the record

as untimely the government's response and granted Precision's motion for summary judgment as unopposed.

The government then filed a motion for reconsideration, which contained the miscitations that resulted in Walser's reprimand. The document listed three names as the submitters, only two of whom signed it: Walser and the Attorney in Charge of the Department of Justice's International Trade Field Office in New York City. (The third name on the motion was that of the Acting Assistant Attorney General.) Walser stated that she "wrote" the motion.

Motion

> See *City of New York v. McAllister Brothers, Inc.*, 278 F.2d 708, 710 (1960) ("'Forthwith' means immediately, without delay, **or as soon as the object may be accomplished by reasonable exertion**." Emphasis added.)

A major argument the government made in support of reconsideration was that it had filed its motion for summary judgment in compliance with the order that it do so "forthwith." The government relied on and quoted the following definition of "forthwith" in Black's Law Dictionary 654 (6th ed. 1990):

> Immediately; without delay; directly; within a reasonable time under the circumstances of the case; promptly and with reasonable dispatch. *U.S. ex rel. Carter v. Jennings*, D.C. Pa., 333 F.Supp. 1392, 1397. Within such time as to permit that which is to be done, to be done lawfully and according to the practical and ordinary course of things to be performed or accomplished. The first opportunity offered.

The motion stated that "[a] review of several court decisions which construed the term 'forthwith' revealed that there is no uniform definition of the term" and that "several courts" have relied on the *Black's Law Dictionary* definition. It stated that "[t]he term is clearly ambiguous and has subjective application." To support this contention, Walser quoted from several judicial opinions.

The following table sets forth in the left column two of the quotations in the motion (one in the text and the other in a footnote), and the right column contains the complete language of the pertinent portion of the opinion:

Opinion

> "Forthwith" means immediately, without delay, or as soon as the object may be accomplished by reasonable exertion. The Supreme Court has said of the word that "in matters of practice and pleading it is usually construed, and sometimes defined by rule of court, as within twenty-four hours." *Dickerman v. Northern Trust Co.*, 1900 176 U.S. 181, 193, 20 S.Ct. 311, 315, 44 L.Ed. 423. *McAllister*, 278 F.2d at 710.
>
> [9]While we did not review the Supreme Court's decision in *Henderson v. United States*, 517 U.S. 654, 680, 116 S.Ct. 1638, 134 L.Ed.2d 880 (1996), in interpreting the meaning of "forthwith," it is noteworthy that in his dissenting opinion, Justice Thomas, with whom The Chief Justice and Justice O'Connor joined, citing *Amella v. United States*, 732 F.2d 711, 713 (C.A.1984), stated that "[a]lthough we have never undertaken to define 'forthwith' . . . , **it is clear that the term 'connotes action which is immediate, without delay, prompt, and with reasonable dispatch.'**"
>
> But "forthwith" is defined by Bouvier as indicating that "as soon as by reasonable exertion, confined to the object, it may be accomplished. This is the import of the term; it varies, of course, with every particular case." In matters of practice and pleading it is usually construed, and sometimes defined by rule of court, as within twenty-four hours.

In *Dickerman*, the Supreme Court stated:

176 U.S. at 193, 20 S.Ct. 311.

The omissions from the judicial opinions that Walser quoted thus were as follows:

1. She omitted the sentence in *McAllister* that follows the sentence she quoted, referring to and quoting from the Supreme Court's *Dickerman* opinion.

2. The quotation in the footnote from Justice Thomas' dissent left out, after "forthwith," the limiting words "as it is used in the SAA [Suits in Admiralty Act]," thereby making Justice Thomas' statement seem broader than it actually was. She also left out his citation to *Dickerman*. Finally, she failed to state "emphasis added" for the quoted material in bold face, although she had so stated about the bold face portions of the quotation from *McAllister* in the text. This difference would lead a reader to assume that the emphasis in Justice Thomas' dissent was provided by him, not by her.

At the oral argument on the government's motion for reconsideration, the court questioned Walser extensively about the foregoing omissions from the judicial opinions she cited and indicated its concern about her conduct. The court said it would issue an order to show cause to give Walser "an opportunity to discuss" what it "consider[ed] to be an egregious problem."

> Although we have never undertaken to define "forthwith" as it is used in the SAA, it is clear that the term "connotes action which is immediate, without delay, prompt, and with reasonable dispatch." *Amella v. United States*, 732 F.2d 711, 713 (C.A.9 1984) (citing Black's Law Dictionary 588 (5th ed.1979)). See also *Dickerman v. Northern Trust Co.*, 176 U.S. 181, 192–193, 20 S.Ct. 311, 315, 44 L.Ed. 423 (1900). *Henderson*, 517 U.S. at 680, 116 S.Ct. 1638 (Thomas, J., dissenting).

The court subsequently issued an order to Walser to show cause why she should not be held in contempt "by reason of misrepresentations" in the government's motion for reconsideration. It issued a second order to show cause why she should not be held in contempt "by reason of the specific misrepresentations discussed by the court during oral argument on June 29, 2000," "those misrepresentations including the omission of language in quotations from *Henderson v. United States*, 517 U.S. 654, 116 S.Ct. 1638, 134 L.Ed.2d 880 (1996) and *City of New York v. McAllister Brothers, Inc.*, 278 F.2d 708 (2nd Cir.1960); the failure to cite the court to *Dickerman v. Northern Trust Company*, 176 U.S. 181, 20 S.Ct. 311, 44 L.Ed. 423 (1900), and false implication resulting therefrom that a Justice of the United States Supreme Court had stated the Court had 'never undertaken' to define the term 'forthwith,' that according to that Justice, its definition was limited to the terminology cited by Defendant, and that the Supreme Court had not further defined the term, adversely to Defendant's position, in *Dickerman v. Northern Trust Company*."

At the hearing on the order to show cause, the court first indicated that it believed that "the omissions from *McAllister* and *Henderson* were . . . an intentional attempt by competent counsel to mislead the Court" and that it would find that "the representation to the Court was in bad faith, and that as a result it was contemptuous." After a lengthy statement by and colloquy with Walser, however, the court stated that it would not find her "in bad faith" and that she was "purged of the contempt," but that it would take under advisement "whether to find a Rule 11 violation or not."

In an unpublished opinion, the court held that Walser had violated Rule 11 of the Rules of the Court of International Trade, and formally reprimanded her. The court stated:

> As counsel for the United States, Ms[.] Walser signed a brief before this court which omitted directly relevant language from what was represented as precedential authority, which effectively changed the meaning of at least one quotation, and which intentionally or negligently misled the court. That conduct is a direct violation of USCIT Rule 11. Accordingly, a sanction under that Rule is appropriate in this case[.]

In the concluding paragraph of its opinion, the court stated:

> [A]n attorney before this court violated USCIT Rule 11 in signing motion papers which contained omissions/misquotations. Accordingly, the court hereby formally reprimands her.

The court determined not to impose monetary sanctions, because it concluded that the unpublished reprimand would be a sufficient deterrent sanction.

In the present appeal Walser is proceeding pro se. She challenges the Court of International Trade's determination that she violated Rule 11 and reprimanding her for that conduct. The Department of Justice, which had represented her before the Court of International Trade in responding to the order to show cause, has filed a brief amicus curiae "in support of" her, in which it argues that her conduct did not violate Rule 11 and was not sanctionable.

II

The first question is whether we have jurisdiction to review the reprimand of Walser by the Court of International Trade. The answer depends upon whether that sanction, imposed as a sentence in the court's unpublished opinion and unaccompanied by any monetary penalty, constituted "a final decision of the United States Court of International Trade," which we may review under 28 U.S.C. § 1295(5) (2000). "This Court has the duty to determine its jurisdiction and to satisfy itself that an appeal is properly before it." *Sanders Assocs., Inc. v. Summagraphics Corp.*, 2 F.3d 394, 395 (Fed. Cir.1993).

In *View Engineering, Inc. v. Robotic Vision Systems, Inc.*, 115 F.3d 962 (Fed. Cir.1997), a district court ruled that a lawyer had violated Federal Rule of Civil Procedure 11 and was given a monetary sanction, but postponed setting its amount. This court "h[e]ld that a district court decision imposing Rule 11 sanctions is not final, and hence not appealable, until the amount of the sanction has been decided by the district court." *Id.* at 964.

This court has not decided whether a trial court's formal reprimand of a lawyer in an unpublished opinion is a reviewable decision. Some of the other circuits, however, have addressed closely related questions.

In *Walker v. City of Mesquite, Tex.*, 129 F.3d 831 (5th Cir. 1997), a government lawyer (Peebles), who was no longer assigned to a pending case, appealed the district court's sanctioning of him for improper litigation tactics. The court of appeals held that it had jurisdiction over the appeal even though the case had not been completed. In rejecting the contention that "there is no Article III case or controversy, and thus no jurisdiction, because the only possible damage is to Peebles' reputation," the court pointed out that the lawyer

> was reprimanded sternly and found guilty of blatant misconduct. That reprimand must be seen as a blot on Peebles' professional record with a potential to limit his advancement in governmental service and impair his entering into otherwise inviting private practice. We therefore conclude and hold that the importance of an attorney's professional reputation, and the imperative to defend it when necessary, obviates the need for a finding of monetary liability or other punishment as a requisite for the appeal of a court order finding professional misconduct.

Id. at 832–33 (footnote omitted).

In *United States v. Talao*, 222 F.3d 1133 (9th Cir.2000), the district court found that in conducting a criminal investigation, an Assistant United States Attorney (Harris) had violated a state ethical rule (Rule 2– 100) prohibiting ex parte contacts with parties represented by a lawyer. In holding that it had jurisdiction over the attorney's appeal from that ruling, the court of appeals distinguished cases (discussed below) holding that judicial criticism of a lawyer's conduct was not itself appealable:

> The district court in the present case, however, did more than use "words alone" or render "routine judicial commentary." Rather, the district court made a finding and reached a legal conclusion that Harris knowingly and willfully violated a specific rule of ethical conduct. Such a finding, per se, constitutes a sanction. The district court's disposition bears a greater resemblance to a reprimand than to a comment merely critical of inappropriate attorney behavior. A reprimand generally carries with it a degree of formality. The requisite formality in this case is apparent from the fact that the trial court found a violation of a particular ethical rule, as opposed to generally expressing its disapproval of a lawyer's behavior. Further, the district court's conclusion that Harris violated Rule 2–100 carries consequences similar to the consequences of a reprimand. If the court's formal finding is permitted to stand, it is likely to stigmatize Harris among her colleagues and potentially could have a serious detrimental effect on her career. In

> addition, she might be subjected to further disciplinary action by the California Bar. We have no reluctance in concluding that the district court's finding of an ethical violation by Harris is an appealable sanction.

Id. at 1138 (footnotes omitted).

See also, *Weissman v. Quail Lodge Inc.*, 179 F.3d 1194, 1199–1200 (9th Cir.1999), "declin[ing] to find, however, that any time a court includes critical words about an attorney's conduct in an order, those words constitute a formal reprimand." *Id.* at 1199. *Weissman* cited with approval and quoted from *In re Williams*, 156 F.3d 86 (1st Cir.1998), *cert. denied*, 525 U.S. 1123, 119 S.Ct. 905, 142 L.Ed.2d 904 (1999). *Id.* at 1199–1200. There the First Circuit held that a bankruptcy court's "published findings of attorney misconduct, originally rendered in support of monetary sanctions, [were not] independently appealable, notwithstanding that the monetary sanctions imposed by the court for that conduct have been nullified." *Williams*, 156 F.3d at 87. It "conclud[ed] that a jurist's derogatory comments about a lawyer's conduct, without more, do not constitute a sanction." *Id.* at 92. It added, however:

> Sanctions are not limited to monetary imposts. Words alone may suffice if they are expressly identified as a reprimand.

Id. (citations omitted). In *Weissman*, the court "agree[d] with the holding of *Williams* that words alone will constitute a sanction only 'if they are expressly identified as a reprimand.'" 179 F.3d at 1200.

The Seventh Circuit, however, appears to have taken a different path. *Clark Equipment Co. v. Lift Parts Manufacturing Co.*, 972 F.2d 817 (7th Cir.1992), involved an appeal by a lawyer from an award of attorney fees by a district court made during a civil suit as sanctions for the lawyer's misconduct. While the appeal was pending, the underlying case was terminated by a judicial decision of one part of it and the parties' settlement of the remaining part. *Id.* at 818. Under the settlement, the parties paid all of the sanctions. *Id.* The court of appeals held that the settlement mooted the lawyers' appeal of the sanctions. *Id.* at 820. It rejected the lawyer's argument that it should also vacate the opinions of the district court, which were highly critical of the lawyer's conduct and which, the lawyer asserted, "harm[ed] his reputation." *Id.* The court stated that it had "already decided that an attorney may not appeal from an order that finds misconduct but does not result in monetary liability, despite the potential reputational effects. *Bolte v. Home Ins. Co.*, 744 F.2d 572, 573 (7th Cir.1984) (district court found misconduct, but case settled before sanctions were imposed)." *Id.*

The foregoing decisions of the First, Fifth, and Ninth Circuits have a common theme: a trial court's reprimand of a lawyer is immediately appealable, even though the court has not also imposed monetary or other sanctions upon the lawyer. This principle reflects the seriously adverse effect a judicial reprimand is likely to have upon a lawyer's reputation and status in the community and upon his career. On the other hand, judicial statements that criticize the lawyer, no matter how harshly, that are not accompanied by a sanction or findings, are not directly appealable.

Although the Seventh Circuit stated in *Clark Equipment* that "an attorney may not appeal from an order that finds misconduct but does not result in monetary liability, despite the potential reputational effects," 972 F.2d at 820, we can not tell whether that court would apply that principle where the attorney was actually reprimanded for the misconduct. When the Seventh Circuit decided *Clark Equipment* and the earlier *Bolte* case upon which it there relied, it did not have the benefit of the analysis of the subsequent cases from other circuits that we have discussed above.

[1] We conclude that we have jurisdiction to review the Court of International Trade's formal reprimand of Walser for attorney misconduct. The reprimand was explicit and formal, imposed as a sanction for what the court determined was violation of the court's "Rule 11 in signing motion papers which contained omissions/misquotations." The reprimand was part of a 16–page opinion that was issued in response to the order to show cause and that was directed only to that issue. The court found, as a basis for the reprimand, that "Walser signed a brief before this court which omitted directly relevant language from what was represented as precedential authority, which effectively changed the meaning of at least one quotation, and which intentionally or negligently misled the court."

As the other circuits have pointed out, a judicial reprimand is likely to have a serious adverse impact upon a lawyer's professional reputation and career. A lawyer's reputation is one of his most important professional assets. Indeed, such a reprimand may have a more serious adverse impact upon a lawyer than the imposition of a monetary sanction. The trial court's formal reprimand of Walser had a sufficiently direct impact upon her that she should be able immediately to obtain appellate review of that action.

Although the opinion that contained the reprimand was unpublished, that fact should not insulate the trial court's action from judicial review. Unpublished opinions, although not then reprinted in the West Publishing Company reports, may be, and frequently are, reported elsewhere.

Similarly, the lack of a separate order containing the reprimand does not make it unreviewable. The Court of International Trade obviously intended its action to be a formal judicial action—it stated that Walser was "formally" reprimanded—and that action was the completion and end of the procedure that the order to show cause had initiated. The court treated the sentence in its opinion containing the reprimand as its final judgment in the matter, and so do we.

Nothing in this decision should be taken as suggesting, or even intimating, that other kinds of judicial criticisms of lawyers' actions, whether contained in judicial opinions or comments in the courtroom, are also directly reviewable.

III

The Court of International Trade sanctioned Walser for violations of Rule 11 of that court's rules. That rule provides in pertinent part:

> (b) Representation to Court.
>
> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after any inquiry reasonable under the circumstances,—
>
> . . .
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> . . .
>
> (c) Sanctions.
>
> If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorney . . . that ha[s] violated subdivision (b).
>
> (1) How Initiated
>
> . . .
>
> (B) On Court's Initiative.
>
> On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney . . . to show cause why it has not violated subdivision (b) with respect thereto.

Ct. Int'l Trade R. 11.

"Court of International Trade Rule 11 . . . is identical to Federal Rule of Civil Procedure Rule 11." *A. Hirsh, Inc. v. United States*, 948 F.2d 1240, 1246 (Fed. Cir.1991). It was obviously taken from the federal rule, and it therefore is appropriate to look to decisions under the latter in interpreting and applying the identical rule of the Court of International Trade. *See id.* (Unless otherwise indicated, "Rule 11" refers to the Court of International Trade Rule.)

[**2**] As Walser recognizes, this court "appl[ies] an abuse of discretion standard in reviewing all aspects of a . . . Rule 11" determination. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990). We uphold a Rule 11 sanction unless there is "error underlying" the lower court ruling. *View Eng'g, Inc.*, 208 F.3d at 984. An abuse of discretion occurs if the Rule 11 sanction rests upon "an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell*, 496 U.S. at 405, 110 S.Ct. 2447.

Walser does not challenge the Court of International Trade's assessment of the evidence. She contends, however, that that court committed two errors of law in concluding that she violated Rule 11.

[**3**] A. Walser first contends that the court did not follow the requirement in Rule 11(c)(1)(B) that to initiate itself a Rule 11 proceeding, the court must issue an order to show cause why "the specific conduct" did not violate the Rule. She points out that the order to show cause issued related only to contempt, not to a Rule 11 violation.

As noted above, the Court of International Trade initially contemplated holding Walser in contempt, and issued an order to show cause why that should not be done. That order described "the specific misrepresentations" upon which it was based, "including the omission of language in quotations from" *Henderson* and *McAllister*, "the failure to cite the court to *Dicker-man*," and the "false implication resulting therefrom." Walser does not contend that this order did not provide adequate notice of the charges she was required to answer. That it did give her such notice is shown by the fact that in response she filed a 27– page document that discussed in detail both the facts and the legal issues.

It was only at the conclusion of the oral argument on the order to show cause that the court indicated that it would not hold her in contempt and would take under advisement whether to find a Rule 11 violation. More than two months later, the court issued its opinion holding that she had violated Rule 11 and formally reprimanding her.

It is unclear what more Walser would have had the court do. Does she contend that when the court actually decided she had violated Rule 11 and that she should be reprimanded, it should have reissued the order to show cause, only this time addressed to Rule 11 and a reprimand instead of to contempt? After it had issued such order, should it have held another oral argument? Walser describes the court's failure to provide explicit notice that it was contemplating a Rule 11 sanction as a "technical violation" and she admits that, based upon the court's statements at the hearing, she was aware that the imposition of sanctions was in the court's mind. Walser had full notice of the basis of the action the court ultimately took, and the court's "technical violation" of the notice requirement of Rule 11 does not warrant setting aside the court's sanction.

B. On the merits, Walser contends her conduct did not violate Rule 11. As noted above, that rule provides in pertinent part that "[b]y presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after any inquiry reasonable under the circumstances,— . . . (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."

Although "the central purpose of Rule 11 is to deter baseless filings in district court," *Cooter & Gell*, 496 U.S. at 393, 110 S.Ct. 2447, the scope of the rule is not that limited.

As noted, it provides that by presenting legal documents to the court, an attorney is certifying her belief, formed after reasonable inquiry, that the "claims, defenses and other legal contentions therein are warranted by existing law or a non-frivolous argument" to change the law.

The Court of international trade stated that Walser

> either willfully or through an unacceptable level of negligence, and the use of selective quotations and direct misquotation, concealed a Supreme Court case of which she was or should have been aware. Counsel's argument that the case was inapposite or dicta is simply irrelevant to this analysis; her misconduct lies not in deciding the case was irrelevant but in attempting to **conceal** it from the court and opposing counsel. That, simply put, is a violation of any attorney's fundamental duty to be candid and scrupulously accurate. (emphasis in original).

The court concluded that Walser violated Rule 11 because she "signed a brief before this court which omitted directly relevant language from what was represented as precedential authority, which effectively changed the meaning of at least one quotation, and which intentionally or negligently misled the court."

We conclude that the Court of International Trade properly described and characterized Walser's actions and properly concluded that those actions violated Rule 11.

[**4**] In the motion for reconsideration, Walser argued that the government's filing of its cross-motion for summary judgment twelve days after it was told to file "forthwith" satisfied that requirement. She began her argument with a quotation from *Black's Law Dictionary's* definition of "forthwith" as including "within a reasonable time under the circumstances of the case; promptly and with reasonable dispatch." She then stated that "the term has been defined by several courts based upon all, or portions of, the definition contained in prior editions of" that dictionary, followed by quotations from two judicial opinions that included the dictionary definition. She also cited in a footnote the dissenting opinion of Justice Thomas in *Henderson,* which stated the various dictionary definitions of the term.

Walser did not cite or mention the 1900 Supreme Court *Dickerman* decision, which stated regarding "forthwith": "In matters of practice and pleading it is usually construed, and sometimes defined by rule of court, as within twenty-four hours." 176 U.S. at 193, 20 S.Ct. 311. The *McAllister* opinion included that quotation, and Justice Thomas' dissent cited *Dickerman*.

In his dissent, Justice Thomas also stated that "[a]lthough we have never undertaken to define 'forthwith' as it is used in the SAA [Suits in Admiralty Act]." *Henderson,* 517 U.S. at 680, 116 S.Ct. 1638 (Thomas, J., dissenting). In her brief Walser eliminated the words "as it is used in the SAA," substituting " . . ." for that language. This omission, as the Court of International Trade pointed out, "effectively changed the meaning" of Justice Thomas' language, and gave it a broader meaning than it had.

The effect of Walser's editing of this material and ignoring the Supreme Court decision that dealt with the issue—a decision that seriously weakened her argument—was to give the Court of International Trade a misleading impression of the state of the law on the point. She eliminated material that indicated that her delay in filing the motion for reconsideration had not met the court's requirement that she file "forthwith," and presented the remaining material in a way that overstated the basis for her claim that a "forthwith" filing requirement meant she could take whatever time would be reasonable in the circumstances. This distortion of the law was inconsistent with and violated the standards of Rule 11.

By signing the motion for reconsideration, Walser certified that the "claims, defenses, and other legal contentions therein are warranted by existing law." Inherent in that representation was that she stated therein the "existing law" accurately and correctly. She did not do so, however, because her omissions from and excisions of judicial authority mischaracterized what those courts had stated. The effect of her doctored quotations was to make it appear that the weight of judicial authority was that "forthwith" means "a time reasonable under the circumstances." This was quite different from the Supreme Court's statement in *Dickerman* that "[i]n matters of pleading and practice," forthwith "is usually construed, and sometimes defined by rule of court, as within twenty-four hours." By suppressing any reference to *Dickerman*, which both the Second Circuit in *McAllister* and Justice Thomas in his dissent in *Henderson* cited and which the Second Circuit quoted, Walser gave a false and misleading impression of "existing law" on the meaning of "forthwith."

This court has dealt with lawyers' miscitations in sanctioning lawyers under Federal Rule of Civil Procedure 38 for frivolous appeals. In *Abbs v. Principi*, 237 F.3d 1342 (Fed.Cir.2001), we recently gave these examples of appeals that are "frivolous as argued": "distorting cited authority by omitting language from quotations"; "misrepresenting facts or law to the court"; "failing to reference or discuss controlling precedents." *See id.* at 1345 (citations omitted). In one of the cases there cited, *Porter v. Farmers Supply Service*, 790 F.2d 882 (Fed.Cir.1986), this court held an appeal frivolous and sanctioned the appellant by requiring payment of costs and attorneys fees because the appellant failed to distinguish relevant authorities and cropped a quote. We noted that the appellant was culpable for "distort[ing] the quote by omitting language devastating to its position on appeal." *Id.* at 887.

Those cases did not involve Rule 11, but Rule 38 dealing with frivolous appeals. They are relevant, however, because they reflect the judicial view of concealment and miscitation of relevant precedent and cropping of quotations to alter their

meaning. There is no reason why misconduct condemned under Rule 38 also should not violate Rule 11.

It is no answer to say, as the Department of Justice argues, that because the Supreme Court's statement in *Dickerman* was dictum, Walser was not obligated to refer to it. The Second Circuit and Justice Thomas believed that the statement was sufficiently important to quote it (*McAllister*) and to cite it (*Henderson*). The failure to include the reference to *Dickerman* in both of those citations made Walser's citations themselves misleading. Walser, of course, could have distinguished *Dickerman* as she saw fit or urged the Court of International Trade not to follow it. Consistent with her obligations as an officer of the court, however, she could not simply ignore it by deleting it from the material she quoted.

Other courts of appeals that have considered the application of Rule 11 to attorney-case-citation issues have reached differing results. Georgene M. Vairo, Rule 11 Sanctions: Case Law Perspectives and Preventive Measures § 6.05[d][4] (2d ed.1995). In some of the cases that have rejected sanctions, the attorney's alleged violation was failure to discover precedents that negated his position. *See, e.g., United States v. Stringfellow*, 911 F.2d 225, 227 (9th Cir.1990). Understandably, courts have been reluctant to punish a lawyer for inadequate or unsound research. That may constitute negligence, but not conduct sanctionable under Rule 11. Similarly, a mere failure to cite contrary authority, without regard to the facts of the particular case, is not necessarily enough to show a violation of Rule 11. *See, e.g., Thompson v. Duke*, 940 F.2d 192, 197–98 (7th Cir. 1991); *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1541–42 (9th Cir.1986). As the court stated in so ruling in *Golden Eagle:* "neither Rule 11 nor any other rule imposes a requirement that the lawyer, in addition to advocating the cause of his client, step first into the shoes of opposing counsel to find all potentially contrary authority, and finally into the robes of the judge to decide whether the authority is indeed contrary or whether it is distinguishable. It is not in the nature of our adversary system to require lawyers to demonstrate to the court that they have exhausted every theory, both for and against their client. Nor does that requirement further the interests of the court." 801 F.2d at 1542.

In the present case, however, Walser was sanctioned not for failure to discover pertinent precedents or to cite adverse decisions. She violated Rule 11 because, in quoting from and citing published opinions, she distorted what the opinions stated by leaving out significant portions of the citations or cropping one of them, and failed to show that she and not the court has supplied the emphasis in one of them. We know of no appellate decision holding that Rule 11 does not cover such misstatements of legal authority. *Cf. Teamsters Local No. 579 v. B & M Transit., Inc.*, 882 F.2d 274, 280 (7th Cir.1989) (upholding Rule 11 sanction for "misstating the law"); *Borowski v. DePuy, Inc.*, 850 F.2d 297, 304–05 (7th Cir.1988) (Counsel's "ostrichlike tactic of pretending that potentially dispositive authority against [his] contention does not exist[ ] [is] precisely the type of behavior that would justify imposing Rule 11 sanctions." (internal citation omitted)).

In *Jewelpak Corp. v. United States*, 297 F.3d 1326 (Fed. Cir.2002), this court stated, in a footnote about a lawyer's failure to cite a case that he admitted at oral argument "would doom his appeal":

> [W]e note our significant dismay at counsel's failure to cite *Heraeus–Amersil* as controlling (or at the very least, persuasive) authority in his opening brief. Although counsel subjectively may have believed that another case was more persuasive, officers of our court have an unfailing duty to bring to our attention the most relevant precedent that bears on the case at hand—both good and bad—of which they are aware.

Id. at 1333.

Similarly, if the Court of International Trade had followed the Supreme Court's statement in *Dickerman* that "[i]n matters of practice and pleading,""forthwith""is usually construed . . . as twenty-four hours," that case would have "doom[ed]" Walser's contention that her filing after 12 days was "forthwith."

IV

[5] At the end of the oral argument on the order to show cause, the court, after stating that it would take the "Rule 11 sanction" under advisement, stated that whether or not it "enter[ed] an order under Rule 11[ ] under the inherent powers I have as a Judge of the Court," it was requiring that all lawyers appearing before it must "meet" "minimum" "standards." Without regard to whether Walser's misconduct violated Rule 11, the sanction imposed upon her would have been sustainable under the inherent power of the court to control and specify the standards of lawyers who appear before it. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). Such inherent power is not dissipated or changed by the sanctioning scheme in Rule 11. *Id.* at 46–51. The Court of International Trade therefore could have imposed the same sanction on Walser under its inherent power as it did under Rule 11. *See id.* at 49, 111 S.Ct. 2123 ("the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct").

V

The ultimate responsibility for the completeness and accuracy of papers that are filed by Department of Justice lawyers rests with the Department itself. We find it troubling that the Department's Amicus Brief seeks to defend Walser's actions on the grounds that the Supreme Court decision in *Dickerman* was not controlling authority; that the motion supposedly did not misrepresent the law; that "the issue of whether or not the Supreme Court had

addressed the meaning of 'forthwith' is not important;" and that the court was not misled. (*Amicus Curiae* Br. at 12, 13, 18, 19). While the court did not err in formally reprimanding Walser, that reprimand should not be seen as in any way detracting from the Department's own responsibility to establish high standards for its lawyers and to provide adequate training and supervision, so that episodes such as this are not repeated.

CONCLUSION

The Court of International Trade's reprimand of Walser under Rule 11 is

AFFIRMED.

IN RE S.C.
CAL.APP. 3 DIST., 2006.

Court of Appeal, Third District, California.
In re S.C., a Person Coming Under the Juvenile Court Law.
Sacramento County Department of Health and Human Services, Plaintiff and Respondent,
v.
Kelly E., Defendant and Appellant.
No. C046784.
April 7, 2006.

Background: County agency filed dependency petition on behalf of 15-year-old minor, who had Down's syndrome with an IQ of 44, based on minor's allegations that she had been sexually molested by her stepfather and her mother's failure to protect her from continuing abuse. The Superior Court, Sacramento County, No. JD220095, Peter Mering, J., declared the minor dependent and found that it would be detrimental to return her to mother's custody at the dispositional hearing. Mother appealed.

Holdings: The Court of Appeal, Scotland, P.J., held that:

(1) appellate counsel's application for permission to file oversized appellate brief was unsupported by good cause;

(2) appellate brief contained numerous violations of court rules;

(3) sufficient evidence supported juvenile court's findings that minor was molested and that mother failed to adequately protect her against recurrence of molestations;

(4) juvenile court adequately fulfilled its duty to ensure that mother had visitation with minor;

(5) appellate counsel violated statutory duty to truthfully represent appellate holdings to the court;

(6) because minor briefly recanted her reports of molestation, expert testimony relating to Child Sexual Abuse Accommodation Syndrome (CSAAS) was relevant;

(7) substantial evidence supported finding that minor was competent to testify; and

(8) evidence failed to support claim of judicial bias in favor of county agency.

Affirmed.

West Headnotes

[1] Infants 211 ⚿ 241

211 Infants
211VIII Dependent, Neglected, and Delinquent Children
211VIII(F) Review
211k241 k. In General. Most Cited Cases

Appellate counsel's application for permission to file oversized appellate brief on behalf of mother in child dependency proceeding was unsupported by good cause, although application was granted; upon appellate court's subsequent review of record, it was evident that nothing in the case required filing brief of 76,235 words. Cal.Rules of Court, Rules 33(b)(1, 5), 37.3.

See Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2005) ¶¶ 16:399, 16:399.1 (CAFAMILY Ch. 16-B).

[2] Infants 211 ⚿ 241

211 Infants
211VIII Dependent, Neglected, and Delinquent Children
211VIII(F) Review
211k241 k. In General. Most Cited Cases

Appellate counsel's opening brief, which was filed on behalf of mother following dispositional hearing in a child dependency proceeding where she was deprived of custody of minor, was deficient under court rules in failing to provide summary of significant facts in proceeding and, although some facts were recounted in contention portions of brief, they were only those facts that were favorable to mother, thus violating another established rule of appellate practice. Cal.Rules of Court, Rules 14(a)(2)(C), 33(a).

[3] Appeal and Error 30 ⚿ 757(1)

30 Appeal and Error
30XII Briefs
30k757 Statement of Case or of Facts
30k757(1) k. In General. Most Cited Cases

An appellant must fairly set forth all the significant facts in the opening brief, not just those beneficial to the appellant.

[4] Appeal and Error 30 ⚿ 181

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k181 k. Necessity of Objections in General. Most Cited Cases

A reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court, in order to encourage parties to bring errors to the attention of the trial court, so that they may be corrected.

[5] Appeal and Error 30 ⚿ 760(1)

30 Appeal and Error
30XII Briefs
30k760 References to Record
30k760(1) k. In General. Most Cited Cases

When an appellant's brief makes no reference to the pages of the record where a point can be found, an appellate court need not search through the record in an effort to discover the point purportedly made, but may simply deem the contention to lack foundation and, thus, to be forfeited. Cal.Rules of Court, Rules 14(a)(1)(C), 33(a).

[6] Infants 211 ⚿ 243

211 Infants
211VIII Dependent, Neglected, and Delinquent Children
211VIII(F) Review
211k243 k. Preservation of Grounds for Review. Most Cited Cases

Mother, who appealed dispositional order in a child dependency proceeding depriving her of custody of minor, was precluded by her failure to raise issue at trial from asserting on appeal that county agency improperly detained minor for more than 48 hours prior to filing juvenile dependency petition. West's Ann.Cal.Welf. & Inst.Code § 313(a).

[7] Infants 211 ⚿ 248.1

211 Infants
211VIII Dependent, Neglected, and Delinquent Children
211VIII(F) Review
211k248 Review
211k248.1 k. In General. Most Cited Cases

On appeal from dispositional order in a child dependency proceeding depriving mother of custody of minor, mother was trifling with appellate court in asserting on appeal that county agency improperly detained minor for more than 48 hours before filing juvenile dependency petition, where delay was for benefit of mother, who had initially accepted agency's offer to provide family with informal services in lieu of filing petition, but then changed her mind, hired an attorney, and refused to communicate further with agency. West's Ann.Cal.Welf. & Inst.Code § 313(a).

[8] Infants 211 ⚿ 250

211 Infants
211VIII Dependent, Neglected, and Delinquent Children
211VIII(F) Review
211k248 Review
211k250 k. Presumptions. Most Cited Cases

The juvenile court's judgment in a child dependency proceeding is presumed to be correct, and it is the appellant's burden to affirmatively show error.

[9] Appeal and Error 30 ⚿ 756

30 Appeal and Error
30XII Briefs
30k756 k. Form and Requisites in General. Most Cited Cases

Appeal and Error 30 ⚿ 760(1)

30 Appeal and Error
30XII Briefs
30k760 References to Record
30k760(1) k. In General. Most Cited Cases

To demonstrate error, the appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error.

[10] Appeal and Error 30 ⚿ 756

30 Appeal and Error
30XII Briefs
30k756 k. Form and Requisites in General. Most Cited Cases

Appeal and Error 30 ⚿ 761

30 Appeal and Error
30XII Briefs
30k761 k. Points and Arguments. Most Cited Cases

When a point is asserted on appeal without argument and authority for the proposition, it is deemed to be without foundation and requires no discussion by the reviewing court.

[11] Infants 211 ⚿ 241

211 Infants
211VIII Dependent, Neglected, and Delinquent Children
211VIII(F) Review
211k241 k. In General. Most Cited Cases

Appellate counsel's opening brief, which was filed on behalf of mother following dispositional order in a child dependency proceeding depriving her of custody of minor, was deficient under governing court rules in failing to cogently and concisely present argument supporting assertions, and in failing to provide meaningful legal analysis and record citations in support of such assertions, and thus unsupported claims were deemed forfeited. Cal.Rules of Court, Rules 14(a)(1)(C), 33(a).

See 10 Witkin, Summary of Cal. Law (10th ed. 2005) Parent and Child, § 715.

[12] Infants 211 ⚿ 197

211 Infants
211VIII Dependent, Neglected, and Delinquent Children
211VIII(D) Proceedings
211k197 k. Petition, Pleadings, and Issues. Most Cited Cases

Dependency petition alleging that minor had suffered physical harm as result of failure of mother to protect her from sexual abuse by member of household, and alleging such sexual abuse, adequately stated causes of action supporting juvenile court jurisdiction. West's Ann.Cal.Welf. & Inst.Code §§ 300(b, d), 332(c, f).

[13] Indians 209 ⚿ 134(4)

209 Indians
209III Protection of Persons and Personal Rights; Domestic Relations
209k132 Infants
209k134 Dependent Children; Termination of Parental Rights
209k134(4) k. Actions and Proceedings in General. Most Cited Cases
(Formerly 209k6.6(3))

Jurisdictional hearing in child dependency proceeding which concerned minor who was subject to requirements

of Indian Child Welfare Act (ICWA) was properly held 10 days after last noticed Indian tribe acknowledged receipt of such notice. Indian Child Welfare Act of 1978, § 102(a), 25 U.S.C.A. § 1912(a); West's Ann.Cal.Welf. & Inst.Code § 334; Cal.Rules of Court, Rule 1447(d).

[14] Attorney and Client 45 ⊶ 32(12)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(12) k. Relations, Dealings, or Communications with Witness, Juror, Judge, or Opponent. Most Cited Cases

An attorney's unwarranted personal attacks on the character or motives of the opposing party, counsel, or witnesses are inappropriate and may constitute misconduct.

[15] Infants 211 ⊶ 201

211 Infants
211VIII Dependent, Neglected, and Delinquent Chil dren
211VIII(D) Proceedings
211k201 k. Discovery and Disclosure. Most Cited Cases

County agency did not withhold evidence which would have been exculpatory to mother in child dependency proceeding; report of physical examination of minor conducted in response to her complaint of sexual molestation by her stepfather was inconclusive due to minor's failure to cooperate, and videotape of interview with minor, who had Down's syndrome with an IQ of 44, showed her to be developmentally disabled, but clearly understanding the difference between being truthful and telling a lie, and minor's recantation of her accusation during interview was not credible. West's Ann.Cal.Welf. & Inst. Code § 300(b, d).

[16] Infants 211 ⊶ 241

211 Infants
211VIII Dependent, Neglected, and Delinquent Children
211VIII(F) Review
211k241 k. In General. Most Cited Cases

Appellate counsel's opening brief, which was filed on behalf of mother following dispositional order in a child dependency proceeding depriving her of custody of minor, was deficient under court rules in failing to support claim that juvenile court engaged in practice of failing to set aside enough time for contested trials with citations to relevant, supporting portions of record. Cal.Rules of Court, Rule 14(a)(2)(C).

[17] Appeal and Error 30 ⊶ 1010.1(6)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1010 Sufficiency of Evidence in Support
30k1010.1 In General
30k1010.1(6) k. Substantial Evidence. Most Cited Cases

In claiming that the evidence is insufficient to support the trial court's findings, an appellant must demonstrate that there is no substantial evidence to support the challenged findings.

[18] Appeal and Error 30 ⊶ 757(3)

30 Appeal and Error
30XII Briefs
30k757 Statement of Case or of Facts
30k757(3) k. Statement of Evidence. Most Cited Cases

An appellant who claims insufficiency of the evidence support the trial court's findings is required to set forth in the appellate brief all the material evidence on the point and not merely his or her own evidence; unless this is done the error is deemed to be forfeited.

[19] Infants 211 ⊶ 241

211 Infants
211VIII Dependent, Neglected, and Delinquent Children
211VIII(F) Review
211k241 k. In General. Most Cited Cases

Appellate counsel's opening brief was deficient under court rules in failing to support claim that insufficient evidence supported juvenile court's findings in a child dependency proceeding resulting in removal of minor from mother's custody with summary of all significant facts, not just facts that lent support to mother's position, and thus claim was forfeited. Cal.Rules of Court, Rules 14(a)(2)(C), 33(a).

[20] Infants 211 ⊶ 156

211 Infants
211VIII Dependent, Neglected, and Delinquent Children
211VIII(B) Subjects and Grounds
211k156 k. Deprivation, Neglect, or Abuse. Most Cited Cases

Sufficient evidence supported juvenile court's findings that minor was sexually molested by her stepfather and that mother failed to adequately protect her against recurrence of molestations, supporting dispositional order in child dependency proceeding depriving mother of custody of minor; mother admitted that minor reported molestation to her, and evidence suggested that mother had come home and found minor and stepfather in suspicious situation, suggestive of abuse, yet mother refused to believe minor, became angry at her, opposed sexual abuse counseling for either herself or minor, and permitted molester to remain in home where he would continue to have unsupervised access to minor. West's Ann.Cal.Welf. & Inst.Code § 300(b, d).

[21] Infants 211 ⚿ 192

211 Infants

211VIII Dependent, Neglected, and Delinquent Children

211VIII(D) Proceedings

211k192 k. Apprehension and Pendente Lite Detention or Placement. Most Cited Cases

Juvenile court adequately fulfilled its duty to ensure that mother had visitation with minor during child dependency proceeding based on minor's reports of sexual molestation by stepfather and mother's failure to protect minor against continuing abuse; after counsel for mother complained to court about infrequency of visits, weekly visitation was ordered and, when two visits were cancelled due to scheduling problems, juvenile court ordered agency to provide additional visits to make up for those that were missed. West's Ann.Cal.Welf. & Inst.Code § 300(b, d).

[22] Attorney and Client 45 ⚿ 32(14)

45 Attorney and Client

45I The Office of Attorney

45I(B) Privileges, Disabilities, and Liabilities

45k32 Regulation of Professional Conduct, in General

45k32(14) k. Candor, and Disclosure to Opponent or Court. Most Cited Cases

Appellate counsel violated statutory duty of truthful representation of law to court by misrepresenting holding of appellate decision in opening brief; in representing mother on appeal following dispositional order in a child dependency proceeding depriving her of custody of minor, counsel represented cited decision as holding that "CSAAS [child sexual abuse accommodation syndrome] is inadmissible altogether in dependency hearings," but appellate court in cited case actually held that child molest syndrome, not CSAAS, was inadmissible as not generally accepted in scientific psychological community. West's Ann.Cal.Bus. & Prof.Code § 6068(d).

See Cal. Jur. 3d, Attorneys at Law, § 297.

[23] Infants 211 ⚿ 173.1

211 Infants

211VIII Dependent, Neglected, and Delinquent Children

211VIII(C) Evidence

211k173 Admissibility

211k173.1 k. In General. Most Cited Cases

Because minor briefly recanted her reports that her stepfather molested her, expert testimony relating to Child Sexual Abuse Accommodation Syndrome (CSAAS) was relevant in a child dependency proceeding to explain why some children who have been sexually abused will at some point recant or deny the abuse after the initial disclosure. West's Ann.Cal. Welf. & Inst.Code § 300(b, d).

[24] Appeal and Error 30 ⚿ 203.3

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(B) Objections and Motions, and Rulings Thereon

30k202 Evidence and Witnesses

30k203.3 k. Competency of Witnesses. Most Cited Cases

To preserve for appeal a claim that a witness lacked testimonial competence, a party must object on this ground in the trial court. West's Ann.Cal.Evid.Code § 701.

[25] Infants 211 ⚿ 207

211 Infants

211VIII Dependent, Neglected, and Delinquent Children

211VIII(D) Proceedings

211k207 k. Reception of Evidence; Witnesses. Most Cited Cases

Substantial evidence supported juvenile court's finding that minor, who had Down's syndrome with an IQ of 44, was competent to testify in a child dependency proceeding based on allegations that her stepfather molested her and her mother failed to protect her against continuing abuse; while developmentally disabled, during videotaped interview, minor demonstrated some reasoning skills, knew the difference between telling the truth and a lie, was genuinely responsive to questions and, for the most part, was easy to understand. West's Ann.Cal.Evid.Code § 701; West's Ann.Cal.Welf. & Inst.Code § 300(b, d).

[26] Infants 211 ⚿ 203

211 Infants

211VIII Dependent, Neglected, and Delinquent Children

211VIII(D) Proceedings

211k203 k. Hearing in General. Most Cited Cases

Infants 211 ⚿ 207

211 Infants

211VIII Dependent, Neglected, and Delinquent Children

211VIII(D) Proceedings

211k207 k. Reception of Evidence; Witnesses. Most Cited Cases

Evidence in record failed to support mother's claim, on appeal of dispositional order in a child dependency proceeding depriving her of custody of minor, of judicial bias in favor of county agency; during hearing in proceeding based on minor's allegations that stepfather molested her and mother's failure to protect her against continuing abuse, judge's careful questioning of minor, who had Down's syndrome with an IQ of 44, and of social worker evinced not a biased effort to

help agency prove its case, but rather a conscientious effort to ascertain whether minor was competent to testify and to understand her testimony. West's Ann.Cal.Welf. & Inst.Code § 300(b, d).

[27] **Constitutional Law 92 ⚿ 4401**

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)18 Families and Children
92k4400 Protection of Children; Child Abuse, Neglect, and Dependency
92k4401 k. In General. Most Cited Cases
(Formerly 92k274(5))

The federal due process clause guarantees a parent the right to confront and cross-examine witnesses in a dependency proceeding. U.S.C.A. Const.Amend. 14.

[28] **Infants 211 ⚿ 207**

211 Infants
211VIII Dependent, Neglected, and Delinquent Children
211VIII(D) Proceedings
211k207 k. Reception of Evidence; Witnesses. Most Cited Cases

Offer of proof by minor's counsel in a child dependency proceeding that 15-year-old minor, who had Down's syndrome with an IQ of 44, was easily distracted and easily intimidated, and was displaying signs of distress in proceeding which was based on minor's allegations that stepfather molested her and mother's failure to protect her against continuing abuse, was sufficient to support trial court's ordering that minor's testimony be taken in chambers without her mother present. West's Ann.Cal.Welf. & Inst.Code § 300(b, d), 350(b)

[29] **Infants 211 ⚿ 207**

211 Infants
211VIII Dependent, Neglected, and Delinquent Children
211VIII(D) Proceedings
211k207 k. Reception of Evidence; Witnesses. Most Cited Cases

Sixth Amendment right of confrontation accorded criminal defendants, as explicated in *Crawford v. Washington*, does not extend to parents in child dependency proceedings. U.S.C.A. Const.Amends. 6.

****458**Julie Lynn Wolff, Sacramento, for Defendant and Appellant.

Robert A. Ryan, Jr., County Counsel and Nanci A. Porter, Deputy County Counsel, for Plaintiff and Respondent.

SCOTLAND, P.J.

***400** This is an appeal run amok. Not only does the appeal lack merit, the opening brief is a textbook example of what an appellate brief should not be.

In 76,235 words, rambling and ranting over the opening brief's 202 pages, appellant's counsel has managed to violate rules of court; ignore standards of review; misrepresent the record; base arguments on matters not in the record on appeal; fail to support arguments with any meaningful analysis and citation to authority; raise an issue that is not cognizable in an appeal by her client; unjustly challenge the integrity of the opposing party; make a contemptuous attack on the trial judge; and present claims of error in other ways that are contrary to commonsense notions of effective appellate advocacy-for example, gratuitously and wrongly insulting her client's daughter (the minor in this case) by, among other things, stating the girl's developmental disabilities make her "more akin to broccoli" and belittling her complaints of sexual molestation by characterizing them as various "versions of her story, worthy of the Goosebumps series for children, with which to titillate her audience."

[1] The Presiding Justice of this court deserves some blame because he granted the request by appellant's counsel, Julie Lynn Wolff, to file an opening brief exceeding the page limitation. Effective January 1, 2005, computer-produced briefs in juvenile dependency appeals "must not exceed 25,500 words, including footnotes." (Cal. Rules of Court, rules 33(b)(1), 37.3; further rule references are to the California Rules of Court.) However, "[o]n application, the presiding justice may permit a longer brief for good cause." (Rule 33(b)(5))

This court does not receive many requests for permission to file oversized briefs and, until now, it has been the practice of the Presiding Justice to accept, as credible, an appellate counsel's declaration under penalty of perjury that good cause exists to file a brief exceeding the word limitation. This has been so in part due to the perhaps naive view that appellate counsel will adhere to the duty of an attorney "never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." (Bus. & Prof.Code, § 6068.) In addition, as a practical matter, in cases where the requested oversized brief is not submitted with the application, it would be difficult to assess the justification for exceeding the word limit without undertaking a review of the appellate record (an exercise that in most cases would require significant time and effort). Therefore, the Presiding Justice took appellant's counsel at her word and granted the application to file an oversized brief based on her representations that, in retrospect, appear to be ***401** the product of a passionate, yet unobjective, assessment of ****459** what occurred in the juvenile court. Having reviewed the issues raised in the opening brief, and having examined the record, we now can say that nothing in this case required the filing of an oversized brief, and surely nothing required filing such an unprofessional and, in many respects, virulent brief of 76,235 words.

These comments are harsh but deservedly so. An opening brief like the one filed in this case has many consequences. For starters, it undoubtedly is costly to the client to file such a brief that is long on words but short on substance. And by

attacking the integrity of individuals involved in this case, the brief in effect falsely tells the client that she has been the victim of a grave injustice perpetrated by a corrupt system. In reviewing the case, this court will be able to see through such hyperbole. But having heard the message from her counsel, the client might give up on the system and not take the steps necessary to be able to reunify with her daughter. There also is a cost to those who have been so personally attacked by the brief. Everyone who toils in the juvenile courts recognizes that dependency proceedings often involve difficult and contentious matters pertaining to family relationships, and that emotions can run high. However, this does not mean they all have developed such thick skins that unjustified personal attacks against them create no harm. Certainly, portraying appellant's developmentally disabled daughter in such a cruel way undermines, rather than advances, appellant's relationship with her daughter, when a positive relationship is necessary to achieve appellant's goal of reunification with her.

Another cost of the opening brief in this case is the need for respondent to file its own oversized brief, at undoubtedly great cost, to respond to every argument and show why, in the words of respondent's counsel, the opening brief "misstates the facts or includes facts not in the record, misstates the law, and/or fails to prove the claims made in [the opening brief]." In addition, the nature of the opening brief has caused this court to spend more time than it would have taken if the brief had not been so overwrought and over the top.

Lastly, the experience in dealing with appellant's opening brief in this case will have consequences for counsel in other cases who feel the need to request an exception to the word limitation. It should come as no surprise that the Presiding Justice will now take a more cautious approach in ruling on those requests. Counsel will be required to demonstrate with specificity why it is necessary for their briefs to exceed the word limit established by the California Rules of Court.

*402 FACTS AND PROCEDURAL BACKGROUND

[2]Rules 14(a)(2)(C) and 33(a) state that an appellant "must," in the opening brief, "[p]rovide a summary of the significant facts limited to matters in the record."

Here, appellant's counsel devotes only six and one-half pages of her 202-page brief to what she calls a "COMBINED STATEMENT OF FACTS AND HISTORY OF THE CASE." The statement is a chronological description of events that occurred in the juvenile court. Nowhere in it is there a summary of the significant facts contained in the record. The only reference to the substance of a witness's testimony is the following argumentative assertion by counsel about an expert called as a witness by the minor's attorney: "[T]he sole purpose minor's counsel could reasonably have in endeavoring to introduce this testimony in these proceedings, was to allow Dr. Miller to pontificate about CSAAS [the Child Sexual Abuse Accommodation**460 Syndrome], and to tell the Judge what to find true."

[3] In the contention portions of the brief, appellant's counsel does recite some of the facts. However, they are only those facts that are favorable to her client, thus violating another established rule of appellate practice. An appellant must fairly set forth all the significant facts, not just those beneficial to the appellant. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881, 92 Cal.Rptr. 162, 479 P.2d 362.)

Without any assistance from appellant's counsel, we summarize the significant facts in the light most favorable to the judgment. (*In re Angelia P.* (1981) 28 Cal.3d 908, 924, 171 Cal.Rptr. 637, 623 P.2d 198.)

In December 2003, the Sacramento County Department of Health and Human Services filed a juvenile dependency petition on behalf of the 15-year-old minor, who has Down's syndrome with an IQ of 44 and functions at the level of a child six or seven years of age. The petition alleged that the minor had been sexually molested by her stepfather, including at least one act of sexual intercourse, and that appellant knew of the molestations but did not take any appropriate action to protect the minor. (Welf. & Inst.Code, § 300, subds. (b) & (d).) The social worker's report prepared for the hearing set forth the following information:

While at school, the minor had told staff that her stepfather watches pornographic movies and "makes noises" as he looks at pictures on the Internet of naked girls with their legs spread open, including pictures of a young girl who appeared to be the minor's age. While talking with a law enforcement officer who was summoned to question her, she told the officer ***403** that her stepfather had "'put his thing inside her thing and banged it against her'" and that she asked him to stop because it hurt her. When asked what "things" meant, she circled the penis of the male and the vaginal area of the female on a drawing of the human anatomy. According to the school principal, the minor had never exhibited sexualized behavior at the school, was "one of the highest functioning students," and was a "proper and well-behaved child" who "has never lied" at school.

The minor was transported to a medical center for examination, which was difficult to perform since the minor refused to cooperate. Consequently, the examination could neither confirm nor negate sexual molestation, although there was "no obvious trauma indicative of sexual abuse."

When interviewed by the social worker, the minor said that she had been sexually molested by her stepfather. She described one incident when she was taking a shower at home. Her stepfather came into the bathroom, "touched her private parts," and "put his private part inside her private part." When asked if she had said anything to her mother about the incident, the minor replied, "'Don't worry about it. It won't happen again.'"

Several days later, the social worker reinterviewed the minor, who again said that she had been sexually molested by the stepfather while her mother was not at home. However, when later interviewed by a member of the multidisciplinary interview committee (MDIC), the minor said that nobody

had touched her inappropriately on a part of her body and that she had not told anyone there had been such a touching.

On January 13, 2004, after the MDIC interview, the minor told the social worker that the minor had not accused her stepfather of molesting her. In the minor's words, "'No that is not true. [He] has never touched my private parts. [He] does not do that.'"

****461** However, the minor's mother, appellant, acknowledged that the minor had told appellant about being molested by the stepfather. But appellant claimed that, on the following day, the minor said her accusation was not true. According to appellant, she then checked the minor "'down there'" and could see that "'no one had penetrated her.'" When asked by the social worker whether she had taken the minor for a medical evaluation, appellant said, "'No,'" explaining: "'Who are you going to believe? A retarded child, or me? I believe my daughter makes up stuff. One day, she told me she had sex with two boys at school.'" Appellant did not report this to the school because she believed that her daughter had fabricated the story.

In an addendum to the report for the hearing, the social worker summarized her conversation with the minor on January 28, 2004. When told that ***404** she was scheduled to visit with appellant, the minor said she did not want to see her stepfather because he was "'a very bad man.'" When asked what she meant, the minor stated: "'I won't lie, [my stepfather and mother] are lying . . . , trust me. [He] pushed me down to the floor and he touched me down here (pointing with her right index finger to her vaginal area). I tried to stop him but he won't stop either. I tried to stop him because it hurt, but he never listens to me. . . . [He] never listens to [my mother] either. [My mother] was mad at him because she knows that this has happened before. She was mad at him because she saw him, and they later started to fight, because [he] started cursing loud at [her]. I was so shocked. I was shocked that it happened before, too. [My mother] found [him] pushing his thing in my thing, plus [he] and [my mother] were bugging me and there's nothing I can do. . . . He is a bad man. He is a liar too.'" The minor again said her stepfather "looks at girls in the computer with no clothes either, and he makes noises." She also recounted that he looks at "girls movies in the TV on the tape."

At trial, the minor testified that her stepfather sexually molested her after she had started to take a shower. She tried to run away from him but, in her words, he "ran faster, caught me." He touched her breasts and vagina, and put his "thingie" into her "thingie" and started "banging." Afterwards, he told her this was "a secret." The minor also testified that her stepfather watched "bad movies" and looked at "his girlfriends" "within the computer too."

Clinical psychologist Jeffrey Miller gave expert testimony based on his interview of the minor. He opined she was moderately disabled but knew the difference between the truth and a lie and could identify gender and genitalia. During his examination of her, the minor told him (in a manner consistent with her testimony at trial and her statements to social workers and a law enforcement officer) that she had been sexually molested by her stepfather. Dr. Miller also provided testimony explaining why some minors who have reported being mo lested by a family member then recant those reports.

Two social workers and a police officer testified (consistent with the information contained in the social worker's report) that the minor complained of being sexually molested by her stepfather. The minor's foster parent also testified that the minor said her stepfather had sexually molested her.

Testifying (consistent with the information contained in the social worker's report) regarding her physical examination of the minor, a registered nurse stated she observed no trauma consistent with recent sexual penetration but was unable to rule out that such penetration had occurred.

****462*405** Claiming that the minor lied "quite frequently," the stepfather denied molesting her. He had, however, been convicted in 1991 for spousal abuse.

Appellant testified that the minor did not take showers when appellant was absent from the home and that appellant did not believe the minor had been sexually molested. Appellant explained that, even though she did not believe the minor, she physically examined her because that is "something [she] would do as a mother." Appellant acknowledged, however, that she had not performed such an examination after, according to appellant, the minor had reported being molested by two boys at school.

At the conclusion of the hearing, the juvenile court found the minor's testimony was credible and sustained the amended petition. In the court's words: "The child's demeanor during the testimony ... and when describing the events relating to the sexual encounter ... established to the Court that this was very credible and that she was honestly portraying what she experienced. Her body responded, her movements were different, her face reacted very profoundly. You could see her eyes-her eyes were widened when she would talk about the presence of becoming aware that the stepfather was approaching, and then in her describing running. All of that, you could tell that she was excited and affected and probably frightened by even the description of it. So I considered these rather powerful displays of emotion and support for the idea that in these areas . . . she was receiving and presenting honest information, credible information." Noting the minor "has given a fairly consistent description" of the event to "a significant number of persons," the court believed that her "inconsistencies are largely attributable to difficulties in communication and understanding her responses. . . ." As for her recantations, the court found there was no "credible explanation" why she would have "made this story up"; and "just saying it never happened and I never told anybody it happened, is not one of those recantations that has some powerful ring of truth to it." In the court's view, other factors supporting the minor's credibility were that the evidence showed "[n]o plausible motive for the child to lie" and she did not report the molestation; rather, it "came out totally unexpectedly," when she was asked about things that had occurred at school. The court also found persuasive the fact that while in

her foster home, the minor always locked the bathroom door, explaining she was afraid of her stepfather while talking a shower.

Noting that "on behalf of the mother it's asserted that virtually every one of those people [the social workers and others involved in the investigation] have a motive and are deceivers and are liars," the juvenile court was not persuaded by this claim. In fact, commenting on evidence of appellant's angry reaction when she returned home and found her husband with the minor, the court suggested this tended to give credence to the minor's complaint that she had just been sexually molested by her stepfather.

*406 At the dispositional hearing, evidence showed that appellant had not engaged in services, and she and her husband continued to deny that the minor was molested. According to appellant, neither she, her husband, nor the minor needed any counseling. The court declared the minor a dependent, found that it would be detrimental to return her to appellant's custody at that time, and ordered appellant to participate in a reunification plan.

We now proceed to appellant's contentions, addressing them in the order in which they are raised by her counsel under **463 19 headings. We generally will begin each discussion with pertinent rules of court and standards of appellate review, or with observations concerning what is not professional appellate advocacy.

DISCUSSION

I

[4] In order to preserve an issue for appeal, a party ordinarily must raise the objection in the trial court. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, 13 Cal.Rptr.3d 786, 90 P.3d 746.) "The rule that contentions not raised in the trial court will not be considered on appeal is founded on considerations of fairness to the court and opposing party, and on the practical need for an orderly and efficient administration of the law." (*People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468, 33 Cal.Rptr.2d 217; accord, *In re Dakota S.* (2000) 85 Cal.App.4th 494, 501, 102 Cal.Rptr.2d 196.) Otherwise, opposing parties and trial courts would be deprived of opportunities to correct alleged errors, and parties and appellate courts would be required to deplete costly resources "to address purported errors which could have been rectified in the trial court had an objection been made." (*People v. Gibson, supra*, 27 Cal.App.4th at pp. 1468, 1469, 33 Cal. Rptr.2d 217.) In addition, it is inappropriate to allow any party to "trifle with the courts by standing silently by, thus permitting the proceedings to reach a conclusion in which the party could acquiesce if favorable and avoid if unfavorable." (*In re Urayna L.* (1999) 75 Cal.App.4th 883, 886, 89 Cal.Rptr.2d 437.)

[5] The party also must cite to the record showing exactly where the objection was made. (Rules 14(a)(1)(C), 33(a); *Metzenbaum v. Metzenbaum* (1950) 96 Cal.App.2d 197, 199, 214 P.2d 603.) When an appellant's brief makes no reference to the pages of the record where a point can be found, an appellate court need not search through the record in an effort to discover the point purportedly made. (*Berger v. Godden* (1985) 163 Cal.App.3d 1113, 1117, fn. 2, 210 Cal.Rptr. 109; *Estate of Cleland* (1953) 119 Cal.App.2d 18, 21, 258 P.2d 1097; *Metzenbaum v. Metzenbaum, supra*, 96 Cal.App.2d at p. 199, 214 P.2d 603; see also *407 *Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856, 85 Cal.Rptr.2d 521.) We can simply deem the contention to lack foundation and, thus, to be forfeited. (See *Berger v. Godden, supra*, 163 Cal.App.3d at p. 1117, 210 Cal.Rptr. 109; *Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647, 199 Cal.Rptr. 72.)

Even if the claim of error has been preserved by an objection in the trial court, appellant cannot prevail without establishing that she was prejudiced by the alleged error. (Cal. Const., art. VI, § 13; *In re Celine R.* (2003) 31 Cal.4th 45, 59–60, 1 Cal.Rptr.3d 432, 71 P.3d 787; *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069, 232 Cal.Rptr. 528, 728 P.2d 1163; *San Diego Housing Com. v. Industrial Indemnity Co.* (1998) 68 Cal. App.4th 526, 545, 80 Cal.Rptr.2d 393.)

[6] Under heading 1 of her opening brief, appellant's counsel claims the Sacramento County Department of Health and Human Services (DHHS) improperly detained the minor for more than 48 hours before filing a juvenile dependency petition. (See Welf. & Inst.Code, § 313, subd. (a); further section references are to the Welfare and Institutions Code unless otherwise specified.) She even alleges that "[t]humbing their noses" at the law, and with "clear intent to obfuscate," DHHS workers engaged in "a blatant attempt to conceal this violation" by misrepresenting to the juvenile court when the minor was detained.

**464 Responding to this attack on its integrity, DHHS asserts that appellant's counsel misrepresents the facts and that, in any event, the claim of error was never raised in the juvenile court.

In her argument on appeal, appellant's counsel-who was her client's counsel at trial-makes no mention of ever tendering the objection in the juvenile court. Moreover, she does not even raise the issue of prejudice to her client. Consequently, we need not consider the matter any further. (See *People v. Gurule* (2002) 28 Cal.4th 557, 618, 123 Cal.Rptr.2d 345, 51 P.3d 224.)

[7] Nevertheless, we point out that the dependency petition was not filed within 48 hours of the minor's detention because the day after the detention, appellant accepted DHHS's offer to provide the family with "Informal Supervision Services," rather than file a petition. The agreement required appellant and the minor's stepfather "to attend individual counseling and have the stepfather move out of the home until the investigation with the Sacramento City Police Department was finalized regarding the sexual abuse allegation." One day later, however, appellant skipped a scheduled appointment to sign the case plan, and she refused to speak with the social worker without counsel being present. Appellant explained that her attorney had instructed her not to discuss the case with anyone. Consequently, DHHS then *408 filed the dependency petition within 48 hours of learning that appellant had changed her mind and no longer agreed to informal supervision in lieu of court intervention via a dependency petition.

In complaining about a delay that was for appellant's benefit and which she caused, appellant's counsel is trifling with the courts.

II

[8][9][10] The juvenile court's judgment is presumed to be correct, and it is appellant's burden to affirmatively show error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, 86 Cal.Rptr. 65, 468 P.2d 193.) To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. (*City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239, fn. 16, 126 Cal.Rptr.2d 178;*In re Marriage of Nichols* (1994) 27 Cal.App.4th 661, 672–673, fn. 3, 33 Cal.Rptr.2d 13.)When a point is asserted without argument and authority for the proposition, "it is deemed to be without foundation and requires no discussion by the reviewing court." (*Atchley v. City of Fresno, supra*, 151 Cal. App.3d at p. 647, 199 Cal.Rptr. 72; accord, *Berger v. Godden, supra*, 163 Cal.App.3d at p. 1117, 210 Cal.Rptr. 109 ["failure of appellant to advance any pertinent or intelligible legal argument ... constitute[s] an abandonment of the [claim of error"].) Hence, conclusory claims of error will fail.

In addition, appellant's brief "must" "[s]tate each point under a separate heading or subheading summarizing the point...." (Rules 14(a)(1)(B), 33(a); *Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830–1831, fn. 4, 41 Cal.Rptr.2d 263.)This is not a mere technical requirement; it is "designed to lighten the labors of the appellate tribunals by requiring the litigants to present their cause systematically and so arranged that those upon whom the duty devolves of ascertaining the rule of law to apply may be advised, as they read, of the exact question under consideration, instead of being compelled to extricate it from the mass." (*Landa v. Steinberg* (1932) 126 Cal.App. 324, 325, 14 P.2d 532; accord, ****465***Opdyk v. California Horse Racing Bd., supra*, 34 Cal. App.4th at pp. 1830–1831, fn. 4, 41 Cal.Rptr.2d 263, fn. 4.)

[11] The contention under heading 2 of appellant's brief, entitled "THE COURT ERRED IN FAILING TO DISMISS THE PETITIONS, THEREBY VIOLATING MOTHER'S CONSTITUTIONAL RIGHTS," runs afoul of the above rules (1) by raising what appear to be five separate complaints that, because of the manner in which they are presented, are painful to read and difficult to understand, and (2) by failing to provide meaningful legal analysis and record citations for complaints raised under this heading.

***409 A**

The contention begins with a chronological account of events that occurred in the juvenile court with respect to the pleadings and discovery. Appellant's counsel devotes five pages of the contention to point out that she unsuccessfully objected to DHHS's amendments of the petition. This verbiage is meaningless clutter because she makes no effort to argue and cite authority for the proposition that the court erred in overruling her objections.

B

In passing, appellant's counsel uses a number of pages to vent, as she did in the juvenile court, about DHHS's "failure to produce discovery." But again it is mere surplusage because, in those pages of her brief, she raises no claim of discovery error.

C

Appellant's counsel consumes more pages of the contention by recounting her unsuccessful objections to amendments to the petition. Once again, what is missing is any coherent argument why the juvenile court should have ruled otherwise regarding the amendments. Thus, we need not say anything more about the matter. (*Berger v. Godden, supra*, 163 Cal.App.3d at p. 1117, 210 Cal.Rptr. 109; *Atchley v. City of Fresno, supra*, 151 Cal.App.3d at p. 647, 199 Cal.Rptr. 72.)

D

After quoting allegations in the original and amended petition, to which she objected in the juvenile court, appellant's counsel contends the court "erred in: 1.) finding the petitions legally sufficient, 2.) failing to strike/dismiss each petition, 3.) not dismissing the petition(s), and ordering [the minor] released to her mother's custody...."

Symptomatic of most of her appellate arguments, this contention is heavy on words but light on analysis. Indeed, after over six pages of prefatory text, her "analysis" is but one short paragraph: "As mandated by section 332(f) [actually section 332, subdivision (f)], the entire juvenile dependency court process, begins with the allegation of facts, which, if true, are sufficient to support jurisdiction under one of the specifically enumerated subdivisions of section 300. As described in *Alysha S.*[*sic*; the correct title is *In re Alysha S.*] (1996) 51 Cal.App.4th 393, [58 Cal.Rptr.2d 494], and in accordance with the mandates of Section 332(f) [*sic*], mother's demurrers should have been sustained, as the legal sufficiency of the allegations cannot withstand scrutiny. (*Id.* at pp. 396–397, [58 Cal.Rptr.2d 494];***410***[In re] Fred J.*[*sic*] (1979) [89] Cal.App.3d 168, 176 & fn. 4, [152 Cal.Rptr. 327]; [*sic*] *[In re] Stephen W.*[*sic*] (1990) 221 Cal.App.3d 629, [271 Cal.Rptr. 319][;] *[In re] Troy D.*[*sic*] (1989) 215 Cal.App.3d 889, [263 Cal.Rptr. 869])."

****466** This is no legal analysis at all. It is simply a conclusion, unsupported by any explanation of why the petition's allegations were not sufficient. Hence, appellant has forfeited the claim of error. (See *Berger v. Godden, supra*, 163 Cal. App.3d at p. 1117, 210 Cal.Rptr. 109;*Atchley v. City of Fresno, supra*, 151 Cal.App.3d at p. 647, 199 Cal.Rptr. 72.)

In any event, the contention is frivolous.

[12] To state a cause of action, a dependency petition must contain the "code section and the subdivision under which the proceedings are instituted," as well as "an allegation pursuant to that section" (§ 332, subd. (c)) and a "concise statement of facts, separately stated, to support the conclusion that the child upon whose behalf the petition is being brought is a person within the definition of each of the sections and subdivisions

under which the proceedings are being instituted."(§ 332, subd. (f).) "This does not require the pleader to regurgitate the contents of the social worker's report into a petition, it merely requires the pleading of essential facts establishing at least one ground of juvenile court jurisdiction." (*In re Alysha S., supra*, 51 Cal.App.4th at pp. 399–400, 58 Cal.Rptr.2d 494.)

Here, in both its initial and amended petitions, DHHS cited section 300, subdivision (b), "FAILURE TO PROTECT," and section 300, subdivision (d), "SEXUAL ABUSE," as the provisions under which the proceeding was instituted. The petitions further alleged that the minor had suffered serious physical harm "as a result of the willful or negligent failure of [appellant] to supervise or protect the [minor] adequately from the conduct of the custodian with whom the child has been left" (§ 300, subd. (b)); that the minor had been "sexually abused, or there [was] a substantial risk that the [minor] will be sexually abused," by a "member of the [minor's] household"; that appellant "knew or reasonably should have known that the [minor] was in danger of sexual abuse"; and that appellant "failed to protect the [minor] adequately from sexual abuse" (§ 300, subd. (d)). As the factual basis for these charges, the petitions alleged that the developmentally disabled minor was "sexually molested by her stepfather … on at least one occasion, including penile penetration" and appellant "knew, or should have known the [minor] is at risk of sexual molestation, as the [minor] told [appellant] of the sexual molestation by her stepfather and [appellant] failed to take appropriate action to protect the child."

As is readily apparent, these allegations unquestionably stated causes of action by setting forth specific factual allegations that support juvenile court ***411** jurisdiction under section 300, subdivisions (b) and (d). (See *In re Alysha S., supra*, 51 Cal.App.4th at pp. 399–400, 58 Cal.Rptr.2d 494;*In re Jamie M.* (1982) 134 Cal.App.3d 530, 544, 184 Cal.Rptr. 778.)

E

The last point made under heading 2 of the brief is a claim that the juvenile court erred in "not dismissing the petitions for legally unsupportable delay in conducting the jurisdictional (and the dispositional hearing for that matter), within the timelines mandated by law in juvenile dependency proceedings-with no 'redetaining' or other sham, so as to render [appellant's] constitutional rights illusory."

This assertion is followed by a string of citations: "(CT 1–39; 78–83; 93; 181–188; RT 39:28–41:4; 62:1–69:12.) (Section 334; Rule 1447(d); *Jeff M. [v. Superior Court*, 56 Cal.App.4th 1238, 66 Cal.Rptr.2d 343], *supra;Renee S. [v. Superior Court*, 76 Cal.App.4th 187, 90 Cal.Rptr.2d 134,] *supra;***467***[In re] James Q.* [81 Cal.App.4th 255, 96 Cal. Rptr.2d 595], *supra;Ingrid E. [v. Superior Court*, 75 Cal.App.4th 751, 89 Cal.Rptr.2d 407], *supra;[In re] Kelly D.*, [82 Cal. App.4th 433, 98 Cal.Rptr.2d 188], *supra;[In re] Daijah T.*, [83 Cal.App.4th 666, 99 Cal.Rptr.2d 904], *supra;[In re] Malinda S.*, [51 Cal.3d 368, 795 P.2d 1244] *supra;[In re] DeJohn B.*, [84 Cal.App.4th 100, 100 Cal.Rptr.2d 649], *supra*.)"

We are mystified as to how appellant's counsel believes the record citations support the claim of error. The cited pages of the appellate record deal with a variety of matters, some of which seem to have no bearing on the claim of error. For example, pages 78 through 83 of the clerk's transcript contain the forensic medical report of the minor's external genitalia.

Since appellant's counsel has not bothered to explain why these record citations are helpful to her client, we have no obligation to try to figure it out. (See *County Nat. Bank etc. Co. v. Sheppard* (1955) 136 Cal.App.2d 205, 223, 288 P.2d 880 [it is not the role of an appellate court to act as counsel for either party to an appeal]; see also *Berger v. Godden, supra*, 163 Cal. App.3d at p. 1117, 210 Cal.Rptr. 109; *Atchley v. City of Fresno, supra*, 151 Cal.App.3d at p. 647, 199 Cal.Rptr. 72.)

Equally unhelpful to us is the string of case citations that contains no references to the volumes of the Official California Appellate Reports where the cases can be found, and no jump cites to the pages of those cases where pertinent holdings purportedly exist. Of course, we can turn to the brief's table of authorities to find out where else in the brief these cases are cited, then thumb through it to ascertain what pages of the cases were cited by appellant's counsel. But accomplished appellate attorneys know they should not require us to do so.

Nevertheless, we undertook that task, only to discover the table of authorities prepared by appellant's counsel is inaccurate. For example, in addition to typographical errors, it reflects that the above quoted citation to "*Jeff M., supra*" ***412**(*Jeff M. v. Superior Court* (1997) 56 Cal.App.4th 1238, 66 Cal.Rptr.2d 343) is the first time that appellant cited the case in the body of the brief. Actually, it is cited on the prior page of the brief, but again only as "*Jeff M., supra*," thus providing no help as to what part of the opinion has relevance to this case.

More importantly, the problem with the string citations is that appellant's counsel makes no effort to explain how the authorities support her claim of error. Indeed, five of the cited cases appear to have no relevance at all because they dealt with inadequate notice of a hearing, which did not occur here (*In re DeJohn B.* (2000) 84 Cal.App.4th 100, 102, 100 Cal.Rptr.2d 649), or erroneous denial of contested hearings, which did not happen here (*In re Daijah T.* (2000) 83 Cal.App.4th 666, 668, 99 Cal.Rptr.2d 904;*In re Kelly D.* (2000) 82 Cal.App.4th 433, 434–435, 98 Cal.Rptr.2d 188;*In re James Q.* (2000) 81 Cal. App.4th 255, 258, 96 Cal.Rptr.2d 595;*Ingrid E. v. Superior Court* (1999) 75 Cal.App.4th 751, 753, 89 Cal.Rptr.2d 407.)

We reemphasize that it is not the role of an appellate court to carry appellate counsel's burden. (See *Berger v. Godden, supra*, 163 Cal.App.3d at p. 1117, 210 Cal.Rptr. 109;*Atchley v. City of Fresno, supra*, 151 Cal.App.3d at p. 647, 199 Cal.Rptr. 72;*County Nat. Bank etc. Co. v. Sheppard, supra*, 136 Cal. App.2d at p. 223, 288 P.2d 880.)

[13] Aside from the inadequacies of the brief, the final flaw in this claim of error is that it lacks merit. Based upon her citations to section 334 and Rule 1447(d) and some of the text of her argument, it appears appellant's counsel is complaining ****468** that the jurisdictional hearing did not commence within

15 judicial days after the date of the juvenile court's order detaining the minor. However, appellant's counsel ignores the fact that the minor has Indian heritage and that requirements of the Indian Child Welfare Act precluded the juvenile court from holding the jurisdictional hearing within this time period. (25 U.S.C. § 1912(a)) [no proceedings shall be held until at least 10 days "after receipt of notice" by the tribe] (hereafter § 1912(a)) As the record shows, the jurisdiction hearing began 10 days after the last tribe acknowledged receiving notice of the dependency proceedings. There was no error.

III

[14] "[I]t is vital to the integrity of our adversary legal process that attorneys strive to maintain the highest standards of ethics, civility, and professionalism in the practice of law." (*People v. Chong* (1999) 76 Cal.App.4th 232, 243, 90 Cal. Rptr.2d 198.) Indeed, unwarranted personal attacks on the character or motives of the opposing party, counsel, or witnesses are inappropriate and may constitute misconduct. (*Id.* at p. 245, 90 Cal.Rptr.2d 198; see also *Stone v. Foster* (1980) 106 Cal.App.3d 334, 355, 164 Cal.Rptr. 901.)

[15]***413** In a lengthy argument under heading 3 of her brief, appellant's counsel attacks the character and motives of a social worker in this case by asserting that "DHHS had discovery in its possession, which .. was withheld, minimized, trivialized, and disregarded by DHHS." She even accuses the social worker of engaging in "concealment of the majority of evidence that did not support [DHHS's] position."

This scorn focuses on two items, the significance of which appellant's counsel exaggerates.

First, counsel criticizes DHHS for waiting until the detention hearing to show her a copy of the physical examination of the minor done in response to the minor's complaint of sexual molestation by her stepfather. Counsel characterizes this as "exculpatory evidence" that "provides zero evidence to support the alleged penile penetration. . . ." Actually, the physical examination was inconclusive because the minor refused to cooperate. While there was "no obvious trauma indicative of sexual abuse," the examiner could neither confirm nor negate whether sexual intercourse had occurred. Thus, the examination was neither inculpatory nor exculpatory evidence.

Next, counsel protests that DHHS did not immediately turn over information regarding the MDIC interview of the minor which, according to appellant's counsel, shows a girl "who cannot distinguish between truth and fantasy" and who "recanted her statement regarding the molestation." We have watched the MDIC interview. The videotape shows a developmentally disabled girl who clearly understood the difference between being truthful and telling a lie; who was able to correctly answer questions about many things and demonstrated some cognitive thinking skills; and who became uncomfortable, reluctant, and even tearful when asked to answer questions about whether anyone had ever touched her inappropriately on a part of her body. It is true that she ultimately told the interviewer, "nobody touched me," then said she "didn't tell anybody" that she had been touched inappropriately. She also said she "probably" never talked to the police about this, and she even denied ever being alone with either her mother or her stepfather. Based upon her demeanor, obvious discomfort, and evasiveness whenever asked about the subject, it is readily apparent that the minor's statements during**469 the MDIC interview do not constitute a credible recantation of her earlier complaint that she was sexually molested by her stepfather. Thus, the interview is not as exculpatory as appellant's counsel suggests. And it certainly does not show a person "who cannot distinguish between truth and fantasy."

Appellant's counsel also asserts that the social worker's reports "intentionally excluded" exculpatory information. Once again, we find this to be an unsupportable exaggeration.

***414** The bottom line is that the record does not support the claim by appellant's counsel that the juvenile court "erred in failing to supervise and enforce DHHS's duty to provide discovery. . . ." The court ordered DHHS to provide appellant with various materials and to meet with appellant's counsel regarding discovery. The record shows that DHHS complied. To the extent that counsel did not immediately receive the information, she has made no showing of prejudice. Hence, there was no reversible error.

IV

It is a fundamental rule of jurisprudence that courts do not issue advisory opinions. (*People v. Slayton* (2001) 26 Cal.4th 1076, 1084, 112 Cal.Rptr.2d 561, 32 P.3d 1073;*City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 69–70, 24 Cal.Rptr.3d 72.) In order to assert a claim of error, appellant must demonstrate that she was aggrieved by the alleged error. (*Benitez v. North Coast Women's Care Medical Group, Inc.* (2003) 106 Cal.App.4th 978, 991, 131 Cal.Rptr.2d 364;*In re Crystal J.* (2001) 92 Cal.App.4th 186, 192, 111 Cal.Rptr.2d 646 ["Since appellant was not aggrieved by the denial of the motion, she lacks standing to appeal the ruling"].)

[16] In two separate but largely redundant arguments under headings 4 and 5 of her brief, appellant's counsel rails against the juvenile court for its purported practice of "refus[ing] to conduct trials day to day, all day, even when specifically demanded, . . . conducting trials only in some portion of an afternoon left over after all other matters are handled, and claiming court congestion good cause to deny trials. . . ."

A fundamental problem with these arguments is that appellant's counsel violates rule 14(a)(2)(C) because her allegations regarding how dependency proceedings are conducted in the Sacramento County Superior Court are based upon matters not in the record of this appeal. Therefore, we need not address the claims since appellant's counsel makes no effort to show that this purported practice occurred in this case.

V

[17][18] In claiming that the evidence is insufficient to support the trial court's findings, an appellant must " 'demonstrate that there is no substantial evidence to support the challenged findings.' . . . [Citations.]" (*Foreman & Clark Corp. v.*

Fallon, supra, 3 Cal.3d at p. 881, 92 Cal.Rptr. 162, 479 P.2d 362; italics omitted.) "A recitation of only [appellant's] evidence is not the 'demonstration' contemplated under the above rule. [Citation.] Accordingly, if, as [appellant] here contend[s], 'some particular issue of fact is not sustained, [appellant is] required to set forth in [her] brief *all* the material evidence on the point and *not merely* [*her*] *own* ***415** *evidence*. Unless this is done the error is deemed to be [forfeited].' (Italics added.) [Citations.]" (*Ibid*.; see also *In re S.B., supra*, 32 Cal.4th at p. 1293, fn. 2, 13 Cal.Rptr.3d 786, 90 P.3d 746.)

****470**[19] Under heading 6 of her brief, appellant's counsel claims there is insufficient evidence to support the juvenile court's findings that resulted in removal of the minor from appellant's custody. But having violated rules 14(a)(2)(C) and 33(a) by not providing this court with "a summary of the significant facts limited to matters in the record," counsel then violates the substantial evidence rule by presenting, in her argument, only facts that lend support to her position. Thus, her claim of error is forfeited.

[20] Even if appellant's counsel had correctly presented the claim of error, it loses on the merits.

In essence, her argument is a challenge to the objectivity and credibility of the social workers and the mental health professional whom DHHS presented as an expert witness. Relying upon the MDIC interview, which she has wrongly characterized as exculpatory (see part III, *ante*), and upon what she views as the more persuasive evidence presented by defense witnesses, counsel claims there was "no support" for the juvenile court's findings.

Appellant's counsel fails to grasp the fundamental rule that an appellate court does not reassess the credibility of witnesses or reweigh the evidence. (*People v. McCleod* (1997) 55 Cal.App.4th 1205, 1221, 64 Cal.Rptr.2d 545.) Conflicts in the evidence must be resolved in favor of the juvenile court's findings, and the evidence must be viewed in the light most favorable to the judgment, accepting every reasonable inference that the court could have drawn from the evidence. (*In re Angelia P., supra*, 28 Cal.3d at p. 924, 171 Cal.Rptr. 637, 623 P.2d 198;*People v. Autry* (1995) 37 Cal.App.4th 351, 358, 43 Cal.Rptr.2d 135.) Thus, we must uphold the juvenile court's factual findings if there is any substantial evidence, whether controverted or not, that supports the court's conclusion. (*In re Jason L*. (1990) 222 Cal.App.3d 1206, 1214, 272 Cal.Rptr. 316.)

Here, ample evidence supports a finding that the minor was sexually molested by her stepfather when she was left alone with him and that appellant, the minor's mother, knew the molestation happened yet failed to adequately protect the minor against the recurrence of such molestations. Appellant admitted that the minor told her about being molested by appellant's husband, and there was evidence suggesting that appellant came home as a molestation was occurring, or just after it had been completed, and found the minor and appellant's husband in a suspicious situation. Nevertheless, appellant refused to believe the minor, became angry at her, and permitted the molester to remain in the home where he could have continued unsupervised ***416** access to the minor. Thus, juvenile court jurisdiction was appropriate under both subdivisions (b) and (d) of section 300.

There also was clear and convincing evidence that no reasonable means of protecting the minor existed if she were to remain in her mother's home, where the stepfather continued to reside. Appellant had not been cooperative with DHHS, did not believe she needed any counseling, and opposed sexual abuse counseling for the minor. Simply stated, the juvenile court reasonably could find that home supervision was inadequate to safeguard the minor from the molesting stepfather due to appellant's failure to recognize the danger that he posed. In sum, substantial evidence supports the dispositional order.

VI

While exaggeration may not violate rules of court and standards of review, it is not an effective tool of appellate advocacy.

****471**[21] Under heading 7 of her brief, appellant's counsel contends the juvenile court "continues to refuse to enter meaningful and enforceable visitation orders, or to ensure it's [*sic*] visitation orders are implemented by DHHS…." The record refutes this exaggerated claim.

The juvenile court ordered DHHS to provide appellant with supervised visits with the minor.[FN1] Contrary to the suggestion of appellant's counsel, the order was not meaningless and unenforceable. (See *In re Moriah T*. (1994) 23 Cal.App.4th 1367, 1374–1377, 28 Cal.Rptr.2d 705.) DHHS's compliance with the order was subject to the court's supervision and control, and if DHHS was "abusing its responsibility in managing the details of visitation," appellant had the power to "bring that matter to the attention of the juvenile court. . . ."(*Id*. at p. 1377, 28 Cal.Rptr.2d 705.)

After appellant's counsel complained about the low number of visits, the juvenile court discussed the matter with counsel and the parties then stated: "The visitation order is to remain in full force and effect. [DHHS] is to comply with that order." Thereafter, DHHS recommended regular visits, and the case plan contained a provision for weekly visitation between appellant and the minor, commencing on January 15, 2004.

***417** On January 28, 2004, appellant's counsel again raised the issue, telling the juvenile court that appellant had not had visitation for 20 days because one visit was cancelled by DHHS, and appellant was in court on the date of another scheduled visit.

FN1. The orders stated: "The mother shall have supervised visitation with the child as frequent as is consistent with the well-being of the child. [DHHS] shall determine the time, place, and manner of visitation, including the frequency of visits, length of visits, and by whom they are supervised." "[DHHS] may consider the child's desires in its administration of the visits, but the child shall not be given the option to consent to or refuse future visits." "The Department's discretion shall extend to determining if and when to begin unsupervised overnight and weekend visits." The court also ordered that the minor shall not have any contact with her stepfather.

The court responded by ordering DHHS to provide appellant with additional visits to make up for those that were missed through no fault of appellant. Thereafter, the social worker advised the court that those visits had been held and that appellant had been visiting the minor on a weekly basis.

In sum, the record shows that the juvenile court did not abuse its discretion or commit any error pertaining to its duty to ensure that appellant was able to visit the minor.

VII

Counsel should never misrepresent the holding of an appellate decision. Not only would that be a violation of counsel's duty to the court (Bus. & Prof.Code, § 6068, subd. (d)), it will backfire because the court will discover the misrepresentation, particularly when it relates to a decision issued by that court.

[22] Under heading 8 of her brief, appellant's counsel argues the juvenile court "erred by admitting and considering CSAAS." By this, she means the testimony of Dr. Jeffrey Miller, the clinical psychologist who had interviewed the minor and who, she says, presented evidence regarding the Child Sexual Abuse Accommodation Syndrome (CSAAS).

According to her, "CSAAS is inadmissible altogether in dependency hearings." Appellant's counsel cites "*Sara M.*[*sic*] (1987) 194 Cal.App.3d 585, 594, 239 Cal.Rptr. 605," for this proposition. However, ****472** she misstates the holding of this court in that case.

In re Sara M., supra, 194 Cal.App.3d 585, 239 Cal.Rptr. 605, did not even deal with CSAAS; rather, that case involved the so-called " 'child molest syndrome.' " (*Id.* at p. 587, 239 Cal.Rptr. 605.) Noting (1) the child molest syndrome was "not recognized by the American Psychological Association (APA) or any other professional organization" and it was "not included as a syndrome in the APA's Diagnostic and Statistical Manual"(*Id.* at p. 589, 239 Cal.Rptr. 605), and (2) the experts described the syndrome "as being in the beginning stages of development and acceptance"(*Id.* at p. 593, 239 Cal.Rptr. 605), this court held that testimony about the syndrome "was inadmissible due to lack of foundational proof that the child molest syndrome has been generally accepted in the scientific psychological community." (*Id.* at p. 594, 239 Cal.Rptr. 605.)

[23]***418** In contrast, it has long been held that in a judicial proceeding presenting the question whether a child has been sexually molested, CSAAS is admissible evidence for the limited purpose of disabusing the fact finder of common misconceptions it might have about how child victims react to sexual abuse. (See, e.g., *People v. Wells* (2004) 118 Cal.App.4th 179, 188, 12 Cal.Rptr.3d 762;*People v. Housley* (1992) 6 Cal.App.4th 947, 955, 8 Cal.Rptr.2d 431;*People v. Archer* (1989) 215 Cal.App.3d 197, 205, fn. 2, 263 Cal.Rptr. 486;*People v. Bowker* (1988) 203 Cal.App.3d 385, 392, 249 Cal.Rptr. 886.)

Here, the juvenile court explicitly stated it would not permit Dr. Miller to proffer an opinion as to whether the minor had been sexually molested. The court simply allowed him to present an expert opinion regarding why some children who have been sexually abused "will at some point recant or deny the abuse after they have made their initial disclosure." This evidence was relevant and admissible because, at one point, the minor had briefly recanted her complaint of being sexually abused by her stepfather.

In another attack on Dr. Miller's testimony, appellant's counsel claims, under heading 9 of her brief, that the juvenile court "erred in admitting and considering dissociation (multiple personality disorder), absent the required supporting diagnosis." However, her argument is based in part on *testimony that was stricken by the court!* As DHHS correctly points out, Dr. Miller did *not* diagnose the minor as having a multiple personality disorder. He simply opined that the minor's expressed desire to be part of another family might be a dissociative reaction, a defense mechanism to cope with some event in her life. It is this testimony, not any medical diagnosis of dissociation, to which the juvenile court later referred in explaining its finding that the minor was competent to testify as a witness. There was no error.

We also reject appellant counsel's argument, under heading 10 of her brief, that Dr. Miller should not have been allowed to testify because of what she says was "the inappropriateness of minor's counsel's failure to properly disclose the intended testimony of Dr. Miller." Counsel provides no analytical discussion and cites no legal authority for her claim of error. For this reason, we deem it to lack foundation. In any event, our examination of the record shows that the juvenile court allowed appellant's counsel ample time to prepare for her examination of Dr. Miller.

Lastly, expressing frustration that Dr. Miller repeatedly requested her to clarify "vague" questions that she asked during cross-examination, appellant's counsel attempts to belittle his testimony and suggests it constituted nothing more than ****473** "unsupported conclusions," upon which the juvenile court should not have relied. We disagree. The record shows that Dr. Miller is a ***419** recognized expert in the evaluation of children with Down's syndrome The evidence of Dr. Miller's qualifications justified the juvenile court's reliance on his testimony as an expert. Appellant counsel's extremely unfair characterization of Dr. Miller's testimony is not supported by the record.

VIII

It is not productive to devote a separate heading to a comment on evidence regarding which no claim of error is made.

In the five sentences under heading 11 of her brief, appellant's counsel notes that (1) her client testified the minor has referred to her biological father as her stepfather, and (2) Dr. Miller testified that at one point during his examination of her, the minor referred to her stepfather by her father's name.

What is conspicuously absent is any argument or analysis of any kind as to why this supports any claim of error. Thus, we move on. (*Atchley v. City of Fresno, supra*, 151 Cal.App.3d at p. 647, 199 Cal.Rptr. 72.)

IX

"It is the duty of an attorney" to "employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." (Bus. & Prof.Code, § 6068, subd. (d).)

Under heading 12 of her brief, appellant's counsel presents lengthy criticism of the interviewing techniques used by various persons who questioned the minor. In her view, everyone who spoke with the minor during the investigation stage "violated repeatedly" the "interview techniques accepted by the relevant scientific community" for questioning a child who has complained of sexual molestation, and instead used "suggestive" techniques and leading questions. This assertion is followed by over ten pages of snippets from the clerk's transcript and reporter's transcript.

The only "authority" that appellant's counsel cites to support her conclusory assertion is a two-page quotation that she attributes to literature authored by four experts in the field and that she says is taken from specified pages of the reporter's transcript. We have examined those pages, only to discover that the quoted words do not exist on the cited pages of the reporter's transcript. Those pages cover some of the cross-examination of Dr. Miller by appellant's then trial counsel. It appears the quotation purportedly taken from treatises is actually a recasting of some of her cross-examination questions. In presenting *__420__ this as purported evidence of scientific opinion on proper interview techniques, she has attempted to mislead this court.

Aside from counsel's apparent attempt to mislead this court, the only discernable claim of legal error set forth under heading 12 of her brief is the assertion that "a review of the entire record makes clear, it would be impossible to find any of the allegations of the petition ... supported by substantial evidence." Not so. Our examination of the record and viewing of the videotape of the MDIC interview convince us (1) the claim that improper interview techniques were used is exaggerated, and (2) there is substantial evidence that the minor was sexually molested by her stepfather and that appellant knew about the molestation but failed to protect the minor.

**474 X

"[W]e note with dismay the ever growing number of cases in which most of the trappings of civility ... are lacking." (*Townsend v. Superior Court* (1998) 61 Cal.App.4th 1431, 1438, 72 Cal.Rptr.2d 333.) Here, appellant's counsel has taken that unfortunate practice to its extreme. As we will explain, there is no excuse for the uncivil, unprofessional, and offensive advocacy employed by appellant's counsel, which is all the more unconscionable because it falsely attributes offensive language to others.

Some of the most egregious aspects of the brief filed by appellant's counsel are under heading 13, entitled: "[The minor] was not competent to testify at trial, was not competent at the time she allegedly made out of court statements, therefore, the court erred in admitting such evidence."

[24] Before discussing the unprofessionalism of this part of her brief, we pause to point out that appellant's counsel has not shown that she raised an objection in the juvenile court to the minor's testimony on the ground of incompetence. (Evid. Code, § 701.) "[T]o preserve for appeal a claim that a witness lacked testimonial competence, a party must object on this ground in the trial court." (*People v. Cudjo* (1993) 6 Cal.4th 585, 622, 25 Cal.Rptr.2d 390, 863 P.2d 635;*People v. Aleshire* (1949) 90 Cal.App.2d 506, 509, 203 P.2d 569.) By simply claiming, but not showing by citation to the record, that she objected in the juvenile court that the minor was not competent to testify, appellant's counsel has forfeited the claim of error. Nevertheless, we discuss it because it is so irresponsible.

Spread out over 81 pages is a contemptuous attack by appellant's counsel on the mental competence of appellant's daughter. The attack is stunning in terms of its verbosity, needless repetition, use of offensive descriptions of the developmentally disabled minor, and misrepresentations of the record.

*__421__ For example, appellant's counsel sets forth a lengthy narration that purportedly quotes the juvenile court's reasons for finding the minor competent to testify. She *attributes to the judge* a statement that the minor, "with an IQ of 44" and "test results ... in the moderately retarded range in all areas, is more akin to broccoli, than to a single celled amoeba." However, our examination of the record reveals that the judge never made such a statement. Rather, those words are the gratuitous, offensive commentary of appellant's counsel. Indeed, earlier in her brief, counsel flippantly "submits nothing is below [the minor's test score] percentile, except broccoli."

Another offensive statement, which appellant's counsel wrongly attributed to DHHS's expert witness, was counsel's assertion in the juvenile court that "Dr. Miller think[s] [the minor is] pretty much a tree trunk at a 44 IQ."Again, this is shameful editorializing by appellant's counsel.

In another part of her brief, appellant's counsel belittles the minor's testimony about being sexually molested. Counsel accuses the minor of having "several more versions of her story, worthy of the Goosebumps series for children, with which to titillate her audience."

Appellant's counsel also describes the minor's testimony, and her responses during the MDIC interview, as "jibber jabber," "meaningless mumble," "mumbles, in a world of her own," and "little more than word salad."

[25] Not only are all the words used by appellant's counsel offensive, they are inaccurate.**__475__ For example, our viewing of the videotape of the MDIC interview made it readily apparent to us that the minor, while developmentally disabled, demonstrated some reasoning skills; knew the difference between telling a truth and a lie; was generally responsive to questions, except when she showed obvious discomfort in responding to questions about whether anyone had ever touched her inappropriately on her body; and, for the most part, was easy to understand. Although some responses by the minor showed

her confusion on certain subjects, they did not demonstrate that she is incompetent to testify in court. They simply bore upon her credibility. (*In re Katrina L.* (1988) 200 Cal.App.3d 1288, 1299, 247 Cal.Rptr. 754.)[FN2]

Completely devoid of merit is appellant counsel's claim, tendered under heading 14 of her brief, that the minor's trial attorney conceded the minor's ***422** incompetence as a witness. Before the minor testified, her attorney told the judge that the minor is developmentally disabled and, thus, is "easily distracted and easily intimidated." According to her attorney, the minor had displayed signs of stress after attending earlier proceedings. Later, after the judge remarked that one inquiry during cross-examination was "a tricky question," the attorney observed that cross-examination by appellant's counsel was "clearly frustrating [the minor] and clearly affecting the testimony." By no stretch of the imagination did the attorney's comments constitute a concession that the minor was incompetent to testify.

In sum, our viewing of the MDIC interview and our review of the minor's testimony at trial discloses there was substantial evidence supporting the juvenile court's finding that the minor was competent to testify. Thus, we reject appellant counsel's characterization of the proceedings as a "mockery of justice."

XI

We reiterate that appellant cannot prevail on a claim of error if she makes no effort to establish that she was prejudiced by the alleged error. (Cal. Const., art. VI, § 13; see *Atchley v. City of Fresno*, *supra*, 151 Cal.App.3d at p. 647, 199 Cal.Rptr. 72.)

Claiming DHHS has sent the "message" that it "will do whatever it wants, whenever it wants, with no regard for the law," appellant's counsel argues, under heading 15 of her brief, that "County Counsel and minor's counsel ... repeatedly misrepresented the law to the [juvenile] court, and supported the social worker in showing disdain for the court's authority and orders."

We need not set forth the specific claims of misconduct, or decide whether they are supported by the record. This is so because (1) there has been no showing that appellant's counsel raised the claims in the juvenile court, and (2) in any event, she makes no showing that her client suffered prejudice from the alleged misconduct.

XII

Disparaging the trial judge is a tactic that is not taken lightly by a reviewing court. Counsel better make sure he or she has the facts right before venturing ****476** into such dangerous territory because it is contemptuous for an attorney to make the unsupported assertion that the judge was "act[ing] out of bias toward a party." (*In re White* (2004) 121 Cal.App.4th 1453, 1478, 18 Cal.Rptr.3d 444.)

[26] Under heading 16 of her brief, appellant's counsel argues the trial judge "was not impartial, per se requiring a reversal." Her complaint focuses ***423** primarily on questions the court asked the minor during direct examination by the minor's attorney. According to appellant's counsel, the judge "pressed [the minor], repeatedly, to say the words the judge was giving her, in order to endeavor to prove the government's case." Appellant's counsel also criticizes questions the court asked the social worker during her testimony. "[I]n each instance," appellant's counsel asserts, the judge's " 'questioning appears to have been motivated by a desire to assist the prosecution's case.' [Citation.]" She even claims the judge *admitted* that he was biased. As we will explain, these outrageous claims are meritless.

It is well within the province of the judge to ask a witness questions, particularly when the judge is the fact finder. (Evid. Code, § 775.) We have carefully reviewed the questions that were asked by the judge in this case. The questions he posed to the minor can be put into five categories: (1) conducting voir dire regarding the minor's competency to testify; (2) specifying, for the record, the areas of the minor's body to which she pointed in response to questioning by a party's attorney, and the size of a room in her home about which the minor testified; (3) making sure the minor understood questions asked by a party's attorney; (4) requesting the minor to repeat or explain her testimony that the court obviously was having difficulty hearing; and (5) obtaining additional information from the minor in an apparent effort to determine where and how certain acts about which she testified took place. On only two occasions did the judge ask the minor a series of questions, none of which were anything like how appellant's counsel has described them.

Simply stated, no reasonable attorney could interpret the judge's questions of the minor as a biased effort to help DHHS prove its case. Rather, they represent a conscientious effort by the judge to understand the testimony of the developmentally disabled minor. So it was with the relatively few, short questions that the judge posed to the social worker with the obvious goal of understanding her testimony.

Appellant counsel's claim that the judge admitted he was biased is sheer folly. In explaining why he found the minor was competent to testify and was credible when she stated her stepfather molested her and appellant had knowledge of the molestation, the judge noted: "[T]he questioning was difficult and things were hard to understand and we repeated things and the Court became very actively involved, I trust not excessively, but in part because I needed to satisfy myself that I could understand what [the minor] was saying. And so [the minor's attorney] and I on occasion would repeat the child's answer and get her to indicate that's what she said. So much of that related to the inability to be sure one could understand

FN2. As purported evidence of incompetence, appellant's counsel places great emphasis on the minor's proclivity to respond "probably not," rather than "no," to some questions. She faults the trial judge for interpreting "probably not" as meaning "no." This argument lacks merit. It appeared to us, as we watched the videotape of the MDIC interview of the developmentally disabled minor, that in her manner of speaking, "probably not" did indeed mean "no."

what her answers were. So that whole process is one in which I was very active, and I wasn't just an impartial person sitting on the sidelines evaluating the child."

***424** Taken in context, the last sentence of the above statement by the judge was not an admission of bias. It simply was an observation that because of the minor's developmental disability, the judge was unable to just sit back to hear and observe her testimony; instead, he was required to get involved in the questioning in order to ****477** ensure that he understood the minor's answers.

Indeed, our review of the record reveals that the judge had incredible patience and equanimity throughout the lengthy proceeding that often was contentious due to the aggressive nature of counsel's advocacy.

Lacking any foundation, appellant counsel's accusation that the trial judge was biased in favor of DHHS and interceded in an effort to help DHHS prove its case appears to constitute contempt of court. (*In re White*, *supra*, 121 Cal.App.4th at pp. 1477–1478, 18 Cal.Rptr.3d 444.) Rather than institute contempt proceedings, we have decided to leave it to the State Bar of California to address the issue.

XIII

Redundancy is seldom good in an appellate brief, but clarity is essential.

Under headings 17 and 18 of her brief, appellant's counsel sets forth what seems to be a rambling stream of consciousness of repetitious venting about various aspects of this case.

[27] She begins with over two pages of quotations from authorities addressing the right, guaranteed by the Sixth Amendment to the United States Constitution, to confront and cross-examine witnesses. However, that right applies to criminal proceedings, not to juvenile dependency actions. (*In re Malinda S.* (1990) 51 Cal.3d 368, 383, fn. 16, 272 Cal.Rptr. 787, 795 P.2d 1244;*In re Angel W.* (2001) 93 Cal.App.4th 1074, 1080, 113 Cal.Rptr.2d 659.) It is the Due Process Clause of the Constitution that guarantees a parent the right to confront and cross-examine witnesses in a dependency proceeding. (*In re Malinda S.*, *supra*, 51 Cal.3d at p. 383, fn. 16, 272 Cal.Rptr. 787, 795 P.2d 1244.)

Appellant's counsel goes on by pointing out that the juvenile court granted the motion of the minor's attorney to allow the minor to testify and be cross-examined outside the immediate presence of her mother, appellant. Curiously, she does not make a specific claim that the court erred in doing so. At most, she complains the motion was not supported by "evidence from psychologists" stating that the minor would suffer "psychological damage" if required to testify in her mother's immediate presence or that granting the motion was necessary to ensure truthfulness by the minor.

The argument then evolves into a redundant allegation that DHHS and the social worker improperly concealed discovery (a claim that we already have rejected in part III, *ante*).

***425** At this point, the argument under heading 17 shifts to, and ends with, over a page of general observations about a parent's right of cross-examination in a dependency action. Once again, no specific claim of error is made.

Under heading 18, appellant's counsel begins with five pages of quotations from authorities addressing the right of confrontation in criminal cases. She then suggests that DHHS's introduction into evidence of the social worker's report containing out-of-court statements of witnesses violated the holding of the United States Supreme Court in *Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (hereafter *Crawford*).

After briefly digressing to say, once again, that there was no substantial evidence to support the juvenile court's finding that the minor was competent to testify (a claim that we already have rejected in part X, *ante*), appellant's counsel returns to the *Crawford* decision and argues that even the *testimony* of the minor in ****478** this case "cannot survive" in light of the Supreme Court's holding in *Crawford*.

The argument ends with a paragraph asserting that "[t]his court can not [*sic*] speculate whether having her mother present during [the minor's] examination in the jurisdictional portion of the proceedings would not have made a difference."

Since appellant should not be penalized by her counsel's failure to articulate a coherent argument, we have extracted from counsel's stream of consciousness what appear to be efforts to raise two issues: (1) there is insufficient evidence to support the juvenile court's finding that it was necessary to allow the minor to testify and be cross-examined by counsel outside of appellant's immediate presence; and (2) the social worker's report should not have been introduced into evidence because it denied to appellant the right to confrontation and cross-examination regarding the information contained in the report.

A

Subdivision (b) of section 350 provides that in a dependency proceeding, the "testimony of a minor may be taken in chambers and outside the presence of the minor's parent or parents, if the minor's parent or parents are represented by counsel, the counsel is present and any of the following circumstances exist: [¶] (1) The court determines that testimony in chambers is necessary to ensure truthful testimony. [¶] (2) The minor is likely to be intimidated by a formal courtroom setting. [¶] (3) The minor is afraid to testify in front of his or her parent or parents. [¶] After testimony in chambers, the ***426** parent or parents of the minor may elect to have the court reporter read back the testimony or have the testimony summarized by counsel for the parent or parents."

[28] Here, the minor's attorney asked the judge to "take [the minor's] testimony in chambers outside of the presence of her mother [appellant]." The minor's attorney represented to the judge that such an order was necessary because as a developmentally disabled child, the minor is "easily distracted

and easily intimidated"; after attending earlier proceedings, the minor "was displaying signs of distress"; and the minor had said she was afraid to testify in front of appellant.

Based on these representations, and on evidence in the social worker's report stating appellant became angry at the minor when she told others about the sexual molestation, the judge found there was "a very great likelihood that the [minor] will be intimidated and fearful of offending [appellant] or disturbing [appellant] and causing more trouble for which she has been sternly chastised before." Hence, the judge granted the motion.

Appellant's counsel now suggests that the representations of the minor's counsel, to which there was no objection in the juvenile court, were insufficient to satisfy the statutory requirements of section 350, subdivision (b) that would allow the minor to testify outside of appellant's immediate presence. It appears that, in her view, expert evidence from a psychologist is necessary before the court can grant such an order. Since she did not tender this issue in the juvenile court, she is precluded from raising it now. (*In re S.B., supra*, 32 Cal.4th at p. 1293, 13 Cal.Rptr.3d 786, 90 P.3d 746.) In any event, counsel has provided no legal authority to support her view, and we have found none.

We construe the representations made by the minor's counsel as offers of proof that were not objected to by appellant's counsel. Along with information in the social worker's report upon which the court relied, they were sufficient to satisfy ****479** the requirements of section 350, subdivision (b).

B

Also without merit is the suggestion of appellant's counsel that DHHS's introduction into evidence of the social worker's report containing out-of-court statements of witnesses, and even the minor's testimony, violated the holding of the United States Supreme Court in *Crawford, supra*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 concerning the right to confrontation in a criminal proceeding.

[29] "*Crawford* has no application here because the Sixth Amendment right of a criminal defendant to confrontation under the United States Constitution does ***427** not extend to parents in state [juvenile] dependency proceedings." (*In re April C.* (2005) 131 Cal.App.4th 599, 602, 610–612, 31 Cal. Rptr.3d 804.)

In any event, appellant's counsel misunderstands the holding in *Crawford*, a case that involved the testimonial statement of a witness who told law enforcement officers about a stabbing committed by the defendant. The Supreme Court held that the Sixth Amendment bars the introduction of such a statement into evidence, *unless the declarant is subject to, or has been subjected to, cross-examination regarding the statement*.(*Crawford, supra*, 541 U.S. at pp. 68–69, 124 S.Ct. at p. 1374, 158 L.Ed.2d at p. 203.) Here, appellant had the opportunity, through her counsel, to cross-examine the minor and other witnesses about their out-of-court statements that were included in the social worker's report. Hence, there was no denial of her due process right of confrontation. (*In re Malinda S., supra*, 51 Cal.3d at pp. 382–385, 272 Cal.Rptr. 787, 795 P.2d 1244.)

XIV

The final claim of error raised by appellant's counsel is frivolous.

The minor has Indian heritage. Consequently, the juvenile court was required to comply with the notice provisions of the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.), and the hearing was delayed because the notice period had not expired as to one of the tribes at issue in this case.

Under heading 19 of her brief, appellant's counsel contends the juvenile court erred in refusing to commence the hearing until at least 10 days after the Indian tribe *received* notice of the proceedings. According to her, the delay should be no more than 10 days after such notice was *sent* to the Indian tribe.

She is wrong. Section 1912(a) of ICWA states, "[n]o [dependency] proceeding shall be held until at least ten days after *receipt* of notice by the ... tribe...." (Italics added.)

Appellant's counsel cites *In re L.B.* (2003) 110 Cal.App.4th 1420, 3 Cal.Rptr.3d 16 to support her position. However, that decision did not interpret section 1912 of ICWA; rather, it addressed what the appellate record must contain in order to establish compliance with notice provisions of ICWA. (*Id.* at pp. 1424–1427, 3 Cal.Rptr.3d 16.) There was no error.

*428 DISPOSITION

The orders of the juvenile court are affirmed. Upon issuance of the remittitur, the Clerk/Administrator of this court is directed to send a copy of this opinion to the State Bar of California.

We concur: NICHOLSON and ROBIE, JJ.

Cal.App. 3 Dist.,2006.

In re S.C.

138 Cal.App.4th 396, 41 Cal.Rptr.3d 453, 06 Cal. Daily Op. Serv. 2909, 2006 Daily Journal D.A.R. 4157

In re CARLYLE SHEPPERSON
No. 95-133.
Supreme Court of Vermont.
Jan. 24, 1996.

Attorney appealed Professional Conduct Board's recommendation that he be disbarred for violating disciplinary rules prohibiting handling matters when incompetent and when lacking adequate preparation. The Supreme Court held that attorney's misconduct in preparing inadequate and incomprehensible legal briefs over seven-year period and in failing to complete tutorial program warranted suspension for not less than six months and until he could demonstrate fitness to practice law.

Suspended.

1. Attorney and Client ⚿53(2)

Record supported findings that attorney disserved his clients by preparing inadequate and incomprehensible legal briefs, in violation of disciplinary rules prohibiting handling matters when incompetent and when lacking adequate preparation. Code of Prof.Resp., DR 6–101(A)(1, 2).

2. Attorney and Client ⚿49

Primary purpose of attorney disciplinary system is to protect public.

3. Attorney and Client ⚿58

Attorney's conduct in preparing inadequate and incomprehensible legal briefs over seven-year period, in violation of disciplinary rules prohibiting handling matters when incompetent and when lacking adequate preparation, and in failing to complete tutorial program designed to improve his skills warranted suspension for not less than six months and until he could demonstrate fitness to practice law, rather than disbarment, where there was no indication that his conduct was intentional or based on corrupt motives. Code of Prof.Resp., DR 6–101(A)(1, 2).

Original Jurisdiction, Professional Conduct Board, Docket No. 94–40.

Before ALLEN, C.J., GIBSON, J., BARNEY, C.J. (Ret.), Specially Assigned, and PECK and UNDERWOOD, JJ. (Ret.), Specially Assigned.

ENTRY ORDER

Respondent Carlyle Shepperson appeals the Professional Conduct Board's recommendation that he be disbarred for violating DR 6–101(A)(1) (lawyer shall not handle legal matter that lawyer is incompetent to handle) and DR 6–101(A)(2) (lawyer shall not handle legal matter without adequate preparation). We suspend respondent indefinitely until he can demonstrate that he is fit to practice law.

In June 1991, a justice of this Court not taking part in this decision filed a complaint with the Board concerning the quality of respondent's legal submissions. In March 1993, the Board and respondent entered into a remedial stipulation in which respondent agreed not to engage in the practice of law while he completed a legal writing tutorial. The stipulation provided that respondent would participate in periodic tutoring sessions to develop skills in legal analysis, persuasive writing techniques, writing organization, and use of legal authority, propercitation form, and proper formatting for memoranda and briefs. At the end of the tutorial program, which was to last for a minimum of six months, respondent was to prepare a ten-page legal writing sample and a self-written evaluation of his progress. Respondent was given until September 1, 1993 to report on his progress with the tutor. On September 15, 1993, respondent wrote bar counsel that he would not be completing the tutorial, and that he had left the United States for an indefinite period of time.

Bar counsel filed a petition of misconduct in June 1994, charging respondent with violating DR 6–101(A)(1) and (2). Respondent filed memoranda with the Board but did not appear for the disciplinary hearing held in December 1994. A majority of the Board adopted the hearing panel's recommendation that respondent be disbarred, with two dissenting members stating that they would suspend respondent indefinitely until he proved he was fit to practice law.

All members of the Board agreed with the hearing panel's findings that between 1985 and 1992 respondent repeatedly submitted legal briefs to this Court that were generally incomprehensible, made arguments without explaining the claimed legal errors, presented no substantiated legal structure to the arguments, and devoted large portions of the narrative to irrelevant philosophical rhetoric. The briefs contained numerous citation errors that made identification of the cases difficult, cited cases for irrelevant or incomprehensible reasons, made legal arguments without citation to authority, and inaccurately represented the law contained in the cited cases. All members of the Board also agreed with the hearing panel's conclusions that (1) respondent's briefs were not competently prepared and fell below the minimum standard for brief-writing expected of a practicing attorney in this state; (2) respondent failed to prepare adequately or give appropriate attention to his legal work; and (3) respondent did not use proper care to safeguard the interests of his clients.

[1, 2] A review of the exhibits in this case supports the Board's findings that respondent disserved his clients by preparing inadequate and incomprehensible legal briefs, in violation of DR 6–101(A)(1) and (2). Respondent's brief in this matter is a further example of the deficiencies noted by the Board. In over ninety pages, respondent fails to raise a legitimate legal issue or cite a single authority in support of his

arguments. The gist of his harangue against the legal system is that the Board and this Court have violated his freedoms of speech and religion and limited his ability to think in diverse ways by dictating what is and what is not a proper legal argument. If we were to accept this argument, it would preclude any oversight of attorney competence in representing members of the public. Respondent may represent himself as he pleases, but he cannot be permitted to represent others in a manner that, under reasonable and accepted standards, fails to safeguard his clients' interests. Indeed, the primary purpose of the attorney disciplinary system is to protect the public. *In re Berk*, 157 Vt. 524, 532, 602 A.2d 946, 950 (1991); ABA Standards for Imposing Lawyer Sanctions, Standard 1.1, Commentary (1991).

[**3**] The only real issue on appeal is whether respondent should be disbarred or suspended indefinitely.* According to the American Bar Association Standards, which we have found helpful in determining appropriate sanctions, see *Berk*, 157 Vt. at 532, 602 A.2d at 950, "Disbarment should be imposed on lawyers who are found to have engaged in multiple instances of incompetent behavior . . . [or] whose course of conduct demonstrates that they cannot or will not master the knowledge and skills necessary for minimally competent practice." Standard 4.51, Commentary. Here, respondent's course of conduct in filing several incomprehensible briefs over a period of seven years and his failure to follow through with the stipulated tutorial program designed to improve his skills demonstrate his inability or refusal to understand and apply fundamental legal doctrines and procedures. *Id.* Standard 4.51. Nevertheless, because there is no indication that respondent's conduct was intentional or based on corrupt motives, we adopt the minority position of the Board and suspend respondent until he can prove that he is fit to practice law. See ABA Standard 9.32(b) (absence of dishonest or selfish motive is mitigating factor); cf. *In re Hogan*, 112 Ill.2d 20, 96 Ill.Dec. 75, 76–77, 490 N.E.2d 1280, 1281–82 (1986) (attorney's inability to draft comprehensible briefs, which does not involve corrupt motive or moral turpitude, warrants placement on inactive status during period of rehabilitation until competence to engage in practice of law is demonstrated). In no event, however, shall respondent's suspension be less than six months. See A.O. 9, Rule 7A(2); *id.* Rule 20B, D.

Judgment that Carlyle Shepperson be suspended, effective upon issuance of this order, for not less than six months and until he has demonstrated to the satisfaction of this Court, via motion to the Professional Conduct Board, that he is fit to practice law in this state. The Board is empowered to require such further study and examination, oral or written, as it deems appropriate to the circumstances.

*We grant respondent's motion to file an enlarged brief, but deny his motion to dismiss for lack of jurisdiction, which is without merit.

356 Ill.App.3d 380
292 Ill.Dec. 784

TECHNOLOGY SOLUTIONS COMPANY,
Plaintiff–Appellant and Cross–Appellee,

v.

NORTHROP GRUMMAN CORPORATION,
Defendant–Appellee and Cross–Appellant.

No. 1-02-0368.

Appellate Court of Illinois,
First District, Second Division.
March 31, 2005.
Rehearings Denied April 28, 2005.

Background: Software designer brought action against airplane manufacturer, alleging breach of oral contract relating to creation of systems designed to computerize manufacturing processes. The Circuit Court, Cook County, Lee Preston, J., entered judgment on jury verdict partially in software designer's favor. Parties appealed.

Holdings: The Appellate Court, Burke, P.J., held that:

(1) inclusion of legal argument and misstatements of fact in statement of facts portion of appellate briefs violates rule governing appellate briefs;

(2) parties' excessive and improper use of footnotes warranted the striking of footnotes from appellate briefs; and

(3) cross-appellee's reply/response to a cross-appellant's brief is to be limited to a total of 77 pages.

Affirmed.

1. Appeal and Error ⊸ 766

Inclusion of legal argument and misstatements of fact in statement of facts portion of appellate briefs violates rule governing appellate briefs. Sup.Ct.Rules, Rule 341.

2. Appeal and Error ⊸ 761

Substantive arguments may not be made in appellate brief footnotes and responses made thereto are likewise improper. Sup.Ct.Rules, Rule 341.

3. Appeal and Error ⊸ 767(2)

Appellate Court would strike footnotes from parties' opening and reply appellate briefs on its own motion as violative of rules of appellate procedure; parties' liberal use of footnotes, 91 attributable to plaintiff and 74 to defendant, violated requirement that footnotes be used sparingly, footnotes were improperly used to make substantive arguments and to allege trial court error, and footnotes were improperly used to circumvent page limitations. Sup.Ct.Rules, Rule 341.

4. Appeal and Error ⊸ 758.3(1)

Contentions of trial court error should not be made in appellate brief footnotes. Sup.Ct.Rules, Rule 341.

5. Appeal and Error ⊸ 762

Cross-appellee's reply/response to a cross-appellant's brief is to be limited to a total of 77 pages, i.e., 27 pages for its reply brief plus an additional 50 pages as cross-appellee to respond to the issues raised on cross-appeal. Sup.Ct.Rules, Rules 341, 343.

6. Appeal and Error ⊸ 756

Fact that issues on appeal are detailed due to a great volume of evidence does not give the parties authority to ignore specific language of supreme court rules establishing page limitations. Sup.Ct.Rules, Rule 341.

7. Appeal and Error ⊸ 497(1)

Despite role of clerk of circuit court in binding record, appealing parties nonetheless have a duty to appellate court to ensure that the record is in a proper state for efficient review.

Grippo & Elden (Gary M. Elden, Marc S. Lauerman, Ayson T. Todd, of counsel), Chicago, for Appellant.

Wildman, Harrold, Allen & Dixon (Michael Dockter man,Lisa Simmons, Chung– Han Lee, of counsel), Chicago, for Appellee.

Presiding Justice BURKE delivered the opinion of the court:

Plaintiff Technology Solutions Company appeals from entry of a final judgment and verdict partially in plaintiff's favor, following a jury trial, on plaintiff's breach of oral contract claims against defendant Northrop Grumman Corporation, in which the circuit trial court granted in part and denied in part plaintiff's request for prejudgment interest. On appeal, plaintiff contends that the trial court erred in denying its request for mandatory prejudgment interest because the amount of its damages was certain. Plaintiff also contends that the trial court erred in granting it discretionary interest only from June 21, 1997, rather than from June 21, 1993, the date it filed its lawsuit. Defendant has filed a cross-appeal and contends that the trial court erred in denying its motion for judgment notwithstanding the verdict (JNOV) with respect to three of plaintiff's claims on the basis that plaintiff failed to present evidence of oral agreements, the claims were barred by the parol evidence rule, and one of the claims was barred by the statute of limitations. Defendant also contends that it was entitled to JNOV on the damage verdict because plaintiff failed to present sufficient evidence of damages. Defendant further contends that the trial court made numerous evidentiary errors during the trial, including: (1) barring evidence

of another lawsuit filed against plaintiff to impeach plaintiff's witnesses; (2) barring evidence of a Securities and Exchange Commission (SEC) inquiry against plaintiff; (3) admitting evidence of defendant's course of dealing; (4) admitting two documents as business records because they were prepared in anticipation of litigation, not in the regular course of business; (5) admitting another document because it was legally incompetent; and (6) admitting evidence in violation of the parol evidence rule. For the reasons set forth below in the nonpublished portion of this opinion, we affirm.

[Editor's Note: Text omitted pursuant to Supreme Court Rule 23.]

ANALYSIS

Before addressing the merits of the parties' arguments, we are compelled to comment on both plaintiff and defendant's attorneys' violations of supreme court rules, particularly Supreme Court Rule 341. (188 Ill.2d R. 341). As attorneys for large prestigious law firms, both should be well aware of the rules and strive to follow them to the letter. However, this is not, and has not been, the case here. This court is dismayed by counsels' conduct and, because of this, we are making this portion of our decision an opinion to not only guide other attorneys, but warn counsels that this court will not further tolerate such disrespect and disregard for court rules and decorum.

Defense counsel has filed two motions to strike plaintiff's briefs, or portions thereof, that we have taken with the case. For the reasons discussed below, these motions are denied. However, our denial in no way condones counsels' flagrant and extensive abuses here. The magnitude of such violations would easily warrant this court striking all of the briefs and dismissing the appeals in their entirety. *LaGrange Memorial Hospital v. St. Paul Insurance Co.*, 317 Ill.App.3d 863, 876, 251 Ill.Dec. 191, 740 N.E.2d 21 (2000).

[**1**] Defendant filed a motion to strike plaintiff's statement of facts as violative of Supreme Court Rule 341(a) (188 Ill.2d R. 341(a)). Defendant maintains that plaintiff's statement of facts contains legal discussion and argument, it includes facts not relevant to plaintiff's appeal, which are also conclusory, argumentative, and false, and those facts included that are relevant to its appeal are "riddled with improper argument," are conclusory, are conjecture, and are unsupported by the record. Defendant argues that the Illinois Appellate Court has repeatedly reaffirmed the importance of Rule 341 and, because plaintiff has blatantly violated this rule, we should strike plaintiff's statement of facts in its entirety.

We agree with defendant that portions of plaintiff's statement of facts contain improper argument. However, while defendant is seeking to use Rule 341 as a weapon against plaintiff, it, too, has blatantly violated that rule. Its statement of facts is also "riddled with improper argument" as well as misstatements of fact. Thus, both plaintiff and defendant's statement of facts violate Rule 341.

[**2**] Additionally, in defendant's brief, counsel makes substantive arguments in its footnotes (see discussion below) and plaintiff's counsel then responds to these. Plaintiff's counsel, too, makes substantive arguments in its footnotes and defendant's counsel thereafter continues this conduct in defendant's reply brief. Substantive arguments may not be made in footnotes and responses made thereto are likewise improper. *Lundy v. Farmers Group, Inc.*, 322 Ill.App.3d 214, 218, 255 Ill.Dec. 733, 750 N.E.2d 314 (2001). In addition, defense counsel makes numerous misstatements of the facts and of the evidence in defendant's brief, as detailed by plaintiff in its reply. We highlight only two. First, defense counsel argues that plaintiff's witnesses, including Thomas, lied to the SEC. Clearly, this is an erroneous statement since there is no evidence in the record that any of plaintiff's employees, particularly Thomas, were interviewed by the SEC. In addition, defense counsel argues that plaintiff's counsel made certain arguments to the jury with respect to the SEC inquiry. However, as plaintiff notes, these arguments were made to the trial court, outside the presence of the jury.

[**3, 4**] We further note that both parties have used an excessive number of footnotes in violation of supreme court rules. Rule 341(1) provides that "[f]ootnotes, if any, shall be used sparingly." 188 Ill.2d R. 341(a). Rule 344(b) also discourages the use of footnotes in briefs. 155 Ill.2d R. 344(b). Plaintiff's 42–page opening brief contains 18 single-spaced footnotes and its 124–page reply brief contains 73 single-spaced footnotes. Defendant's 93–page opening brief contains 53 single-spaced footnotes and its 27–page reply brief contains 21 footnotes. This is a total of 165 footnotes, 91 attributable to plaintiff and 74 to defendant! This cannot be characterized as a "sparingly" use of footnotes. In addition, much of the information contained in these footnotes is "substantive material that should have been presented in the body of the briefs." *Lundy*, 322 Ill.App.3d at 218, 255 Ill.Dec. 733, 750 N.E.2d 314. In fact, a majority of the footnotes in defendant's reply brief contain substantive arguments. Defendant has even raised contentions of trial court error in the footnotes and asks this court for relief. See fns. 30, 31, and 32. Clearly, this is improper. Moreover, had defendant's 21 footnotes been incorporated into the body of its 27–page reply brief, that brief clearly would have exceeded the page limitation set forth in Rule 341(a). 188 Ill.2d R. 341(a). Accordingly, defendant's attorney's conduct in filing defendant's motion to strike plaintiff's brief in this regard is disingenuous. Defendant's motion to file a reply brief in excess of the page limitation was denied by this court. Thereafter, defendant filed its 27–page reply brief with 21 footnotes. Clearly, counsel was seeking to avoid this court's ruling, as well as the page limitation of Rule 341(a) through the use of footnotes. We note that defense counsel employed the same tactics before the trial court. Specifically, despite a 15–page limitation, defense counsel filed a 95–page posttrial motion. Thereafter, the trial court ordered counsel to shorten the motion to 30 pages, a generous relaxation of the page-limitation rule. Although counsel shortened its motion

to 30 pages, counsel attached previous briefs it had filed with respect to various issues and effectively increased the length of the motion to 250 pages.

Defendant has also filed a motion to dismiss plaintiff's reply brief, contending that its exceeds the page limitation set forth by Rule 341(a). Defendant maintains that plaintiff's reply brief was limited to 77 pages. Plaintiff, conversely, maintains that its reply brief was limited to 125 pages (75 pages for an appellee's (or cross-appellee's) response to the appellant's (or cross-appellant's) opening brief, plus 50 additional pages as cross-appellee).

[**5, 6**] Supreme Court Rule 341 provides the following page limitations:

1. Appellant's and appellee's opening briefs: 75.
2. Appellant's reply brief: 27.
3. Cross-appellant and cross-appellee are each given an additional 50 pages.
4. Cross-appellant's reply: 27.

Our independent research has disclosed no case addressing the page limitation for a cross-appellee's reply/response to a cross-appellant's brief. Instructive, however, is Rule 343 that provides that an appellant's answer to a cross-appeal is to be contained in its reply brief. Thus, reading the two rules together, plaintiff had 27 pages for its reply brief plus an additional 50 pages as cross-appellee to respond to the issues raised by defendant on cross-appeal for a total of 77 pages. To allow 125 pages as plaintiff maintains would be to ignore the language of these two rules. Although the issues here are detailed due to the volume of evidence presented, this does not give the parties authority to ignore the specific language of supreme court rules. While we could order plaintiff's counsel to file a reply brief within the page limitation, we decline such remedy so as to not prolong this matter any further.

Clearly, neither party has followed the letter, nor the spirit, of the supreme court rules. We do not condone such careless and deliberate disregard for the rules, as well as this court's rulings on motions. We, however, decline to penalize the parties by striking their briefs for their counsels' wrongdoings. We do, however, on our own motion, strike all of the parties' footnotes. See, *e.g.*, *Lundy*, 322 Ill.App.3d at 218, 255 Ill.Dec. 733, 750 N.E.2d 314; *Wright v. County of Du Page*, 316 Ill. App.3d 28, 36, 249 Ill.Dec. 456, 736 N.E.2d 650 (2000); *Lagen v. Balcor Co.*, 274 Ill. App.3d 11, 15, 210 Ill.Dec. 773, 653 N.E.2d 968 (1995) (all dismissing footnotes from parties' briefs on the courts' own motion). We also will disregard any inappropriate or unsupported material. *Geers v. Brichta*, 248 Ill.App.3d 398, 400, 187 Ill.Dec. 940, 618 N.E.2d 531 (1993). We admonish all counsels involved in preparing these briefs, from both law firms of Grippo & Elden and Wildman, Harrold, Allen & Dixon, to comply with supreme court rules in the future or face the possibility of dismissal of their clients' appeals.

[**7**] In addition to the violations of supreme court rules hindering review of this matter, the state of the record itself has been a great impediment to review. The record is not in chronological order, nor is the report of proceedings (*e.g.*, November 27, 2000, November 28, 2000, September 22, 2000, November 30, 2000). Similarly, many of the orders are either illegible or unreadable (*i.e.*, # 9 in volume 2 of 2 supplemental volumes), and numerous pleadings are incomplete. Additionally, the manner in which the record was put together and bound hampered review. While we acknowledge part of the blame for the state of the record lies with the clerk of the circuit court since it bound the record, we believe that the parties nonetheless have a duty to this court to ensure that the record is in a proper state for efficient review. Specifically, many of the volumes of the record have fallen apart because the clips are too short and do not contain a fastener. In many other instances, the volume was bound too tight and therefore the first few lines of each page were inaccessible, necessitating the court to take the record apart. Also, in this regard, page holes were punched through text, rendering it unreadable. Lastly, the record contains double sided pages, again impeding review of this case. Given the vastness of this record (110 volumes) and the complexity of the case, we expect a proper record to enable our review, which is not the case here.

[Editor's Note: Text omitted pursuant to Supreme Court Rule 23.]

CONCLUSION

For the reasons stated in the unpublished portion of this opinion, we affirm the judgment of the circuit court of Cook County.

Affirmed.

UNITED STARS INDUSTRIES, INC. v. PLASTECH ENGINEERED PRODUCTS, INC.
C.A.7 (Wis.), 2008.

United States Court of Appeals,Seventh Circuit.
UNITED STARS INDUSTRIES, INC.,
Plaintiff-Appellee,
v.
PLASTECH ENGINEERED PRODUCTS, INC.,
Defendant-Appellant.
Jones Day, Appellant.
Nos. 07-2919, 07-3052, 07-3106, 07-3107.
Argued April 2, 2008.
Decided May 13, 2008.

Background: Seller of stainless-steel tubing brought action against buyer arising from contract dispute over surcharge of certain costly elements of steel. The United States District Court for the Western District of Wisconsin, Barbara B. Crabb, Chief Judge, entered judgment in favor of seller and awarded sanctions against buyer's law firm for misconduct. Buyer appealed.

Holdings: The Court of Appeals, Easterbrook, Chief Judge, held that:

(1) it was not required to resolve buyer's contention that district court erred in concluding that compromise had been reached between buyer and seller regarding contract dispute, and

(2) district judge did not abuse her discretion by requiring law firm representing buyer to pay about $30,000 in sanctions.

Affirmed.

West Headnotes

[1] Federal Courts 170B ⚿ 757

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk756 Matters Not Necessary to Decision in Review
170Bk757 k. Specific Questions. Most Cited Cases

Appellate court was not required to resolve contention raised by buyer of stainless-steel tubing that district court erred in concluding, in contract action, that compromise had been reached between buyer and seller regarding contract dispute over surcharge of certain costly elements, and in considering terms of compromise in entering judgment in favor of seller; if district court would have reached question regarding the surcharge, it would have still found in favor of seller, and the amount awarded in that situation would have substantially exceeded the amount disputed by buyer.

[2] Federal Civil Procedure 170A ⚿ 2771(2)

170A Federal Civil Procedure
170AXX Sanctions
170AXX(B) Grounds for Imposition
170Ak2767 Unwarranted, Groundless or Frivolous Papers or Claims
170Ak2771 Complaints, Counterclaims and Petitions
170Ak2771(2) k. Particular Types of Cases. Most Cited Cases

Federal Civil Procedure 170A ⚿ 2802

170A Federal Civil Procedure
170AXX Sanctions
170AXX(C) Persons Liable for or Entitled to Sanctions
170Ak2802 k. Firms or Members Thereof. Most Cited Cases

District judge did not abuse her discretion by requiring law firm representing buyer of stainless-steel tubing to pay about $30,000 in sanctions for making unsupported contentions during litigation of contract dispute with seller; but for buyer's baseless counterclaim the suit could have been resolved without a trial, making, as a practical matter, all of seller's legal expenses attributable to the counterclaim. Fed.Rules Civ.Proc. Rule 11, 28 U.S.C.A.

[3] Federal Courts 170B ⚿ 813

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk813 k. Allowance of Remedy and Matters of Procedure in General. Most Cited Cases

Appellate review of Rule 11 sanctions is deferential. Fed. Rules Civ.Proc.Rule 11, 28 U.S.C.A.

[4] Federal Courts 170B ⚿ 945

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(L) Determination and Disposition of Cause
170Bk943 Ordering New Trial or Other Proceeding
170Bk945 k. Determination of Damages, Costs or Interest; Remittitur. Most Cited Cases

Appellate court would not remand to district court to allow district court to substitute Rule 11 as the basis of its sanctions award against law firm in place of statute imposing liability on counsel for excessive costs, even though statute did not authorize awards against law firms. 28 U.S.C.A. § 1927; Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

***606** Nancy B. Johnson, Brennan, Steil & Basting, Janesville, WI, Matthew B. Burke, Diane R. Sabol (argued), Mayer Brown, Chicago, IL, for Plaintiff-Appellee.

Brian J. Murray (argued), Jones Day, Chicago, IL, Victor A. Arana, Thompson & Knight, Austin, TX, for Defendant-Appellant.

Victor A. Arana, Jones Day, Chicago, IL, for Defendant-Appellant.

Before EASTERBROOK, Chief Judge, and BAUER and EVANS, Circuit Judges.

EASTERBROOK, Chief Judge.

United Stars Industries sold stainless-steel tubing to Plastech Engineered Products between 2000 and 2005. The firms agreed that the price would be adjusted periodically as the cost of raw materials changed. Steel mills set a basic price covering iron and other common ingredients, such as silicon and carbon, plus a surcharge for costly elements that are used in particular alloys. Plastech initially ordered products made from a steel that the parties call 304, which contains chromium and nickel. Later it asked United Stars to use 316L steel, which resists corrosion better. Grade 316L stainless steel contains more nickel than grade 304, plus molybdenum, in addition to chromium.

United Stars changed its price for finished tubing every time the steel mills changed their surcharge for chromium, nickel, or molybdenum. Plastech paid regularly until May 2005, when United Stars sent it an extra bill for roughly $700,000. United Stars told Plastech that for the last 18 months it had been basing bills on the surcharge for 304 steel rather than the higher surcharge for 316L steel. Plastech inquired how the surcharges had been calculated and learned that United Stars ***607** passed through the entire cost of raw materials, even though about 9% of the steel that United Stars purchased was lost as waste during the process of forming tubing. Plastech insisted that it had agreed to pay surcharges only for the cost of nickel, not chromium or molybdenum, and had not agreed to pay any part of the steel mills' surcharges for materials that United Stars discarded during manufacturing. By Plastech's calculation, United Stars owed it about $900,000.

Plastech stopped paying for tubing, contending that it was entitled to recoup the $900,000 by setoff. United Stars stopped shipping once Plastech fell into arrears. Meetings to discuss this $1.6 million disagreement led to a compromise in August 2005, or so the district judge found after a bench trial of this diversity litigation. United Stars agreed to give Plastech a credit of about $200,000, spread over several years, and Plastech promised to continue buying from United Stars as long as it kept the price low. Plastech then submitted new orders, using the newly negotiated price. United Stars resumed shipping and ordered new raw materials (steel mills need orders 12 weeks in advance of delivery).

Plastech went on submitting orders and accepting deliveries until mid-October 2005-but it never paid United Stars another dollar. When the tab had reached $800,000, it told United Stars that it was taking its business to a different vendor. (It had signed a contract with the new vendor in June 2005, without telling United Stars.) United Stars then filed this suit, and the district judge entered judgment in its favor for some $1.3 million, a figure that covers the price of tubing that Plastech did not pay for, interest on that figure, and the loss that United Stars incurred when reselling raw materials that it could not use after Plastech walked away. 2007 U.S. Dist. LEXIS 40958 (W.D. Wis. June 5, 2007). The judge added sanctions against Jones Day, Plastech's law firm, for misconduct. 2007 U.S. Dist. LEXIS 64096 (W.D.Wis. Aug. 27, 2007). Plastech entered bankruptcy after filing its appellate briefs, but United Stars is secured by a supersedeas bond. The bankruptcy court has lifted the automatic stay so that the appeal can be resolved.

[1] According to Plastech, the district judge erred in concluding that a compromise had been reached in August 2005 (though Plastech submitted orders consistent with the new arrangement, and the judge credited testimony that Plastech had agreed orally to the written offer United Stars sent). If there was an agreement, Plastech insists, it dealt only with future prices and not with Plastech's claim that it had been overcharged in years past. The complaint that United Stars filed rested on the 2000 contract and Plastech's later purchase orders; that should have been the sole topic of trial, Plastech believes. Finally, Plastech maintains that the 2000 contract limited its liability for raw materials to steel that it had expressly authorized United Stars to purchase. The district court's opinion does not clearly resolve the parties' dispute about whether all acquisition of the unused raw materials had been authorized in "releases" that Plastech sent to United Stars.

Suppose Plastech is right and that the trial should have been limited to determining whether United Stars calculated surcharges correctly under the 2000 contract plus the purchase orders and releases that Plastech submitted. Plastech thinks that, if the district judge erred, then it own position must be correct. Not at all. If we were to accept Plastech's argument that the dispute was not compromised in April 2005, it still would lose-indeed, the judgment in United Stars' favor would ***608** have been even greater (though United Stars has not filed a cross appeal, so the award cannot be increased).

United Stars understands the contract as allowing it to pass through the entire surcharge, while Plastech contends that only the surcharge for nickel could be passed through, and then only for the weight of the delivered tubing. As the district judge remarked when imposing sanctions on Jones Day after trial, although Plastech filed a counterclaim demanding $890,000 for supposed overcharges, it never produced a scrap of evidence to support its position. And because Plastech therefore loses whether or not a binding compromise was struck in August 2005, it is unnecessary to resolve Plastech's challenges.

Plastech does not rely on any particular language in the contract, and when United Stars demanded that Plastech designate a corporate witness to attend a deposition with documents supporting its position and able to describe an audit that Plastech claims to have performed, Plastech produced

Scott Ryan, who professed ignorance about the subject and did not supply a single document or recollection. Plastech called Ryan at trial, with the same result: no evidence. Nor does Plastech have evidence of discussions between the parties in 2000 about how surcharges would be handled. It relies on the testimony of Elizabeth Pypa, Plastech's vice-president for purchasing in 2000, about her understanding of the contract's meaning. But Pypa's beliefs do not count because they were not communicated to United Stars during the negotiations. See, e.g., *Skycom Corp. v. Telstar Corp.*, 813 F.2d 810, 814–15 (7th Cir.1987) (Wisconsin law); *Household Utilities, Inc. v. Andrews Co.*, 71 Wis.2d 17, 28–29, 236 N.W.2d 663, 669 (1976). So, if the district judge had reached the question whether United Stars was correct in calculating the surcharge, it would have prevailed and won $700,000 on top of the invoice price of the tubing that Plastech accepted and did not pay for. That $700,000 substantially exceeds the (disputed) $264,574 that the judgment included to compensate United Stars for unused raw materials.

United Stars had more going for it than just Plastech's failure to substantiate its own view of the contract. The written documents entitle United Stars to pass on the steel mills' metals surcharges. When Plastech decided to order steel containing molybdenum and extra nickel, it necessarily undertook to pay the higher cost; otherwise United Stars was making it a gift, and it rarely makes sense to interpret a commercial contract as lopsided. Paying for all of the surcharges likewise was logical. United Stars recovered 100% of the steel's base price from Plastech through the list price of the tubing, even though 9% of the steel is lost in the manufacturing process. Why should things be otherwise with the surcharge, which is a variable component of the steel's price?

If United Stars must buy 110 tons of steel coil in order to deliver 100 tons of steel tubing, it must cover the entire cost of the 110 tons through the price of the tubing in order to stay in business. The structure of this contract is one in which Plastech pays for the raw material, and the final price then compensates United Stars for its value added (turning giant steel coils into steel tubing). Plastech might have been able to get somewhere if it could show that the custom in the trade is that fabricators swallow the surcharges for scrap (as they might if scrap containing valuable metals fetches enough from recyclers), but Plastech did not offer any evidence to that effect-and we know from the district court's handling of the unused-materials question that United Stars was ***609** unable to recover the full price of 316L steel even when it was still in the original coils. No more need be said to show that United Stars is entitled to an award at least as high as the judgment.

The remaining question is whether the district judge abused her discretion by requiring Jones Day to pay about $30,000 in sanctions for making unsupported (but costly to defend) contentions during the litigation. Here is the district judge's explanation concerning the counterclaim, which accounts for about 3/4 of the sanction.

> Plaintiff is correct in characterizing defendant's counterclaim as baseless. Although defendant alleged that plaintiff had overcharged defendant by approximately $890,000, it never produced any evidence that it had a legitimate basis for the claim. At the same time, it used the counterclaim as the basis for discovery requests related to the alleged overcharges.
>
> Although defendant made many requests directed to the overcharges, when it came to its own disclosures, it identified only one employee, Scott Ryan, as having information about them. It told plaintiff that Ryan had performed an "in-depth audit" and was knowledgeable about the alleged overcharges. In fact, at his deposition, Ryan expressed his ignorance of any damages. He denied having ever conducted an audit or even knowing what an "internal audit staff" was. Undaunted, defendant named Ryan as a witness at trial and called him despite his lack of knowledge about the alleged overcharges. It produced no other witnesses to testify about its counterclaim.
>
> Even now, defendant cannot point to any evidence to show that its counterclaim had any kind of foundation. It quotes the testimony of Rodney Turton [Plastech's current vice president for purchasing] that "[W]e had our finance team conduct audits in order to [see] what we were being charged, how much we paid, et cetera, to understand where this disconnect came about," Tr. 2–80: 16–25, but says nothing about the results of the audits.
>
> Defendant argues that plaintiff would have incurred the fees incurred during discovery in any event because it had to prove the terms of the parties' agreement, "which generally consisted of multiplying an applicable tube weight by an applicable surcharge rate." It asserts that the ultimate questions for plaintiff's claim and defendant's counterclaim were identical (apparently because both related to the calculation of surcharges). This is an ingenious argument but not one that stands up to scrutiny. For plaintiff to explain how it calculated the surcharges took almost no work because it did these calculations regularly. On the other hand, it would have had to engage in extensive efforts to try to understand how and why defendant believed the surcharges to be improper. One can appreciate the difficulty (and futility) of those efforts now that it is clear that defendant itself cannot explain the basis for its belief.

But for this baseless counterclaim the suit could have been resolved without a trial. As a practical matter, all of United Stars' legal expenses are attributable to the counterclaim, though the district judge awarded only $21,754 for the time counsel spent dealing with Ryan's deposition and testimony. That sanction is modest.

The district court invoked 28 U.S.C. § 1927 as the basis of sanctions, and Jones Day reminds us that this statute authorizes awards against individual lawyers but not law firms. *Claiborne v. Wisdom*, 414 F.3d 715 (7th Cir.2005). (*Claiborne* was not called to the district court's attention ***610** until after it had ruled, and at oral argument Jones Day abandoned this as a ground for reversal; it does not want the sanctions imposed directly on the lawyers who represented Plastech.) Moreover, § 1927 sets a higher standard for sanctions than do other sources such as Fed.R.Civ.P. 11(c)(3), 26(g)(3), and 37(a)(5), (b). See *Kotsilieris v. Chalmers*, 966 F.2d 1181, 1184–85 (7th Cir.1992); *In re TCI Ltd.*, 769 F.2d 441 (7th Cir.1985). The judge stated that Rule 11"is useless in [this] situation because the lack of any foundation for the counterclaim is not obvious to the opposing party early enough in the litigation to make a Rule 11 motion efficacious." This supposes that only a motion by counsel under Rule 11(c)(2) allows sanctions; the judge overlooked Rule 11(c)(3), which allows sanctions on the judge's initiative at any time.

[2][3][4]Rule 11(c)(3) is the best foundation for this sanction. The judge found that Jones Day advanced a position that never had any evidentiary support, and thus necessarily could not have been based on a reasonable investigation preceding the counterclaim. Rule 11 also allows the imposition of sanctions on law firms as well as on individual lawyers. (Rule 11(c)(1) was amended in 1993 to depart from *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989), which had held that sanctions must be assessed against lawyers rather than law firms.) Rule 11(c)(3) requires notice and an opportunity to respond; Jones Day had that opportunity as a result of United Stars' motion. And although Jones Day contends that it conducted the reasonable inquiry required by the Rule, the district court's findings show otherwise. The remaining sanctions, in lesser amounts, also are within the district court's authority under Rule 11, which applies to every motion as well as every pleading. See Rule 11(a). It is unnecessary to analyze these modest sanctions in detail. Appellate review of Rule 11 sanctions is deferential, see *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990), and the district judge did not abuse her discretion. This is clear enough that it would be pointless to remand just so that the district judge may substitute Rule 11 for § 1927. Cf. *Samuels v. Wilder*, 906 F.2d 272 (7th Cir.1990). Since Rule 11 gives the district judge more discretion than does § 1927, the outcome would be foreordained.

AFFIRMED

C.A.7 (Wis.),2008.

United Stars Industries, Inc. v. Plastech Engineered Products, Inc.

525 F.3d 605

UNITED STATES of America, Appellee,
v.
Gaetano VASTOLA, Appellant.
No. 93-5529.
United States Court of Appeals,
Third Circuit.
Argued March 4, 1994.
Decided May 25, 1994.
Rehearing and Suggestion for Rehearing
In Banc Denied June 16, 1994.

Defendant was convicted of racketeering and extortion charges in the United States District Court for the District of New Jersey, and the Court of Appeals, 899 F.2d 211, affirmed in part and reversed in part. Certiorari was granted, and the United States Supreme Court, 497 U.S. 1001, 110 S.Ct. 3233, 111 L.Ed.2d 744, vacated and remanded for reconsideration. The Court of Appeals, 915 F.2d 865, remanded, and the District Court, 772 F.Supp. 1472, reinstated convictions. Defendant again appealed. The Court of Appeals, 989 F.2d 1318, vacated and remanded for reconsideration, and the District Court, Brotman, J., 830 F.Supp. 250, again reinstated convictions. Defendant again appealed. The Court of Appeals, Van Antwerpen, District Judge, sitting by designation, held that: (1) evidence supported finding that assistant United States Attorney's research, standing alone, could not be considered adequate so as to justify failure to seal wiretap tapes in timely fashion, but (2) evidence supported finding that attorney's own research, when combined with her consultation with more experienced attorneys, was minimally sufficient to meet standards of reasonably prudent attorney.

Affirmed.

Stapleton, Circuit Judge, dissented and filed opinion.

1. Criminal Law ⚿ 1134(10), 1158(4)

In reviewing district court's conclusion that assistant United States Attorney supervising wiretap surveillance conducted adequate legal research or otherwise acted as reasonably prudent attorney when she failed to seal wiretap tapes in timely fashion, Court of Appeals reviewed court's factual findings for clear error, but exercised plenary review over court's legal conclusion that Attorney's conduct was reasonably prudent under circumstances.

2. Criminal Law ⚿ 394.6(4)

Evidence supported finding that assistant United States Attorney did not herself adequately research the law when she failed to seal wiretap tapes in timely fashion; although Attorney read and outlined statute and read corresponding annotations, reasonable attorney should not be satisfied with basic understanding of the law given possibility that suppression would result if law was mistakenly applied.

3. Criminal Law ⚿ 394.3

Although assistant United States Attorney's own research of wiretap statute could not alone be considered adequate, she acted as reasonably prudent attorney under circumstances when she failed to seal wiretap tapes in timely fashion; Attorney relied not only on her own research but on advice she received from more experienced attorneys, and such advice was consistent attorney's research.

4. Attorney and Client ⚿ 112.50

When attorney receives confirmation of legal theories from number of proper sources, each consistent with the next, attorney can act reasonably in relying on such theories in course of legal research.

Herald Price Fahringer (argued), Diarmuid White, Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, New York City, for appellant.

Marion Percell (argued), Michael Chertoff, U.S. Atty., Newark, NJ, for appellee.

Before: STAPLETON and SCIRICA, Circuit Judges, and VAN ANTWERPEN, District Judge.*

OPINION OF THE COURT

VAN ANTWERPEN, District Judge.

Appellant Gaetano Vastola ("Vastola") comes before us for the fourth time seeking to overturn his May 3, 1989 convictions for two substantive RICO offenses under 18 U.S.C. § 1962(c), a RICO conspiracy offense under 18 U.S.C. § 1962(d), and conspiracy to use extortionate means to collect an extension of credit, in violation of 18 U.S.C. § 894. Vastola seeks suppression of certain wiretap recordings, improperly sealed under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Wiretap Act), as amended, 18 U.S.C. § 2510 *et seq*. Vastola challenges the findings of the district court from the most recent remand in this case. *U.S. v. Vastola*, 830 F.Supp. 250 (D.N.J.1993). Specifically, Vastola disputes the finding that the United States Attorney supervising the wiretap surveillance conducted adequate legal research or otherwise acted as a reasonably prudent attorney when she failed to seal the wiretap tapes in a timely fashion.

The history of this complex case has been well-documented in the many published opinions written in connection with this case. *United States v. Vastola*, 989 F.2d 1318 (3d Cir.1993)

*Hon. Franklin S. Van Antwerpen, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

(*Vastola III*); *United States v. Vastola*, 915 F.2d 865 (3d Cir.1990) (*Vastola II*), *cert. denied*, 498 U.S. 1120, 111 S.Ct. 1073, 112 L.Ed.2d 1178 (1991); *United States v. Vastola*, 899 F.2d 211 (3d Cir.1990) (*Vastola I*), *vacated and remanded*, 497 U.S. 1001, 110 S.Ct. 3233, 111 L.Ed.2d 744 (1990). We will discuss only the facts and procedural history relevant to our review of the most recent remand of this case to the district court.

I.

Facts and Procedural History

On May 3, 1989 the district court entered an order of judgment and commitment against Vastola after a jury found him guilty of two substantive RICO offenses. Vastola had been charged, along with 20 other co-defendants in a 114-count indictment filed on September 19, 1986. Vastola was sentenced to serve a total of twenty years' imprisonment and to pay a total fine of $70,000.

Prior to trial, Vastola and the other defendants filed an omnibus motion that included a request for the suppression of the electronic tapes obtained from the government's surveillance of an establishment named the Video Warehouse in West Long Branch, New Jersey ("West Long Branch tapes"), between March 15, 1985 and May 31, 1985. The tapes were not sealed until July 15, 1985, more than 45 days after the final interception on May 31, 1985 and 32 days after the June 13, 1985 expiration date of the order authorizing the surveillance. Defendants contended that the West Long Branch tapes should be suppressed pursuant to the Wiretap Act, 18 U.S.C. § 2518(8)(a).[1]

The district court determined, in effect, that the sealing was untimely. However, the district court refused to suppress the tapes, relying on the case of *United States v. Falcone*, 505 F.2d 478 (3d Cir.1974), *cert. denied*, 420 U.S. 955, 95 S.Ct. 1338, 43 L.Ed.2d 432 (1975) for the rule that suppression is warranted only where it can be shown that the physical integrity of the tapes has been compromised. Finding by clear and convincing evidence that the physical integrity of the West Long Beach tapes had not been compromised, the district court denied Vastola's and the other defendants' motion to suppress. *United States v. Vastola*, 670 F.Supp. 1244, 1282 (D.N.J.1987), *aff'd in part, rev'd in part*, 899 F.2d 211 (3d Cir.), *vacated and remanded*, 497 U.S. 1001, 110 S.Ct. 3233, 111 L.Ed.2d 744 (1990).

On appeal, we affirmed the district court's refusal to suppress the West Long Branch tapes on the basis of *Falcone*. *Vastola I*, 899 F.2d 211 (3d Cir.1990). On June 25, 1990, the Supreme Court vacated this decision and remanded the matter for further consideration in light of the recently decided case of *United States v. Ojeda Rios*, 495 U.S. 257, 110 S.Ct. 1845, 109 L.Ed.2d 224 (1990). In *Ojeda Rios*, the Supreme Court held that a delay in sealing authorized electronic surveillance tapes requires suppression of the tapes unless the government offers a "satisfactory explanation" for the sealing delay. The court held that section 2518(8)(a) requires that the actual reason for the sealing delay be objectively reasonable at the time of the delay. *Ojeda Rios*, 495 U.S. at 266–267, 110 S.Ct. at 1850–1851.

On remand from the Supreme Court, this court concluded that "a sealing delay indeed occurred as the West Long Branch tapes should have been sealed either as soon as was practical after May 31, 1985, when the actual surveillance ended, or as soon as practical after June 13, 1985, when the final extension order expired." *Vastola II*, 915 F.2d 865, 875 (3d Cir.1990). We then remanded to the district court to determine "whether the government should now be permitted, under *Ojeda Rios*, to offer an explanation for its violation of the sealing requirement." *Id*. at 876. Vastola's petition for certiorari from this decision was denied. *Vastola v. United States*, 498 U.S. 1120, 111 S.Ct. 1073, 112 L.Ed.2d 1178 (1991).

On December 14, 1990 the district court conducted a hearing at which the government presented evidence concerning the reason for the sealing delay. The district court determined that "the actual reason for the sealing delay was that the Assistant United States Attorney in charge of the electronic surveillance, Diana Armenakis, and her supervisor on the case, Thomas Roth, believed that the Wiretap Act did not require the sealing until the end of the investigation." *United States v. Vastola*, 772 F.Supp. 1472, 1481 (D.N.J.1991), *vacated and remanded*, 989 F.2d 1318 (3d Cir.1993). The court found that the government's misunderstanding of the law had been objectively reasonable and the delay had perforce been satisfactorily explained." *Id*. at 1483. Accordingly, the district court reinstated Vastola's conviction, sentencing him to 17 years imprisonment.

On appeal from the order reinstating his conviction, we held that the district court had not abused its discretion by allowing the government to present evidence supporting its explanation for the sealing delay. *Vastola III*, 989 F.2d 1318, 1324–25 (3d Cir.1993). However, relying on our earlier decision in *United States v. Carson*, 969 F.2d 1480 (3d Cir.1992), we reversed as to the finding that the government's explanation was objectively reasonable. Nonetheless, we remanded this case for further proceedings because, as we held in *Carson*, an "unreasonable mistake of law does not automatically lead to suppression." *Vastola III*, 989 F.2d at 1327. In *Vastola III*, we discussed the *Carson* holding as follows:

1. Section 2518(8)(a) provides, in pertinent part:

> The contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions . . . The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517.

18 U.S.C. § 2518(8)(a).

> The *Carson* court explained that even though an attorney's mistake of law is unreasonable, the government can still show a satisfactory explanation if "the attorney involved acted as a 'reasonably prudent' attorney would to investigate the legal question involved in a reasonably prudent manner." 969 F.2d at 1494 … The case [*Carson*] then stands for the proposition: When a government attorney's legal conclusion is found to be unreasonable, the explanation for the delay would still be an objectively reasonable "mistake of law" if the government can show that its attorney has adequately researched the law or has otherwise acted reasonably.

Vastola III, 989 F.2d at 1327. Since the district court did not make a determination whether Assistant United States Attorney Armenakis ("Armenakis") acted reasonably under the circumstances, we remanded for further proceedings.

The district court addressed this narrow question of attorney conduct in its published opinion *United States v. Vastola*, 830 F.Supp. 250 (D.N.J.1993) ("*Second Remand*"). The court found that while Armenakis failed to conduct adequate research, her "reliance on the authoritative advice given by her colleagues constituted an adequate substitute for further reading of the caselaw, and her behavior was objectively reasonable under the circumstances." *Id*. 830 F.Supp. at 256. Finding that the government had offered a "satisfactory explanation" for the failure to timely seal the West Long Branch tapes, the court held that the tapes were properly admitted at trial. Consequently, the court issued an order reinstating the convictions of Vastola.

Vastola now appeals the district court's findings, arguing that Armenakis' conduct was not objectively reasonable under the circumstances and that suppression of the surveillance tapes is warranted. For the reasons that follow, we affirm the findings of the district court.

II.

Standard of Review

[**1**] We review the district court's factual findings for clear error. *Vastola II* at 1324 (quoting *U.S. v. McMillen*, 917 F.2d 773, 774 (3d Cir.1990)). We exercise plenary review over the district court's legal conclusion that the Assistant United States Attorney's conduct was "reasonably prudent" under the circumstances. *Id*. at 1324.[2]

III.

ANALYSIS

This Court in *Vastola III* remanded to the district court on one narrow issue: Did Armenakis, in making an unreasonable mistake of law, nevertheless conduct herself reasonably under the circumstances? *Vastola III*, 989 F.2d at 1327. The answer is "yes," if the government can show that its attorney has adequately researched the law or has otherwise acted prudently. *Id*. The burden of proof is on the government to make this showing. *Vastola III*, 989 F.2d at 1327.

The relevant facts for this analysis are few in number: Armenakis studied the statute, outlined it, read its annotations, and spoke with more experienced attorneys. *Vastola III*, 989 F.2d at 1327.[3]

The district court invoked Federal Rule of Civil Procedure 11 jurisprudence to define the "reasonably prudent attorney." The district court cited *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 94 (3d Cir.1988) for the following Rule 11 standard:

> An attorney's actions will be considered objectively reasonable where, given the existing circumstances, she undertakes "'a normally competent level of legal research'" to support the conclusion she reaches.

Second Remand, 830 F.Supp. at 254. Under the circumstances, this standard is helpful in beginning an analysis of reasonable attorney conduct. The intended goal of Rule 11 is accountability. It "imposes on counsel a duty to look before leaping and may be seen as a litigation version of a familiar railroad crossing admonition to 'stop, look, and listen.'" *Lieb v. Topstone Indus., Inc.*, 788 F.2d 151, 157 (3d Cir.1986). In this case, we are assessing the reasonableness of Armenakis' conduct and her duty to stop, look and listen while conducting a wiretap investigation.[4]

2. The Government urges a highly deferential review of all aspects of the district court's opinion in this case, not just of its findings of fact; it thus argues we should use the standard of review we use for the Rule 11 determinations of a district court. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990). Because this case involves a question of the legal standard of reasonable research of a government attorney in a criminal case, and not just reasonable attorney conduct in a civil context, we find the suggested standard inappropriate.

3. These findings of fact were established by the district court during the first remand, *United States v. Vastola*, 772 F.Supp. 1472, 1480 (D.N.J. 1991). The district court held an evidentiary hearing in 1990, five years after the relevant conduct occurred. The district court's findings were acknowledged by the Third Circuit in *Vastola III*, and relied upon by the district court during the most recent remand. We are satisfied that they are not clearly erroneous.

The district court found in *Second Remand* that these facts provided a sufficient factual basis to decide the question of reasonable conduct. As a result, no additional evidence was taken and the district court made its rulings on these facts alone. We acknowledge that these facts are adequate for the task at hand and that further inquiry by the district court would not have produced additional relevant facts.

4. The analogy to Rule 11 has its limits in this context. Some of the factors relevant to determining whether an attorney has made a reasonable pre-filing inquiry into the law, (e.g., whether the position taken was a good faith effort to extend or modify the law) are not particularly helpful in determining the reasonableness of a government attorney's research of the law during an ongoing criminal investigation. *See e.g. Thomas v. Capital Security Services, Inc.*, 812 F.2d 984, 988 (5th Cir.1987); Fed.R.Civ.Proc. 11, *Advisory Committee Note*; *Lingle*, *supra*, 847 F.2d at 95; *Schering Corp. v. Vitarine Pharmaceuticals, Inc.*, 889 F.2d 490, 496 (3d Cir.1989).

[2] The district court found that Armenakis herself had not adequately researched the law. The court reasoned as follows:

> Armenakis' research, which consisted of reading and outlining the statute and reviewing the relevant annotations, was enough to give an average attorney a basic understanding of the law. However, standing alone, this limited investigation cannot be considered a normally competent level of research that a reasonably prudent attorney would undertake.

Second Remand, 830 F.Supp. at 255. We agree. Given the serious consequences which follow from the mistaken application of the Wiretap Act, i.e., suppression, a reasonable United States attorney should not be satisfied with a basic understanding of the Act and a summary review of applicable caselaw. In addition, as the district court reasoned, "the meaning of a complex statute, such as the Wiretap Act, is not always readily ascertainable from just the reading of the text; and the annotations often fail to fully reflect how caselaw has interpreted a statutory provision." Thus, Armenakis' research, standing alone, cannot be considered adequate. The inquiry, therefore, turns on whether Armenakis otherwise acted prudently.

[3] The district court found that Armenakis acted as a reasonably prudent attorney, and based its conclusion on the "interaction between Armenakis' own research and the authoritative confirming advice she received from other, more experienced United States Attorneys." That is, Armenakis' research, standing alone was inadequate. This coupled with the confirmation of her initial understanding of the law by more experienced colleagues, however, convinced the district court that Armenakis acted reasonably under the circumstances.[5]

[4] We agree that when an attorney receives confirmation of legal theories from a number of proper sources, each consistent with the next, the attorney can act reasonably in relying on these theories in the course of legal research. The district court properly found that Armenakis' limited book research was inadequate. Moreover, her conversations with other attorneys, standing alone, were also insufficient. *Carson*, 969 F.2d at 1495 (an attorney may not rely merely on conversations with peers or supervisors concerning developing area of law where incorrect answer could lead to suppression of important evidence). However, we believe that the combined impact of these concurring sources created a degree of certainty (albeit minimal) which a prudent attorney could have accepted in arriving at an appropriate procedure for sealing.

From a factual standpoint, the caselaw as it existed at the time was not inconsistent with a reasonably thorough review of the relevant annotations.[6] When Armenakis conducted her legal research, no "red flags" would have appeared to warn her about the need to seal the tapes as the investigation continued but the location of the surveillance changed. Our review of the relevant annotations discloses no Third Circuit case which would have definitively clarified this issue, or even notified Armenakis of a conflict.[7] In fact, cases from other circuits could have led her in the opposite direction.[8]

An inquiry into the reasonableness of an attorney's legal research is necessarily fact and time specific. The court must take into account not only the particular methodology employed by the attorney, but also the complexity of the law at the time in question.[9] Armenakis' conduct is far from a model for others to follow and our ruling is, of course, limited to the facts and time frame of this case.

5. We do not accept the district court's finding that Roth's view was the general understanding of the office. The court inferred this from the fact that Roth was Armenakis' supervisor during the Video Warehouse surveillance, and that Roth was the most experienced of any attorney in the United States Attorney's office in New Jersey with respect to interceptions. *Second Remand*, 830 F.Supp. at 256, n. 6. We do not think it necessarily follows that Armenakis spoke to other attorneys with Roth's view. Since Roth would have counselled her to promptly seal the tapes after each location, such information might have better informed Armenakis about proper procedure. App. at 25. Nonetheless, we accept the finding that she spoke to more experienced colleagues, and that they confirmed her view of the law. We think it was reasonable for Armenakis to rely on these colleagues, whether or not Roth's view was the general understanding of the office.

6. Just as we examined Armenakis' understanding of the law to determine whether it was objectively reasonable *at the time of the delay, Ojeda Rios*, 495 U.S. at 1851, 110 S.Ct. at 1851, we will also examine Armenakis' conduct at the time of the delay to determine if it was reasonably prudent attorney conduct. *Cf. Schering Corp., supra*, 889 F.2d at 496 ("the wisdom of hindsight is to be avoided; the attorney's conduct must be judged by what was reasonable to believe at the time the pleading, motion, or other paper was submitted.")

7. Of the few Third Circuit cases appearing in the relevant portions of the Federal Digest, only the *United States v. Falcone*, 505 F.2d 478 (3d Cir. 1974) appears to be even remotely on point. In that case, the court ruled that the tapes were not sealed in accordance with the statute. However, there was no explanation of how or why the sealing failed to accord with the statute. The rule of law in *Falcone*, later overturned in *Ojeda Rios*, was as follows:

> all we hold is that where the trial court has found that the integrity of the tapes is pure, a delay in sealing the tapes is not, in and of itself, sufficient reason to suppress the evidence obtained therefrom. We hasten to add that this holding, of course, does not deprecate the importance of the sealing requirement. Certainly, it should be complied with in all respects. As this case so aptly demonstrates, compliance would have avoided considerable uncertainty and delay.

Falcone, 505 F.2d at 484. Instead of clarifying the meaning of 18 U.S.C. § 2518(8), we held that delays in sealing would not result in suppression.

8. *See e.g., United States v. Principie*, 531 F.2d 1132, 1142, and n. 14 (2nd Cir. 1976), *cert. denied*, 430 U.S. 905, 97 S.Ct. 1173, 51 L.Ed.2d 581 (1977) (electronic surveillance order entered 16 days after a prior order regarded as an "extension" within the meaning of § 2518 because it was considered part of the same investigation of the same individuals conducting the same criminal enterprise); *United States v. Scafidi*, 564 F.2d 633, 641 (2nd Cir.1977), *cert. denied*, 436 U.S. 903, 98 S.Ct. 2231, 56 L.Ed.2d 401 (1978) (where intercept is on same premises and involves substantially same persons, an extension under those circumstances requires sealing only at conclusion of whole surveillance).

9. Due to the absence of controlling Third Circuit precedent, we cannot label Armenakis' conclusions "patently unmeritorious or frivolous." Only when an attorney offers such an implausible view of the law, in the Rule 11 context, would she be subject to sanctions. *See Doering v. Union Country Bd. of Chosen Freeholders*, 857 F.2d 191, 194 (3d Cir.1988); *Dura Systems, Inc. v. Roth-bury Investments, Ltd.*, 886 F.2d 551, 556 (3d Cir.1989) (Rule 11 evaluation includes question of whether pleading was based on plausible view of the law).

With its decision in *Ojeda Rios*, the Supreme Court significantly clarified the sealing requirements of the Wiretap Act and changed the caselaw which we use to help judge reasonable attorney behavior.[10] The Court admonished: "the seal required by § 2518(8)(a) is not just any seal but a seal that has been obtained *immediately* upon the expiration of the underlying surveillance order." *Ojeda Rios*, 495 U.S. at 262–63, 110 S.Ct. at 1849 (emphasis in original). Of additional significance is the clarification of the Wiretap Act provided by section 2518(11), added to Title III as part of the Electronic Communications Privacy Act of 1986, § 106(d)(3), Pub.L. No. 99–508, 100 Stat. 1848, 1857, *reprinted in* 1986 U.S.Code Cong. & Admin. News. This provision, which authorizes roving surveillance upon a showing that the suspect's purpose is to thwart interception by changing facilities, was passed in 1986 and plainly discredits arguments based upon the so-called "extension theory."[11] *See Vastola II*, 915 F.2d at 874.

Vastola argues that *Carson* compels a different result. The district court cited to *Carson* for the proposition that an attorney's reliance on the counsel of more experienced colleagues can constitute reasonable attorney conduct. *See Second Remand*, 830 F.Supp. at 256. In *Carson*, the government attorney, Robins, did not immediately seal wiretap tapes after surveillance ended because he expected the same surveillance to begin again when the subject returned from a hospital stay. Robins alleged that, like Armenakis, he believed at the time that sealing was not necessary until the *entire* investigation was completed. Robins claimed that he asked his supervisor about the sealing requirements and had (mistakenly) understood his supervisor to explain that no sealing was required until all surveillance ended. The *Carson* Court found that Robins' legal conclusion regarding sealing was *not* objectively reasonable, but it remanded the case to the district court for consideration of whether Robins' reliance on what he thought the supervisor told him was reasonable without any additional, independent research. The court in *Carson* offered the following standards regarding an attorney's reliance on the counsel of colleagues:

> Arguably, a reasonable attorney would not have risked the exclusion of the tapes, evidence important to his case, without personally checking the law relating to its admission. *It is not always unreasonable for an attorney to rely on a reasoned oral opinion of a supervisor, or even that of a peer with more experience in the area of law in question*. Moreover, an attorney working under another lawyer on a case could not be faulted for following instructions, as opposed to advice, from the person in charge of the case or investigation. On the other hand, we do not think that a reasonable attorney can rely on a casual conversation with a peer or supervisor concerning developing law on a complex, controversial subject if an incorrect answer is likely to preclude admission of evidence of vital importance to the case.

Carson, 969 F.2d at 1495 (emphasis added).

The district court found that, like Robins in *Carson*, Armenakis relied on the opinions of her more experienced colleagues in formulating her opinion. But unlike the attorney in *Carson*, Armenakis did more here than merely rely on these conversations.[12] Her understanding of the law was supplemented by her reading and outlining of the statute and her review of the relevant annotations at that time. Armenakis did, in fact, check the law in this case. And her reading of the law confirmed her understanding (albeit a misunderstanding) that sealing was only required at the end of the investigation. Thus, the *Carson* decision is authoritative but clearly distinguishable on its facts.

We recognize that the wiretap is a powerful and invasive law enforcement tool, and that the Wiretap Act was enacted to establish procedural safeguards which assure that "the interception is justified and that the information obtained thereby will not be misused." *Gelbard v. United States*, 408 U.S. 41, 47, 92 S.Ct. 2357, 2361, 33 L.Ed.2d 179 (1972) (citations omitted). Nonetheless, we hold for the reasons stated that the combined effect of Armenakis' conduct at the time in question was minimally sufficient to meet the standards of a reasonably prudent attorney.

IV.

Conclusion

For the reasons set forth above, we conclude that the order of the district court should be affirmed.

STAPLETON, Circuit Judge, dissenting:

10. *See* Judge Easterbrook's opinion in *Mars Steel Corp. v. Continental Bank, N.A.*, 880 F.2d 928 (7th Cir.1989), in which he observed:

> A lawyer who founds his suit on *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), has revealed all we need to know about the reasonableness of the pre-filing inquiry . . . If the legal point is obscure, though, even an absurd argument may not be sanctionable, because a "reasonable" inquiry does not turn up every dusty statute and precedent. An objectively frivolous legal position supports an inference that the signer did not do a reasonable amount of research, but an inference, no matter now impressive, is no more than an inference.

Mars Steel Corp. v. Continental Bank, N.A., 880 F.2d at 932.

11. The court in *Vastola II* referred to the Electronic Communications and Privacy Act of 1986 in order to make a legal determination, based on the text of the statute, of the meaning of the Wiretap Act. Since the amending provision was not passed until after the relevant conduct by Armenakis, it is evident that by referring to section 2518(11) the court in *Vastola II* was not commenting upon the reasonableness of Armenakis' conduct in 1985. The court in *Vastola III* remanded this matter to the district court for a determination of the reasonableness of her conduct.

12. We note that the court in *Carson* did not decide the question of whether attorney Robins' reliance on what he thought his superior told him without independently checking the law might be reasonable. Thus, *Carson* leaves open the possibility than a mere reliance on a superior's understanding of the law might be reasonable in certain circumstances. Of course, in this case Armenakis conducted independent research in addition to her consultation with other, more experienced attorneys in the office.

If the government's evidence in this case is sufficient to carry its burden of providing a "satisfactory explanation" for failing to comply with the immediate sealing requirement of the statute, that requirement is reduced to a precatory entreaty. Because it is clear from *Ojeda Rios* that Congress intended something more, I respectfully dissent.

Wire surveillance of the Video Warehouse in West Long Branch, New Jersey, was authorized on March 15, 1985. After two extensions, the authority expired on June 13, 1985. The surveillance actually terminated on May 31, 1985. Wire surveillance of Video's new location in Neptune City, New Jersey, was authorized on June 26, 1985. That authority ceased and the surveillance was terminated on July 25, 1985.

Duplicates of 185 reels of tape from the West Long Branch surveillance were sealed 45 days after that surveillance ceased and 32 days after the authorization terminated. When the government realized its mistake, the originals of these reels of tape were sealed a little over a month later, on August 19, 1985.

The federal wire surveillance statute, after providing for court authorized wire surveillances, stipulates the following with respect to the making and sealing of tape recordings:

> The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. *Immediately upon the expiration of the period of the order, or extensions thereof*, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders…. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517.

18 U.S.C. § 2518(8)(a) (emphasis supplied).

The tapes from the West Long Branch surveillance are the ones at issue here. The government has not contended that a sealing involving a 32 day or longer delay would constitute an "immediate" sealing. Rather, the government, in *United States v. Vastola*, 915 F.2d 865 (3d Cir.1990), *cert. denied*, 498 U.S. 1120, 111 S.Ct. 1073, 112 L.Ed.2d 1178 (1991) ("*Vastola II*"), advanced two alternative theories under which there was said to be no violation of the statute. First, it insisted that there had been no delay because the order of June 26, 1985, authorizing surveillance of the Neptune City site, was an "extension" of the original authorization, and the duty to seal did not arise until the Neptune City surveillance terminated. We rejected this argument, concluding:

> We could not possibly hold that the Neptune City interception order was an extension of the West Long Branch order. Although the government rightly points out that *Rios* [*United States v. Ojeda Rios*, 495 U.S. 257, 110 S.Ct. 1845, 109 L.Ed.2d 224 (1990)] did not decide whether a change in the location of an illegal operation will prevent a subsequent order covering the new location from being an extension of a previous order, the statute unambiguously rules out this possibility.

Id. at 874 (footnote omitted).

In support of this conclusion, we referred to the above quoted portion of the statute and two other sections requiring that an application for wire surveillance authority justify the need for surveillance at a specific site:

> Section 2518(1)(b)(ii) plainly states that an application for surveillance order must contain 'a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted.' In addition, section 2518(3)(d) requires a particularized showing of probable cause that 'the facilities from which, or the place where, the wire, oral, or electronic communications are to be intercepted are being used, or are about to be used, in the commission of [the] offense [under investigation].' Based on these two provisions alone, we would have no difficulty concluding that Congress intended for interception orders, and their accompanying extensions, to apply only to surveillances in the particular locations specified in the applications.

Vastola II, 915 F.2d at 874.[1] We held, based on the plain meaning of the text of the statute, that the duty to seal arises "upon the expiration of the order or extensions thereof" and that an order authorizing surveillance at another site is not an extension.[2]

1. As the majority correctly points out, we also referred to a 1986 statutory amendment authorizing roving surveillance upon a showing that the suspect's purpose is to thwart interception by changing facilities. The "unmistakable inference" to be drawn from this amendment, we held, was that the other provisions of the statute "restricted surveillance to particular locations, regardless of whether the same suspects and crimes were involved." *Id*. at 875. The above quoted text leaves no doubt, however, that our conclusion would have been the same in *Vastola II* if we had confined our analysis to the text of the statute as it existed prior to this amendment when the surveillances in this case were conducted.

2. During our analysis of the plain meaning of the text in *Vastola II*, we pointed out that the Second Circuit case law existing at the time of the surveillance in this case did not support the view that a new authorization for surveillance at a different location could constitute an extension of a prior authorization for another site. We noted and rejected the government's contention that *United States v. Vazquez*, 605 F.2d 1269 (2d Cir. 1979), *cert. denied*, 444 U.S. 981, 100 S.Ct. 484, 62 L.Ed.2d 408 (1979), stood "for the proposition that the term, 'extension,' encompasses all continuation of wiretap orders involving the same crimes and substantially the same people." 915 F.2d at 874 n. 15. We indicated that "[w]e would be hard pressed to read *Vazquez* so broadly." *Id*. The *Vazquez* court summarized the state of the law in the Second Circuit in 1979 as follows:

> Therefore, we conclude that the term "extensions," as used in the phrase "period of the order, or extensions thereof" is to be understood in a common sense fashion as encompassing all consecutive continuations of a wiretap order, however designated, where the surveillance involves the same telephone, the same premises, the same crimes, and substantially the same persons. *See United States v. Scafidi, supra*, 564 F.2d at 641; *cf. United States v. Principie*, 531 F.2d 1132, 1142 n. 14 (2d Cir.1976), *cert. denied*, 430 U.S. 905, 97 S.Ct. 1173, 51 L.Ed.2d 581 (1977).

Vazquez, 605 F.2d at 1278. It is thus clear that the Court of Appeals for the Second Circuit does not read its case law in the same way the majority reads it in footnote 8, *supra*.

Having concluded that the duty to seal the West Long Branch tapes arose no later than June 13, 1985, the date the authorization for the surveillance of that location terminated, we turned to the government's second argument—i.e., its "suggestion that, even if erroneous, the supervising attorneys' reasonable belief that the order of June 26, 1985, extended the original interception order satisfactorily explains the delay" in sealing the West Long Branch tapes. *Id*. at 875. We declined to pass upon this argument because the government up to that point had tendered no evidence to the district court concerning the circumstances of the sealing delay. We remanded to the district court so that it could exercise its discretion on whether to reopen the record and allow the government to offer such evidence.

Between *Vastola II* and the time this case returned to us in *Vastola III*, we had occasion to consider another case in which a sealing delay had occurred in the context of sequential surveillance of different sites. *United States v. Carson*, 969 F.2d 1480 (3d Cir.1992). The investigation in *Carson* was conducted in 1981 and 1982. An evidentiary hearing was held by the district court in that case at which Warren Robins, the attorney who had caused 33 of the tapes of the first, "Zax", surveillance to be sealed, testified. His testimony was summarized as follows:

> Robins discussed the sealing issue with Stewart, his supervisor, during the time in December 1981 when DiGilio was in the hospital. Although Stewart meant to convey that sealing was required at the end of a particular order or its extension, Robins understood him to mean that sealing was required only at the conclusion of the investigation, rather than at the end of interception at a particular location. Robins' misunderstanding of Stewart's advice arose, because at the time of their discussion the Zax order [authorizing the first surveillance] constituted the entire electronic surveillance operation.
>
> * * * * * *
>
> As a result, Robins believed that the sealing obligation for all of the tapes, including the Zax tapes, arose on May 12, 1982 when the [second] surveillance was terminated.
>
> * * * * * *
>
> Robins therefore thought that so long as any part of the "wiretap interception process" was occurring, there was no requirement to seal—even if a particular wiretap operation which was a part of the investigation was complete.

Id. at 1493–95.

The district court in *Carson* concluded "that Robins' view, though wrong, was objectively reasonable and that, therefore, the government provided a satisfactory explanation for the delay." *Id*. at 1494. We rejected this conclusion based on *Vastola II*, explaining:

> In reaching this conclusion, the court accepted Robins' explanation even though it was contrary to the unambiguous language of the statute. *See id*. at 494 (quoting *Vastola II*, 915 F.2d at 874).
>
> We agree with the district court that a reasonable mistake of law can be a satisfactory explanation for delay, but we also think the district court's findings do not support its conclusion that Robins' explanation was satisfactory. For an explanation to be satisfactory under *Ojeda Rios*, it must be objectively reasonable . . . . The government does not, and cannot, argue that an objective reading of the extant case law might have caused an objectively reasonable attorney to take Robins' view.

Id. at 1494 (footnote omitted).

Although the government did not maintain that the case law would have "caused an objectively reasonable attorney to take Robins' view" on February 27, 1982 (when the final extension of the authority for the first surveillance terminated and the duty to seal was triggered), the government in *Carson* did insist that it had satisfactorily explained the delay by showing that "it was attributable to an innocent mistake on Robins' part in misunderstanding what Stewart told him." *Id*. at 1494. We acknowledged that it was possible for the government to have a "satisfactory explanation" even though it acted on the basis of an objectively unreasonable view of the law. We held, however, that the district court's findings would not support the view that the delay occurred "without any fault on the government's part." *Id*. at 1494. We observed:

> Robins said his conclusion that the sealing requirement was not triggered until all surveillance ended was based on a misunderstanding of Stewart's oral advice on the sealing requirements. The district court made no finding as to whether Robins could have reasonably understood Stewart as telling him no sealing was required until all surveillance ended or whether it was reasonable to rely on what Stewart told him without any independent research. If a reasonably prudent lawyer could have interpreted Stewart's statements as Robins did and, under all the circumstances, reasonably relied on them without any independent investigation of the law, Robins' explanation as to the March 9, 1982 delay would be an objectively reasonable mistake of law that satisfactorily explains the government's failure to meet the statute's requirement of immediate sealing. Affirmative answers to those two questions of fact are necessary to a determination that Robins' mistake of law was objectively reasonable. …

Id. at 1494.

We ultimately remanded the *Carson* case to the district court to determine "whether Robins' explanation was satisfactory and objectively reasonable." *Id*. at 1501. In doing so, we made the following cautionary observations that are very pertinent here:

> The circumstances of this case may show that Robins had an affirmative duty to do more than rely on the advice of his superior. Arguably, a reasonable attorney would not have risked the exclusion of the tapes, evidence important to his case, without personally checking the law relating to its admission. It is not always unreasonable for an attorney to rely on a reasoned oral opinion of a supervisor, or even that of a peer with more experience in the area of law in question. Moreover, an attorney working under another lawyer on a case could not be faulted for following instructions, as opposed to advice, from the person in charge of the case or investigation. *On the other hand, we do not think that a reasonable attorney can rely on a casual conversation with a peer or supervisor concerning developing law on a complex, controversial subject if an incorrect answer is likely to preclude admission of evidence of vital importance to the case . . . .*

Id. at 1495 (emphasis supplied).

Carson, like *Ojeda Rios*, makes clear that the government bears the burden of persuading the court that its explanation is "satisfactory."

On remand from *Vastola II*, the district court allowed the government to introduce additional evidence concerning the circumstances of the surveillance and the sealings.

Based on that evidence, the district court concluded that "the actual reason for the sealing delay was that the government attorneys in charge of the surveillance believed that sealing was not required until after the entire investigation." More specifically, Assistant United States Attorney Armenakis, the decision maker in this case, had "form[ed] the same mistaken belief held by Attorney Robins in *Carson*." *United States v. Vastola*, 989 F.2d 1318, 1323 (3d Cir.1993) ("*Vastola III*").

In *Vastola III*, we, of course, held that Armenakis' view of the law was not "objectively reasonable." *Id*. at 1327. This holding was required by *Carson* and, indeed, was the law of the case in this proceeding after *Vastola II*. Those cases establish that a reasonable attorney who had reviewed the text of the statute with even a minimal degree of care could not have reached the conclusion that Armenakis did.

Since the record supported the finding that Armenakis' view of the law was the "actual reason" for the sealing delay, if that view had been objectively reasonable, that would have ended the matter in the government's favor; there would have been no occasion to inquire into the historic facts of how Armenakis reached her conclusion. This court's conclusion that her view was not objectively reasonable did not end the matter in the defendant's favor, however, because the government contended that Armenakis, even though wrong, acted reasonably under all the circumstances in reaching her erroneous conclusion. Relying on *Carson*, we held that this was a tenable position for the government to take, but concluded that the district court had not made the findings necessary to sustain it. We remanded so that the district court could "determine whether Armenakis conducted herself reasonably under the circumstances." *Id*. at 1327.

On remand from *Vastola III*, the parties stipulated that the existing record was adequate to enable the district court to make the required findings. That record consisted of a hearing at which Armenakis and her immediate supervisor, Thomas Roth, testified. Roth testified that he recalled no conversation with Armenakis regarding the sealing of the tapes in this case. While not required under his understanding of the law in the spring of 1989, if he had been asked by Armenakis, he would have counseled that "the more prudent way to do it, and the way [he] always did it [was to seal] when any particular facility was terminated." Appendix at 25.

Armenakis testified that she had had no prior experience with wire surveillance and that she received no formal training in that area with respect to this case. Her *entire* testimony with respect to how she reached her view of the law on sealing was as follows:

> Q. Did it occur to you to seal the interceptions that had commenced in March and had ceased at the end of May at Video Warehouse, One, I'll call it?
>
> Did it occur to you at any point along the way?
>
> A. Well, yes, at some point it did occur to me, yes.
>
> Q. What was your understanding at that time as to what you were required to do in terms of sealing?
>
> A. My understanding was that when the investigation was completed that you immediately sealed whatever tapes had been obtained.
>
> Q. From what did you get that understanding?
>
> A. Well, when I began working on the investigation I studied the statute and several of the annotations. I spoke with more experienced attorneys in the office on wiretaps and it was, it was my understanding, which appeared to be consistent throughout the office. A. 55–56
>
> * * * * * *
>
> Q. Did you speak to Mr. Fettweis during May or June regarding what your sealing obligations were?
>
> A. I had a conversation with someone. Frankly I don't recall who it was. It may have been Mr. Fettweis because I had asked him questions throughout the investigation. I did speak with someone concerning the issue of sealing when the agent raised it. I don't recall who it was. A. 88.
>
> * * * * * *
>
> Q. You testified that your understanding of the sealing requirement was based on part on the statute itself; is that correct?
>
> A. Yes.
>
> Q. I would like to show you defendant's exhibit A in evidence?

MR. WHITE: If I may approach the witness?

THE COURT: Yes.

By Mr. White:

Q. And ask you to look at—do you know what defendant's exhibit A is?

A. It's a portion of the statute 2518. It may be the entire statute.

Q. Yes, it is the entire statute. A. 89.

* * * * * *

Q. Have you looked at the statute—would you agree with me that it does not support your understanding that in 1985, that tapes didn't have to be sealed until the end of an entire interception where there had been change of premises and the second series of interceptions was not an extension?

A. I think the answer is, no, I would not agree with you. The statute was the same then and it was my understanding and I truly felt that it was the interpretation of other assistants that this statute meant the end of the investigation and that is what I understood to be the case.

Q. Did you rely on the interpretation of other assistants for that conclusion?

A. I felt that my beliefs were consistent with those, who I went to who had conducted wiretaps, yes.

Q. You relied on, for your conclusion, on what their perception of the statute was?

A. Not completely, but it but, in part, yes.

Q. You also relied on your own reading of the statute?

A. Yes and the annotations at the time. I don't recall exactly. A. 90–91.

* * * * * *

Q. I believe your testimony was that Agent Mahoney notified you that the tape custodian at the F.B.I. had noticed the change in the numbers and brought that to his attention?

A. Yes.

Q. You consulted with some people about what you should do?

A. Yes.

Q. After the consultation, it was indicated to you you should seal those tapes?

A. That it would probably be better to seal them.

Q. Did anyone—how many people did you consult with, do you have any idea?

A. No, I don't recall exactly.

Q. Did anybody indicate to you you better get those sealed?

A. No. A. 99.

The district court concluded that Armenakis "acted reasonably under the circumstances." While "reading and outlining the statute and reviewing the relevant annotations" could not be "considered a normally competent level of research that a reasonably prudent attorney would undertake," the district court believed the "critical aspect in this case [was] the interaction between Armenakis' own research and the authoritative confirming advice she received from other, more experienced United States Attorneys in her office." Appendix pp. 10–11.

I would conclude that the record will not support the district court's conclusions that Armenakis acted reasonably under the circumstances and, accordingly, that the government's explanation is not "satisfactory" as that term has been interpreted by this court and the Supreme Court in *Ojeda Rios*. To hold that this record suffices to carry the government's burden under *Ojeda Rios* would effectively eliminate that burden and would ill serve the privacy concerns underlying the sealing requirement of the statute.

The district court properly considered the extent of Armenakis' personal investigation into the law. The degree of effort she put into that investigation is one factor to be considered in determining whether she behaved reasonably. On the other hand, her efforts have to be evaluated in light of the fact that the text of "the statute unambiguously rules out" the conclusion she reached, as we noted in *Vastola II*, 915 F.2d at 874. For this reason, I agree with the district court that Armenakis' personal investigation of the legal issue involved will not support a finding of reasonableness.

This leaves Armenakis' testimony that she consulted others in the office whose identity she cannot now recall, at times she cannot now recall, and under circumstances that she cannot now recall. While I do not fault Armenakis for being unable to recall in December of 1990 what she did in the spring of 1985, the indefiniteness of her testimony precludes anyone from determining anything about the circumstances under which she relied upon the advice of others. One can tell nothing, for example, about what she told her allegedly more experienced peers as a factual predicate for the solicited opinion, whether she inquired over lunch or in a more structured context, whether the opinions provided by the peers were tendered immediately off the top of their heads or after reasoned analysis, and whether or not Armenakis inquired concerning the basis for their proffered views. The government's evidence simply does not permit the kind of inquiry we insisted upon in *Carson*. As a result, we do not know whether this is a case involving "a reasoned oral opinion of a . . . peer with more experience," or a mere "casual conversation." *Carson*, 969 F.2d at 1495.

In order for the government's explanation to be "satisfactory" in a situation like this, a determination that the advice received by the decision maker from others was reasonably relied upon requires far more specific support than the government supplied here. Accordingly, I would hold that the government did not carry its burden of demonstrating that Armenakis acted reasonably under all of the circumstances.

The government has argued throughout the extended history of this case that the admission of the 185 reels of West Long Branch surveillance, if error, was harmless error. It renews that contention before us and suggests that we should determine that issue without further help from the trial judge. This suggestion has some appeal because the parties would understandably like to bring this case to a close. I would decline, however, to accept this invitation. As we noted in *Vastola II*, "if the tapes should have been suppressed, the extent of the damage to the government's case could not easily be assessed." 915 F.2d at 877. The trial judge, who heard the very extensive evidence against Mr. Vastola, is in a far better position than we to assess that damage, and I would solicit his help in doing so.

I would remand with instructions to decide the harmless error issue and to grant a new trial if that issue is determined in Mr. Vastola's favor.

HWESTERN WISCONSIN WATER, INC. v. QUALITY BEVERAGES OF WISCONSIN, INC.

Wis.App., 2005.

NOTICE: UNPUBLISHED OPINION. RULE 809.23(3), RULES OF CIVIL PROCEDURE, PROVIDE THAT UNPUBLISHED OPINIONS ARE OF NO PRECEDENTIAL VALUE AND MAY NOT BE CITED EXCEPT IN LIMITED INSTANCES. (The decision of the Court is referenced in the North Western Reporter in a table captioned "Wisconsin Court of Appeals Table of Unpublished Opinions".)

Court of Appeals of Wisconsin.

WESTERN WISCONSIN WATER, INC. d/b/a La Crosse Premium Water, Plaintiff-Appellant,

v.

QUALITY BEVERAGES OF WISCONSIN, INC. d/b/a J.P. Hering Company, Crystal Canyon Bottled Water, Acuity, a Mutual Insurance Company, Defendants, Jeffrey J. Welter and Stephen Welter, Defendants-Respondents, Crystal Canyon, Inc. and Jonathan Swanson, Defendants-ThirdParty Plaintiffs,

v.

Jeff Schaitel, Michael Burns and Brian Elder, Third-Party Defendants.

Western Wisconsin Water, Inc. d/b/a La Crosse Premium Water, Plaintiff-Appellant,

v.

Quality Beverages of Wisconsin, Inc. d/b/a J.P. Hering Company, Crystal Canyon Bottled Water, Acuity, a Mutual Insurance Company, Jeffrey J. Welter and Stephen Welter, Defendants, Crystal Canyon, Inc., Defendant-Third-Party Plaintiff, Jonathan Swanson, Defendant-Third-Party Plaintiff-Respondent,

v.

Jeff Schaitel, Michael Burns and Brian Elder, Third-Party Defendants.

Nos. 03-2903, 03-3438.

Feb. 3, 2005.

Appeal from judgments of the circuit court for La Crosse County: Michael J. Mulroy, Judge. Affirmed in part; reversed in part and cause remanded with directions.

Before DEININGER, P.J., LUNDSTEN and HIGGINBOTHAM, JJ.

¶ 1DEININGER, P.J.

***1** Western Wisconsin Water, Inc., appeals two judgments that dismissed its claims against Jeffrey and Stephen Welter and Jonathon Swanson. A corporation controlled by the Welters (J.P. Hering Distributing Co., Inc.) sold the assets of a bottled water distributorship to a corporation controlled by Swanson (Crystal Canyon, Inc.). Western Wisconsin alleged that, in so doing and afterward, the Welters and Swanson committed several torts that caused Western Wisconsin to suffer damages. It contends that the circuit court erred in dismissing on summary judgment its claims against these individuals for tortious interference with a contract, fraudulent misrepresentation under WIS. STAT. § 100.18 (2003–04),[FN1] conspiracy to injure business under WIS. STAT. § 134.01 and trademark infringement.

¶ 2 We conclude that disputed issues of material fact preclude summary judgment in favor of Swanson as to whether he tortiously interfered with a contract between Western Wisconsin and J.P. Hering and as to whether Swanson was personally liable for trademark infringement. We reverse the judgment of dismissal in favor of Swanson, and with respect to these claims, we remand for further proceedings on them in the circuit court. As to the remainder of the claims against Swanson and all claims against the Welters, we affirm the judgments of dismissal.

BACKGROUND

¶ 3 Western Wisconsin Water produces and sells bottled water. J.P. Hering distributed a Western Wisconsin product-LaCrosse Premium Water. J.P. Hering had acquired the "LaCrosse Premium Water 5-gallon retail business in LaCrosse and surrounding area," consisting of some "420 rental water accounts including coolers," from Western Wisconsin in 1997. The 1997 sale agreement provided that J.P. Hering would "use only LaCrosse Premium Water in said business" and that Western Wisconsin "reserves a 'First Right of Refusal' to re-acquire the business at original purchase price based on original number of accounts in event buyer, at any time, opts to sell or 'shut down' the same."

¶ 4 The principal owner of J.P. Hering, Edward Welter, died in April 2001. His son, Jeffrey Welter, was active in a part of the J.P. Hering business and was president of the corporation, and another son, Stephen Welter, became personal representative of Edward's estate. After their father's death, Jeffrey and Stephen Welter decided to sell the bottled water distribution business to Crystal Canyon, Inc., a competitor of Western Wisconsin. The record contains a sales agreement between J.P. Hering and Crystal Canyon, Inc., dated June 20, 2001, signed by Crystal Canyon's president, Jonathan Swanson, and another officer of Crystal Canyon, although the document bears no signatures from anyone on behalf of Hering. The agreement recites that J.P. Hering was selling its assets, including "water coolers installed at customer locations," "water accounts that own their own cooler" and several "vehicles" to Crystal Canyon.

¶ 5 The asset sale transaction closed on November 2, 2001. Following the closing, Crystal Canyon leased a J.P.

FN1. All references to the Wisconsin Statutes are to the 2003–04 version unless otherwise noted.

Hering warehouse facility and took possession of J.P. Hering's trucks and inventory. In addition, many of J.P. Hering's former employees became Crystal Canyon employees. On November 8, 2001, counsel for Western Wisconsin wrote to Stephen Welter informing him of Western Wisconsin's right of first refusal and of J.P. Hering's apparent breach of contract in selling its assets to Crystal Canyon. Welter responded with a letter from his attorney asserting that he was unaware of the 1997 sale agreement until receiving the letter from Western Wisconsin's counsel. Welter further informed Western Wisconsin that J.P. Hering would be willing to honor the right of first refusal provision, but not as interpreted by Western Wisconsin with regard to price. Western Wisconsin apparently did not respond favorably to this offer.

***2** ¶ 6 After acquiring the retail distribution business, Crystal Canyon sent letters to the customers it had acquired from J.P. Hering. The letterhead displayed the names of both Crystal Canyon and J.P. Hering and the letters informed customers that Crystal Canyon and J.P. Hering had "merged." It also said that "[d]ue to several price increases and some quality issues in our current brand of water, we have decided to offer all of our customers 'Crystal Canyon Water.'" Customers were told that they would be transferred to Crystal Canyon products but that "[w]e will continue to distribute our current products for those customers who request not to be switched."

¶ 7 Western Wisconsin sued Crystal Canyon and J.P. Hering, and it later impleaded Swanson and the Welters. Crystal Canyon and J.P. Hering subsequently filed for bankruptcy relief in federal court and the instant state court action against the corporations was stayed. The bankruptcy court concluded that J.P. Hering had breached its contract with Western Wisconsin by not offering it the opportunity to exercise its right of first refusal. The court awarded Western Wisconsin some $262,000 on its claim against J.P. Hering for lost profits, mitigation costs and other damages. In the state court action against the individual defendants, the circuit court granted Swanson's and the Welters' separate summary judgment motions. Western Wisconsin appeals the judgments dismissing its claims and awarding costs to these defendants.

ANALYSIS

¶ 8 We review the granting or denial of motions for summary judgment de novo, applying the same methodology and standards as the trial court. *Green Spring Farms v. Kersten*, 136 Wis.2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate where the pleadings and evidentiary submissions show no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Maynard v. Port Publ'ns, Inc.*, 98 Wis.2d 555, 558, 297 N.W.2d 500 (1980). This court will reverse a decision granting summary judgment if the trial court incorrectly decided legal issues or if material facts are in dispute. *Coopman v. State Farm Fire & Cas. Co.*, 179 Wis.2d 548, 555, 508 N.W.2d 610 (Ct. App.1993) We, like the trial court, may not decide issues of fact but must determine only whether a material factual issue exists. *Id.* Finally, if there is doubt as to whether a genuine issue of material fact exists, we will resolve those doubts against the party moving for summary judgment. *Grams v. Boss*, 97 Wis.2d 332, 338–39, 294 N.W.2d 473 (1980)

¶ 9 The ultimate burden of demonstrating that the record on summary judgment is sufficient to warrant a trial rests on the party that has the burden of proof on the issues that are addressed by the movant for summary judgment. *Transportation Ins. Co. v. Hunzinger Const.*, 179 Wis.2d 281, 290, 507 N.W.2d 136 (Ct.App.1993). At times, a moving party may be able to demonstrate only that there are no facts in the record to support an element on which the opposing party has the burden of proof. *Id.* If that is the case, the party opposing the motion may not simply rest on its allegations or denials in the pleadings. *Moulas v. PBC Prods., Inc.*, 213 Wis.2d 406, 410–11, 570 N.W.2d 739 (Ct.App.1997) Instead, the non-moving party must point to specific items in the summary judgment record that demonstrate the presence of a genuine issue for trial. *Id.* at 411, 570 N.W.2d 739.

***3** ¶ 10 Before addressing each of Western Wisconsin's claims against Swanson and the Welters that the trial court dismissed, we note that our review was made more difficult by the appellant's failure to structure its arguments in terms of the specific causes of action it pled and the items of proof going to each of the elements it needed to establish or place in dispute in order to survive summary judgment. For example, the appellant begins its brief with a lengthy statement of the case and underlying "facts," followed by a "summary of argument" and a discussion of our well-settled standard of review. Finally, on page thirty-five of its brief, the appellant begins discussing the merits of its appeal, but the discussion first lumps several causes of action together in an effort to persuade us that the record contains sufficient evidence for a jury to find that the three individual defendants "personally participated in tortious conduct."

¶ 11 There is no cause of action, however, for generalized "tortious conduct." What we must decide is whether each of Western Wisconsin's specific claims (tortious interference with contract, conspiracy to injure business, fraudulent misrepresentation, and trademark infringement) should survive against either or both Swanson and the Welters. It is not until the fifty-first page of its brief that Western Wisconsin begins addressing its separate claims in terms of their elements and the items the parties submitted on summary judgment that relate to those elements. Even then, however, its germane arguments are interspersed with claims that the circuit court should not have considered certain, allegedly belated, arguments made by the movants in the trial court.

¶ 12 We do not include this criticism of the appellant's brief to embarrass its counsel but to point out the all too common failure on the part of appellants to properly structure

their arguments when appealing summary judgment rulings. What both we and the circuit court must decide on summary judgment is whether there needs to be a trial to resolve factual disputes that are material to the specific causes of action properly pled by a plaintiff or to any legally cognizable defenses raised by a defendant. And, because our review is de novo, whether the circuit court properly considered certain arguments or submissions is irrelevant to our independent analysis. Although the presentation of a certain amount of introductory context may be necessary to our proper understanding of the arguments which follow, appellants should succinctly explain to us why we should or should not permit specific claims to survive summary judgment based on what the law requires claimants or defendants to prove and what the record demonstrates regarding the presence or absence of disputed facts material to those requirements.

¶ 13 We now turn to Western Wisconsin's specific claims against Swanson and the Welters.

Tortious Interference With Contract

***4** ¶ 14 Western Wisconsin alleges this claim against only Swanson. The elements of tortious interference with a contract are: (1) the plaintiff had a contract or prospective contractual relationship with a third party; (2) the defendant interfered with the relationship; (3) the interference was intentional; (4) a causal connection exists between the interference and the damages; (5) the defendant was not privileged to interfere. *Dorr v. Sacred Heart Hosp.*, 228 Wis.2d 425, 456–57, 597 N.W.2d 462 (Ct.App.1999) Because Western Wisconsin would have the burden at trial of proving the first four elements, in order for the tortious interference claim to survive summary judgment, Western Wisconsin must point to evidentiary materials in the record that establish or place in dispute each of these elements. *Transportation Ins. Co.*, 179 Wis.2d at 291–92, 507 N.W.2d 136 ("[O]nce sufficient time for discovery has passed, it is the burden of the party asserting a claim on which it bears the burden of proof at trial 'to make a showing sufficient to establish the existence of an element essential to that party's case.'" (citation omitted)).

¶ 15 We conclude that the factual underpinning of the first two elements is not in dispute. Although there may have been some initial dispute between the parties as to whether the right of first refusal in the 1997 sales agreement between Western Wisconsin and J.P. Hering was valid, the bankruptcy court's decision to award Western Wisconsin breach-of-contract damages against J.P. Hering for failing to give Western Wisconsin the opportunity to re-acquire the distribution business establishes the existence of Western Wisconsin's contractual right to acquire the Hering assets. The record also demonstrates that Swanson was instrumental in arranging and effecting the transfer of J.P Hering's bottled water business assets to Crystal Canyon, thereby permitting a reasonable inference that he interfered with Western Wisconsin's contract with J.P. Hering.

¶ 16 Whether the present record establishes or places in dispute the presence of the third element, that Swanson's interference with the Western Wisconsin-J.P. Hering contract was intentional, is a closer question. Swanson asserts that he was not aware of the 1997 sales agreement between Western Wisconsin and J.P. Hering until after the closing on November 2, 2001. Western Wisconsin refutes this claim by way of an affidavit from an individual previously employed by J.P. Hering who became a Crystal Canyon and later a Western Wisconsin employee. In the affidavit, the employee avers that he met with Swanson on October 15, 2001, learned of Crystal Canyon's plan to purchase J.P. Hering and told Swanson that "there were contracts in play between Western Wisconsin and J.P. Hering and that [he] did not know the details . . . but [knew] that [Western Wisconsin] had a first right to buy the business."The employee further states in the affidavit that, at the end of the conversation, Swanson told him not to mention the meeting to anyone.

¶ 17 Under summary judgment methodology, we must accept the employee's statements as true, and thus, unless a fact finder ultimately determines otherwise, Swanson knew prior to the closing on the sale that Western Wisconsin had a contractual "first right to buy" J.P. Hering's water distribution business. *See Moulas*, 213 Wis.2d at 410, 570 N.W.2d 739 Swanson contends that the employee's averment as to what the employee told him on October 15, even if true, is insufficient to show either that he knew and understood that a valid, contractual right of first refusal existed in favor of Western Wisconsin or that he formed the intention to interfere with that contractual right. We conclude, however, that it is for a fact finder to determine not only the extent of what Swanson knew prior to November 2 but also what his intentions were based on that knowledge. If November 2, 2001, is regarded as the date Crystal Canyon purchased J.P. Hering's assets in violation of Western Wisconsin's contractual rights, a fact finder could reasonably infer that, by failing to at least make further inquiries regarding Western Wisconsin's contractual rights before going forward with the closing, Swanson's interference with those rights was intentional.

***5** ¶ 18 Swanson argues, however, that Crystal Canyon purchased J.P. Hering's business assets in June or July of 2001, when he signed the agreement on behalf of Crystal Canyon to do so. We note, however, that, at least on the record before us, no officer of J.P. Hering signed the sale agreement, and further, that the agreement called for a closing and Crystal Canyon's payment of the full purchase price by October 1, 2001, which undisputedly did not occur. We conclude that a fact finder could determine that a sale of J.P. Hering's business assets did not occur until November 2, 2001, and that Swanson knew of the Western Wisconsin contract at that time and intended to interfere with it.

¶ 19 The fourth element of tortious interference requires that "a causal connection exists between the interference and the damages." *Dorr*, 228 Wis.2d at 456, 597 N.W.2d 462

Although Western Wisconsin does not directly address this element, we have noted that the bankruptcy court awarded Western Wisconsin damages for lost profits and "mitigation expenses" stemming from J.P. Hering's breach of contract. In addition, Western Wisconsin's president testified at a temporary injunction hearing in this action as to the adverse impact the sale of J.P. Hering's business to Crystal Canyon had and would have on Western Wisconsin's business. The record does not indicate whether Western Wisconsin was made whole by any amounts it may have recovered as a result of the bankruptcy court's ruling. We conclude that the record permits a reasonable inference that Swanson's alleged interference with Western Wisconsin's contractual rights caused the company to suffer damages.

¶ 20 As to the fifth element, whether Swanson enjoyed a privilege to interfere with the Western Wisconsin-J.P. Hering contract, Swanson would bear the burden of proving the existence of such a privilege. *See Finch v. Southside Lincoln-Mercury, Inc.*, 2004 WI App 110, ¶ 38, 274 Wis.2d 719, 635 N.W.2d 154 Swanson claims that, even if he did intentionally interfere with the contract, he was simply acting as a corporate officer in the best interest of Crystal Canyon and is therefore protected from liability. The privilege on which Swanson apparently seeks to rely, however, applies when a corporate officer causes or induces a breach of contract between *his own* company and another. *See Lorenz v. Dreske*, 62 Wis.2d 273, 286–87, 214 N.W.2d 753 (1974) (citation omitted). Swanson's alleged interference was with the Western Wisconsin-J.P. Hering contract, not with a contract to which his company, Crystal Canyon, was a party.

***6** ¶ 21 To the extent that Swanson claims a broader, free-ranging privilege on the part of officers of a corporation to interfere with contracts to which their corporations are not a party, on the theory that such interference with other parties' contracts furthers the interests of the officer's corporation, we reject the claim. We find no authority for such an extensive privilege to engage in otherwise tortious conduct so long as one is furthering the interests of one's corporate employer. We agree instead with Western Wisconsin that Swanson is personally liable for any tortious acts he may have committed, regardless of whether he was acting to further Crystal Canyon's interests. *See Oxmans' Erwin Meat Co. v. Blacketer*, 86 Wis.2d 683, 692, 273 N.W.2d 285 (1979) ("A corporate agent cannot shield himself from personal liability for a tort he personally commits or participates in by hiding behind the corporate entity; if he is shown to have been acting for the corporation, the corporation also may be liable, but the individual is not thereby relieved of his own responsibility.").

¶ 22 Finally, Swanson also relies on *Cudd v. Crownhart*, 122 Wis.2d 656, 364 N.W.2d 158 (Ct.App.1985), which he claims stands for the proposition that a party has a right to protect what he believes are his legal interests and cannot be liable for his actions if his belief is ultimately determined to be incorrect. Swanson points to the fact that the June 2001 J.P. Hering-Crystal Canyon sale agreement provided that Hering warranted against any "demands or claims that would mature or adversely effect (sic) the assets conveyed" and that Hering further agreed to indemnify Crystal Canyon against "all claims . . . with respect to the business assets conveyed." He asserts that, based on the warranty and indemnification provisions, he believed J.P. Hering had the right to sell its assets to Crystal Canyon, and he cannot, therefore, be liable for closing on the sale and operating the business, even though it later turned out that Western Wisconsin had a valid contractual claim to the Hering assets.

¶ 23 We reject this argument as well. First, as we have explained, what Swanson knew regarding Western Wisconsin's contractual right to acquire the J.P. Hering business assets and what he intended in light of that knowledge are matters of disputed fact and inference. The fact that J.P. Hering may have warranted good title to the assets and a right to convey them, and may also have agreed to indemnify Crystal Canyon against future claims regarding the assets conveyed, does not logically negate what Swanson knew or intended when he caused Crystal Canyon to go forward with the sale on November 2, 2001.

*7 ¶ 24 Second, Crystal Canyon arguably had no rights to the assets in question until on or after the November 2 closing. (Recall, the record does not reflect that a representative of J.P. Hering ever signed the June agreement, and the agreement called for a closing on or before October 1, which did not happen.) Put another way, until Crystal Canyon actually consummated the purchase, it had no legal interest in the Hering assets to protect. Although Western Wisconsin cites some of Swanson's alleged post-closing actions as supporting its other causes of action, its tortious interference claim focuses on Swanson's role in Crystal Canyon's acquisition of the J.P. Hering assets. Swanson cannot claim a privilege for protecting Crystal Canyon's legal rights in assets before it acquired those rights.

¶ 25 We thus conclude that the trial court erred in dis missing Western Wisconsin's tortious interference with contract claim against Swanson.

Conspiracy to Injure Business Reputation Under WIS. STAT. § 134.01

¶ 26WISCONSIN STAT. § 134.01 provides as follows:

Any 2 or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of willfully or maliciously injuring another in his or her reputation, trade, business or profession by any means whatever . . . shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding $500.

A plaintiff must prove four things in order to prevail in a civil action for damages alleging a violation of § 134.01:(1) the defendants acted together; (2) the defendants acted with a common purpose to injure the plaintiff's business; (3) the defendants acted maliciously in carrying out the common purpose; (4) the acts of the defendants financially injured the plaintiff. WIS JI-CIVIL 2820.

¶ 27 As to the requirement that the defendants acted "maliciously," the jury instructions explain that the defendants must be shown to have acted "with a malicious motive. For conduct to be malicious, it must be intended to cause harm for harm's sake. The harm must be an end in itself, and not merely a means toward some legitimate end."*Id*.;*Maleki v. Fine-Lando Clinic Chartered, S.C.*, 162 Wis.2d 73, 87–88, 469 N.W.2d 629 (1991). Moreover, in order to prove a conspiracy, a plaintiff must demonstrate more than "suspicion or conjecture that there was a conspiracy."*Id*. at 84, 469 N.W.2d 629 If circumstantial evidence supports equal inferences of lawful action and unlawful action, then the claim of conspiracy is not proven and should not be submitted to the jury.*Id*. at 85, 469 N.W.2d 629 (citation omitted).

¶ 28 As evidence of Swanson's and the Welters' malice toward Western Wisconsin points to the fact that they went ahead with the sale of J.P. Hering to Crystal Canyon despite being told by a J.P. Hering employee that Western Wisconsin had a contractual right of first refusal to re-acquire the business. Western Wisconsin also cites the defendants' alleged "desire for secrecy" and an alleged statement by "Crystal Canyon's owners" that they intended to bring Western Wisconsin "to its knees" as additional damning evidence from which a jury could reasonably infer malice. Finally, Western Wisconsin asserts that the defendants' failure to "cease and desist from the illegal conduct in which they were engaged," after receiving a letter from its counsel demanding that they do so, is additional evidence of the defendants' malice. We disagree that these facts, if found to be true, permit a reasonable inference that the defendants intended to harm Western Wisconsin's business "for the sake of the harm as an end in itself."*See Maleki*, 162 Wis.2d at 88, 469 N.W.2d 629.

***8** ¶ 29 At best, the evidence Western Wisconsin cites shows that the defendants pursued their mutually advantageous transaction knowing both that Western Wisconsin claimed a superior right to acquire the J.P. Hering assets and that Crystal Canyon would likely obtain a significant competitive advantage over Western Wisconsin in the LaCrosse bottled water market by acquiring those assets. Willful acts are not sufficient to show a violation of WIS. STAT. § 134.01 absent a showing of malicious motive. *See id*. at 91 n. 10,469 N.W.2d 629. Moreover, a "purpose . . . to improve one's competitive advantage does not run afoul of conspiracy laws if there is not a malicious motive."*Id*. at 87 n. 9, 469 N.W.2d 629. Finally, "[t]here can be no conspiracy if malice is not found in respect to both conspirators."*Id*. at 86, 469 N.W.2d 629. Thus, even if Swanson was out to bring Western Wisconsin "to its knees," and that this alleged aim can be interpreted as something more than a desire to surpass a business competitor, there can be no recovery for a violation of WIS. STAT. § 134.01 unless a jury could find that the Welters, too, intended by their dealings with Swanson to harm Western Wisconsin "for harm's sake." Western Wisconsin has pointed to nothing in the record from which a jury could infer such a motive on the part of the Welters.

¶ 30 We conclude that the trial court did not err in dismissing Western Wisconsin's claim under WIS. STAT. § 134.01 against these three defendants.

Fraudulent Misrepresentation Under WIS. STAT. § 100.18

¶ 31 In order to recover on a claim of fraudulent misrepresentation under WIS. STAT. § 100.18, Western Wisconsin must show that the defendants: (1) made a statement to the public concerning the sale or distribution of bottled water; (2) the statement contained an assertion or representation that was false, deceptive or misleading; and (3) Western Wisconsin suffered pecuniary loss as a result of the false assertion. WIS JI-CIVIL 2418; *see Tietsworth v. Harley-Davidson, Inc*., 2003 WI App 75, ¶ 21, 261 Wis.2d 755, 661 N.W.2d 450[FN2] As to the first element, there is no dispute that Crystal Canyon sent a letter concerning the sale or distribution of bottled water to the customers it acquired from J.P. Hering, and that the letter bore the names of both Crystal Canyon and J.P. Hering. For present purposes, we accept without deciding that a fact finder might reasonably infer from the record that Swanson, and perhaps the Welters as well, were responsible for sending the letter and for its contents. We also accept on the same basis that one could reasonably infer from the record that Western Wisconsin suffered pecuniary loss on account of one or more statements in the letter regarding its product, LaCrosse Premium water.

¶ 32 Our disposition thus turns on the second element, whether a statement in the Crystal Canyon letter was false, deceptive or misleading. The portion of the letter to "valued customers" to which Western Wisconsin objects reads as follows: "Due to several price increases and some quality issues in our current brand of water, we have decided to offer all of our customers 'Crystal Canyon Water.'" Significantly, Western Wisconsin does *not* challenge the trial court's conclusion that the record establishes that "LaCrosse Premium Water had quality issues."Rather, Western Wisconsin contends that the statement is actionable because it cites quality issues as the reason Crystal Canyon decided to offer its own water to its new customers, when the real reasons were that it would not be able to obtain the Western Wisconsin product after its initial supply acquired from J.P. Hering ran out and because Crystal Canyon quite simply wanted to sell its own water to its new customers.

FN2.Many if not most claims under WIS. STAT. § 100.18 involve a plaintiff who was fraudulently induced to purchase a product from or enter into a contract with the defendant as a result of false or deceptive statements the defendant communicated to the public. It appears, however, that the statute also permits an action brought by a competitor of the defendant whose sales are adversely affected by false or misleading advertisements regarding the competitor or its product. *See Tim Torres Enters., Inc. v. Linscott*, 142 Wis.2d 56, 64–65, 416 N.W.2d 670 (Ct. App.1987) (upholding jury verdict in favor of one seller of frozen custard against another who published untrue statements that caused the plaintiff seller to suffer pecuniary loss).

***9** ¶ 33 We conclude that the record on summary judgment does not establish or place in dispute whether the cited statement was false, deceptive or misleading. Silence or nondisclosure of facts is not sufficient to support a claim under WIS. STAT. § 100.18; an affirmative misrepresentation is required. *Tietsworth*, 270 Wis.2d 146, ¶ 40, 677 N.W.2d 233. The fact that Crystal Canyon may well have had other, undisclosed reasons for urging its new customers to switch to its own brand of water is thus not actionable under WIS. STAT. § 100.18. Western Wisconsin's claim therefore rests solely on its being able to establish that the "quality issues" regarding its product, which it concedes existed, played no part in Crystal Canyon's decision to promote its own product to its new customers. We conclude that, even if this purported "fact" could be said to be a reasonable inference from the present record, instead of mere conjecture, a seller's statement of its reasons for conducting a particular sales promotion is not actionable under § 100.18 unless those reasons themselves contain false assertions of fact.

¶ 34 The supreme court concluded in *State v. American TV & Appliance of Madison, Inc.*, 146 Wis.2d 292, 430 N.W.2d 709 (1988), that the use of the words "clearance" and "closeout" "cannot form the basis of a claim under sec. 100.18(1)" *Id.* at 302,430 N.W.2d 709. Although this court had concluded that the seller's depiction of a sale as a "closeout sale" was false or deceptive because the seller had ordered merchandise specifically for the sale, the supreme court disagreed, concluding that the advertisement's suggestion that it had stock on hand that it wished to sell during the sale made irrelevant the timing of its acquisition of the merchandise. *Id.* at 302–03, 430 N.W.2d 709. Similarly, we conclude here that, so long as it was true that LaCrosse Premium water had "quality issues," which Western Wisconsin has not disputed, how big a role, if any, that fact played in Crystal Canyon's decision to encourage its customers to switch over to its own water is immaterial for purposes of the analysis under § 100.18.[FN3]

¶ 35 Under the heading in its brief asserting the defendants' generalized "tortious conduct," Western Wisconsin makes additional accusations against Swanson and the Welters that it claims find support in the record. Western Wisconsin may have intended to argue that some of these other alleged actions also support its fraudulent misrepresentation claim. For example, Western Wisconsin claims that Swanson, without authority to do so, allowed or authorized Crystal Canyon employees to pass themselves off as representatives of Western Wisconsin by wearing uniforms and driving trucks bearing the LaCrosse Premium Water logo. Western Wisconsin also claims that Swanson allowed or authorized Crystal Canyon to place misleading listings in local phone books, causing persons seeking to obtain "LaCrosse Premium Water" to reach Crystal Canyon instead of Western Wisconsin. Western Wisconsin also implicates the Welters in these actions, alleging that they acted as though they still owned J.P. Hering after November 2, 2001, and thus were in a position to prevent Swanson's "tortious conduct." Although some of these alleged activities may support a trademark infringement claim, which we discuss below, we conclude that they are not the type of affirmative misrepresentations of fact that are required to support a claim under WIS. STAT. § 100.18. *See Tietsworth*, 270 Wis.2d 146, ¶ 40, 677 N.W.2d 233

***10** ¶ 36 We conclude that the circuit court did not err in dismissing Western Wisconsin's claim under WIS. STAT. § 100.18 because Western Wisconsin has not established or placed in dispute that Swanson or the Welters made untrue statements to the public that are actionable under the statute.

Trademark Infringement

¶ 37 Western Wisconsin's complaint alleges a cause of action against all three defendants for "common law trademark infringement" based on Crystal Canyon's use of the "trademark 'LaCrosse Premium Water' on trucks, uniforms, and products" following the transfer of J.P. Hering's assets to Crystal Canyon. A difficulty with Western Wisconsin's argument on appeal, however, is that, instead of presenting the elements of this claim in its opening brief and citing the evidentiary submissions that support them, it attacks only Swanson's trial court argument invoking the "first sale" doctrine. We nonetheless conclude that, on the present record, Westerns Wisconsin's trademark infringement claim against Swanson survives summary judgment but its claim against the Welters does not.

¶ 38 We explained in *Madison Reprographics v. Cook's Reprographics*, 203 Wis.2d 226, 552 N.W.2d 440 (Ct. App.1996), that in order to prevail on a cause of action for common law trademark infringement, a plaintiff "must show that a designation meets the definition of a trademark or trade name and that the defendant's use of a similar designation is likely to cause confusion." *Id.* at 234, 552 N.W.2d 440. "A trade name is a word or other designation . . . that is used in a manner that identifies that business or enterprise and distinguishes it from the business or enterprise of others." *Id.* at 234, 552 N.W.2d 440. Neither Swanson nor the Welters dispute that Western Wisconsin's "LaCrosse Premium Water" brand is a trademark or trade name, and our inquiry thus turns to whether the record shows or places in dispute that Crystal Canyon's use of it caused its customers to be confused into believing that Crystal Canyon was an authorized distributor of LaCrosse Premium Water.

FN3.In its reply brief, Western Wisconsin argues for the first time that other parts of the "valued customer" letter were deceptive or misleading within the meaning of WIS. STAT. § 100.18. For example, they cite the joint Crystal Canyon-J.P. Hering letterhead, the reference to having "merged" and the offer to continue to distribute "our current products" as deceiving customers into believing that a true merger had occurred and that Crystal Canyon was authorized to "continue" to distribute LaCrosse Premium water, which, of course, it was not. We generally do not address arguments first raised in a reply brief and decline to do so here. *See Swartout v. Bilsie*, 100 Wis.2d 342, 346 n. 2, 302 N.W.2d 508 (Ct.App.1981)

¶ 39 The factors involved in proving the likelihood of confusion are: (1) the distinctiveness or strength of plaintiff's trademark, (2) similarity of the defendant's designation to plaintiff's trademark, (3) similarity and proximity of the goods offered by plaintiff and defendant, (4) overlap of marketing channels, (5) degree of care likely to be exercised by consumers in selecting the product, (6) evidence of actual confusion, and (7) defendant's intent when selecting its designation *Id*. at 236–37, 552 N.W.2d 440. The record establishes that, following its acquisition of J.P. Hering's assets, Crystal Canyon used the LaCrosse Premium Water logo, without Western Wisconsin's authority, on driver uniforms and delivery trucks. Furthermore, affidavits from Western Wisconsin and Crystal Canyon customers aver that they were confused as to whether Crystal Canyon was an authorized distributor of LaCrosse Premium Water. There also appears to be no dispute as to the distinctiveness of the trade name, the similarity of the goods purveyed, the proximity to Western Wisconsin's market area or the overlap in marketing channels. Finally, the record indicates that Crystal Canyon employees told customers, and the "valued customer" letter implied, that Crystal Canyon would and could continue to distribute LaCrosse Premium Water. We are thus satisfied that the "use . . . likely to cause confusion" element is sufficiently established for purposes of surviving summary judgment.

***11** ¶ 40 As we have noted, however, Crystal Canyon is no longer a defendant in this action. The dispositive question thus becomes whether the record demonstrates or places in dispute whether Swanson or the Welters were individually culpable for Crystal Canyon's wrongful use of the LaCrosse Premium Water trade name. Swanson, citing FLETCHER'S CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS (perm.ed., Supp.2002), acknowledges that corporate officers can be held individually liable for acts of trademark infringement when a corporation's acts were "instigated and controlled by them," or if they "induced" the infringement. He claims, however, that the record is devoid of any evidence that he personally authorized the wrongful actions or that he knew (or should have known) that his own actions would induce trademark infringement. We agree with Western Wisconsin, however, that Swanson's admitted knowledge that Crystal Canyon's drivers and trucks were using the LaCrosse Premium Water logo, as well as his involvement in the preparation and distribution of the 'valued customer' letter, are sufficient to permit a reasonable inference that Swanson knew or should have known that his own actions and those of the employees he supervised would cause water customers to be confused regarding Crystal Canyon's status as a distributor of LaCrosse Premium water.

¶ 41 As for the "first sale doctrine" on which Swanson seeks to rely, the doctrine precludes liability for trademark infringement on the part of one who, although not an authorized seller, does nothing more than to resell a product under the producer's trademark. *See Sebastian Int'l, Inc. v. Longs Drug Stores Corp*., 53 F.3d 1073, 1074 (9th Cir.1995). Swanson claims that, because Crystal Canyon simply resold LaCrosse Premium Water that it acquired from J.P. Hering, he cannot be found liable for infringing Western Wisconsin's trade name. If Crystal Canyon had done nothing more than resell the product it acquired in the asset purchase, we might accept Swanson's contention. We conclude, however, that the use of the LaCrosse Premium Water logo on its drivers' uniforms and trucks, the suggestion in the "valued customer" letter that it could continue to provide its "current product," and evidence that Crystal Canyon may have refilled some LaCrosse Premium Water bottles it acquired from J.P. Hering with its own water go beyond the simple stocking and reselling of LaCrosse Premium Water. *See id*. at 1076 (noting that conduct going beyond "merely stocking and reselling genuine trademarked products" (e.g., the use of a trademark in telephone directory listings and advertisements, or other use of it "in a manner likely to cause the public to believe the reseller was part of the producer's authorized sales force or one of its franchisees") may be "sufficient to support a cause of action for infringement").

¶ 42 As for the Welters, Western Wisconsin asserts that they may be found liable for Crystal Canyon's alleged trademark infringement because they acted as if they still owned J.P. Hering by offering to sell its assets to Western Wisconsin after the November 2, 2001 closing. Western Wisconsin points to nothing in the record, however, to indicate that the Welters' offer was anything other than an attempt, apparently with Crystal Canyon's consent, to resolve Western Wisconsin's breach of contract claim. That is, there is no evidence in the record that the Welters exercised any day-to-day control over the former J.P. Hering assets after Crystal Canyon took possession of them.

***12** ¶ 43 Western Wisconsin also cites the fact that J.P. Hering purchased a quantity of LaCrosse Premium Water just before the closing and transferred it to Crystal Canyon as proof, in Western Wisconsin's view, that the Welters knew that the product would be "improperly sold to customers of Crystal Canyon." We conclude, however, that the record establishes that the Welters played no role in Crystal Canyon's activities after the closing. They were simply in no position to direct, authorize or control how Crystal Canyon conducted its business. As we have noted, the mere sale by J.P. Hering of the trademarked water to Crystal Canyon, or by Crystal Canyon to its customers, standing alone, did not constitute trademark infringement, and we reject Western Wisconsin's contention that, on this record, the Welters could have or should have prevented Crystal Canyon from using the LaCrosse Premium Water trade name in the manner it did after acquiring the J.P. Hering assets.

¶ 44 We thus conclude that the trial court erred in dismissing Western Wisconsin's trademark infringement claim against Swanson but did not err in dismissing the claim against the Welters.

CONCLUSION

¶ 45 For the reasons discussed above, we affirm the judgment entered in favor of the Welters, and we reverse the judgment in favor of Swanson. As to Swanson, we affirm the circuit court's dismissal of Western Wisconsin's fraudulent misrepresentation claim under WIS. STAT. § 100.18 and its claim for conspiracy to injure business under WIS. STAT. § 134.01. We remand to the circuit court for further proceedings on Western Wisconsin's claims against Swanson for tortious interference with contract and trademark infringement. The Welters are entitled to costs under WIS. STAT. RULE 809.25(1)(a)1, but we allow no costs to either Swanson or Western Wisconsin. *See* RULE 809.25(1)(a)5.

Judgments affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.

Wis.App.,2005.

Western Wisconsin Water, Inc. v. Quality Beverages of Wisconsin, Inc.

280 Wis.2d 556, 694 N.W.2d 509, 2005 WL 240938 (Wis.App.), 2005 WI App 59

APPENDIX L

Wiretapping Statutes

The following are relevant federal wiretapping statutes (sections 2510, 2511, 2515, and 2520 of title 18 of the United States Code) found when researching the Jennifer Weiss problem:

Title 18 United States Code

§ 2510. Definitions

As used in this chapter—

(**1**) "wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce;

(**2**) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication;

(**3**) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(**4**) "intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device;

(**5**) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire, oral, or electronic communication other than—

(**a**) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a

provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business; or (ii) being used by a provider of wire or electronic communication service in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents," when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire, oral, or electronic communications;

(10) "communication common carrier" has the meaning given that term in section 3 of the Communications Act of 1934;

(11) "aggrieved person" means a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed;

(12) "electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include—

(A) any wire or oral communication;

(B) any communication made through a tone-only paging device;

(C) any communication from a tracking device (as defined in section 3117 of this title); or

(D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds;

(13) "user" means any person or entity who—

(A) uses an electronic communication service; and

(B) is duly authorized by the provider of such service to engage in such use;

(**14**) "electronic communications system" means any wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of wire or electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications;

(**15**) "electronic communication service" means any service which provides to users thereof the ability to send or receive wire or electronic communications;

(**16**) "readily accessible to the general public" means, with respect to a radio communication, that such communication is not—

(**A**) scrambled or encrypted;

(**B**) transmitted using modulation techniques whose essential parameters have been withheld from the public with the intention of preserving the privacy of such communication;

(**C**) carried on a subcarrier or other signal subsidiary to a radio transmission;

(**D**) transmitted over a communication system provided by a common carrier, unless the communication is a tone only paging system communication; or

(**E**) transmitted on frequencies allocated under part 25, subpart D, E, or F of part 74, or part 94 of the Rules of the Federal Communications Commission, unless, in the case of a communication transmitted on a frequency allocated under part 74 that is not exclusively allocated to broadcast auxiliary services, the communication is a two-way voice communication by radio;

(**17**) "electronic storage" means—

(**A**) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and

(**B**) any storage of such communication by an electronic communication service for purposes of backup protection of such communication;

(**18**) "aural transfer" means a transfer containing the human voice at any point between and including the point of origin and the point of reception;

(**19**) "foreign intelligence information," for purposes of section 2517(6) of this title, means—

(**A**) information, whether or not concerning a United States person, that relates to the ability of the United States to protect against—

(**i**) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(**ii**) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

(**iii**) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

(**B**) information, whether or not concerning a United States person, with respect to a foreign power or foreign territory that relates to—

(**i**) the national defense or the security of the United States; or

(**ii**) the conduct of the foreign affairs of the United States;

(**20**) "protected computer" has the meaning set forth in section 1030; and

(21) "computer trespasser"—

(A) means a person who accesses a protected computer without authorization and thus has no reasonable expectation of privacy in any communication transmitted to, through, or from the protected computer; and

(B) does not include a person known by the owner or operator of the protected computer to have an existing contractual relationship with the owner or operator of the protected computer for access to all or part of the protected computer.

§ 2511. Interception and disclosure of wire, oral, or electronic communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(e) (i) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, intercepted by

means authorized by sections 2511(2)(a)(ii), 2511(2)(b)-(c), 2511(2)(e), 2516, and 2518 of this chapter, (ii) knowing or having reason to know that the information was obtained through the interception of such a communication in connection with a criminal investigation, (iii) having obtained or received the information in connection with a criminal investigation, and (iv) with intent to improperly obstruct, impede, or interfere with a duly authorized criminal investigation, shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

(2)(a)(i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire or electronic communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service, except that a provider of wire communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) Notwithstanding any other law, providers of wire or electronic communication service, their officers, employees, and agents, landlords, custodians, or other persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications or to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, if such provider, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with—

(A) a court order directing such assistance or a court order pursuant to section 704 of the Foreign Intelligence Surveillance Act of 1978 signed by the authorizing judge, or

(B) a certification in writing by a person specified in section 2518(7) of this title or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required,

setting forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specifying the information, facilities, or technical assistance required. No provider of wire or electronic communication service, officer, employee, or agent thereof, or landlord, custodian, or other specified person shall disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the person has been furnished a court order or certification under this chapter, except as may otherwise be required by legal process and then only after prior notification to the Attorney General or to the principal prosecuting attorney of a State or any political subdivision of a State, as may be appropriate. Any such disclosure shall render such person liable for the civil damages provided for in section 2520. No cause of action

shall lie in any court against any provider of wire or electronic communication service, its officers, employees, or agents, landlord, custodian, or other specified person for providing information, facilities, or assistance in accordance with the terms of a court order, statutory authorization, or certification under this chapter.

(iii) If a certification under subparagraph (ii)(B) for assistance to obtain foreign intelligence information is based on statutory authority, the certification shall identify the specific statutory provision and shall certify that the statutory requirements have been met.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of Chapter 5 of title 47 of the United States Code, to intercept a wire or electronic communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

(e) Notwithstanding any other provision of this title or section 705 or 706 of the Communications Act of 1934, it shall not be unlawful for an officer, employee, or agent of the United States in the normal course of his official duty to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, as authorized by that Act.

(f) Nothing contained in this chapter or Chapter 121 or 206 of this title, or section 705 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, and procedures in this chapter or chapter 121 and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted.

(g) It shall not be unlawful under this chapter or Chapter 121 of this title for any person—

(i) to intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public;

(ii) to intercept any radio communication which is transmitted—

(I) by any station for the use of the general public, or that relates to ships, aircraft, vehicles, or persons in distress;

(II) by any governmental, law enforcement, civil defense, private land mobile, or public safety communications system, including police and fire, readily accessible to the general public;

(III) by a station operating on an authorized frequency within the bands allocated to the amateur, citizens band, or general mobile radio services; or

(IV) by any marine or aeronautical communications system;

(iii) to engage in any conduct which—

(I) is prohibited by section 633 of the Communications Act of 1934; or

(II) is excepted from the application of section 705(a) of the Communications Act of 1934 by section 705(b) of that Act;

(iv) to intercept any wire or electronic communication the transmission of which is causing harmful interference to any lawfully operating station or consumer electronic equipment, to the extent necessary to identify the source of such interference; or

(v) for other users of the same frequency to intercept any radio communication made through a system that utilizes frequencies monitored by individuals engaged in the provision or the use of such system, if such communication is not scrambled or encrypted.

(h) It shall not be unlawful under this chapter—

(i) to use a pen register or a trap and trace device (as those terms are defined for the purposes of Chapter 206 (relating to pen registers and trap and trace devices) of this title); or

(ii) for a provider of electronic communication service to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful or abusive use of such service.

(i) It shall not be unlawful under this chapter for a person acting under color of law to intercept the wire or electronic communications of a computer trespasser transmitted to, through, or from the protected computer, if—

(I) the owner or operator of the protected computer authorizes the interception of the computer trespasser's communications on the protected computer;

(II) the person acting under color of law is lawfully engaged in an investigation;

(III) the person acting under color of law has reasonable grounds to believe that the contents of the computer trespasser's communications will be relevant to the investigation; and

(IV) such interception does not acquire communications other than those transmitted to or from the computer trespasser.

(3) (a) Except as provided in paragraph (b) of this subsection, a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such person or entity, or an agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

(b) A person or entity providing electronic communication service to the public may divulge the contents of any such communication—

(i) as otherwise authorized in section 2511(2)(a) or 2517 of this title;

(ii) with the lawful consent of the originator or any addressee or intended recipient of such communication;

(iii) to a person employed or authorized, or whose facilities are used, to forward such communication to its destination; or

(iv) which were inadvertently obtained by the service provider and which appear to pertain to the commission of a crime, if such divulgence is made to a law enforcement agency.

(4) (a) Except as provided in paragraph (b) of this subsection or in subsection (5), whoever violates subsection (1) of this section shall be fined under this title or imprisoned not more than five years, or both.

(b) Conduct otherwise an offense under this subsection that consists of or relates to the interception of a satellite transmission that is not encrypted or scrambled and that is transmitted—

(i) to a broadcasting station for purposes of retransmission to the general public; or

(ii) as an audio subcarrier intended for redistribution to facilities open to the public, but not including data transmissions or telephone calls,

is not an offense under this subsection unless the conduct is for the purposes of direct or indirect commercial advantage or private financial gain.

[(c) Redesignated (b)]

(5) (a)(i) If the communication is—

(A) a private satellite video communication that is not scrambled or encrypted and the conduct in violation of this chapter is the private viewing of that communication and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain; or

(B) a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the

Federal Communications Commission that is not scrambled or encrypted and the conduct in violation of this chapter is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain,

then the person who engages in such conduct shall be subject to suit by the Federal Government in a court of competent jurisdiction.

(ii) In an action under this subsection—

(A) if the violation of this chapter is a first offense for the person under paragraph (a) of subsection (4) and such person has not been found liable in a civil action under section 2520 of this title, the Federal Government shall be entitled to appropriate injunctive relief; and

(B) if the violation of this chapter is a second or subsequent offense under paragraph (a) of subsection (4) or such person has been found liable in any prior civil action under section 2520, the person shall be subject to a mandatory $500 civil fine.

(b) The court may use any means within its authority to enforce an injunction issued under paragraph (ii)(A), and shall impose a civil fine of not less than $500 for each violation of such an injunction.

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

§ 2520. Recovery of civil damages authorized

(a) In general.—Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.

(b) Relief.—In an action under this section, appropriate relief includes—

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases; and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) Computation of damages.—(1) In an action under this section, if the conduct in violation of this chapter is the private viewing of a private satellite video communication that is not scrambled or encrypted or if the communication is a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the court shall assess damages as follows:

(A) If the person who engaged in that conduct has not previously been enjoined under section 2511(5) and has not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $50 and not more than $500.

(B) If, on one prior occasion, the person who engaged in that conduct has been enjoined under section 2511(5) or has been found liable in a civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $100 and not more than $1000.

(2) In any other action under this section, the court may assess as damages whichever is the greater of—

(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

(d) **Defense.**—A good faith reliance on—

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) or 2511(2)(i) of this title permitted the conduct complained of;

is a complete defense against any civil or criminal action brought under this chapter or any other law.

(e) **Limitation.**—A civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

(f) **Administrative discipline.**—If a court or appropriate department or agency determines that the United States or any of its departments or agencies has violated any provision of this chapter, and the court or appropriate department or agency finds that the circumstances surrounding the violation raise serious questions about whether or not an officer or employee of the United States acted willfully or intentionally with respect to the violation, the department or agency shall, upon receipt of a true and correct copy of the decision and findings of the court or appropriate department or agency promptly initiate a proceeding to determine whether disciplinary action against the officer or employee is warranted. If the head of the department or agency involved determines that disciplinary action is not warranted, he or she shall notify the Inspector General with jurisdiction over the department or agency concerned and shall provide the Inspector General with the reasons for such determination.

(g) **Improper disclosure is violation**—Any willful disclosure or use by an investigative or law enforcement officer or governmental entity of information beyond the extent permitted by section 2517 is a violation of this chapter for purposes of section 2520(a).

APPENDIX M

Background Information on Search and Seizure

This appendix contains an excerpt from *Criminal Law and Procedure* by Dr. Daniel Hall and provides background information on search and seizure and the exclusionary rule. This information may be helpful in understanding the George Peak search and seizure problem and other search and seizure material in this book.

INTRODUCTION

This section of the appendix[1] gives you some background on search and seizure and the exclusionary rule. It should be of help in understanding search and seizure material in this book.

THE FOURTH AMENDMENT

Searches, seizures, and arrests are vital aspects of law enforcement. Because they involve significant invasions of individual liberties, limits on their use can be found in the constitutions, statutes, and other laws of the states and federal government.

The most important limitation is the fourth amendment to the United States Constitution, which reads:

> The right of the people to be secure in their persons, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Two remedies are available to the defendant whose fourth amendment rights have been violated by the government. First, in a criminal prosecution, the defendant may invoke the exclusionary rule. Second, he or she may have a civil cause of action against the offending officer under a rights statute or for a "constitutional tort."[2]

The concepts of reasonable expectation of privacy and probable cause are important throughout the law of searches, seizures, and arrests. Accordingly, they will be examined first. The Supreme Court has defined a *search* as occurring "when an expectation in privacy that society is prepared to consider reasonable is infringed" and a *seizure* as a "meaningful interference with an individual's possessory interest" in property.[3]

PROBABLE CAUSE DEFINED

Probable cause is a phrase describing the minimum amount of evidence necessary before a search, seizure, or arrest is proper. Whether the issue concerns a search and seizure or an arrest, the same quantity of evidence is necessary to establish probable cause.

There is no one universal definition of probable cause. In fact, the definition of probable cause differs depending on the context. In all situations, it is more than mere suspicion and less than the standard required to prove a defendant guilty at trial (beyond a reasonable doubt). As the Supreme Court has expressed, probable cause is present when the trustworthy facts within the law enforcement officer's knowledge are sufficient in themselves to justify a "person of reasonable caution" in the belief that seizable property would be found or that the person to be arrested committed the crime in question.[4]

SEARCHES AND SEIZURES

THE WARRANT REQUIREMENT

Depending upon the circumstances, a search may be conducted with or without a warrant. The Supreme Court has expressed a strong preference for the use of warrants, when possible, over warrantless actions.[5] The warrant preference serves an important purpose: it protects citizens from overzealous law enforcement practices.

EXCEPTIONS TO THE SEARCH WARRANT REQUIREMENT

Although the general rule is that a warrant must be obtained before a search may be undertaken, there are many exceptions. The exceptions to the warrant requirement are sometimes referred to as *exigent circumstances*.

CONSENT SEARCHES

Voluntary consent to a search obviates the warrant requirement. A person may consent to a search of his or her person or property. The scope of the search is limited by the person consenting. Absent special circumstances, a consent to search may be terminated at any time by the person giving consent.

A person's consent must be voluntary. All of the circumstances surrounding the consent are examined to determine whether the consent was voluntary. There is no requirement that police officers inform a person that he or she may refuse to consent.[6]

Of course, a defendant who is threatened or coerced into consenting has not voluntarily consented. It is not coercion for a person to be told that, if he or she does not consent, a warrant will be obtained authorizing the desired search. It is coercion for officers to tell a person that, if he or she does not consent to a search, a warrant will be obtained and the officers will ransack the person's home.[7]

MOTOR VEHICLES

Privacy in automobiles is protected by the Fourth Amendment. However, the Supreme Court has not extended full Fourth Amendment protection to the occupants of automobiles. The Court's rationale for decreased protection is twofold. First, because of the mobile nature of automobiles, evidence can disappear quickly. Second, automobiles are used on the public roads where they and their occupants are visible to the public; thus, an occupant of an automobile has a lesser expectation of privacy than does the occupant of a home.

Of course, a motorist may be stopped if an officer has probable cause. In addition, a *Terry* stop may be made if there is reasonable suspicion. As discussed earlier, *Terry* stops must be limited in duration and reasonable in method, and a frisk of the occupant is permissible only if the officer possesses a reasonable belief that the individual may have a weapon.

Where the Fourth Amendment's mandates have been reduced is in the context of the warrant requirement. In *Carroll v. United States*, 267 U.S. 132 (1925), it was announced that a warrantless search of a vehicle stopped on a public road is reasonable, provided the officer has probable cause to believe that an object subject to seizure will be found in the vehicle. The existence of probable cause is the key to the search. This authority has been extended to permit the search to continue after the vehicle is impounded.

The sticky question in this area is the scope of the search. Generally, an officer is given the scope that a magistrate would have if a warrant were sought. Thus, if an officer has probable cause to believe that a shotgun used in a crime will be found in a car, a search of the glove box is improper. The opposite would be true if the item sought was a piece of jewelry, such as a ring.

Officers may also search closed items found in the vehicle, provided probable cause exists to believe an item sought may be contained therein. The same rules apply as previously discussed. Rifling through a suitcase found in a car in search of a stolen painting that is larger than the suitcase is unreasonable and violative of the Fourth Amendment. Once the sought-after item is found, the search must cease.

An automobile may be searched incident to the arrest of its driver, but that search is also limited. If a motorist is arrested and removed from a vehicle, but there is no independent probable cause to search the vehicle, items contained therein may not be opened. This is true even if the vehicle is impounded and an inventory is performed. The inventory should note the luggage found, but no effort to discover its contents should be made.

May the occupants of a vehicle be searched incident to a proper search of the vehicle? The answer is no—but if an officer has probable cause to believe that one of the occupants has hidden the item sought on his or her person, a search of that occupant is permissible.

Fourth Amendment issues also arise in the context of roadblocks, which are used by law enforcement officers in two situations. First, they assist in the apprehension of a particular suspect. Second, serving the regulatory function of protecting the public from unsafe drivers, officers may stop vehicles to determine if the car satisfies the state's safety requirements, whether the driver is properly licensed, and whether the vehicle is properly registered. In regard to the former, reasonable suspicion is required before a stop can be made. As to the latter, temporary regulatory detentions are permitted so long as they are both objectively random and reasonable. That is, the police must use an objective system in deciding what automobiles will be stopped. Every car, or every tenth car, or some similar method is permissible.

STOP AND FRISK

On October 31, 1963, in Cleveland, Ohio, a police detective observed three men standing on a street corner. Suspicious of the men, the detective positioned himself in order to watch their behavior. After some time, the officer concluded that the men were "casing a job, a stick-up."

The officer approached the men, identified himself, and asked them to identify themselves. After the men "mumbled something," the officer grabbed one of the men and conducted a *frisk*, or a pat-down, of the man's clothing. The officer felt a pistol in the man's coat pocket. He removed the gun from the coat and then patted down the other two men. Another gun was discovered during those frisks.

The officer testified that he conducted the frisks because he believed the men were carrying weapons. The first man frisked was defendant Terry. At trial, he was convicted of carrying a concealed weapon and was subsequently sentenced to one to three years in prison. His appeal made it to the United States Supreme Court.

In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court was confronted with these issues: Did the officer's behavior amount to a search or seizure under the fourth amendment? If so, was the search and seizure by the officer reasonable?

The Court decided that defendant Terry had been seized under the fourth amendment. "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." As to the frisk, the court stated that "it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a search."

With these statements, the Court made it clear that the police practice of stopping and frisking people is one governed by the Fourth Amendment. However, the Court then concluded that an exception to the probable cause requirement was justified because the intrusion upon a person's privacy is limited in a stop and frisk, as opposed to an arrest and full search.

Officers are not given carte blanche to stop and frisk. Although probable suspicion is not required, officers must have a "reasonable suspicion" that the person to be stopped has committed, is committing, or is about to commit a crime. The officer's suspicion must be supported by "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry* 392 U.S. at 21. An officer's intuition alone is not enough suspicion to support a *Terry* seizure.

The stopping of a vehicle does fall within the reach of the Fourth Amendment. However, the Supreme Court has said that once a person is lawfully pulled over, he or she may be ordered out of the vehicle, even though there is no reason to believe that the driver is a threat.

In addition to requiring reasonable suspicion, the *Terry* court also stated that stops are to "last no longer than is necessary," and the investigative methods employed during the stop should be the "least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." If an officer detains a person longer than necessary, the investigatory detention turns into a full seizure (arrest), and the probable cause requirement of the Fourth Amendment is triggered.

Florida v. Royer, 460 U.S. 491 (1983), provides an example of the distinction between an investigatory detention and an arrest. The defendant, a suspected drug dealer, was questioned in a public area of an airport. After a few minutes, he was taken 40 feet away to a small police office, where he consented to a search of his luggage. The Court concluded that the search was the product of an illegal arrest,

as less intrusive methods of investigation were available. As alternatives, the Court mentioned that the officers could have used narcotics dogs to inspect the luggage or could have immediately requested consent to search the defendant's luggage. The act of requiring the defendant to accompany the officers to a small room 40 feet away transformed the detention from a Terry stop to an arrest, which was violative of the Fourth Amendment because it was not supported by probable cause.

THE EXCLUSIONARY RULE

An important constitutional development was the creation of the *exclusionary rule*. The rule is simple: Evidence that is obtained by an unconstitutional search or seizure is inadmissible at trial.

The rule was first announced by the Supreme Court in 1914.[8] However, at that time the rule had not been incorporated into the due process clause of the Fourteenth Amendment. As such, the exclusionary rule did not apply to state court proceedings. This was changed in 1961 when the Supreme Court declared that evidence obtained in violation of the Constitution could not be used in state or federal criminal proceedings. The case was *Mapp v. Ohio*, 367 U.S. 643 (1961).

The exclusionary rule has been the subject of intense debate. There is no explicit textual language in the Constitution establishing the rule. For that reason, many contend that the Supreme Court has exceeded its authority by creating it; that it is the responsibility of the legislative branch to make such laws.

On the other side is the argument that without the exclusionary rule the Bill of Rights is ineffective. Why have constitutional standards if there is no method to enforce them. For example, why require that the officers in the *Mapp* case have a search warrant, yet permit them to conduct a warrantless search and use the evidence obtained against the defendant? These questions go to the purpose of the exclusionary rule: it discourages law enforcement personnel from engaging in unconstitutional conduct. The exclusionary rule works to prevent the admission into evidence of any item, confession, or other thing that was obtained by law enforcement officers in an unconstitutional manner.

Most exclusionary rule issues are resolved prior to trial by way of a motion to suppress. In some instances the motion may be made at the moment the prosecutor attempts to introduce such evidence at trial. This is known as a *contemporaneous objection*.

FRUIT OF THE POISONOUS TREE

The exclusionary rule applies to *primary evidence*, evidence that is the direct result of an illegal search or seizure. It is possible that such primary evidence may lead the police to other evidence. Suppose that police officers beat a confession out of a bank robber. In that confession the defendant tells the police where he has hidden the stolen money. The confession is the primary evidence and is inadmissible under the exclusionary rule. The money (after it is retrieved by the police) is *secondary*, or *derivative, evidence*. Such evidence is known as *fruit of the poisonous tree* and is also inadmissible evidence. Generally, evidence that is tainted by the prior illegal conduct is inadmissible. The rule does not make all evidence later obtained by law enforcement inadmissible, though. In some instances, evidence may be admissible because the connection between the illegally seized evidence and the subsequently obtained

evidence is marginal, or as the Supreme Court put it, "the causal connection . . . may have become so attenuated as to dissipate the taint."[9]

1. Grateful thanks is given to Dr. Daniel Hall who authored this portion of the appendix. From HALL. *Criminal Law and* Procedure, 4E. © 2004 Delmar Learning, a part of Cengage Learning, Inc. Reproduced by permission. <http://www.cengage.com/permissions>.
2. *Biven v. Six Unknown Named Agents*, 403 U.S. 388 (1972).
3. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).
4. *Carroll v. United States*, 267 U.S. 132 (1934).
5. *Beck v. Ohio*, 379 U.S. 89 (1964).
6. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).
7. *United States v. Kampbell*, 574 F.2d 962 (8th Cir. 1978).
8. The rule, as applied in federal courts, was announced in *Weeks v. United States*, 232 U.S. 383 (1914).
9. *Nardone v. United States*, 308 U.S. 338 (1939).

Glossary

act A law passed by one or both houses of a legislature.

act of God An event caused entirely by nature alone, especially a cataclysmic event. Also called force majeure. In contract law, however, force majeure is often defined as an unavoidable natural or man-made event.

addendum An appendix or addition to a document.

adjournment sine die An adjournment is the suspension of business and "sine die" means without day. Hence, the term means ending a legislative or judicial session without setting a time for another session.

adjudication The formal giving, pronouncing, or recording of a judgment for one side or another in a lawsuit.

administrative agency A sub-branch of the government set up to carry out the laws. For example, the police department is a local administrative agency and the I.R.S. is a national one.

administrative law Laws about the duties and proper running of an administrative agency (see that word) that are imposed on agencies by legislatures and courts.

Administrative Procedure Act (5 U.S.C. 500) A law that describes how U.S. agencies must do business (hearings, procedures, etc.) and how disputes go from these federal agencies into court. Some states also have administrative procedure acts.

administrative regulations Rules and regulations written by administrative agencies.

admissibility A judge must decide whether a piece of evidence may be considered by the factfinder in deciding a case.

admissible Describes evidence that should be "let in" or introduced in court, or evidence that the jury may use.

advance session law services Are publications that contain the text of recently-passed statutes and statutory amendments produced by commercial publishers to fill the gap between the passage of the statutes and the appearance of the government published session laws.

advance sheets "Hot off the press" unbound copies of case decisions that will later be printed with other cases in bound form.

affirmative defense That part of a defendant's answer to a complaint that goes beyond denying the fact and arguments of the complaint. It sets out new facts and arguments that might win for the defendant even if everything in the complaint is true. The burden of proof for an affirmative defense is on the defendant. For example, an affirmative defense to a lawsuit for injuries caused by an auto accident might be the contributory negligence of the person who was hurt. Some other affirmative defenses in civil cases are accord and satisfaction, assumption of risk, and estoppel. Affirmative defenses in criminal cases include insanity and self-defense.

alerts A function of many Internet search engines and subscription databases allowing users to specify terms and phrases pertaining to a topic, or tag a case, statute or other document they would like to be notified of when new activity is available. Most alerts are delivered by e-mail or RSS feed.

ALWD Citation Manual The style guide for legal citation produced by the Association of Legal Writing Directors.

American Jurisprudence 2d A multivolume, national legal encyclopedia. It is cross-referenced with American Law Reports.

American Law Reports Series A secondary source that offers useful commentary on selected legal issues, publishes selected cases, and serves as a case finder to locate cases with which one can begin the research process.

amicus curiae (Latin) "Friend of the court." A person allowed to give argument or appear in a lawsuit (usually to file a brief, but sometimes to take an active part) who is not a part to the lawsuit. [pronounce: a-me-kus cure-ee-I]

annotated code The annotated code contains the text of existing statutes, in language identical to that contained in the code for the jurisdiction. It is referred to as an annotated code because it contains annotated material after each statutory section. An annotation is a paragraph summary of a relevant court opinion, attorney general opinion, or administrative decision interpreting the preceding statutory section. It is a commercial publication and often appears on a more timely basis than a code published by the federal or a state government; the annotated code is generally supplemented frequently by pocket parts and supplementary pamphlets.

annotation An annotation is a paragraph summary of a relevant court opinion, attorney general opinion, or administrative decision interpreting the preceding statutory section.

answer The first pleading by the defendant in a lawsuit. This pleading responds to the charges and demands of the plaintiff's complaint. The defendant may deny the plaintiff's charges, may present new facts to defeat them, or may show why the plaintiff's facts are legally invalid.

appellant The person who appeals a case to a higher court.

appellant's brief Written from the appellant's perspective.

appellate brief Written statement submitted to an appellate court to persuade the court of the correctness of one's position. An appellate brief argues the facts of the case, supported by specific page references to the record, and the applicable law, supported by citations of authority.

appellate court Refers to a higher court that can hear appeals from a lower court.

appellate jurisdiction The power and authority of a higher court to take up cases that have already been in a lower court and the power to make decisions about these cases. The process is called appellate review. Also, a trial court may have appellate jurisdiction over cases from an administrative agency.

appellee The person against whom an appeal is taken (usually, but not always, the winner in the lower court). Compare with appellant.

appellee's brief Written from the appellee's perspective.

assignment The transfer of property, rights in property, or money to another person. For example, an assignment of wages involves an employer paying part of an employee's salary directly to someone whom the employee owes money.

attorney fees The rule as followed in this country is that each party pays his or her own attorney's fees unless otherwise provided by contract or by statute. A typical contract provision is that the losing party would pay attorney's fees if the contract is litigated. Some statutes, especially consumer protection statutes, obligate the losing party to pay the winning party's attorney's fees. Attorney's fees are important because an attorney may decide not to take a case or the client may decide not to sue if the client has no chance of recovering attorney fees in the lawsuit.

Attorney General opinions Legal opinions of the country's legal representative given at the request of the President or heads of departments within the executive branch and concerning the meaning of laws administered by the executive branch.

bench trial A case tried without a jury; in a bench trial, the judge determines the facts and decides questions of law.

bicameral Having two chambers. A two-part legislature, such as the U.S. Congress is bicameral: composed of the Senate (the "upper house" or "upper chamber") and the House of Representatives (the "lower house" or "lower chamber").

binding authority Sources of law that must be taken into account by a judge deciding a case; for example, statutes from the same state or decisions by a higher court of the same state.

blog A Web page serving as a publicly accessible personal journal for an individual or group. The word blog is a play on the words "web" and "log," as most blogs will be displayed in a journal or log entry format. Content is typically updated daily, and often reflects the personality or focus of the author.

boilerplate Standardized, recurring language found in a document or a form for a document, such as those sold in formbooks. The word implies standardization or lack of tailoring to the individual legal problem.

Boolean search Most database searching is based on the principles of Boolean logic, the system of logical thought developed by the English mathematician and computer pioneer, George Boole. A Boolean search looks for a particular term or group of terms in a specific relationship to one another.

breach Breaking a law or failing to perform a duty. [pronounce: breech]

browser Computer software used to access information on the World Wide Web. Internet Explorer is the most popular commercial Internet browser.

case brief An outline or summary of a published court opinion.

Case Management/Electronic Case Filing (CM/ECF) A system that enables federal courts to receive and process case filings electronically over the Internet.

case names The full name of the case contains the names of the parties to the case. In a case citation, the case name is generally abbreviated.

cause of action 1. Facts sufficient to support a valid lawsuit. For example, a cause of action for battery must include facts to prove an intentional, unconsented-to physical contract. 2. The legal theory upon which a lawsuit ("action") is based.

charge The judge's final summary of a case and instructions to the jury.

charter An organization's basic starting document (e.g., a corporation's articles of incorporation).

checklists A formbook contains checklists of typical provisions included in a particular type of contract.

chief executive The head of the executive branch of government. For a state, the chief executive is the governor and, for the federal government, the chief executive is the President.

chief justice The presiding justice, usually of a court of last resort. The chief justice of the United States Supreme Court presides over the Court and has additional administrative duties related both to the Supreme Court and to the entire federal court system.

choice of law Deciding which jurisdiction's laws apply to a lawsuit, to a document, etc.

citation A reference to a legal authority and where it is found. For example, "17 U.D.L.R. 247" is a citation to an article that begins on page 247 of volume 17 of the University of Dull Law Review. *See also* pinpoint citation.

citation sentence A sentence that contains only one or more citations.

citators A set of books or database that lists relevant legal events subsequent to a given case, statute, or other authority. It will tell, for example, if a case has been overruled, distinguished, or followed. This is done by looking up the case by its citation (see that word) and checking whether there are citations to other cases listed under it. If there are, it means that the case was mentioned in these later cases. Two leading citators are Shepherd's and KeyCite.

cite 1. Refer to specific legal references or authorities. 2. Short for "citation."

civil action Every lawsuit other than a criminal proceeding. A lawsuit that is brought to enforce a right or to redress a wrong, rather than a court action involving the government trying to prosecute a criminal; in general, a lawsuit brought by one person against another.

civil damages Money that a court orders paid to a person who has suffered damage (a loss or harm) by the person who caused the injury.

civil law 1. Law handed down by the Romans. Law that is based on one elaborate document or "code," rather than a combination of many laws and judicial opinions. 2. "Noncriminal law."

client trust account Upon the receipt of the retainers, the money is deposited into a client trust account.

clipping service Electronic clipping services track newspaper, magazines, Web sites and wire services, as well as many network television and radio news and talk shows. You specify a list of key words—companies, people, industries and the like—and the service sends you copies of articles or segments that mention those key words. Legal databases such as LexisNexis and WESTLAW also provide clipping services for active cases in many jurisdictions.

code 1. A collection of laws. 2. A complete, interrelated, and exclusive set of laws.

Code of Federal Regulations A multivolume set of books containing federal administrative regulations arranged by federal agencies and by topic.

common law 1. Either all case law or the case law that is made by judges in the absence of statutes. 2. The legal system that originated in England and is composed of case law and statutes that grow and change, influenced by ever-changing custom and tradition.

complaint The first main paper filed in a civil lawsuit. It includes, among other things, a statement of the wrong or harm done to the plaintiff by the defendant, a request for specific help from the court, and an explanation why the court has the power to do what the plaintiff wants.

computer-assisted legal research Legal research performed on a computer.

concurring opinion Agree. A "concurring opinion," or "concurrence," is one on which a judge agrees with the result reached in an opinion by another judge in the same case but not necessarily with the reasoning that the other judge used to reach the conclusion.

consequential damages Court-ordered compensation for indirect losses or other indirect harm. Also, in contract law, sometimes called special damages.

constitution 1. A document that sets out the basic principles and most general laws of a country, state, or organization. 2. The U.S. Constitution is the basic law of the country on which most other laws are based, and to which all other laws must yield. Often abbreviated "Const." or "Con."

contingency provision A contract term designed to deal with a potential problem.

contingent fee arrangement Payment to a lawyer of a percentage of the "winnings," if any, from a lawsuit rather than payment of a flat amount of money or payment according to the number of hours worked. A defense (or negative or reverse) contingent fee is payment based on the money the lawyer saves a client compared to the potential losses the client thinks are likely.

contract An agreement that affects or creates legal relationships between two or more persons. To be a contract, an agreement must involve: at least one promise, consideration (something of value promised or given), persons legally capable of making binding agreements, and a reasonable certainty about the meaning of the terms. A contract is called bilateral if both sides make promises (such as the promise to deliver a book on one side and a promise to pay for it on the other) or unilateral if the promises are on one side only. According to the Uniform Commercial Code, a contract is the "total legal obligation which results from the parties' agreement," and according to the Restatement of the Law of Contracts, it is "a promise or set of promises for the breach of which the law in some way recognizes a duty."

controlling case A court decision on a question of law (how the law affects the case) that is binding authority on lower courts in the same court system for cases in which those courts must decide a similar question of law involving similar facts.

Corpus Juris Secundum A multivolume, national legal encyclopedia that is cross-referenced with the American Digest System. *Corpus Juris Secundum* is its most recent update.

counterclaim A claim made by a defendant in a civil lawsuit that, in effect, "sues" the plaintiff. It can be based on entirely different things from the plaintiff's complaint (a permissive counterclaim) and may even be for more money than the plaintiff is asking. A counterclaim often must be made if it is based on the same subject or transaction as the original claim (a compulsory counterclaim); otherwise, the person with the counterclaim may not be permitted to sue for it later.

court of general jurisdiction Another term for trial court; that is, a court having jurisdiction to try all classes of civil and criminal cases excluding cases that can only be heard by a court.

court of last resort The highest tier in the federal court system and the state court system, which usually contains one court, referred to as the court of last resort. The role of the appellate court is to determine whether the lower court applied the law correctly. In a court of last resort, such as the United States Supreme Court or a state supreme court, all members of the court participate in deciding a case.

court of limited jurisdiction A court whose cases are limited to civil cases of certain types, or which involves a limited amount of money, or whose jurisdiction in criminal cases is confined to petty offenses.

court order An order issued by the court requiring a party to do or not do a specific act.

court report fee A fee charged by a court reporter to make a record of a legal proceeding. The fee can also include the fee charged by a court reporter to produce a transcript of the proceeding.

court rules Govern the procedure of beginning a lawsuit and handling a case before a court. The rules cover such mundane matters as the size paper on which documents are to be submitted to the courts and the format for appellate briefs. They also set forth important time limitations such as the time period within which the defendant has to answer a complaint and the time period within which a party may appeal a decision.

currency The principle that a legal source is authoritative as of the date of the research.

Current Law Index A print index used to locate periodicals.

damages 1. Money that a court orders paid to a person who has suffered damage (a loss or harm) by the person who caused the injury (the violation of the person's rights). See injury for more complete comparison of damage, damages, and injury. 2. A plaintiff's claim in a legal pleading for the money defined in definition no. 1. Damages may be actual and compensatory (directly related to the amount of the loss) or they may be, in addition, exemplary and punitive (extra money given to punish the defendant and to help keep a particularly bad act from happening again). Also, merely nominal damages may be given (a tiny sum when the loss suffered is either very small or of unproved amount).

database A collection of information organized in such a way that a computer program can quickly select desired pieces of data; a type of electronic filing system. Traditional databases are organized by fields, records, and files. A field is a single piece of information, a record is one set of fields, and a file is a collection of records.

deductive reasoning Legal rules (constitutions, statutes, court rules, and administrative regulations) are general statements of what the law permits, requires, and prohibits. Because the regulatory language is general, it may not be clear whether a particular rule applies to a given factual situation. Deductive reasoning is used to determine if the rule applies; it involves reasoning from the general (rule) to the specific (the impact of the rule on a particular fact pattern).

deed A document by which one person transfers the legal ownership of land to another person.

defendant The person against whom a legal action is brought. This legal action may be civil or criminal.

defined terms A shorthand way of referring to something, often to the parties, throughout a contract. For example, in a contract for sale and purchase, the initial paragraph may identify the seller as "Seller" and the buyer as "Buyer." The balance of the contract will use "Seller" and "Buyer" to reference the parties to the contract.

definitional section A common provision of a legislative act that defines terms used in the act.

delegation The giving of authority by one person to another. Delegation of powers is the constitutional division of authority between branches of government and also the handing down of authority from the president to administrative agencies.

democratic Government by the people, either directly or indirectly through representatives; ideally, as a basis for a system highly protective of individual liberties.

democratic or representation reinforcement A method of Constitutional interpretation based on the principle that the Constitution defines the processes, structures, and relationships that constitute the foundation of the American democracy and those basic republican themes are interpreted within the context of contemporary society.

depth of treatment stars In KeyCite, each case found as having cited the case being KeyCited is identified by one to four stars. These stars indicate how extensively the case being KeyCited is discussed by the cases that cite it.

dictum *See* obiter dictum.

digests A multivolume set of books that functions as an index, allowing the researcher to locate cases with similar subject matter, facts, and issues as that of the legal problem being researched. Digests contain summaries of cases and references to other research materials, with the case summaries arranged by topic, allowing one to find cases related to a particular legal principle.

direct history The direct history of the case includes prior and subsequent history of that case.

discretionary jurisdiction A court with discretionary jurisdiction over a case can decide if the court should hear the case.

discussion group A form of Internet communication linking people with common interests; provides a format to discuss issues and share information related to a specific topic, theme, or area of expertise. Often referred to by other names, including discussion lists, interest groups, or mailing lists. All communication in a discussion group is carried on by e-mail.

disposition The court's final ruling with respect to the lower court's decision, for example affirmed, reversed, vacated, etc.

dissenting opinion A judge's formal disagreement with the decision of the majority of the judges in a lawsuit. If the judge puts it in writing, it is called a dissenting opinion.

distinguishing Point out basic differences. To distinguish a case is to show why it is irrelevant (or not very relevant) to the lawsuit being decided.

diversity jurisdiction The two bases of federal jurisdiction in United States district courts are federal question jurisdiction and diversity jurisdiction. Federal courts have diversity jurisdiction as long as the amount in controversy is more than $75,000 and the parties have the requisite diversity of citizenship. Diversity is met so long as the parties are citizens from different states or so long as one party is a citizen of a state and the other party is a citizen of a foreign country. Diversity must be complete. If there are multiple plaintiffs or multiple defendants, no plaintiff may be a citizen of the same state as any defendant.

docket A case docket is maintained by the court clerk for every case filed and lists all the document filing activities associated with the case, along with a summary of the case, the parties, counsel, and the judge assigned to the case. Most federal courts with electronic access to their dockets include hypertext links to view or print the PDF file of a particular case document.

doctrine of caveat emptor (Latin) "Beware"; warning. Caveat emptor means "let the buyer beware." While this is still an important warning, laws and court decisions provide many safeguards to the buyer. [pronounce: kav-ee-at]

doctrine of judicial review Principle that a higher court examines a lower court decision.

doctrine of original intent Principle that the Constitution is interpreted and applied in a manner consistent with the framers' intentions.

doctrine of stare decisis (Latin) "Let the decision stand." The rule that when a court has decided a case by applying a legal principle to a set of facts, the court should stick to the principle and apply it to all later cases with clearly similar facts unless there is a strong reason not to, and that courts below must apply the principle in similar cases. This rule helps promote fairness and reliability in judicial decision making.

domain name The name used in URLs (*see* URL) to identify particular Web pages. For example, in the http://www.microsoft.com the domain name is *microsoft.com*

elegant variation Use of a number of different words to refer to the same thing.

en banc (French) All the judges of a court participating in a case all together, rather than individually or in panels of a few.

enabling legislation Legislation that created an agency and defines its powers is known as enabling legislation.

engrossed The final copy of the bill is often referred to as the "engrossed" copy because it contains the definitive text approved by the chamber.

enroll or **enrolled** Register or record a formal document in the proper office or file.

enumerated powers The powers specifically granted to a branch of government in a constitution.

evidentiary facts Fact that are learned directly from testimony or other evidence. Important factual conclusions inferred from evidentiary facts are called ultimate facts.

ex post facto law (Latin) "After the fact." An ex post facto law is one that retroactively attempts to make an action a crime that was not a crime at the time it was done, or a law that attempts to reduce a person's rights based on a past act that was not subject to the law when it was done. Ex post facto laws are prohibited by the U.S. Constitution (Article 1, Section 9).

executive The branch of government that carries out the laws (as opposed to the judicial and legislative branches). The administrative branch.

expert witness fees A fee charged by a person possessing special knowledge or experience who is allowed to testify at a trial not only about the facts (like an ordinary witness) but also about the professional conclusions he or she draws from these facts.

extranet A variation on the use of Internet technology to access and disseminate information; a private network that uses standard Internet technology and a public telecommunications system (i.e., telephone system) to securely share designated parts of a business's internal information or operations to designated persons via a password.

facts The occurrences on which a case is based.

federal judiciary The branch within the national government that interprets the law.

federal question jurisdiction A legal issue directly involving the U.S. Constitution, statutes, or treaties. Federal courts have jurisdiction in cases involving a federal question.

Federal Register A federal government source published each business day that contains federal administrative regulations arranged chronologically.

federalism A system of political organization with several different levels of government (e.g., city, state, and national) coexisting in the same area with the lower levels having some interdependent powers.

fee-based Used to describe online database services that require users to pay a fee before being able to access the information; users are generally charged fees to search the database based on annual or monthly contracts, or on a pay-as-you-go "per transaction" basis.

filing fee A fee charged by the court for accepting a pleading or other legal document.

finding tools Those sources in a law library used to locate primary and secondary authority.

findings of fact Determinations of the facts in a case. A ruling of law, or a ruling on a question involving law and fact.

flat fee arrangement The attorney quotes the client one fee that will cover payment for a particular legal matter. The fee may or may not include costs and expenses. The flat fee arrangement is often used in criminal defense work. It may also be used if the attorney has been asked to draft a discrete legal document, such as a will, a trust, or a set of basic corporate documents.

footnotes The footnotes in the sample office memo are not part of the office memo itself. Although an office memo may contain footnotes, there are not usually more than one or two.

foreign Refers to a U.S. corporation, partnership or other legal business entity doing business in a state other than the one in which it is incorporated; opposite of domestic. Also refers to a corporation or other business entity which was incorporated under the laws of a foreign country.

forma pauperis (Latin) "As a pauper." Describes a court filing that is permitted without payment of the customary fees or court costs, if the person filing proves he or she is too poor to pay.

formbooks A collection of legal forms with summaries of relevant law and information on how to use the forms.

forms A model to work form (or a paper with blanks to be filled in) of a legal document such as a contract or a pleading.

general jurisdiction The power of a court to hear and decide any of a wide range of cases that arise within its geographic area.

geographical jurisdiction A court's jurisdiction is the power of the court to decide cases. To decide a case, a court must have geographical jurisdiction, subject matter jurisdiction, and hierarchical jurisdiction. Geographical jurisdiction refers to the geographical area within which cases arise. A court is restricted to deciding cases arising within a certain geographical area.

good standing Refers to status of a corporation or other legal business entity; indicates actively doing business and in compliance with all registration requirements of the state in which the entity is incorporated.

headnotes A summary of a case, or of an important legal point made in the cases, placed at the beginning of the case when it is published. A case may have several headnotes.

hearing A court proceeding.

hierarchical jurisdiction Hierarchical jurisdiction refers to the level of court deciding a case. A case begins in a court of original jurisdiction. The court of original jurisdiction initially hears and decides a case. When a court decision is appealed, the case is heard by a court with appellate jurisdiction.

history What happened at trial and at each level before the case reached the court whose opinion you are briefing.

holding The core of a judge's decision in a case. It is that part of the judge's written opinion that applies the law to the facts of the case and about which can be said "the case means no more and no less than this." When later cases rely on a case as precedent, it is only the holding that should be used to establish the precedent. A holding may be less than the judge said it was. If the judge made broad, general statements, the holding is limited to only that part of the generalizations that directly apply to the facts of that particular case.

hornbook A book summarizing the basic principles of one legal subject, usually for law students.

hourly fee arrangement The attorneys (and often the paralegals in the firm) keep a detailed record of the amount of time the attorneys spend on the client's legal matters. The client is billed for the time spent times the hourly billing rate of the persons who worked on the client matter.

hourly pricing A type of billing arrangement for online database searching; with hourly pricing, you pay charges based on the time that you spend searching or browsing a document online. *See* transactional pricing.

hyperlink An element in an electronic document or Web site that links to another place in the same document or to an entirely different source. A hyperlink may be a word, an icon, or a graphic

hypertext (*See also* hyperlink) Highlighted text that, when selected, links to related topics or Web sites. Links can also be a word or text, an icon, or a graphic.

ignorantia legis neminem excusat (Latin) Ignorance of the law is no excuse.

impeachment The first step in the removal from public office of a high public official such as a governor, judge, or president. In the case of the United States President, the House of Representatives makes an accusation by drawing up articles of impeachment, votes

on them, and presents them to the Senate. This is impeachment. But impeachment is popularly thought to include the process that may take place after impeachment: the trial of the President in the Senate and conviction by two-thirds of the senators.

Index to Legal Periodicals A print index used to locate periodicals and law reviews by either subject or author.

injunction A court order that commands or prohibits some act or course of conduct. It is preventative in nature and designed to protect a plaintiff from irreparable injury to the plaintiff's property or property rights by prohibiting or commending the doing of certain acts.

in personam jurisdiction The authority of a court to determine the rights of the defendant.

in rem jurisdiction The authority of a court to determine the status of property.

instrumentalists *See* Modernists.

intermediate appellate court An appellate court that is subject to judicial review by a higher appellate court.

Internet An international "network of networks," interconnected to allow for sharing of information on a global scale. The graphical component of the Internet is the World Wide Web.

intranet An internal Web site accessible only by the organization's members, employees, or others with authorization. Company intranet sites look and function similar to external Web pages, and may even link out to the Internet.

issue A question that a judge or a jury must decide in a case.

journal A type of legal periodical published by a law school, bar association, or academic organization with articles on legal subjects such as court decisions and legislation.

judicial 1. Having to do with a court. 2. Having to do with a judge. 3. Describes the branch of government that interprets the law and that resolves legal disputes.

judicial restraint A judge's decision and decision making that excludes the judge's personal views and relies strictly on precedent.

jurisdiction 1. The geographical area within which a court (or a public official) has the right and power to operate. 2. The persons about whom and the subject matters about which a court has the right and power to make decisions that are legally binding.

jurisprudence constante In deciding a legal problem, the code must be reviewed to find the appropriate code provision and the provision must be applied to solve the legal problem. In applying code provisions, judges rely primarily on scholarly articles and books written by professors rather than on prior case law. Cases may also be reviewed, but prior case law is not binding as it is in a common law system. A rule might be derived from a settled pattern of judicial decisions, but not from any single, individual case.

justice A judge, especially an appellate judge such as a justice of the U.S. Supreme Court.

KeyCite A leading citator.

key terms Words central to a legal research problem that can be used by the legal researcher to begin researching in print indexes or to formulate a query in computer-assisted legal research.

landmark case A court case that makes major changes in the law, especially a U.S. Supreme Court case that resolves a major issue and has substantial practical impact.

law office memo Is seen only by those in the law office and by the client and, therefore, can be objective.

law review A type of legal periodical published by a law school, bar association, or academic organization with articles on legal subjects such as court decisions and legislation.

legal conclusion 1. A statement about legal rights, duties, or results that is not based on specific facts. A conclusory statement. 2. A conclusion about legal rights, duties, or results that is drawn from specific facts, but those facts do not include the facts legally necessary to draw the conclusion. 3. Used loosely to mean a conclusion of law, the opposite of the meanings in no. 1 and no. 2.

legal dictionaries Provide definitions of legal terms and their pronunciation, with citation to relevant case laws. The two major legal dictionaries used in the United States are the *Black's Law Dictionary* and the *Ballentine's Law Dictionary*.

legal encyclopedias Legal encyclopedias are a secondary source that offer a useful commentary on the law as it is and serve as a case finder to locate cases with which one can begin the research process. Legal encyclopedias are multivolume sets covering broad legal topics arranged in alphabetical order, with the topics divided into sections. Index volumes are located at the end of the set. Each topic gives a textual explanation of the law relating to that topic. Topic coverage serves as a valuable frame of reference for more in-depth research in other sources.

legal newspapers Legal periodicals that provide information on recent court decisions, changes in the law, legal publications, and other items of interest to the legal community.

legal periodicals Legal periodicals are a secondary source, published periodically, that contain articles, usually on a range of different issues and legal developments. The articles generally contain narrative text and citations to relevant primary sources.

legislation 1. The process of thinking about and passing or refusing to pass bills into law (statutes, ordinances, etc.). 2. Statutes, ordinances, etc.

legislative Lawmaking, as opposed to "executive" (carrying out or enforcing laws), or "judicial" (interpreting or applying laws). Concerning a legislature.

legislative history The background documents and records of hearings related to the enactment of a bill. These documents may be used to decide the meaning of the law after it has been enacted.

legislative intent The principle that when a statute is ambiguous, a court should interpret the statute by looking at its legislative history to see what the lawmakers meant or wanted when they passed the statute. This is one of several possible ways of interpreting statutes. Compare with legislative purpose rule.

limited jurisdiction Subject matter jurisdiction refers to the type of case a court may hear. A court is a court of general jurisdiction or a court of limited jurisdiction. As the names imply, a court of limited jurisdiction is limited to hearing certain types of cases, and a court of general jurisdiction may hear all other types of cases.

liquidated damages A sum agreed upon by the parties at the time of entering into the contract as being payable by way of compensation for loss suffered in the event of a breach of contract.

literalism 1. The process of discovering or deciding the meaning of a written document by studying only the document itself and not the circumstances surrounding it. 2. Studying the document and surrounding circumstances to decide the document's meaning.

living (constitution) The written United States Constitution, including all amendments to it, is less than twenty pages in

length. The living constitution would include those pages and all case law interpretations of the Constitution. If printed, the living constitution would require numerous volumes. Scholars and laypersons alike have hotly debated constitutional interpretation. Some believe that any interpretation should be based on the plain language of the Constitution and should not stray far from it. Others believe that the broad language of the Constitution should be interpreted as needed to deal with legal questions never dreamed of when the Constitution was first enacted.

local court rules Court rules that govern procedure in a particular local court and supplement other court rules.

looseleaf publications The legal sources appearing in looseleaf publication format include state annotated codes, state administrative codes, formbooks, and services providing a collection of source material in a particular subject area. The information in looseleaf services is stored in binders rather than formatted as hardbound volumes and paper pamphlet supplements. The binder format allows easy insertion of new material and removal of outdated material.

looseleaf series for recent cases *See* looseleaf publications.

looseleaf services A format for some law library sources in which information is stored in binders that allow easy insertion of new material and removal of outdated material.

major premise The basis for a logical deduction. The facts or arguments upon which a conclusion is based.

majority Greater than half of the judges hearing the case. A majority opinion is an opinion agreed upon by greater than half of the judges hearing the case. More than half. Fifty-one is a majority vote when one hundred persons vote.

mandatory authority Binding authority.

Martindale-Hubbell Law Dictionary A multivolume book that lists many lawyers by location and type of practice. Other volumes contain summaries of each major area of the law in each state and most foreign countries. A brief of law. It is often submitted to a judge in a case.

memorandum of law A brief of law. It is often submitted to a judge in a case. The purpose of the memorandum of law is to support and argue the client's position in the lawsuit.

minor premise The basis for a logical deduction. The facts or arguments upon which a conclusion is based.

Modernists Also known as Instrumentalists, they are those individuals who find meaning through reading the language of the Constitution in light of contemporary life, and through this approach the judiciary contributes to judicial, social, and moral evolution of the nation.

motion A request that a judge make a ruling or take some other action. For example, a motion to dismiss is a request that the court throw the case out; a motion for more definite statement is a request that the judge require an opponent in a lawsuit to file a less vague or ambiguous pleading; a motion to strike is a request that immaterial statements or other things be removed from an opponent's pleading; and a motion to suppress is a request that illegally gathered evidence be prohibited. Motions are either granted or denied by the judge.

motion for a directed verdict A verdict in which the judge takes the decision out of the jury's hands. The judge does this by telling jurors what the jury must decide or by actually making the decision. The judge might do this when the person suing has presented facts that, even if believed by a jury, cannot add up to a successful case.

motion for a summary judgment A final judgment (victory) for one side in a lawsuit (or in one part of a lawsuit), without trial, when the judge finds, based on pleadings, deposition, affidavits, etc., that there is no genuine factual issue in the lawsuit (or in part of the lawsuit).

negative indirect history The negative indirect history includes cases outside the direct appellate line of the case being KeyCited that may have a negative impact on the precedential weight of the case. For example, cases listed under negative indirect history are later cases that may have questioned the reasoning of the earlier case, distinguished themselves on their facts, or limited the effect of the earlier case.

negotiated terms The terms of the contract that the parties talked about and agreed to.

network A group of two or more computers linked together. The Internet is a "network of networks." Computers and other electronic devices that allocate resources for a network are called servers.

notice 1. Knowledge of certain facts. "Constructive notice" means a person is treated as if he or she knew certain facts. 2. Formal receipt of the knowledge of certain facts. For example, "notice" of a lawsuit usually means that formal papers have been delivered to a person (personal notice) or to the person's agent (imputed notice).

obiter dictum (Latin) 1. Singular of dicta. 2. Short for "obiter dictum" (a remark by the way, as in "by the way, did I tell you …"); a digression; a discussion of side points or unrelated points.

office practice attorneys Attorneys whose practice excludes litigation. Office practice attorneys help clients plan transactions to make them as advantageous as possible to the client while avoiding potential legal problems.

officer of the court A court employee such as a judge, clerk, sheriff, marshal, bailiff, and constable. Lawyers are also officers of the court and must obey court rules, be truthful in court, and generally serve the needs of justice.

on all fours A term meaning that facts and the applicable law in two cases being examined are very similar. Because of the similarity, the earlier-decided case may serve as precedent for the case under considersation.

online The condition of being connected to a network of computers or other devices. The term is frequently used to describe someone who is currently connected to the Internet; variation in spelling: on-line.

on point A term meaning that facts and the applicable law in two cases being examined are similar but not as similar as two cases on all fours. Because of the similarity, the earlier-decided case may serve as precedent for the case under considersation.

operative provisions The essential terms of a contract including such things as parties to the contract, the subject matter of the contract, and payment terms.

oral argument The presentation of each side of a case before an appeals court. The presentation typically involves oral statements by a lawyer, interrupted by questions from the judges.

ordinal numbers Numbers describing the ranking of an item (i.e., first, second, third, etc.).

ordinances A local or city law, rule, or regulation. (Ordinance of 1787 providing for the government of the Northwest Territory.)

original intent Principle that the Constitution should be interpreted to mean what the framers originally intended it to mean.

original jurisdiction The power of a court to take a case, try it, and decide it (as opposed to appellate jurisdiction, the power of a court to hear and decide an appeal).

overrule To reject or supercede. For example, a case is overruled when the same court, or a higher court in the same system, rejects the legal principles on which the case was based. This ends the case's value as a precedent.

PACER Public Access to Court Electronic Records; a system that allows registered users to obtain electronically via the Internet case and docket information and document images, where available.

panel A group of judges (smaller than the entire court) that decides a case.

parallel citations An alternate reference to a case (or other legal document) that is published in more than one place. There is usually one official publication of a court case or a statute. If so, that is the official or primary citation, and all others are "parallel citations."

parties 1. A person concerned with or taking part in any contract, matter, affair, or proceeding. 2. A person who is either a plaintiff or a defendant in a lawsuit. A real party is a person who actually stands to gain or lose something from being a part of the case, while a formal or nominal part is one who has only a technical or "name only" interest.

penumbra doctrine 1. The principle that the "necessary and proper clause" of the U.S. Constitution allows the federal government to take all actions to carry out legitimate government purposes, even if the powers needed to carry out these purposes are only implied from other powers (which themselves are not specifically mentioned in the Constitution, but only implied). 2. The principle that specific constitutional rights have less clear, but still real, implied rights, such as the right to privacy.

per curiam opinion (Latin) "By the court." Describes an opinion backed by all the judges in a particular court and usually with no one judge's name on it. [pronounce: per-cure-ee-am]

person acting under color of law One taking an action that looks official or appears to be backed by law.

persuasive authority All sources of law that a judge might use, but is not required to use, in making up his or her mind about a case; for example, legal encyclopedias or related cases from other states. A case may be strongly persuasive if it comes from a famous judge or a nearby, powerful court.

petition for writ of certiorari (Latin) "To make sure." A request for certiorari (or "cert." for short) is like an appeal, but one that the higher court is not required to take for decision. It is literally a writ from the higher court asking the lower court for the record of the case. [pronounce: sir-sho-rare-ee]

pinpoint citation A citation including the page number(s) on which a quotation or referenced material appears. The page number of a specific quote, as opposed to the general citation (see that word). It follows the page number on which the quoted document begins. In the general citation 17 U.D.L.R. 247, 250, the pinpoint citation is page 250.

plagiarism Taking all or part of the writing or idea of another person and passing it off as your own. [pronounce: play-jar-ism]

plain meaning rule 1. The principle that if a law seems clear, one should take the simplest meaning of the words and not read anything into the law. This is one of several possible ways of interpreting statutes. 2. The principle that if a contract, statute, or other writing seems clear, the meaning of the writing should be determined from the writing itself, not from other evidence such as testimony.

plaintiff A person who brings (starts) a lawsuit against another person.

pleading 1. The process of making formal, written statements of each side of a civil case. First the plaintiff submits a paper with "facts" and claims; then the defendant submits a paper with "facts" (and sometimes counterclaims); then the plaintiff responds; etc., until all issues and questions are clearly posed for a trial. 2. A pleading is any one of the papers mentioned in no. 1. The first one is a complaint, the response is an answer, etc. The pleadings are the sum of all these papers. Sometimes, written motions and other court papers are called pleadings, but this is not strictly correct.

plug-ins Software programs that extend the capabilities of a Web browser in a specific way, providing the ability to play audio files or view video movies. Acrobat Reader® by Adobe is a popular plug-in.

plurality opinion The greatest number. For example, if Jane gets ten votes and Don and Mary each get seven, Jane has a plurality (the most votes), but not a majority (more than half of the votes).

pocket part An addition to a lawbook that updates it until a bound supplement or a new edition comes out. It is found inside the back (or occasionally, front) cover, secured in a "pocket," and should always be referred to when doing legal research.

podcast Similar to RSS (*See* RSS); allows users to subscribe to a set of feeds to view syndicated Web site content. With podcasting, subscribers receive regular updates with new content on an iPod or similar device rather than reading them on a computer screen.

point heading A main point heading answers one of the questions in the questions presented section of the memorandum, with the main point headings appearing in order corresponding to the order of the questions presented. The word heading is used because a point heading serves as a heading to one portion of the argument section. Main point headings are often written in all capitals or underlined to make them stand out from the rest of the memorandum. They may also be numbered with roman numerals or lettered with capital letters. A complex issue may call for several point headings for sub-issues under a main point heading.

police power The government's right and power to set up and enforce laws to provide for the safety, health, and general welfare of the people; for example, police power includes the power to license occupations such as hair cutting.

popular name An act often is identified by a name given it by the legislature and for easy reference is often referred to by that name. This is the "short title" or "popular name" of the act.

preamble An introduction (usually saying why a document, such as a statute, was written).

precedent A court decision on a question of law (how the law affects the case) that is binding authority on lower courts in the same court system for cases in which those courts must decide a similar question of law involving similar facts. (Some legal scholars

include as precedent court decisions that are merely persuasive authority.) The U.S. court system is based on judges making decisions supported by past precedent, rather than by the logic of the judge alone. *See* stare decisis.

preempted Foreclosed, prevailed over, took precedence over.

preemption doctrine Describes the first right to do anything. For example, when the federal government preempts the field by passing laws in a subject area, the states may not pass conflicting laws and sometimes may not pass laws on the subject at all.

primary sources Primary sources contain the actual law itself and are given the most weight by courts. Examples of primary law include cases, constitutions, statutes, administrative regulations, municipal codes and ordinances, and court rules.

privacy Describes the right to be left alone. The right to privacy is sometimes "balanced" against other rights, such as freedom of the press.

prospective Looking forward; concerning the future; likely or possible. For example, a prospective law is one that applies to situations that arise after it is enacted. Most laws are prospective only.

protocol A system of rules or standards for communicating over a network such as the Internet. The protocol tells Web browser software which Internet tool to use to interpret the electronic information being requested.

Public Access to Court Electronic Records *See* PACER.

public domain The public domain comprises the body of all creative works and other knowledge (writings, artwork, music, inventions) in which no person or organization has any proprietary interest (usually represented by a copyright or patent). Such works and inventions are considered part of the public's cultural heritage, and anyone can use and build upon them without restriction.

public records Documents or other written records required by law to be maintained by a governmental agency, filed with a court clerk or recorded with a county comptroller's office; generally open to view by the public. Examples include land deeds, mortgages and real property records, birth, marriage and death records, bankruptcy filings, federal and state tax liens, and civil judgments.

questions of fact A point in dispute in a lawsuit; an issue for decision by judge or jury.

questions of law A point in dispute in a lawsuit; an issue for decision by the judge.

RSS Stands for Really Simple Syndication; a method to keep current with pertinent news and information. Often associated with updated content such as blog entries, news headlines or podcasts. Content users deem valuable is delivered directly to a user's computer screen; also referred to as a feed, web feed, or channel.

reasoning The main body of the text of a court opinon, which discusses the meaning of the issue(s), offers a discussion that leads to a disposition of the case, and explains why a certain rule or rules must apply to the dispute.

reasoning by analogy Is reasoning by applying the doctrine of stare decisis. First, the researcher must identify case law relevant to the legal problem being researched. Then the researcher compares the similarities and differences among the legal problem and relevant case law. Finally, the researcher reviews the significance of the various similarities and differences to determine if and how prior case law will control the answer to the legal problem being researched.

reasoning by example *See* reasoning by analogy.

record 1. A formal written account of a case, containing the complete formal history of all actions taken, papers filed, rulings made, opinions written, etc. The record also can include all the actual evidence (testimony, physical objects, etc.) as well as the evidence that was refused admission by the judge. Courts of record include all courts for which permanent records of proceedings are kept. 2. A public record is a document filed with, or put out by, a government agency and open to the public for inspection. For example, a title of record to land is an ownership interest that has been properly filled in the public land records. The official who keeps these records is usually called the recorder of deeds, and the filing process is called recordation.

recusal The process by which a judge is disqualified (or disqualifies him- or herself) from hearing a lawsuit because of prejudice or because the judge is interested.

registered agent The person whose name and address is designated by a corporation as the individual to receive legal service of process and other official documents on its behalf; also called an agent for service of process or agent for acceptance of service. States require that a corporation name an actual person in its articles of incorporation and other filings with the secretary of state who is authorized to accept service of any lawsuit or claim against the corporation. Corporations doing business in multiple states will designate a registered agent in each state, pursuant to the laws of that jurisdiction.

related annotations A section of an ALR annotation that identifies annotations covering related issues.

remands Sends back. For example, a higher court may remand (send back) a case to a lower court, directing the lower court to take some action. Also, a prisoner is remanded to custody when sent back to jail after failing to meet, or being denied release on, bail.

reporters Sets of books containing published court decisions.

representation reinforcement One approach to interpreting the United States Constitution. Some analysts glean that the framers did not intend to establish a precise set of substantive laws. Rather, they intended to define the who, what, where, and when of substantive rulemaking. Following this theory, judicial interpretation should be guided by the general republican principles underlying the Constitution. However, the analysis is contemporary. The basic republican themes established by the framers are used as a base, but those themes are interpreted within the context of contemporary society. By allowing change in this way, constitutional law actually reflects the will of people. Accordingly, the United States Supreme Court is not viewed as a countermajoritarian institution, but one that reinforces democracy and republicanism.

res ipsa loquitur Latin, meaning "the thing speaks for itself." A rebuttable presumption (a conclusion that can be changed if contrary evidence is introduced) that a person is negligent if the thing causing an accident was in his or her control only, and if that type of accident does not usually happen without negligence.

Restatements of the Law Books published by the American Law Institute that tell what the law in a general area is, how it is changing, and what direction the authors think this change should take; for example, the Restatement of the Law of Contracts.

retainer 1. Employment of a lawyer by a client. 2. The specific agreement in no. 1. 3. The first payment in no. 1 either for one specific case or to be available to unspecified future cases.

retrospective A retrospective or retroactive law is one that changes the legal status of things already done or that applies to past actions.

reverse Set aside. For example, when a higher court reverses a lower court on appeal, it sets aside the judgment of the lower court and either substitutes its own judgment for it or sends the case back to the lower court with instructions on what to do with it.

rules of appellate procedure Court rules that govern the conduct of cases before an appellate court.

rules of civil procedure Court rules that govern the conduct of civil cases at the trial level.

rules of construction A decision (usually by a judge) about the meaning and legal effect of ambiguous or doubtful words that considers not only the words themselves but also surrounding circumstances, relevant laws and writings, etc. (Looking at just the words is called "interpretation," although interpretation is sometimes used to mean construction also.)

rules of criminal procedure Court rules that govern the conduct of criminal cases at the trial level.

rules of evidence Court rules that govern the gathering of information for use at trial and admission of information as evidence at trial.

saving clause (separability or severability) A clause in a statute (or a contract) that states that if part of the statute (contract) is declared void, the remainder stays in effect.

scope A section of an ALR annotation that identifies the issue covered in the annotation.

secondary law Secondary sources contain commentary on the law and may be used by courts in deciding a matter in the absence of any primary sources. Secondary law includes treatises, legal periodicals, law review articles, legal encyclopedias, American Law Reports annotations, law dictionaries, legal thesauruses, restatements of the law, and hornbooks.

secondary sources Secondary sources are designed to explain legal concepts and can be used to understand basic legal terms and general concepts. They provide the researcher with background information and a framework of an area of the law, arranging legal principles in an orderly fashion. In contrast to primary authority (constitutions, cases, statutes, court rules, and administrative regulations), secondary sources do not have the force and effect of law.

server The host computer that "serves" software or information to a user's (client's) computer. A computer in a network shared by multiple users. The term may refer to both the hardware and software or just the software that performs the service. See dedicated server.

session laws Statutes printed in the order that they were passed in each session of legislature. *See also* statutes at large.

Shepard's Citations A leading citator.

short title A legislative act often is identified by a name given it by the legislature and for easy reference is often referred to by that name. This is the "short title" or "popular name" of the act.

signposts Words or phrases in a document that point the reader in the right direction and provide a framework for understanding the document.

slip law A printed copy of a bill passed by Congress that is distributed immediately once signed by the president.

slip opinion A court decision published singly, shortly after the case has been decided.

software A general term for the various kinds of programs used to operate computers and related devices. Software is often packaged on CD-ROMs and computer diskettes, or downloaded over the Internet. Some software programs come pre-loaded when you purchase a computer.

specific performance Being required to do exactly what was agreed to. A court may require specific performance of a contract if one person fails to perform and damages (money) will not properly compensate the other side for work done.

statements of the rule of law The law contained in any legal sources.

status flags In KeyCite, a red or yellow triangular status flag located in the upper-left-hand corner of a primary source warns one of any negative history. A red flag appearing on a case means that the case is no longer good law for at least one of the points it contains. A yellow flag appearing on a case means that the case has some negative history, but it has not been reversed or overruled.

statute of frauds Any various state laws, modeled after an old English law, that requires many types of contracts (such as contract for the sale of real estate or of goods over a certain dollar amount, contracts to guarantee another's debt, and certain long-term contracts) to be signed and in writing to be enforceable in court.

statutes at large A collection of all statutes passed by a particular legislature (such as the U.S. Congress), printed in full and in the order of their passage. The U.S. Statutes at Large also contains joint resolutions, constitutional amendments, presidential proclamations, etc.

strict construction Exact, precise; governed by exact rules. Strict construction of a law means taking it literally or "what it says, it means" so that the law should be applied to the narrowest possible set of situations. Strict construction of a contract means that any ambiguous words in the contract should be interpreted in the way least favorable to the side that wrote the words.

string citation A citation sentence with more than one citation.

style Official name

subject matter jurisdiction The person about whom and the subject matters about which a court has the right and power to make decisions that are legally binding.

subsequent history The history of a case beginning after the decision cited.

summary and comment A section of an ALR annotation that contains summary of information covered in the remainder of the annotation.

supremacy clause The provision in Article VI of the U.S. Constitution that the U.S. Constitution, laws, and treaties take precedence over conflicting state constitutions or laws.

Supreme Court of the United States The highest of the United States courts.

tabulation Can be used very effectively in legal writing where you have a list of items or activities. When you tabulate, you place each item or activity on a separate line. Each line, except for the last and next to the last line, ends with a semicolon. The next to the last line ends with a semicolon and the word "and" or "or." The last line ends with a period.

testimony Evidence given by a witness under oath. This evidence is "testimonial" and is different from demonstrative evidence.

textual sentence A complete grammatical sentence with a subject and a verb.

textualism 1. The process of discovering or deciding the meaning of a written document by studying only the document itself and not the circumstances surrounding it. But *see* no. 2. 2. Studying the document and surrounding circumstances to decide the document's meaning. *See* construction.

The Bluebook The style guide for legal citation published by the Harvard Law Review Association in conjunction with the Columbia Law Review, the University of Pennsylvania Law Review, and The Yale Law Journal.

thesis paragraph This paragraph should contain your thesis—the central idea of your memo.

third-party information provider Refers to a company that compiles data received directly from the original sources (e.g., courts, government agencies, law enforcement, and the major credit reporting agencies), compiles it in a uniform, user-friendly, searchable database, and sells the repackaged information to subscribers for a fee.

title The United States Code presents the federal laws currently in effect organized according to subject matter into 50 "titles." Thus a title is one of the major organizational divisions of the United States Code.

topic sentence Contains one main idea summarizing the rest of the paragraph, with the rest of the paragraph developing the idea presented in the topic sentence.

transactional pricing A type of billing arrangement for online database searching: flat fee charges are incurred for each "transaction" as defined by the terms of the contract, rather than per minute on-line access costs. Transactions include running a search in a database, retrieving a document, editing a query, or running a search query in a new database. *See* hourly pricing.

transitional language Provides a "transition" or link between what you have just written and what you are going to write about.

treatises The treatise is a work, often multivolume, generally covering a single field of law and written by one or more legal scholars. The treatise contains text, explaining the field in detail, supported by citation to relevant authority.

trial courts The lowest tier in the federal court system and the state court system is usually comprised of trial courts. In our adversary system, the two parties present their evidence at the trial level. The two parties may have different versions of the facts, and the attorneys representing them may be relying on differing legal theories. The evidence may be testimony, documents, or tangible evidence. The role of a trial court is to determine the facts and to apply the applicable law to the facts.

ultimate facts Facts essential to a plaintiff's or a defendant's case. Often facts that must be inferred from other facts and evidence.

unicameral A legislature with a single-house system.

unified court structure A simplified state court structure with three or four tiers; the court structure of other states that do not have a unified court structure is more complex.

URL Abbreviation for Uniform Resource Locator, the global address of documents and other resources on the World Wide Web. The first part of the URL is the protocol and the second part is the resource name, separated by a colon and two forward slashes. Example: http://www.findlaw.com.

United States Code The official law books containing federal laws organized by subject. They are recompiled every six years, and supplements are published when needed.

United States Code Annotated *(U.S.C.A.)* A multivolume commercial publication containing annotated codes for federal statutes, the United States Constitution, court rules, and other materials to aid the legal researcher.

United States Code Service *(U.S.C.S.)* A multivolume commercial publication containing annotated codes for federal statutes, the United States Constitution, court rules, and other materials to aid the legal researcher.

United States Code Congressional and Administrative News An advance session law service for federal statutes.

United States Courts of Appeals Hear appeals from lower federal courts and administrative agencies; there is one court for each of twelve geographical circuits plus the Federal Circuit, which hears appeals nationwide from specialized federal courts and other appeals such as patent cases.

United States district courts The U.S. trial courts.

United States Magistrate Judge A judge, usually within limited functions and powers; for example, a police court judge. U.S. magistrates conduct pretrial proceedings, try minor criminal matters, etc. [pronounce: maj-eh-strate]

United States Statutes at Large A collection of all statutes passed by the U.S. Congress, printed in full and in the order of their passage.

United States Supreme Court review of state court decisions The United States Supreme Court has jurisdiction to review final decisions of the highest state court rejecting claims based on federal constitutional law. Thus the United States Supreme Court makes the final interpretation of the meaning of the United States Constitution.

Universal Citation Guide The style guide for legal citation published by the American Association of Law Libraries. The legal citations in this guide are medium and publisher neutral.

U.S. Case/Party Index A national database index of U.S. federal district, bankruptcy, and appellate courts available on the Internet through the PACER subscription service.

will A document in which a person tells how his or her property is to be handed out after death. If all the necessary formalities have been taken care of, the law will help carry out the wishes of the person making the will.

World Wide Web (Web/WWW) A hypertext-based system for finding and accessing documents and resources on the Internet using a system of hypertext and hypermedia links; the worldwide "network of networks."

Words and Phrases A multivolume judicial legal dictionary in which defined words and phrases are arranged in alphabetical order, and each word or phrase is followed by a paragraph summary of the word or phrase as used in a case.

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e.resources and Back of Book (BOB) CD-ROMs

Minimum System Requirements:

PC:

- Operating System: Windows 2000 w/ SP4, XP w/ SP2, Vista
- Hard Drive space: [200MB]
- Screen resolution: 800 x 600 pixels
- CD-ROM drive
- Sound card and listening device required for audio features

- An Internet connection, Firefox 2 or Internet Explorer 6 & 7 for Internet based content
- [Microsoft® Word 95 is required to edit the Instructor's Manual and Microsoft PowerPoint® 97 is required to edit the presentations]

Mac:

- Operating System: Mac OS X 10.4
- Hard Drive space: [200 MB]
- Screen resolution: 800x600
- CD-ROM drive
- Sound card and listening device required for audio features
- An Internet connection, Firefox 2 or Safari 3 for Internet based content
- [Other software requirements]

PC Setup Instructions:

1. Insert disc into CD-ROM drive. The program should start automatically. If it does not, go to step 2.
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3. Double-click the *start.exe* file to start the program.

Mac Setup Instructions

1. Insert disc into CD-ROM drive. The CD icon will pop up on your desktop
2. Double-click the icon for the CD.
3. Double-click the *start* file with the "F" circle logo, to start the program.

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