Part One: The Complete Guide to Writing a Legal Memorandum

> WRITING . . . IS IN MANY WAYS SIMILAR TO EXECUTING A PIECE OF CARPENTRY. IF YOU TAKE SOME WOOD AND NAILS AND GLUE AND MAKE A BOOKCASE, ONLY TO FIND WHEN YOU'RE DONE THAT IT TOPPLES OVER WHEN YOU TRY TO STAND IT UPRIGHT, YOU MAY HAVE CREATED SOMETHING REALLY VERY BEAUTIFUL, BUT IT WON'T WORK AS A BOOKCASE.
>
> William Goldman, 1983

Let's start with the basics. A *legal memorandum* is a research paper. Someone, usually a client, has a problem, and the solution to that problem isn't obvious. Why isn't it obvious? Because, in the United States, we have a common-law system. That means that like cases are decided in a like manner. And it takes research into previously decided cases to figure out where a current client's case fits into the existing legal framework—what cases, in other words, are "like" the client's case—and how, as a consequence of the precedents, the judge or jury will resolve the client's case. This is how we advise clients about their options: we write memoranda that describe the client's problem, communicate the relevant legal framework, situate the problem within that framework, and predict candidly how a decision-maker will resolve the issues. If the client's going to win, great. But if she's going to lose, she needs to know it. In a memorandum, we analyze our client's problem objectively, as a neutral party would, and tell her frankly what her chances of success are. (Figure 1, on the opposite page, contains a simple, graphical definition of a legal memorandum.)

The ability to analyze a problem objectively and to communicate that analysis in writing is a fundamental skill for any attorney to have. As one book puts it, "the ability to assess a legal problem and to communicate your assessment to others . . . will form the cornerstone of your work as an attorney."[1] It doesn't matter whether you plan to be a trial attorney or litigator—or to do transactional work such as mergers or estate planning. Writing memoranda in your first-year writing course helps you "develop[] [the] fundamental skills of analysis and communication"[2] which are applicable to any attorney on the job. Keep in mind, too, that every discipline has its own style. The style a doctor uses is different from the style an engineer uses. The style an engineer uses is different from the style an English professor uses. The same is true of attorneys. We have our own distinctive way of speaking and writing. The preferred style for the discipline you studied as an undergraduate may very well be different than the style your legal-writing professor wants you to use.

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1 CHRISTINE COUGHLIN ET AL., A LAWYER WRITES xii (2008).

2 *Id.*

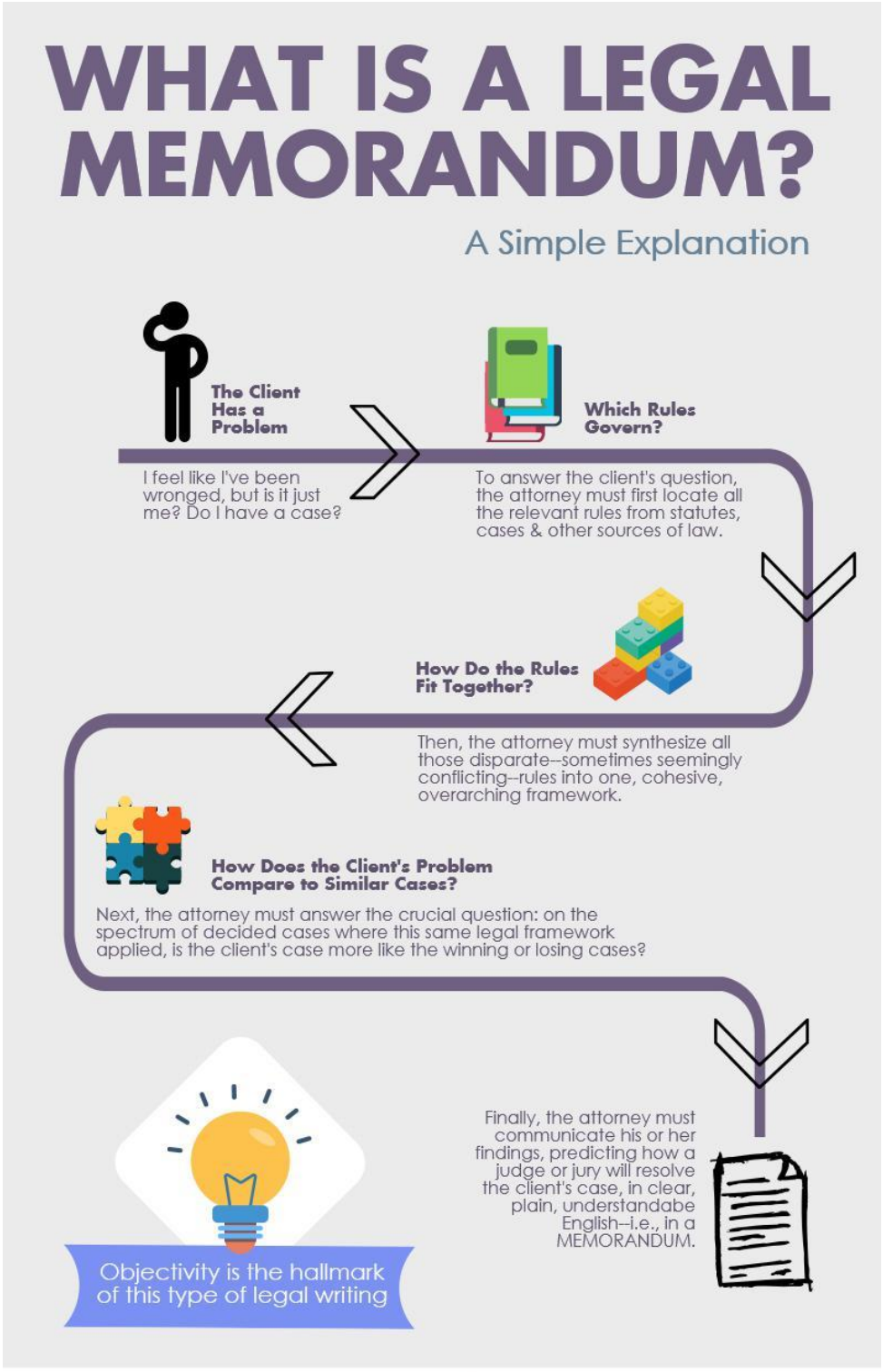
WHAT IS A LEGAL MEMORANDUM?
A Simple Explanation
The Client Has a Problem
I feel like I've been wronged, but is it just me? Do I have a case?
Which Rules Govern?
To answer the client's question, the attorney must first locate all the relevant rules from statutes, cases & other sources of law.
How Do the Rules Fit Together?
Then, the attorney must synthesize all those disparate--sometimes seemingly conflicting--rules into one, cohesive, overarching framework.
How Does the Client's Problem Compare to Similar Cases?
Next, the attorney must answer the crucial question: on the spectrum of decided cases where this same legal framework applied, is the client's case more like the winning or losing cases?
Finally, the attorney must communicate his or her findings, predicting how a judge or jury will resolve the client's case, in clear, plain, understandabe English--i.e., in a MEMORANDUM.
Objectivity is the hallmark of this type of legal writing
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Figure 1

I think it's important to start this way, by defining exactly what a memorandum is, because laypeople (and perhaps first-year law students) don't know what we mean when we talk about "memos." When I was a young attorney, working on a memorandum for several days, and complaining about it for that same period to a non-lawyer friend of mine, he finally said to me on Day #3 of this process, "You're still working on a *memo*?" I think he had in mind a note I was writing on one of those yellow Post-Its. I'm sure he was giving me the benefit of the doubt, and visualizing a *large* Post-It, but still . . . not something that would take days to write! No wonder he was confused! So, now, when I talk to laypeople about memoranda, I'm always careful to explain my terms, and you should be too.

Another way to define a "memorandum" is to distinguish it from another type of document that lawyers write: a brief. Memoranda and briefs are in many ways the opposites of one another. Memoranda are objective. Briefs take a side. Memoranda are internal, shared only within the firm and client. Briefs are public, filed with the court, copied to the adversary, and available to anyone who wants them. But, with both types of writing, the author accurately summarizes the law, applies the law to the facts of a case, and predicts (in memoranda) or suggests (in briefs) a certain outcome. First-year law students at accredited law schools in the United States spend fall semester working on memoranda and spring semester working on briefs. Figure 2 below summarizes the differences between memoranda and briefs.

But let's get on with talking about how to write a memorandum. The first thing I want you to do (if you haven't already) is turn to Appendix 1 and read the model memorandum that appears there. That will give you the big picture of what a legal research paper—a memorandum—really is. When you're done reading, turn back to this page and follow along as I break the model into parts and show you the techniques you should use to craft each part effectively. A memorandum has six parts, which the following sections will discuss in turn: (I) the introduction; (II) the question; (III) the answer; (IV) the facts; (V) the analysis; and (VI) the conclusion.

I. The Introduction

Learning Objective: To teach you to write a short, generic introduction at a high level of generality.

It's conventional to begin a memorandum with a brief, one-sentence introduction. This introduction should summarize the memorandum's purpose at a high level of generality applicable to any parties and any case; it should not mention the names of the players in your case and it should avoid too specific a rendition of the relevant facts.

Four sample introductions appear below. The first is based on *Minot v. Canterbury*. If that name sounds familiar, it should: you're already aware of the case—which involves the attorney-client privilege—because you read a model memorandum about it (*see* Appendix 1). The second introduction is based on *United States v. Fernandez-Caro*, which may be unfamiliar to you. However, as mentioned in the Introduction, we'll be using examples from *Fernandez-Caro* throughout the semester. Consequently, before you proceed any further in this Workbook, you need to read the case. It's very short and appears in Appendix 3. Go there now and read the case before continuing on here.

The third and fourth introductions are based on *Bradwell v. Illinois*, 83 U.S. 130 (1872), and *Kaplan v. Stock Mkt. Photo Agency, Inc.*, 133 F. Supp. 2d 317 (S.D.N.Y. 2001), respectively. These two cases are *not* reproduced in the Appendices and you're *not* required to read them. If you're interested in reading them, though, they're readily available in law libraries and legal databases.

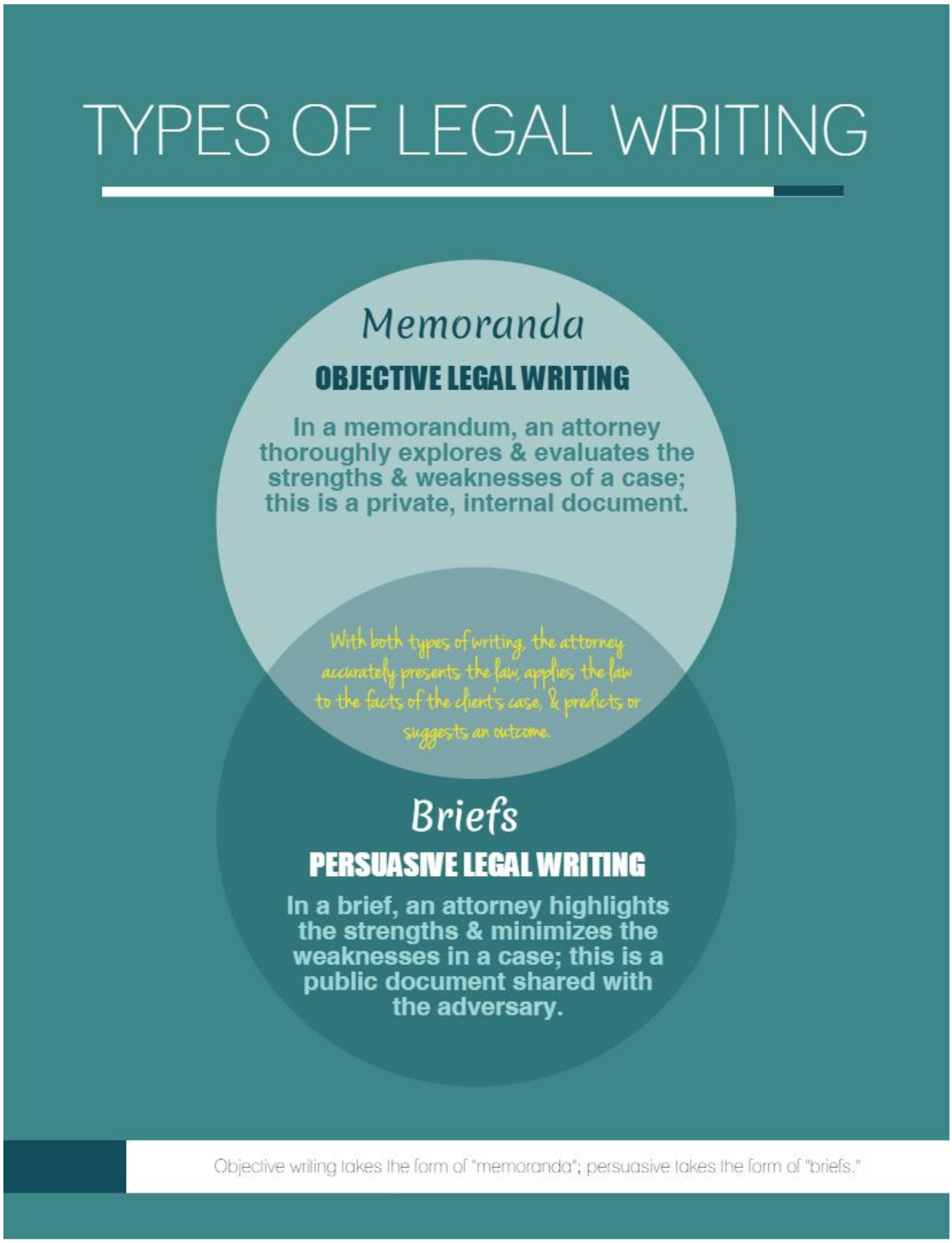
TYPES OF LEGAL WRITING
Memoranda
OBJECTIVE LEGAL WRITING
In a memorandum, an attorney thoroughly explores & evaluates the strengths & weaknesses of a case; this is a private, internal document.
With both types of writing, the attorney accurately presents the law, applies the law to the facts of the client's case, & predicts or suggests an outcome.
Briefs
PERSUASIVE LEGAL WRITING
In a brief, an attorney highlights the strengths & minimizes the weaknesses in a case; this is a public document shared with the adversary.
Objective writing takes the form of "memoranda"; persuasive takes the form of "briefs."
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Figure 2

Four Sample Introductions

- Sample Introduction Based on *Minot v. Canterbury*: This Memorandum analyzes whether the attorney-client privilege protects a prospective client's non-verbal actions.
- Sample Introduction Based on *United States v. Fernandez-Caro:* This Memorandum analyzes whether evidence obtained by foreign officials through the use of torture is admissible in an American courtroom.
- Sample Introduction Based on *Bradwell v. Illinois*: This Memorandum analyzes whether a state can deny an otherwise-qualified applicant a license to practice law because she is a married woman.
- Sample Introduction Based on *Kaplan v. Stock Mkt. Photo Agency, Inc.*: This Memorandum analyzes whether an advertisement that copies the idea of another advertisement, but changes its aesthetics, violates the copyright on the original.

Note as an initial matter that all of these sample introductions follow a recipe: they all start with the words "This Memorandum analyzes whether." This is "boilerplate," i.e., standard, customary, tried-and-true terminology. It's not the *only* way to start an introduction, but it's a good way to do so. In fact, since you're a beginning a legal writer, I would recommend that you use this language verbatim in your own introductions. Someday, after you've finished *Legal Writing I* and *II*, you can use your own, unique verbiage if you want to (or you can stick with the boilerplate), but, for now, the boilerplate is the safest choice. If you try to craft something unique, you run the risk that it will be inferior in terms of grammar or style to what I'm giving you here. The boilerplate will also make your job as a writer easier, freeing up your intellectual energy for other aspects of the writing process, aspects that aren't easily reduced to boilerplate.

Note, additionally, that none of the authors mentioned the parties' names or got deeply into the details of the cases. For example, in the first introduction, based on *Minot*, the author didn't mention Mr. Minot or Ms. Canterbury or even explain that the "non-verbal actions" involved opening a duffel bag and revealing human remains. This was the right thing to do in terms of achieving a high level of generality and communicating the facts in a way that might apply to other parties and cases. "Non-verbal actions" could encompass things like pointing, nodding, or winking—things that might come up, in other words, in other cases. "Opening a duffel bag and revealing human remains" doesn't encompass anything but itself. It isn't generalizable. We can't easily extrapolate from it to other situations. Similarly, in the second introduction, based on *Fernandez-Caro*, the author didn't mention the Mexican Federal Judicial Police. He just said "foreign officials." He wrote at a high level of generality: "foreign officials" could encompass officials in Mexico or Greece or Nigeria or *anywhere*. The terminology is applicable to other parties and other cases. Likewise, in the third introduction, based on *Bradwell v. Illinois*, the author didn't mention the State of Illinois. She just said "a state." This terminology could encompass any U.S. state and maybe even foreign provinces or sovereign nations. It's not tied solely to Illinois. The language is general enough to apply to other cases. In the final example, based on *Kaplan*, the author described "an advertisement that copie[d] the idea of another advertisement, but change[d] its aesthetics." Both

advertisements featured a businessman standing on the ledge of a skyscraper. But the author didn't say so because "copy[ing] an idea" could encompass all sorts of copying. "Copying a businessman standing on the ledge of a skyscraper" could not. Ultimately, saying that both pieces had the same "idea" was enough. The specifics of the idea weren't important to the legal question. All of these authors were creating a *generic* summary of the facts, as is appropriate in an Introduction section.

The last thing I want you to notice about these introductions is that none of them tells us how the legal issue will be resolved. None of them tells us the answer! For example, after reading the last introduction, we don't know whether copying another person's idea, but changing her aesthetics, constitutes copyright infringement or not. We have to read on to find out the answer. That's as it should be. In a sense, the author is doing what creative writers do: raising a "story question." Story questions create tension in the reader, so that the reader wants to know what happens next. This is what television shows do with cliffhangers at the end of the season: they end on some dramatic note, some unanswered question, so that you can't wait to find out what happens when the next season begins. Our introductions won't be quite so dramatic, but they'll do a little bit of the same thing.

When writing your introductions, you should use the same techniques used in the sample introductions above. Take a look at Figure 3 on the next page. It summarizes these techniques in graphical form.

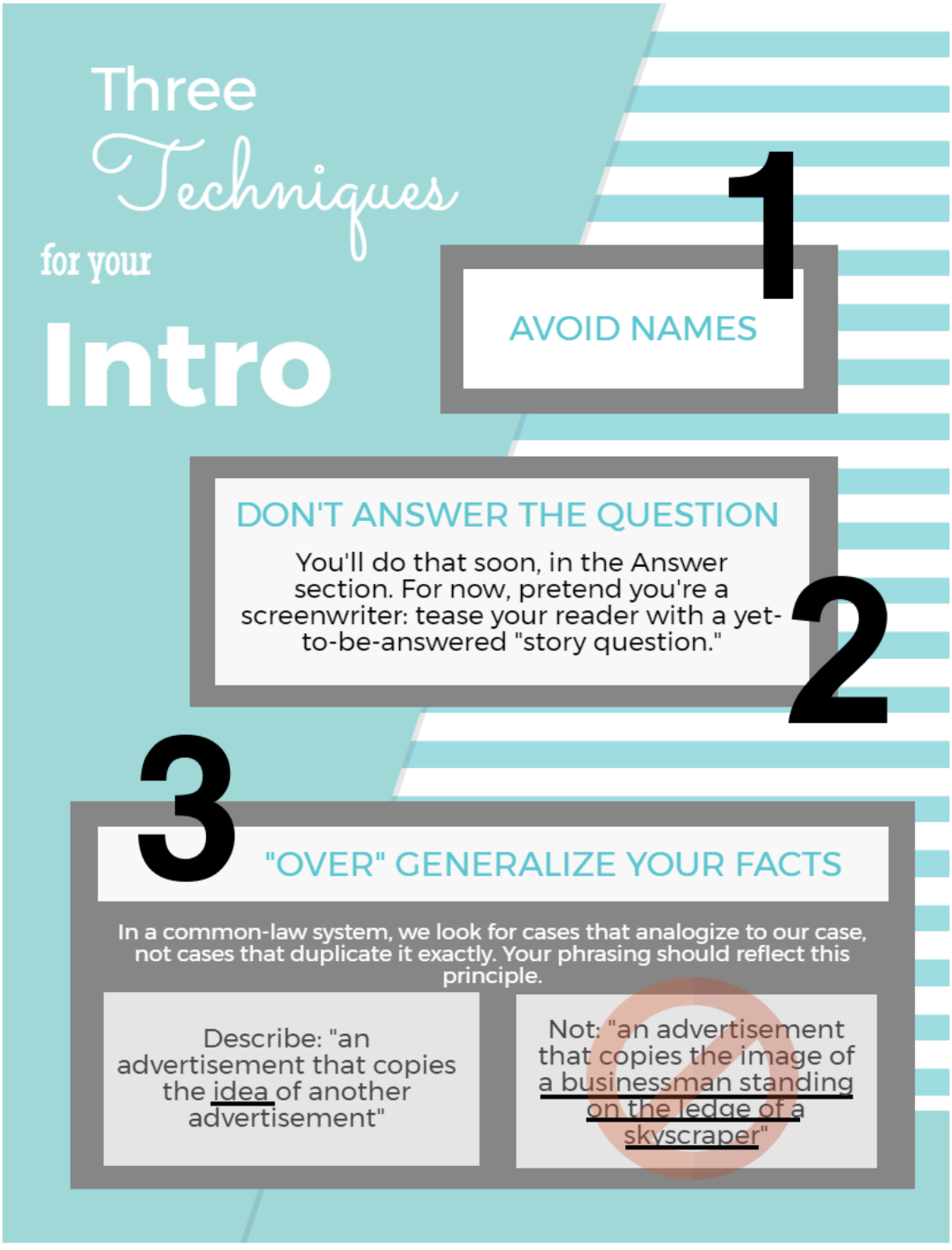
Three
Techniques
for your
Intro
1
AVOID NAMES
DON'T ANSWER THE QUESTION
You'll do that soon, in the Answer section. For now, pretend you're a screenwriter: tease your reader with a yet-to-be-answered "story question."
2
3
"OVER" GENERALIZE YOUR FACTS
In a common-law system, we look for cases that analogize to our case, not cases that duplicate it exactly. Your phrasing should reflect this principle.
Describe: "an advertisement that copies the idea of another advertisement"
Not: "an advertisement that copies the image of a businessman standing on the ledge of a skyscraper"
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Figure 3

II. The Question

***Learning Objective*: To teach you to write a "Garnerized" question that doesn't embed the answer, yet gives enough facts and/or law so that the reader can predict the answer.**

The second section of a memorandum is the Question section. In this section, you present a brief synopsis of the issue you're researching. You explain what the problem is and give the reader a sense why the problem requires deep analysis of the sort that warrants a written memorandum on the subject.[3]

A. Traditional Questions

Traditionally, Question sections were written as a single sentence that called for a yes-or-no answer. Often, they began with the word "Whether." For example, imagine you're representing one of the parties in *Minot* or clerking for the judge deciding the case. If you were asked to write a memorandum on the dispute, you might write the Question section—in the traditional style—like so:

- Whether the attorney-client privilege applies to an act, unaccompanied by words, performed by a person who arrived unannounced at an attorney's law firm, who did not have any prior personal or professional relationship with the attorney, when the act was done in the privacy of the attorney's personal office and appears to have been a response to a question from the attorney?

or

- Does the attorney-client privilege apply to an act, unaccompanied by words, performed by a person who arrived unannounced at an attorney's law firm, who did not have any prior personal or professional relationship with the attorney, when the act was done in the privacy of the attorney's personal office and appears to have been a response to a question from the attorney?

As you can see, each of these bullet points is a single sentence that calls for a yes-or-no answer. The actual answer might not have been "yes" or "no"; it might have been "probably" or "probably not." Regardless, you had to draft the Question section as if "yes" and "no" were the only possible answers.

Now, let's look more closely at the first example, the one that begins with "Whether." Beginning this way results in an incomplete sentence. For that reason, the modern preference is to choose another opening word like in the second example, which begins with "Does." This makes the sentence much better but, let's face it, not perfect. The traditional, single-sentence format produces Question sections that are frequently long, convoluted, and difficult to understand—as the examples above amply illustrate. It's also easy to make grammatical errors in such sentences. In short, this format is not reader-friendly and in that sense violates our basic *mantra* as legal writers: *to make things easy on our readers*.

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[3] If the answer were obvious, you wouldn't have been asked to write a memorandum on the subject!

For all these reasons, I dislike the traditional question format, and will soon provide you with what I think is a superior alternative. But, because some partners still prefer the traditional format, I've given several examples of Questions written in that format, below. These examples are based on an article, *High Court Faces Another Term of Bruising Battles*, by Robert Barnes, which appeared in the October 1, 2007 issue of *The Denver Post*, at 4A. The author was summarizing the U.S. Supreme Court's docket for 2007 and—knowingly or not—wrote his summaries in the format of a traditional Question section. His summaries are clear and understandable; he somehow managed to avoid the pitfalls that ordinarily occur with the traditional format. His questions thus serve as good examples for anyone wanting to write a Question section in the conventional manner.

Examples of Question Sections Written in the Traditional Style

- Case About Voter Identification: Can states require all voters to show photo identification at their polling places? (*Crawford vs. Marion County*)
- Case About Lethal Injection: Does an inmate facing execution have a right to be protected against the "unnecessary risk of pain"? (*Baze vs. Rees*)
- Case About Mexican Prisoners: Can the President require states to reopen death-penalty cases in order to enforce an international treaty? (*Medellin vs. Texas*)
- Case About Drug Sentences: Can judges set lower prison terms for those convicted of selling drugs, including crack cocaine? (*Kimbrough vs. United States & Gall vs. United States*)
- Case About 401(k) Plans: Can an employee sue to recover his money if his retirement fund lost $150,000 after the plan administrator ignored his request to move his money to a safer investment? (*LaRue vs. DeWolff*)
- Case About Age Bias: Does a fired manager who sues, alleging age bias, have a right to tell the jury about others in the company who say they, too, experienced age discrimination? (*Sprint vs. Mendelsohn*)
- Case About Investor Lawsuits: Can investors who lost money because of stock fraud sue other companies that participated in a scheme to inflate earnings? (*Stoneridge vs. Scientific-Atlanta*)
- Case About Gun Rights: Does the Second Amendment give individuals a right to own a gun, despite a city's ban on handguns? (pending appeal in District of Columbia vs. Heller)

If you find yourself working with someone who prefers the old-style format, you should use these examples as models for your Question sections. You should also read Appendix 4, where legal-writing experts Terrill Pollman, Judith M. Stinson, Richard K. Neumann, Jr., and Elizabeth Pollman explain in detail how to use the "Under-Does-When" method for writing a traditional Question section.[4] This method is easy to use and it produces high-quality Question sections that will satisfy any reader. But

[4] You don't have to read Appendix 4 now, for this class, but, assuming you save this Workbook, you can read it if you work for someone who wants you to use a traditional approach to the Question section.

that's enough about the traditional approach to writing Question sections. It's time to turn our attention to my preferred, more-modern format, something I call a "Garnerized" Question.

B. Garnerized Questions

Legal-writing expert Bryan Garner has developed a new approach to writing a Question section, an approach that is in many ways more flexible than the old approach. It's a technique that's easy for authors to employ, so it's attractive to law students and lawyers. It's also a technique that produces Question sections that are easy to understand—far easier than their traditional counterparts—so it's attractive to clients, judges and partners. In short, it's an approach that has something for everyone.

1. The Basic Recipe for Garnerized Questions

The main difference between a "Garnerized" Question and a traditional one is that the former should be drafted as a syllogism. A syllogism is a rhetorical device used to prove an argument. It consists of three parts: a major premise, a minor premise, and an inevitable conclusion. The conclusion is "inevitable" because it must be true if the major and minor premises are true. In other words, the conclusion logically follows from the two premises. The Greek philosopher, Aristotle, is credited with inventing the following syllogism (or one very much like it):

- Major premise: All mortals die.
- Minor premise: All men are mortals.
- Conclusion: All men die.

There is a difference, however, between an argument that is logically sound and an argument that is undoubtedly true. Aristotle's argument, above, is both logical and true. However, the following syllogism, although logical, is untrue:

- All dogs can fly.
- Rover is a dog.
- Rover can fly.

In this example, the major premise is untrue. However, the argument itself is valid because the conclusion follows logically from the premises. As a lawyer, it's important to be able to both create valid arguments and state true premises.

So, how does all of this translate into writing the Question section of a memorandum? Let's see an example. The following Garnerized Question comes from Bryan Garner himself:

> Missouri law provides that a party to a contract cannot tortiously interfere with its own contract. Dr. Borstead claims that St. Anthony's Hospital tortiously interfered with a lease between himself and St. Anthony's Properties, Inc., the hospital's wholly owned subsidiary. Can St.

> Anthony's Hospital tortiously interfere with the lease entered into by its wholly owned subsidiary?[5]

Note that, in this example, the major premise—*Missouri law provides that a party to a contract cannot tortiously interfere with its own contract*—is the law. This is often a good way to start your syllogism: use the legal framework for the major premise. Note also that the third part of the syllogism, the "inevitable conclusion," is stated as a question rather than a conclusion: *Can St. Anthony's Hospital tortiously interfere with the lease entered into by its wholly owned subsidiary?* This is a contrast to a standard syllogism, like the ones we saw above, where the third part was stated in conclusory terms: *All men die* and *Rover can fly*. But one thing a standard syllogism and a Garnerized Question have in common is that the third part of the syllogism—whether stated as a question or in conclusory terms—is inevitable. It may not seem so to you right now, but for an experienced attorney, Mr. Garner's major and minor premises set up the final sentence. In other words, after reading the major and minor premises, an experienced lawyer could guess what the final sentence would be. The first two parts of your syllogism should do the same thing: they should set up the ultimate question. Stated differently, they should make that question *inevitable*.

Now let's look at Mr. Garner's sentence structure. He used three sentences for his Question section. A syllogism has three parts (major premise, minor premise, and inevitable conclusion) and his sentences reflect those parts. But he didn't have to do this. He didn't have to use exactly three sentences. There's no requirement that your Question section be three sentences long. It must have a *minimum* of three sentences, to reflect the parts of a syllogism, and your inevitable question should be one sentence long. But it's entirely possible that you will need more than one sentence for either the major premise or the minor premise, or both. That said, we still want to keep the Question section relatively brief, so limit yourself to 100 words or less. And, as with a traditional Question section, you must phrase a Garnerized Question section so that it calls for a yes-or-no answer (even if your answer is "probably" or "probably not").

Let's see another example of a Garnerized Question section, one you've read before in the model memorandum, one that was drafted by your professor:

> The attorney-client privilege protects communications, between lawyers and clients, made in confidence for the purpose of legal assistance. The firm's client, Louis Minot ("Mr. Minot") arrived unannounced at Elizabeth Canterbury's ("Ms. Canterbury's") law office. The two had never met before. After some small talk, Mr. Minot told Ms. Canterbury that he had information about an unsolved murder. Ms. Canterbury asked him why he had not gone to the police. He replied that he was worried he would become a suspect—and he unzipped a duffle bag, revealing a human skeleton (the "Act"). Was the Act privileged?

As you can see, I wrote my Question section in the Garnerized fashion, as a syllogism. Furthermore, like Mr. Garner, I made the first part of my syllogism, the *major premise*, the law. I made the second part of

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[5] Taken from Bryan Garner's Advanced Legal Writing & Editing (Rev. ed. 2002).

my syllogism, the *minor premise*, the facts. This is a good recipe to follow: use the legal framework for the major premise and the facts for the minor premise. There are other ways to craft a syllogism, but the law-facts layout is a good one to try first. If it works, your job is done. If it doesn't work, you'll have to do some experimentation until you find something that does (for example, you could try something that has factual information in both the major and minor premises).

One difference between Mr. Garner's syllogism and mine is that he used only three sentences and I used seven. I used one sentence for my major premise and one for my inevitable question, but my minor premise is *five* sentences long. Still, I kept things brief, using only ninety-six words for the whole syllogism. So, remember, you must have a minimum of three sentences, and your inevitable question at the end of the syllogism should consist of only one sentence, but, if you need more than two sentences for the major or minor premise, or both, that's perfectly acceptable—so long as you don't exceed 100 words.

There's one more important difference between Mr. Garner's Question section mine. His minor premise—*Dr. Borstead claims that St. Anthony's Hospital tortiously interfered with a lease between himself and St. Anthony's Properties, Inc., the hospital's wholly owned subsidiary*—is an allegation made by one party against another. And it's very legalistic. In a sense, it's a legal conclusion about tortious interference. But there's no explanation of what *facts* indicate tortious interference. Did the parent's personnel discourage the subsidiary's personnel from renewing Dr. Borstead's lease? Did the hospital tell the subsidiary to turn the electricity off? What facts, or bits of evidence, support the legal conclusion about tortious interference?

My minor premise, in contrast, isn't an allegation by one party against another. I don't say "Ms. Canterbury claims that the attorney-client privilege is inapplicable to Mr. Minot's disclosure." I talk, instead about the *facts* that the parties could use to argue for or against the privilege. For instance, I start my minor premise by saying that "Louis Minot . . . arrived unannounced at Elizabeth Canterbury's . . . law office." This isn't a biased claim. It's a claim that every party to the case agrees on. And it isn't legalistic. It's evidence that the parties could use to argue their case. Ms. Canterbury could argue that she didn't know Mr. Minot and that he didn't make a formal appointment with her for legal services and that, therefore, they weren't in an attorney-client relationship. Mr. Minot could counter that showing up at a law office in and of itself indicates that he was seeking legal services and that, therefore, he and Ms. Canterbury *were* in an attorney-client relationship. It's a pure and neutral statement of facts. If I had merely said something like "Ms. Canterbury claims that she and Mr. Minot did not have an attorney-client relationship," instead of mentioning Mr. Minot's unscheduled arrival at Ms. Canterbury's law firm, the reader would have been left wondering what evidence Ms. Canterbury would use to prove her claim, and what evidence Mr. Minot might use to counter it. This would have been a mistake.

It's a mistake that I think Mr. Garner makes in the example about St. Anthony's Hospital, above. As I mentioned above, he starts his minor premise differently than I did—not with a neutral, factual statement, but with a one-sided and very legalistic statement: "Dr. Borstead claims that St. Anthony's Hospital tortiously interfered with a lease . . . ." Mr. Garner is obviously being one-sided when he indicates that this is only Dr. Borstead's claim. He is also stating a legal conclusion, rather than reciting facts, when he uses the term of art "tortiously interfered." For me, this specialized terminology begs the question *What, exactly, did St. Anthony's do that might have amounted to tortious interference with a lease? Did it evict the tenant? Did it stop providing essential utilities?* These are the facts the reader needs to know to start formulating a gut feeling about how the inevitable question should be answered. The statement about tortious interference is really law, not facts. So Mr. Garner did not, in my view,

produce the best minor premise he could have. He should have given the reader facts—preferably neutral facts that all the parties agree upon (or at least facts going both ways)—rather than a bald legal claim made by one of the parties.

So, when you're writing your Question sections, please follow my lead with respect to the minor premise, not Mr. Garner's. First, keep the minor premise fact-oriented. Avoid legal conclusions. Don't worry about who's claiming what. Ignore the claims and recite the facts. Second, use only undisputed facts (facts that all of the parties agree to) if possible. If that's not possible, then try to give some facts that favor your client and some that don't. This helps the reader understand the complexities of the dispute; if all of the facts were one-sided, then the dispute would be easy to resolve and you wouldn't be writing a memorandum on it.

Finally, give at least three facts.[6] These facts should be the most important in the case. They should be "material," that is, "outcome-determinative": they should be facts that could affect how the case comes out, who wins and who loses. They should also relate to the legal standard you presented in your major premise. If you had more than three elements in that standard, and you have room within the 100-word limit to provide one fact for each element, then do so. But the reality of the word limit is that, often, we can't give one fact for each element. So, as a rule of thumb, force yourself to give at least three facts. And, as already stated, those facts should be material and either undisputed or a mixture of favorable and unfavorable to your client.

Put at least 3 hard facts into your minor premise.

You might hear me talking about "hard" facts at some point in class or in this Workbook. That's my shorthand way of describing a material, or outcome-determinative, fact. A *hard* fact is something that could come in as evidence in your case in the form of a document or other object or witness testimony. I want to see hard facts in your minor premise. I don't want to see conclusions. I'm interested, in the minor premise, in the *basis* for your conclusions, not the conclusions themselves. Now, you might be asking *What's the difference between a conclusion and a hard fact?* Let's take a simple example. Let's say my friend, Anastasia, and I are gossiping. We're talking about some co-workers, Brandi and Joe. Anastasia says "I think Brandi and Joe are dating." Well, that's a conclusion. Since I know and trust Anastasia, I'm likely to accept her conclusion as valid. On the other hand, if I didn't know her well, I might be skeptical. I'd want to know what evidence—what hard facts—underlay her conclusion. I might ask "What makes you think that?" If she said, "I don't know, it's just a gut feeling," then I'd be inclined to keep an open mind on the subject. If she said "Brandi just texted me a picture of them kissing," and showed me her phone, then I'd probably agree that the two were dating. It's the difference between

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[6] In the minor premise of my Question section for the *Minot* case, I recite approximately eight neutral facts: (1) Louis Minot arrived unannounced at Elizabeth Canterbury's law office; (2) the two had never met before; (3) they engaged in some small talk; (4) Mr. Minot told Ms. Canterbury that he had information about an unsolved murder; (5) Ms. Canterbury asked Mr. Minot why he had not gone to the police; (6) Mr. Minot said he was worried about becoming a suspect; (7) Mr. Minot unzipped a duffle bag; and (8) the duffel bag contained a human skeleton. These are facts that both parties would agree to (they are "neutral"), and they are facts that could be used as evidence for or against the applicability of the attorney-client privilege. Facts 1-3 go to the existence of an attorney-client relationship. Facts 4-6 go to the question whether Mr. Minot was seeking legal advice. Facts 5-8 go to the question whether a communication had occurred. You should strive for at least three "hard" facts—facts that could be used as evidence—in your Question sections.

showing and telling. Showing is a lot more persuasive than telling. In fact, it can be definitive. Creative writers know this, too, as evidenced by the mantra of many a literature professor: "Show, don't tell."

As lawyers, it's our job to be skeptical when it comes to the law. We can't take people's word for things. We can't accept their legal conclusions as valid. We need to examine the evidence that underlies those conclusions and make up our own minds. So, to bring things back to a more serious example, the *Minot* case, you don't want your minor premise to consist of statements like "Mr. Minot was seeking legal advice from Ms. Canterbury." The term "seeking legal advice" is one of the elements you recited in the major premise. It's a term of art. It's a legal conclusion. It's not evidence. It's not a hard fact. What you need to say instead is something like "Mr. Minot went to Ms. Canterbury's law office with information about an unsolved murder." Going to a law office is a fact. So is having information about an unsolved crime. They are things that could come in at trial through testimony from either Mr. Minot or Ms. Canterbury. They are the hard facts that underlie the conclusion that Mr. Minot was seeking legal advice. The best minor premises will consist of facts like these, not conclusions.

This idea—facts, not conclusions—is important generally in terms of legal analysis. So, start training yourself right now to write in precise terms, to use hard facts rather than conclusions. It will benefit you in your legal-writing classes, in other classes, and as a practicing lawyer.

Okay. Critiques of Mr. Garner's work aside, the Garnerized Question is a major improvement on the traditional Question. I've been teaching it to my students for many years now, and they like it. It's easier to write than a traditional question, so it's better for them, and it's more understandable to the reader, so it's better for me. In short, it achieves our most important goal, to make things easy on our readers, and our secondary goal, to make things easy on ourselves.

Just remember that the best Question sections often use the legal framework as the major premise and always use the hard facts as the minor premise. This "double whammy" of law and facts serves as a set-up for the final question; your reader should be able to predict that question after reading the major and minor premises. Take a look at Figure 4 on the next page. It summarizes the best practices for the Question section in graphical form.

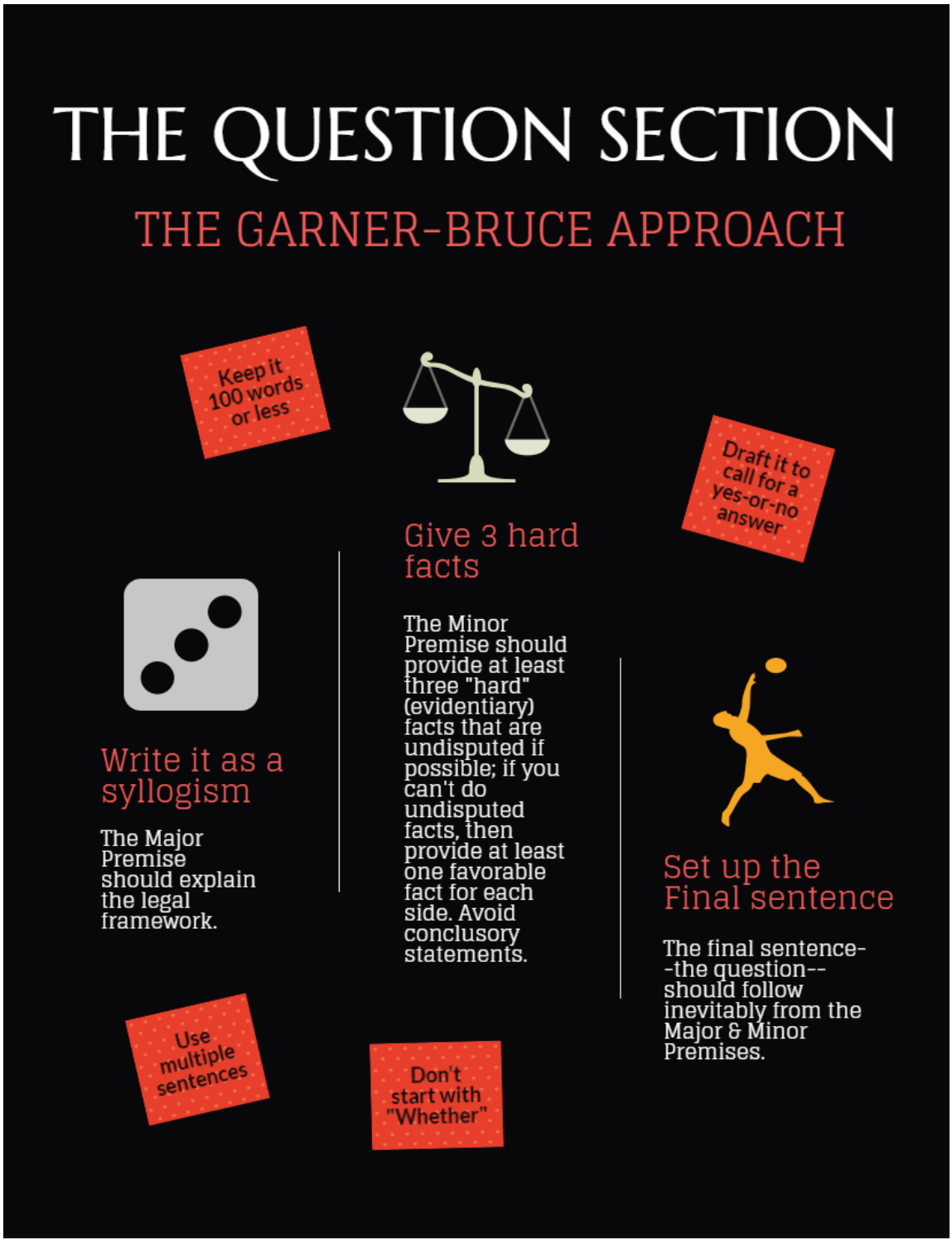
THE QUESTION SECTION
THE GARNER-BRUCE APPROACH
Keep it 100 words or less
Draft it to call for a yes-or-no answer
Give 3 hard facts
The Minor Premise should provide at least three "hard" (evidentiary) facts that are undisputed if possible; if you can't do undisputed facts, then provide at least one favorable fact for each side. Avoid conclusory statements.
Write it as a syllogism
The Major Premise should explain the legal framework.
Set up the Final sentence
The final sentence--the question--should follow inevitably from the Major & Minor Premises.
Use multiple sentences
Don't start with "Whether"
powered by
Piktochart
make information beautiful

Figure 4

2. Potential Problems that Can Arise with Garnerized Questions

On balance, Garnerized Questions are easier to write and understand than traditional Questions. But, based on my students' papers, there are two subtle problems that can arise when drafting them. First, some Garnerized Questions embed the answer. Stated differently, they fail to raise a story question. They give away the keys to the candy store. Remember, you're writing a *Question* section. Therefore, it should be a question, not an answer. It's okay to give your reader a gut sense of what the answer might be. In fact, you want to do that. But you don't want to actually state that answer. After all, the very next section of the memorandum is the Answer section. You'll have plenty of opportunity to spill the beans there.

Let's see an example from the *Minot* case. Suppose a student turned a memorandum in with this as his Question section:

> The attorney-client privilege protects communications, between lawyers and clients, made in confidence for the purpose of legal assistance. Louis Minot ("Mr. Minot") showed an attorney, Elizabeth Canterbury ("Ms. Canterbury"), a duffel bag filled with human remains. Was his non-verbal communication privileged?

This student would not score well on his Question section. *Why?* Because the final sentence—*Was his non-verbal communication privileged?*—embeds the conclusion that the non-verbal act was, indeed, a communication. That's one of the questions the student is supposed to be analyzing for the reader (whether an act devoid of accompanying language can be considered a communication). He may ultimately decide that such an act can be considered a communication, but the Question section is not the place to present such decisions.

Let's see another example from the same case, submitted by an actual student. For brevity, I'll only present the major and minor premises:

> The attorney-client privilege applies where there is a communication, in confidence, related to legal advice, between people in a client-lawyer relationship. The client, Louis Minot ("Mr. Minot"), non-verbally disclosed his discovery of human remains during a consultation to obtain legal advice from the attorney, Elizabeth Canterbury ("Ms. Canterbury").

The underlined portion is a legal conclusion, not a fact. One of the things necessary for the attorney-client privilege to arise, as the student herself points out, is an interaction "related to [the seeking of] legal advice." Thus, this student, like the student in the last paragraph, is embedding a conclusion in her Question section.[7] In other words, one of the questions she's supposed to be analyzing is whether Mr. Minot was seeking legal advice at the time of his disclosure. She may ultimately decide that he *was* seeking such advice, but the Question section is not the right place to communicate that decision.

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[7] In her case, the answer is embedded in the minor premise; in the former student's case, it's embedded in the inevitable question or third part of the syllogism.

Instead, she should have presented facts related to the legal question, like I did in my model Question where I presented the following facts: (1) Mr. Minot sought out Ms. Canterbury at her law office; (2) Mr. Minot told Ms. Canterbury he had information about an unsolved murder; and (3) Mr. Minot told Ms. Canterbury he was worried that he might become a suspect in the case. This goes back to the idea discussed above, about lawyer-authors having to avoid conclusions, and lawyer-readers not taking an author's "word" for something. When writing a Question section, don't allow yourself to embed an answer in the minor premise or the final sentence of the syllogism.

COMMON PROBLEMS IN QUESTION SECTION

-embedding the answer

-not giving enough facts &/or law

That brings us to the second problem that can arise with Garnerized questions. Some writers don't provide enough law, facts, or both, so that the reader can predict the answer to the inevitable question. As the last few paragraphs just made clear, you don't want to actually *state* the answer to that question. But you do want your reader to form an intuition about what the answer might be. You want to present the reader with "hard" or "evidentiary" facts related to the legal questions—that is, facts that can come in at trial, through witness testimony, documents, video footage, or the like, as evidence supporting or undermining the relevant legal claims. As you know, my rule of thumb is to give my reader at least three hard facts. If I can give at least one "good" and one "bad" fact (from my client's perspective), all the better. After all, there must be arguments on both sides if the partner (or professor) has asked me to write a memorandum on the subject.

One way to check whether your Question section gives enough hard facts is to ask yourself this question: *Can my reader make an argument using the legal framework and facts I provided that one of the parties should prevail?* If the answer is *yes*, you've done your job. If it's *no*, you're missing some law, some facts, or some of both. To illustrate this concept, let's take another look at my model Question from the *Minot* case. As you read it, focus on the major and minor premises, and the underlined passages.

> The attorney-client privilege protects communications, between lawyers and clients, made in confidence <u>for the purpose of legal assistance</u>. The firm's client, Louis Minot ("Mr. Minot") arrived unannounced at Elizabeth Canterbury's ("Ms. Canterbury's") <u>law office</u>. The two had never met before. After some small talk, Mr. Minot told Ms. Canterbury that <u>he had information about an unsolved murder</u>. Ms. Canterbury asked him why he had not gone to the police. He replied that <u>he was worried he would become a suspect</u>—and he unzipped a duffle bag, revealing a human skeleton (the "Act"). Was the Act privileged?

After reading the major premise, we know that a client claiming attorney-client privilege must show (among other things) that she was seeking "legal assistance" when the communication at issue occurred. After reading the minor premise, we know that Mr. Minot sought out Ms. Canterbury at a "law office," that he told her "he had information about an unsolved murder," and that he didn't go to the police because he "was worried he would become a suspect." Can we make an argument that Mr. Minot was seeking legal advice? Yes! It would go something like this:

> Mr. Minot was seeking legal advice. He didn't run into Ms. Canterbury at a random location like the supermarket. He sought her out specifically at

> her place of business—a law office. Moreover, he had a serious legal problem. He had sensitive information about an unsolved murder. In fact, the information was so sensitive he was worried it would look like inside information. He was worried it would look like he was the murderer. His very freedom was on the line. He went to Ms. Canterbury, a lawyer, for assistance with this very difficult criminal-law issue.

There it is. I easily made an argument, with the law and facts provided in the Question section, on behalf of one of the parties. That means I avoided one of the most common mistakes students make when drafting a Garnerized Question. I didn't leave my reader in a position where he had to take my word for things. I gave him enough law and facts so that he could begin to formulate his own opinion about what the answer to the inevitable question should be.

One way to avoid the two mistakes we've been discussing—embedding answers and providing too little facts and law—is to resist the temptation to write in a conclusory style. Sometimes, this means resisting the temptation to embed legal conclusions in the wrong places, such as in a minor premise. Sometimes, it means resisting the temptation to summarize facts and to state our conclusions about the facts rather than the facts themselves. For example, if I tell you, in regard to the *Fernandez-Caro* case, that "the police tortured the suspect," I'm really just communicating a conclusion I've reached based on the underlying facts that the police beat the defendant about the head and face, poured water into his nostrils, and placed electrical shocks on his wet body. If you don't know any of those "hard" facts, you're left in a position where you simply have to take my word about the torture. And, as an attorney, you should never do that. It's our duty as attorneys to identify the underlying, hard, evidentiary facts and come to our own conclusion about their significance. As my contracts professor, Robert Summers, used to say, "God is in the facts." Consequently, you should never allow yourself to be afraid to get down into the nitty-gritty of the facts and to communicate those facts to your reader in their rawest form.

Don't be conclusory!

Part One, § II, Exercises (The Question Section)

These exercises (and all the exercises in this Workbook) are, for the most part, geared toward the exact criteria I'll grade you on when you turn in your papers. An occasional question, like Question #1 below, isn't directly connected to those criteria but is nevertheless useful in developing critical-thinking and other essential skills. *Don't turn your answers in unless instructed to do so in the Syllabus*. They're mostly for your eyes only, a way for you to try your hand at something before you're actually graded on it. The answers appear at the end of this section. Be sure to compare your answer to the given answer. If they differ, think about why. If you still have questions after that process, raise them in class.

1. *Read the following syllogisms and think about whether they are both logically valid and based on true premises. Be prepared to discuss your thoughts.*

   All Colorado ski resorts permit snowboarding.
   Loveland is a Colorado ski resort.
   Loveland permits snowboarding.

   Some doctors are men.
   Some doctors are tall.
   Some men are tall.

   All skiers use poles.
   Raheem is a skier.
   Raheem uses poles.

   All horses are quadrupeds.
   Secretariat is a horse.
   Secretariat is a quadruped.

   All snowboarders wear helmets.
   Mary is a snowboarder.
   Mary wears a helmet.

2. *This question suffers from one of the two problems that can occur with Garnerized questions (embedding the answer or failing to provide enough facts and/or law so that the reader can predict the answer). Which one? Where is the problem? (Underline it.)*

   Colorado law prohibits, as nuisances, intentional, negligent, or abnormally dangerous activities that interfere substantially and unreasonably with the use and enjoyment of real property. Tiffany Singh ("Ms. Singh") and Augustus Wilkes ("Mr. Wilkes") are neighbors whose living rooms are separated by a small, five-foot-wide side yard. Ms. Singh's living room receives Mr. Wilkes' cigar smoke producing congestion and other nuisances. Ms Singh, who leads a healthy lifestyle, is worried about the dangers of inhaling second-hand smoke, and therefore she would like to bring a nuisance action against Mr. Wilkes. Does Mr. Wilkes' cigar smoke constitute a nuisance to Ms. Singh?

3. *This question suffers from one of the two problems discussed above. Which one? Where is the problem? (Underline it.)*

   A manufacturer is not strictly liable for a product, even if that product is defective, if the plaintiff used the product improperly. Plaintiff Daniel Wright ("Wright") was cleaning his bathroom with Jax Extreme, a powerful cleaning powder manufactured by Defendant Acme, Inc. ("Acme"). During use, Wright misused the product (by not wearing gloves despite warnings on the packaging) and suffered severe burns to his hands. Is Acme strictly liable to Wright?

4. *This question embeds the answer. Where is the problem? (Underline it.)*

   Colorado law prohibits, as nuisances, intentional, negligent, or abnormally dangerous activities that interfere substantially and unreasonably with the use and enjoyment of real property. Mr. Wilkes' cigar smoke drifts out of his living-room window and into Ms. Singh's home which denies her full enjoyment of her living room. Does Mr. Wilkes' cigar smoke constitute a nuisance in such a way that it would offend a person of "normal" sensitivity?

5. *Do the premises below give rise to an inevitable question? If so, what is it?*

   The fair-use doctrine allows secondary artists to use portions of copyrighted material, without permission, so long as they "transform" the original. Ms. Stein used Mr. Montoya's copyrighted documentary photograph in its entirety, as a political poster, altered to look like it was a painting in the neo-impressionist *pointillist* style (made up only of dots of color).

6. *Referring to the problem above, does the writer give us enough facts and law so that we can argue for one side or the other? If so, jot down a quick argument for the answer you would advocate for, just based on gut feelings after having read the question. (Don't worry about whether your answer is right; I'm interested in your argument, not your answer.)*

7. *Do the premises below give rise to an inevitable question? If so, what is it?*

   Federal law generally forbids the unauthorized use of copyrighted material; however, the fair-use doctrine is an exception to this rule. In her secondary work, Ms. Stein used copyrighted material without the consent or authorization of the owner.

8. *Referring to the problem above, does the writer give us enough facts and law so that we can argue for one side or the other? If, so, jot down a quick argument for the answer you would advocate for, just based on gut feelings after having read the question. (Don't worry about whether your answer is right; I'm interested in your argument, not your answer.)*

9. *Read the Question section below. Does the writer give us enough facts and law so that we can argue for one side or the other? If, so, jot down a quick argument for the answer you would advocate for, just based on gut feelings after having read the question. (Don't worry about whether your answer is right; I'm interested in your argument, not your answer.)*

   Under California law, employers are vicariously liable for employee errors which occur within the "scope of employment." At 7:00 a.m. one Friday morning last May, Father Prynne stopped at a grocery store to buy food for himself for the weekend. He allegedly ran his car over a spigot in

the parking lot and broke it. The landowner has now sued the church as well as Father Prynne. Is the church vicariously liable for Father Prynne's actions?[8]

10. ***Copyright Problem****. Read the following hypothetical. At the end, I have included a Question section written by a former student in the traditional, non-Garnerized style. Your job is to write a new, Garnerized Question section.*

During her life, Karla Marx ("Ms. Marx") authored and copyrighted numerous songs. She had four children, Lily Marx, Forest Marx, Iris Marx, and Rose Marx (collectively, the "Marx Children"). She never married her children's father, but, later in life, did marry Freddie Engels ("Mr. Engels"). The two were married for ten years. Early last year, Ms. Marx died. She was survived by Mr. Engels and the Marx Children. She had no will.

The Copyright Act provides for an original copyright term and a renewal term. If an author dies while his or her copyright is still in its original term, the renewal rights survive the death and pass to "the widow, widower, or children of the author."[9] See 17 U.S.C. § 304(a)(1)(C). When Ms. Marx died, all of her copyrights were in their original terms.

The Marx Children argue that the renewal rights should pass to Mr. Engels and the Marx Children per capita: in other words, Mr. Engels should receive a 20% interest and each of the siblings should receive a 20% interest. Mr. Engels, however, believes that the parties should split the interest fifty-fifty, with Mr. Engels taking 50% and the Marx Children splitting the other 50% equally between them. The Marx Children have sued Mr. Engels in federal district court to settle this ownership dispute. How is the court likely to rule?

Traditional Question Written by Former Student: Are the copyright renewal rights of Ms. Marx passed to her surviving spouse and children equally or fifty percent to her spouse and the remaining fifty percent to be distributed to her children?

11. ***Nuisance Problem****. Read the following hypothetical. At the end, I have included a Question section written by a former student in the traditional, non-Garnerized style. Your job is to write a new, Garnerized Question section.*

Tiffany Singh ("Ms. Singh") lives in a single-family home in Boulder, Colorado. She is a well-regarded yoga instructor and spends substantial time doing yoga in her living room. Augustus Wilkes ("Mr. Wilkes") is Ms. Singh's next-door neighbor. He is a retired history professor who spends substantial time reading and smoking cigars in his living room.

The two neighbors' living rooms are separated by a small, five-foot-wide side yard. The rooms have large windows that directly face one another. In the summer months, when the parties

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[8] This is based on a syllogism originally written by Bryan Garner. Note that the original did not contain the first sentence. In other words, it did not provide a legal framework; it assumed the reader, an experienced attorney, was familiar with that framework (which is acceptable if you know this about your audience). This layout might work if you run into a situation where the major-premise-is-law-minor-premise-is-facts layout doesn't work. Mr. Garner seems to have used facts as the major premise and procedural posture as the minor premise.

[9] Case law indicates that the "or" in section 304(a)(1)(C) should be interpreted as an "and." The surviving spouse cannot take 100% of the rights.

keep their windows open, Mr. Wilkes' cigar smoke drifts out of his living-room window and into Ms. Singh's. Ms. Singh is a non-smoker who leads a healthy lifestyle. She finds the smell of cigar smoke to be unpleasant. The smoke congests her. She is worried about the dangers of inhaling second-hand smoke. She cannot, in short, fully enjoy her living room in the summer months because of Mr. Wilkes' smoking.

Colorado law prohibits, as nuisances, intentional, negligent, or abnormally dangerous activities that interfere substantially and unreasonably with the use and enjoyment of real property. Ms. Singh would like to bring a nuisance action against Mr. Wilkes. Will she prevail in such a lawsuit?

Traditional Question Written by Former Student: Whether Mr. Wilkes' cigar smoke that moves across the boundary constitutes a nuisance in such a way that it would offend a person of "normal" sensitivity?

12. ***Attorney-Client Privilege Problem****. Read the following hypothetical. At the end, I have included a Question section written by me in the traditional, non-Garnerized style. Your job is to write a new, Garnerized Question section.*

The Colorado District Court appointed attorney Dorothea Lange ("Ms. Lange") to represent Hal Epps ("Mr. Epps"), an indigent criminal defendant. Mr. Epps had been charged with murdering Felix Shaw ("Mr. Shaw"), an 18-year-old college student. Mr. Shaw's body had been found in Rocky Mountain National Park, where he had been camping with three friends. Mr. Epps had attacked the young men and tied them up. Mr. Shaw's three companions were able to escape, but Mr. Shaw was not. After Mr. Shaw's body was found and Mr. Epps was arrested, Mr. Shaw's friends identified Mr. Epps as their attacker. The crime had received a lot of publicity and Ms. Lange's representation of Mr. Epps was well known.

In Ms. Lange's initial interview with Mr. Epps, he admitted to killing Mr. Shaw. But he also told her that he had murdered another person, a teenage boy. He even told her where he had buried the body. Ms. Lange was not sure if Mr. Epp's disclosure was credible, so she went to the site to confirm it. Once there, she did, indeed, find human remains; unsure how to proceed, she documented her findings by taking photographs.

Ms. Lange believed that the body was that of a teenage boy who had gone missing under suspicious circumstances. The boy's story had been in the news lately. The whole community was agonizing over the boy's fate. And it was common knowledge that the boy's mother was so distraught that she had been hospitalized after a suicide attempt.

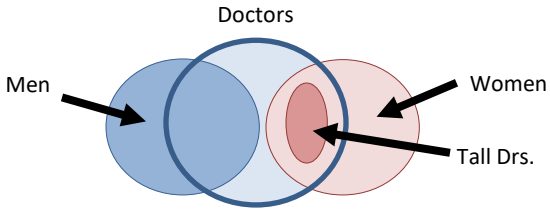
Attorney-client communications are privileged, and attorneys are bound to protect them—subject to some very limited exceptions. Under one of those exceptions, a lawyer may disclose an attorney-client communication if he or she reasonably believes the disclosure is necessary to prevent reasonably certain death or substantial bodily harm.

Traditional Question Written by Professor: Can an attorney disclose the location of a murder victim's body when she learned of the location from a client who she has been in the news for representing, the victim is likely a missing teenage boy who has also been in the news, and the victim's mother is so distraught that she has attempted suicide?

Part One, § II, Answers (The Question Section)

1. All Colorado ski resorts permit snowboarding; Loveland is a Colorado ski resort; Loveland permits snowboarding. (True premises & logically valid)

   Some doctors are men; some doctors are tall; some men are tall. (True premises but not logically valid => it's possible that all the tall doctors, indicated by the pink oval below, are women)



   All skiers use poles; Raheem is a skier; Raheem uses poles. (False premises (not all skiers use poles) but logically valid)

   All horses are quadrupeds; Secretariat is a horse; Secretariat is a quadruped. (True premises & logically valid)

   All snowboarders wear helmets; Mary is a snowboarder; Mary wears a helmet. (False premises (not all snowboarders wear helmets) but logically valid)

2. You'll be given the answer to this question in class; be prepared to discuss your thoughts.
3. You'll be given the answer to this question in class; be prepared to discuss your thoughts.
4. You'll be given the answer to this question in class; be prepared to discuss your thoughts.
5. You'll be given the answer to this question in class; be prepared to discuss your thoughts.
6. You'll be given the answer to this question in class; be prepared to discuss your thoughts.
7. You'll be given the answer to this question in class; be prepared to discuss your thoughts.
8. You'll be given the answer to this question in class; be prepared to discuss your thoughts.
9. You'll be given the answer to this question in class; be prepared to discuss your thoughts.
10. You'll be given the answer to this question at a later date.
11. You'll be given the answer to this question at a later date.
12. You'll be given the answer to this question at a later date.

III. The Answer

***Learning Objective*: To teach you to write an Answer section that has the four required parts in the right order.**

The third section of a memorandum is the Answer section. In this section, you briefly answer the question, probably in one paragraph, and provide the rationale (reasoning) on which the answer rests. You must take a clear stand one way or the other regarding the case's probable outcome.

Your Answer section should consist of these four parts, in this order: (1) a short answer; (2) a sentence that answers ultimate question; (3) the relevant legal "test"; and (4) your rationale. It's also crucial, as mentioned above, that you take a firm stand. Sometimes this stand will be obvious to the reader after he examines the four sections just set forth. Other times, you'll want to follow the fourth part of the answer, the rationale, with a final sentence that predicts clearly how the case will be resolved.

Let's take a look at some examples. First, read the Question section, so you have context for the answer. Then, as you read the answer, note where the four parts begin and end and where the writer took a firm stand. (Parts #1, #2, #3, and #4 are shown in red, blue, grey, and yellow and the "stand" in green.)

Example #1, Attorney-Client Privilege (*Minot v. Canterbury*)

- *Question*: The attorney-client privilege protects communications, between lawyers and clients, made in confidence for the purpose of legal assistance. The firm's client, Louis Minot ("Mr. Minot") arrived unannounced at Elizabeth Canterbury's ("Ms. Canterbury's") law office. The two had never met before. After some small talk, Mr. Minot told Ms. Canterbury that he had information about an unsolved murder. Ms. Canterbury asked him why he had not gone to the police. He replied that he was worried he would become a suspect—and he unzipped a duffle bag, revealing a human skeleton (the "Act"). Was the Act privileged?
- *Answer*: Yes. Ms. Canterbury had a duty to keep the Act confidential. The Privilege is triggered when, among other criteria, the following two are met: (1) there is a communication and (2) the communication transpires between an attorney and client. A communication can be a non-verbal act, so long as the act is intended to convey information. And an attorney-client relationship begins at the initial client meeting, regardless whether the parties ultimately formalize the relationship. Mr. Minot's Act meets these requirements. First, it was a communication: it was a direct response to a question from Ms. Canterbury, essentially an answer to that question, and, as such, it was intended to convey information. Second, it occurred in the context of an attorney-client relationship. The parties had never met before, but their meeting had all of the hallmarks of an initial client interview: Mr. Minot needed a criminal-defense attorney and he went to see Ms. Canterbury after reading a newspaper article about her criminal-defense work. The clear implication from the situation is that Mr. Minot wanted Ms. Canterbury to represent him. Accordingly, assuming the parties' interaction meets the other requirements for Privilege, Ms. Canterbury should have kept the Act confidential.

Example #2, Fourth Amendment, (*United States v. Fernandez-Caro*)

- *Question*: American prosecutors can, as a general matter, use evidence obtained by foreign officials in foreign countries in American courtrooms. This is true even if the foreign officials' behavior would have violated the Fourth Amendment if it had occurred here. British officials extracted a confession from Defendant Robert Smith ("Mr. Smith") by depriving him of sufficient amounts of food and water and placing him in a room that was impervious to light and sound for thirty days—behavior that would have been impermissible in the United States. Is Mr. Smith's confession admissible in an American prosecution?
- *Answer*: No. Prosecutors cannot rely on Mr. Smith's confession. The rule allowing prosecutors to use evidence obtained in foreign countries is not unlimited. Such evidence is inadmissible, for example, if the foreign actors obtained it through physical torture or in some other manner that "shocks the judicial conscience." Mr. Smith can establish that he meets this standard. British officials endangered him, caused him physical pain, and treated him inhumanely when they starved him and withheld water from him. Moreover, they put him in serious psychological jeopardy by depriving him of two sensory inputs—sight and sound—for a month. Even if this latter deprivation does not constitute physical torture, the former deprivations do. Thus, Mr. Smith has a strong argument that the court should exclude his confession.

There are four main problems that can arise in drafting the Answer section: (1) omitting one of the required four parts or putting them in the wrong order; (2) not taking a firm stand; (3) having too much redundancy between the Question and Answer sections; and (4) relying on conclusions rather than hard facts. The first problem is self-explanatory, but we should take a closer look at the others.

The second problem— not taking a firm stand—occurs when a student makes his ultimate conclusion about how the case will come out contingent on something. He might, for instance, say "Mr. Minot has a good chance of winning if he can prove that his disclosure was confidential." The language "if he can prove" makes the whole conclusion about winning contingent on something the author hasn't resolved. When a partner reads it, she's just going to ask the author to write another memorandum on the question whether Mr. Minot can prove that his disclosure was confidential. And she's probably going to be pretty annoyed. The whole point of the first memorandum was to answer the ultimate question of whether Mr. Minot could win on his malpractice claim against Ms. Canterbury. To win, Mr. Minot would need to prove four elements. One of those elements would be a confidential disclosure. The author should have predicted whether Mr. Minot could prove this element (and all of the elements) the first time around. So, if your Answer section doesn't resolve every element, or is contingent on whether something else can be proved, you've probably failed to thoroughly analyze the situation.[10]

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[10] My model Answer, for the *Minot* problem, ends with terminology that could be seen as contingent: "Accordingly, assuming the parties' interaction meets the other requirements for Privilege, Ms. Canterbury should have kept the Act confidential." However, in the body of the memorandum, I analyze these "other requirements," taking a firm stand at the end of the memorandum that Ms. Canterbury should have kept the Act confidential. The only reason I avoided a more thorough conversation in my Answer was to save space.

The second problem can also occur when a student holds back an ultimate conclusion on the theory that more evidence is needed. The student might say something like "It is unclear whether Mr. Minot can prove that his disclosure was confidential; more evidence on this element is needed." Now, I can't vouch for other professors, but I for one don't make it a practice to give out problems that can't be solved. If you feel you're lacking evidence on some element, you should probably go back and read the assignment more thoroughly. If that doesn't work, come see me and we'll talk about it. I suspect other professors would agree. Moreover, in a real-life situation, although you could, perhaps, lack evidence on an element, you generally have to work with what you've got. The partner is usually asking you to evaluate things based on the existing evidence. If you don't have evidence to prove an element, your client will lose that element—and that's what you should write in your memorandum.

The third problem—too much redundancy between the Question and Answer sections–obviously involves both the Question and the Answer. It underscores that you need to draft these two sections to harmonize with one another. If you choose, in your Question, to make your major premise the legal framework and your minor premise the facts (our default layout), you should state the major premise very simply and broadly. Don't put in too much detail. Remember, you have a 100-word limit in the Question section. When you write Part #3 of your Answer section (the legal test), don't simply re-state the Question's major premise. Provide more detail, narrow the issues down, or do a little of both. You don't have a word limit for the Answer, so you can and should present the legal framework more thoroughly than you did in the Question. Let's take another look at the examples we just read. Remember, what we're looking for is coordination—but not duplication—between the major premise and Part #3 of the Answer. I've excerpted these areas for ease of reference.

Example #1, Harmonizing the Question and Answer

- *Question's Major Premise*: The attorney-client privilege protects communications, between lawyers and clients, made in confidence for the purpose of legal assistance.
- *Answer's Part #3*: The Privilege is triggered when, among other criteria, the following two are met: (1) there is a communication and (2) the communication transpires between an attorney and client. A communication can be a non-verbal act, so long as the act is intended to convey information. And an attorney-client relationship begins at the initial client meeting, regardless whether the parties ultimately formalize the relationship.

Notice how the major premise and Part #3 of the Answer work together. The major premise presents the legal framework in broad terms. It recites all four elements of the attorney-client privilege in just one sentence. Part #3 of the Answer is less comprehensive. It narrows the legal framework down to only two of the elements, the two the author viewed as most controversial on the facts of the *Minot* case. It then *deepens* the discussion of those two elements, in two additional sentences, getting right to the thorniest issues raised by the facts: whether the law would categorize anything other than spoken or written language as "communication" and whether it would categorize someone who just showed up at an attorney's office one day as a "client." The second example does something similar:

Example #2, Harmonizing the Question and Answer

- *Question's Major Premise*: American prosecutors can, as a general matter, use evidence obtained by foreign officials in foreign countries in American courtrooms. This is true

even if the foreign officials' behavior would have violated the Fourth Amendment if it had occurred here.

- *Answer's Part #3*: The rule allowing prosecutors to use evidence obtained in foreign countries is not unlimited. Such evidence is inadmissible, for example, if the foreign actors obtained it through physical torture or in some other manner that "shocks the judicial conscience."

In this example, the Answer provides more detail about a limitation to the general rule presented in the major premise. It also narrows the focus down to the issue that's going to be analyzed in the memorandum, whether what happened to Mr. Fernandez-Caro is shocking to the judicial conscience.

Okay, now that we've seen examples of harmonious Questions and Answers—that *don't* suffer from the problem of too much redundancy—let's see an example of a problematic pair. Here's a Question and Answer based on a hypothetical case similar to the *Minot* case. I've underlined the major premise and Part #3 of the Answer, which is where you should focus most sharply. Notice how they're very similar to one another, and how Part #3 doesn't give any additional detail about the legal standard or narrow it down to finer points.

Example #3(a), Redundant Question and Answer

- *Question*: The attorney-client privilege (the "Privilege") protects certain communications between lawyers and clients so long as those communications are "confidential." The firm's client, Margaret Cho ("Ms. Cho") was sitting next to her friend, Frank Sinatra ("Mr. Sinatra"), an attorney, at their children's baseball game. There were numerous people sitting near them. During the second inning, Ms. Cho told Mr. Sinatra that she had not paid income tax in five years, said she wanted to right that wrong, and asked Mr. Sinatra how she should proceed. Were these comments privileged?
- *Answer*: No. Unfortunately for Ms. Cho, her comments were not privileged. The attorney-client privilege protects communications, between lawyers and clients, that occur in confidence. This is a problem for Ms. Cho. After all, she and Mr. Sinatra were surrounded by other people when they were talking. Presumably, those people could hear Ms. Cho's comments. Their presence destroys any confidentiality the communication might have otherwise had.

A better Answer might look like this:

Example #3(b), Stronger, More In-Depth Answer (Not a Redundant Answer)

No. Unfortunately for Ms. Cho, her comments were not privileged. The Privilege applies when four criteria are met: (1) a communication occurs; (2) the communication is between a lawyer and a client; (3) the communication is made in confidence; and (4) the communication is made to elicit legal assistance. The third criterion, confidentiality, requires that the communication be private. If people other than the lawyer and client can overhear a communication, it is not confidential. In other words, the presence of third parties destroys confidentiality. This is a problem for Ms. Cho. After all, she and Mr. Sinatra were surrounded by other people when they were talking. Presumably, those people could hear Ms. Cho's comments. Their presence destroys any confidentiality the communication might have otherwise had.

Figure 5 on the next page summarizes the redundancy problem in graphic form.

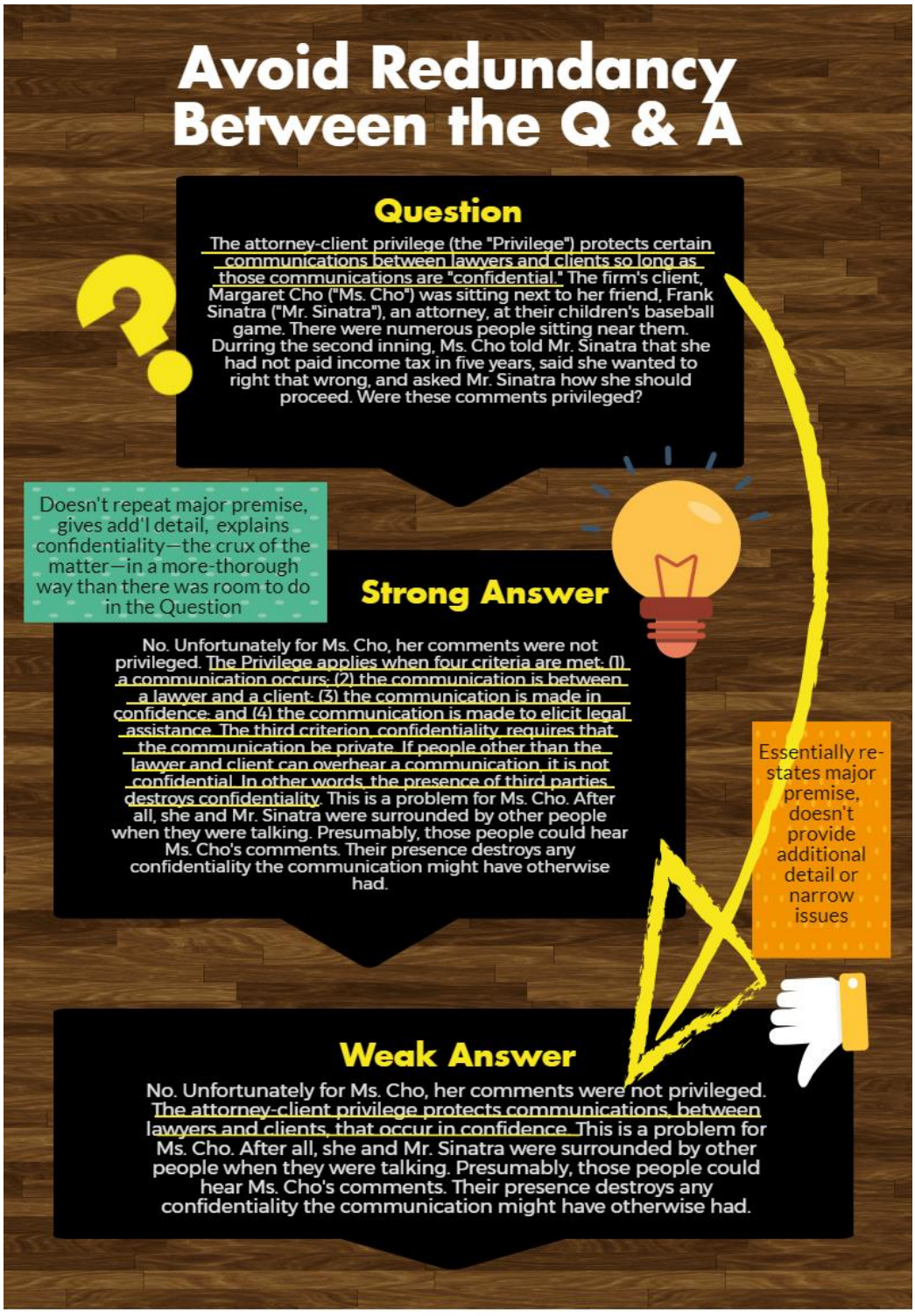
Avoid Redundancy Between the Q & A
Question
The attorney-client privilege (the "Privilege") protects certain communications between lawyers and clients so long as those communications are "confidential." The firm's client, Margaret Cho ("Ms. Cho") was sitting next to her friend, Frank Sinatra ("Mr. Sinatra"), an attorney, at their children's baseball game. There were numerous people sitting near them. Durring the second inning, Ms. Cho told Mr. Sinatra that she had not paid income tax in five years, said she wanted to right that wrong, and asked Mr. Sinatra how she should proceed. Were these comments privileged?
Doesn't repeat major premise, gives add'l detail, explains confidentiality—the crux of the matter—in a more-thorough way than there was room to do in the Question
Strong Answer
No. Unfortunately for Ms. Cho, her comments were not privileged. The Privilege applies when four criteria are met: (1) a communication occurs; (2) the communication is between a lawyer and a client; (3) the communication is made in confidence; and (4) the communication is made to elicit legal assistance. The third criterion, confidentiality, requires that the communication be private. If people other than the lawyer and client can overhear a communication, it is not confidential. In other words, the presence of third parties destroys confidentiality. This is a problem for Ms. Cho. After all, she and Mr. Sinatra were surrounded by other people when they were talking. Presumably, those people could hear Ms. Cho's comments. Their presence destroys any confidentiality the communication might have otherwise had.
Essentially re-states major premise, doesn't provide additional detail or narrow issues
Weak Answer
No. Unfortunately for Ms. Cho, her comments were not privileged. The attorney-client privilege protects communications, between lawyers and clients, that occur in confidence. This is a problem for Ms. Cho. After all, she and Mr. Sinatra were surrounded by other people when they were talking. Presumably, those people could hear Ms. Cho's comments. Their presence destroys any confidentiality the communication might have otherwise had.
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Figure 5

The fourth problem—relying on conclusions rather than hard facts—is something we've talked about elsewhere in this Workbook. Conclusions are answers to ultimate questions. They often use specialized legal terminology, sometimes masqueraded as everyday words.[11] Hard facts are precise. They could be introduced as evidence at trial. They are the bases, or grounds, for conclusions. They are the difference between Anastasia showing me a picture of Brandi and Joe kissing (evidence) and Anastasia telling me she thinks me Brandi and Joe are dating (conclusion). Remember that, in drafting your Question, you must provide hard facts in your minor premise, not conclusions. It's the same thing in Part #4 of the Answer, which communicates your rationale—the *reasons* for your ultimate conclusion. The partner needs to see the evidence in Part #4; he won't just take your word for it that Brandi and Joe are dating!

To illustrate this concept, let's take another look at my Answer section for the *Minot* memorandum. Part #3 of my Answer, the test, discusses the attorney-client privilege. In particular, it focuses on two elements, communication and the existence of an attorney-client relationship. The relevant language, about communication, is highlighted in yellow, and about the relationship, is highlighted in green.

> The Privilege is triggered when, among other criteria, the following two are met: (1) there is a communication and (2) the communication transpires between an attorney and client. A communication can be a non-verbal act, so long as the act is intended to convey information. And an attorney-client relationship begins at the initial client meeting, regardless whether the parties ultimately formalize the relationship.

Part #4 of my Answer, the rationale, gives the reasons for my ultimate conclusion that the Act was a communication and the parties had formed an attorney-client relationship. I've highlighted the relevant language in green and yellow, respectively:

> Mr. Minot's Act meets these requirements. First, it was a communication: it was a direct response to a question from Ms. Canterbury, essentially an answer to that question, and, as such, it was intended to convey information. Second, it occurred in the context of an attorney-client relationship. The parties had never met before, but their meeting had all of the hallmarks of an initial client interview: Mr. Minot needed a criminal-defense attorney and he went to see Ms. Canterbury after reading a newspaper article about her criminal-defense work. The clear implication from the situation is that Mr. Minot wanted Ms. Canterbury to represent him.

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[11] Laypeople might have a certain something in mind when they hear the phrase "legal assistance," but the legal question whether someone sought out legal assistance would have to be proved at trial by independent evidence such as a witness testifying that he visited a lawyer at her place of business after seeing an article about her criminal-defense work in the newspaper. Likewise, laypeople might interpret "a communication made in confidence" to mean the communication was private but, as a legal matter, a litigant trying to establish a confidential communication would have to show that he had an expectation of privacy in the situation and that there were no third parties present who could overhear any conversation. Thus, "legal assistance" and "confidence" have specialized meanings under the law. They're terms of art when used in reference to the attorney-client privilege.

Notice how, in Part #4, I provided hard facts for both of the elements, communication and attorney-client relationship, that I presented in Part #3. For "communication," I explained that Mr. Minot's Act was a response to a question from Ms. Canterbury. For attorney-client relationship, I explained that Mr. Minot went to see Ms. Canterbury about a criminal-law problem after reading about her expertise in the area in a newspaper article. Ideally, in Part #4, you should present a fact for each element set forth in Part #3, just as I did. You don't have a word limit for the Answer section, like you do for the Question section, so it's feasible to present more than the minimum three facts that we would present in the latter section. In summary, in Part #4 of your Answer, if at all possible, give one fact, your most important fact, your strongest or weakest fact, for each element you set forth in Part #3.[12]

[12] Technically speaking, sometimes you'll be dealing with elements and sometimes you'll be dealing with factors or other component parts of a governing rule. "Elements" must all be proved to establish a claim. "Factors" are balanced against one another; typically, if a majority of factors are proved, the claim is established. See CHRISTINE COUGLIN ET AL., A LAWYER WRITES 61-63 (2008). I've often used "elements" in a general way in this Workbook, for ease of reference, to cover elements, factors, prongs, and other such components.

Part One, § III, Exercises (The Answer Section)

1. *Read the following Question and Answer. In the Answer, one of the four parts is missing. Which one?*

   Question: A plaintiff can prevail on a personal-injury claim if he can show that the defendant's negligence caused him damages. Recently, this firm's client, Bob Dylan ("Mr. Dylan"), was about to sit down in a chair when his friend, Joan Baez ("Ms. Baez"), pulled it out from underneath him. She did not give any warning before she moved the chair and the fall seriously injured Mr. Dylan. Will Mr. Dylan prevail in a negligence action against Ms. Baez?

   Answer: Probably. A jury hearing Mr. Dylan's negligence case will probably rule in his favor. Plaintiffs in negligence cases must prove four things: (1) that the defendant owed the plaintiff a duty; (2) that the defendant breached that duty; (3) that there is a causal relationship between the plaintiff's action and the defendant's injuries; and (4) that the injuries resulted in damages to the defendant. Mr. Dylan can probably prove all of these elements and, therefore, he has an excellent chance of prevailing in this matter.

2. *Take another look at the Father Prynne problem, except not just at the Question like last time, but the Answer, too. Then, respond to the queries.*

   Question: Under California law, employers are vicariously liable for employee errors which occur within the "scope of employment." At 7:00 a.m. one Friday morning last May, Father Prynne stopped at a grocery store to buy food for himself for the weekend. He allegedly ran his car over a spigot in the parking lot and broke it. The landowner has now sued the church as well as Father Prynne. Is the church vicariously liable for Father Prynne's actions?

   Answer: No. Father Prynne has done nothing that would give rise to vicarious liability on the part of the church. Under California law, only an employee acting within the scope and course of the employment may make the employer vicariously liable. The test is whether the risk of injury is incidental to (a normal part of) the business in which the employer is engaged. Father Prynne was acting for himself, not the church, more than two hours before his duties began at 9:30 a.m. Therefore, the church will not be liable for his alleged negligence.[13]

   a. *Does this answer follow the four-part structure? What parts does it have?*
   b. *Is there too much redundancy between the question and answer?*

[13] This question and answer are both based on examples by Bryan Garner. Alternations are mine. (The original question did not have any legal framework; in a sense, it was missing the major premise. I therefore added the first sentence, a broad overview of the law. The "test" in the original answer consisted only of the sentence beginning with "under California law." I added the more-detailed rendition of the law, i.e., the sentence beginning with "The test is whether.")

Part One, § III, Answers (The Answer Section)

1. The rationale is missing: *why* does the author think Mr. Dylan can prove all four elements? What are the facts that support each element?

2. Fr. Prynne Example:

   a. Yes, the answer follows the four-part structure. Part 1 (short answer) is "No." Part 2 (narrative answer) begins with "Father Prynne" and ends with "church." Part 3 (test) begins with "Under" and ends with "vicariously liable." Part 4 (rationale) begins with "Father Prynne" and ends with "at 9:30 a.m." Mr. Garner also has the final, extra sentence taking a stand: it begins with "Therefore," and ends with "negligence."

   b. No. There's no redundancy between the statements of the law in the Question and Answer sections. Mr. Garner and Professor Bruce describe the legal standard in more detail in the Question section, i.e., "the test is whether the risk of injury is incidental to . . . the business."

IV. The Facts

Learning Objective: To teach you to write a Facts section that has all material (outcome-determinative) facts and enough storytelling facts to give appropriate context.

The fourth section of a memorandum is the Facts section. This is the section where you tell the story of the case, not just your client's side of the story, of course, because you're being objective, but the entire story: the good facts, the bad facts, the undisputed facts, the disputed facts, things that are clear, and things that are ambiguous. State the facts accurately. Don't misstate them. Don't presume them. Don't leave out facts that are legally significant. Watch out for substituting conclusions for facts.[14] And don't present the facts so that they favor one side over the other.[15] If you're thinking that sounds difficult, you're right. Crafting the Facts section of a memorandum or a brief is one of the hardest things we do as authors. Generally speaking, there are four rules to keep in mind when drafting a Facts section. First, give all the facts upon which you rely in the Analysis section. Second, give enough story-telling facts—i.e., facts that may not be used in the Analysis section—to give a "sophisticated non-expert" the appropriate context for understanding your case. Third, tell your story in pure chronological order, if possible. Finally, end with a procedural posture. The next subsections will flesh out each of these rules in turn.

A. Give the Material Facts Twice: First in the Facts Section and Second in the Analysis Section

The first rule is our main axiom: if you use a fact in your Analysis section (specifically, in the "A" of IRAC), then you must state that fact *first* in your Facts section. This may be difficult to understand right now because we haven't yet talked about the Analysis section or the IRAC acronym. So far, we've talked about the Introduction, Question, and Answer. But remember, a memorandum has six parts: (1) the Introduction; (2) the Question; (3) the Answer; (4) the Facts; (5) the Analysis; and (6) the Conclusion. So, when you're writing a Facts section, you need to do it in conjunction with the Analysis section.[16]

What's the Analysis section all about? In a nutshell, it's where you make legal arguments for and against your client's position. You assess the facts of your client's case in the context of the appropriate legal framework. The facts you'll focus on in the Analysis section will be material, or outcome-determinative facts. You won't be bothering with facts that couldn't impact the jury's decision, like whether someone

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[14] "You set out a legal conclusion when you set out as a fact that one of the elements or rules is met or is not met. Whether an element or rule is or is not met is a legal conclusion and not a fact." LAUREL CURRIE OATES & ANNE ENQUIST, JUST MEMOS 124 (2014); *see also supra* § II(B)1-2 (discussing hard facts and conclusory phraseology); *supra* § III & n.13 (discussing conclusions masquerading as everyday terms).

[15] For example, don't bias the story toward your client: "you're not doing your client any favors by making the facts sound more compelling than they actually are." POLLMAN ET. AL, LEGAL WRITING, EXAMPLES & EXPLANATIONS 163 (2011).

[16] "[W]riting a memo[randum] is a recursive process. Even though you may write the statement of facts first, you may need to revise it after you have completed the discussion [Analysis] section." OATES & ENQUIST, *supra* note 16 at 121. (Note that some legal-writing professors call the "Analysis" section the "Discussion" section.)

accused of running a red light was driving a white Honda or a blue one. You'll be assessing only the facts that have legal significance, the facts that could impact whether your client wins or loses. These are the facts you need to state twice, once in the Facts section, as you're telling the story of your client's case, and again in the Analysis section, as you're explaining the legal ramifications of that story.

Don't worry about the redundancy. This is how you're supposed to do it. It's like a mystery movie where the screenwriter gives you clues throughout the first two acts. When you get to the third act, where the sleuth solves the mystery, doesn't he usually recount the "material" facts in the course of explaining who the culprit is and how he solved the crime? It's the same thing here. You give your reader the "clues" in the Facts section and do your "big reveal," going over the material facts and what they signify, in the Analysis section. There are a couple reasons for this rule. The rule gives the reader, often a lawyer, all of the necessary information to solve the problems presented by the case as she's reading along. She's not surprised, when she gets to the Analysis section, by any new facts that she's never encountered before. In addition, the rule forces you, the author, to tailor your facts to the relevant law. You're not telling your story in a vacuum. You're telling it with a very specific purpose in mind: to assess its legal consequences. Therefore, you should choose the facts that make up your story with the legal framework in mind. You should tailor your facts to the elements of the cause of action at issue. For instance, take a look at paragraphs 3-4 of the Model Memorandum's Facts section, reproduced below. I chose my facts carefully with the four elements of the cause of action at issue in mind, as the marginalia explain.[17] Remember, the relevant elements are: whether (1) a lawyer-client relationship (privileged-persons relationship) existed; (2) Mr. Minot was seeking legal advice; (3) the two parties were speaking confidentially; and (4) Mr. Minot's act of opening the duffel bag was a communication.

Model Memorandum: Facts Tailored to Elements

When Mr. Minot arrived, Ms. Canterbury was in a meeting. Eventually, though, the two met in the lobby. Mr. Minot introduced himself and told Ms. Canterbury about seeing her picture in the newspaper. He said the picture made her look "stubborn and bossy, but still nice." Ms. Canterbury then escorted Mr. Minot to her office. No one else was present and the office door was closed. The door was, however, made largely of glass and bordered by two floor-to-ceiling glass windows, so people outside the office could potentially see inside of it.

Ms. Canterbury took out a legal pad and pen and asked "What can I do for you?" Mr. Minot told Ms. Canterbury that he had information about an unsolved murder. She asked if he had approached the police and he said "No." Ms. Canterbury asked "Why not?" Without saying anything, Mr. Minot unzipped the duffel bag, revealing the skeleton. Mr. Minot was standing in between the duffel bag and the door, and he did not take anything out of the bag. Ms. Canterbury immediately called the police and, when they arrived, turned over the duffel bag and its contents to them. She also told them that Mr. Minot was the source of the remains. Shortly afterward, the police arrested Mr. Minot on suspicion of murder.

Commented [TB1]: This fact goes to the "privileged persons" element; it favors Canterbury; it's a possible argument against an attorney-client relationship. Remember, in a memo, you must present "good" and "bad" facts.

Commented [TB2]: This fact goes to the "seeking legal advice" & "privileged persons" elements; it favors Minot; it shows that he chose Canterbury specifically because of a newspaper article about her criminal-defense work.

Commented [TB3]: This fact goes to the "seeking legal advice" element; it favors Minot; it shows he's evaluating Canterbury's professional demeanor.

Commented [TB4]: This fact goes to the confidentiality element; it favors Minot; it shows they are in private.

Commented [TB5]: This fact goes to the confidentiality element; it favors Canterbury.

Commented [TB6]: These facts go to the "privileged persons" and "seeking advice" elements; they favor Minot; they show that the parties are acting like attorney & client. (Note: quotes are great hard facts. Don't be afraid of them!)

Commented [TB7]: This fact goes to the "seeking legal advice" element; it favors Minot.

Commented [TB8]: These facts go to the "communication" element; they favor Minot; they show that his act was the answer to a question.

Commented [TB9]: These facts go to the "confidentiality" element; they favor Minot; they make Canterbury's argument about glass doors weaker.

[17] For an easier-to-read version of these marginalia, refer to Appendix 2.

B. The Facts Section Should Have "Storytelling" Facts

Our second rule is to give enough storytelling facts so that a sophisticated non-expert has the appropriate context for understanding the case. *Storytelling facts* are those little facts, like whether the defendant was on his way to work when he allegedly ran the red light, that aren't material but that may be very important to telling a coherent story. If we used only material facts to tell our story, it wouldn't be a story at all. It would be a series of discrete points unconnected by an understandable narrative.

Visualize your reader as a sophisticated non-expert. Visualize her, in other words, as a smart person, maybe even an attorney. But visualize her as a stranger to your case, someone who isn't familiar with either the facts of the case or the particular area of law at issue. This person, this sophisticated non-expert, this blank slate, must be able to understand the story you tell in your Facts section. So, although the Facts section will contain all of the material facts recounted in the Analysis section, the reverse isn't true: the Analysis section *won't* contain all of the facts recounted in the Facts section. The Facts section will have "extra," story-telling facts not needed in the Analysis section. These facts will enable the sophisticated non-expert to understand the story.

Another way to look at this is that you should *not* assume, in the Facts section, that your reader has any pre-existing knowledge about your case. That means that you need to include the storytelling, or contextual, facts in the Facts section. In the Analysis section, in contrast, you can assume that your reader has a good understanding of the facts of the case—because you gave them to her in the Facts section. Therefore, you don't need to include the story-telling facts at that juncture. Moreover, the storytelling-facts would be superfluous at that juncture because they couldn't affect the outcome of the case and, in the Analysis section, your only concern should be outcome-determinative (material) facts.

C. Tell the Story in Chronological Order

The third rule for the Facts section is to tell the story in chronological order if possible. This is simply because readers usually understand stories told in chronological order better than those told in other ways. We'll talk more about this concept and alternatives approaches in class. For now, though, here's what Bryan Garner has to say about chronological order:

> Whether you're framing an issue or writing an entire section of a memo or brief, remember the importance of chronology. Learn to see and express a story in your writing, because in effect you're a storyteller. You're telling the story of . . . the case, with a beginning, a middle, and an end. Each part of your story should lead to the next. The more you impart the sense that you're developing a narrative, the easier it will be for the reader to track what you say. And your writing will be more memorable. [18]

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[18] Taken from Bryan Garner's Advanced Legal Writing & Editing 45 (Rev. ed. 2002).

D. End the Facts Section with a Procedural Posture

Our final rule for the Facts section is to end with a procedural posture.[19] The procedural posture should act as a transition to, or a "set up" for, the Analysis section. It should tell the reader *why* you're writing the memorandum and it may, in the course of doing so, communicate where the case is procedurally speaking. Here are some examples of procedural postures based on *Minot* and *Fernandez-Caro*:

- Mr. Minot has approached the firm about the possibility of suing Ms. Canterbury. The cause of action would be legal malpractice, i.e., he would argue that Ms. Canterbury improperly disclosed privileged attorney-client communications to the police.
- Mr. Minot wants to sue Ms. Canterbury for legal malpractice on the ground that she violated her ethical duty to keep attorney-client communications privileged.
- Mr. Fernandez-Caro is on trial for various immigration-related crimes and the prosecutor wants to introduce his confession in evidence. She has asserted that evidence obtained outside the geographic boundaries of the United States is admissible even if the methods for its acquisition are repugnant to the Fourth Amendment. Mr. Fernandez-Caro wants to know if this is a valid argument.
- Mr. Fernandez-Caro wants to move for exclusion of the confession on the ground that it was obtained in a manner that should "shock the judicial conscience."

As you can see, some of these procedural postures are long and some are short. Some contain more about the case history than others. Some are similar to what one might use in the third part of the syllogism that forms the Question section. It doesn't matter. They all work well. The approach you take will depend on your style, personal preferences, and the particular memorandum you're writing.[20]

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[19] I'm using the phrase "procedural posture" in a more informal manner than your contracts or other professors might. The procedural posture at the end of the Facts section does not have to focus strictly on the case's history, or where the case is in terms of the trial and appeal processes.

[20] This section doesn't discuss the citations that sometimes appear in the Facts section of a memorandum. These citations are called "fact cites." I don't discuss them here because I don't require my students to provide them in fall semester. This is simply because there's so much to learn in fall semester that there's not enough time to talk about the correct format for fact cites—a topic about which the Bluebook provides little guidance. I do require fact cites, though, in spring semester, in the Fact sections of my students' briefs. Thus, this Workbook will discuss fact cites later in the chapter entitled "Writing a Winning Brief."

Part One, § IV, Exercises (The Facts Section)

1. *Read the two Fact sections below and think about which one you like best, and why*:

   - Example #1: The plaintiff made a contract claim on the basis that her demotion and reduction in salary violates her employment contract. She made a timely demand under the Attorney's Fees in Wage Actions Act and she argues that she cannot be disqualified from pursuing attorneys' fees under this statute without addressing the merits of her claim.
   - Example #2: In October 1991, Lora Blanchard was hired by Kendall Co. as a Senior Analyst. She worked in that position for two years, but, in August 1993, Kendall demoted her to the position of Researcher. Two months later, she sued for breach of her employment contract, including attorney's fees. She argues that she is entitled to those fees under the Attorney's Fees Wage Actions Act.[21]

2. *Why is it a good idea to end the Facts section with a procedural posture? What does it do for the Facts section? What does it do for the Analysis section?*

[21] Both examples based on those in Bryan Garner's Advanced Legal Writing & Editing (Rev. ed. 2002).

Part One, § IV, Answers (The Facts Section)

1. Obviously, there's no right answer about which version *you* like best. That said, most people who read these two examples like Example #2 best. We'll talk more about why in class. (Note: one thing I dislike about these examples is the use of specific dates. You should avoid dates unless they're relevant to the analysis, e.g., a statute-of-limitations problem.)

2. It's a good idea to end the Facts section with a procedural posture because it gives closure to the Facts section and provides a transition to the Analysis section.

V. The Analysis

***Learning Objective*: To teach you to write an Analysis section that uses a strict IRAC layout, shows the reader explicitly how you got from the issue to the conclusion, and takes a clear stand regarding the issue's probable outcome.**

The fifth section of a memorandum is the Analysis section. In this section, you apply the facts of your case to the governing law. The primary organizational tool for the Analysis section is IRAC, which stands for *Issue*, *Rule*, *Application*, and *Conclusion*. IRAC isn't complicated, really, but it's probably one of the most important tools you'll acquire in law school. It's fundamental to "thinking like a lawyer." And you'll use it not only for memoranda in your 1L fall semester and briefs in your 1L spring semester, but on final exams and other papers, as well. The next subsection discusses each part of the IRAC in detail.

A. Crafting Effective IRACs

There are many IRAC variations, such as CRAC (Conclusion, Rule, Application, Conclusion) and TREAC (Topic, Rule, Explanation, Application, Conclusion). IRAC and all of its variations work well and are acceptable in legal writing. That said, I like the simplicity of the IRAC acronym, just in terms of the word itself, and consequently I'll use that acronym to mean not only IRAC but all of its variations, as well. You're free to use any variation you like, so long as you also use the recipes I give you in this subsection to infuse each part of your analysis with the right flavor.

What do I mean by that? Well, in my view, every part of the IRAC should have its own distinctive flavor—so much so that, if you're doing your job as a legal writer, I should be able to pick a sentence from your Analysis section randomly, read it, and tell you which part of the IRAC it came from. The following subsections will help you achieve that sort of precision in your writing. They will help you craft Issues, Rules, Applications, and Conclusions that are crisp and identifiable.

1. The I-of-IRAC

The first part of the IRAC is the Issue Statement,[22] or I-of-IRAC. This should be a brief, one-sentence statement that summarizes the issue you're analyzing. For example, in my model memorandum, the one related to the *Minot v. Canterbury* case,[23] my first I-of-IRAC[24] is this:

> First, this Memorandum analyzes whether the Act was a communication.

This is a nice, open-ended thesis statement, a true "I" of IRAC. It gives no indication of how I'll resolve the issue (i.e., what I'll say in my conclusion in the C-of-IRAC). But an open-ended thesis is only one of

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[22] Note that "Issue Statement" has two meanings. It can refer to the I-of-IRAC, but it can also refer to the Question section. You must judge by the context of the comment which of the two is being referenced.

[23] *See* Appendix 1.

[24] You may have more than one IRAC in any given Analysis section.

the options available to you. For those of you who, like me, lean more toward CRAC, where we start and end with a conclusory statement, we might draft an "I" (or to be more precise, a "C") that looks like this:

> First, Mr. Minot can prove that the Act was a communication.

Either style is acceptable. You just need to figure out what works best for you and for the particular IRAC you're writing.

Now, let's reduce all of this to a recipe—not to muddy the waters as you might have felt when you encountered a mathematical formula in high-school algebra, but to make things easier on us, the writers, so that we don't have to re-invent the wheel each time we sit down to draft a memorandum. For me, the easiest recipe, and the one I often use, is for a conclusory I-of-IRAC, technically the "C" in CRAC. The blue flowchart on the left shows the recipe in generic terms applicable to any case, with options to be filled in by you, the author. The one on the right shows the recipe with the options filled in; it's based on the second example above.

The Recipe for the I-of-IRAC

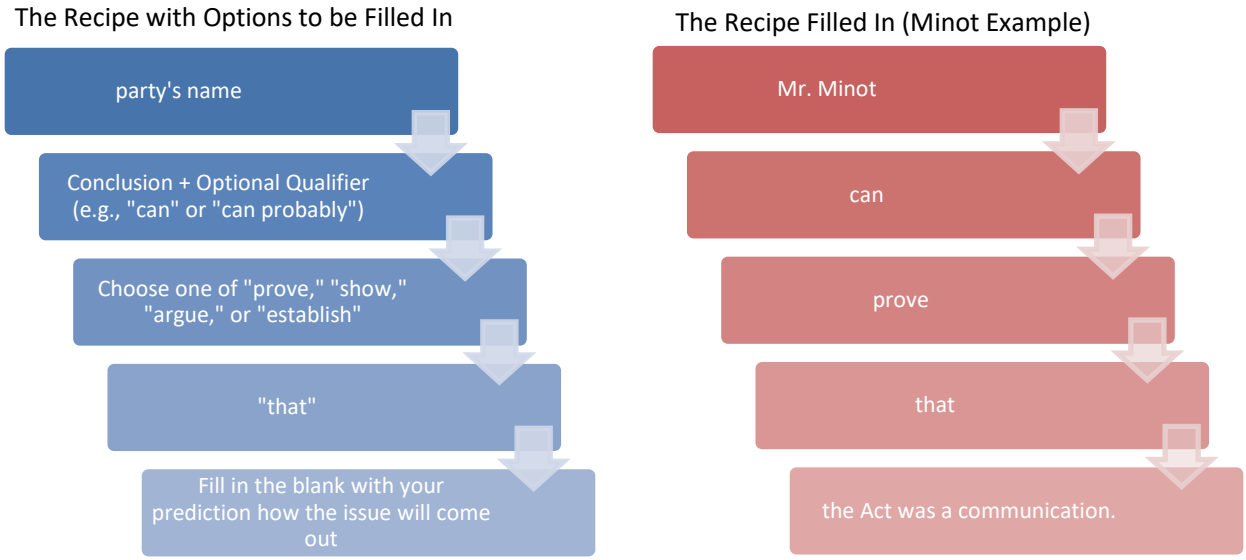

Figure 6

Feel free to model all of your Issue Statements on this recipe. It will result in good, clear Is-of-IRAC, so it will work well for your reader. And it will enable you to spend less time crafting language.

2. The R-of-IRAC

The second part of the IRAC is the Rule, or R-of-IRAC. This should be an explanation of the legal framework that governs your problem. You should write it like a treatise: be neutral and don't mention the parties' names or the events at issue. In a way, your particular case is irrelevant for purposes of the Rule section—except in the broad sense that it dictates the boundaries of the legal framework you're

describing. Fundamentally, the Rule section should be stated in terms that are generally applicable to any lawsuit, not just the one you're analyzing.

You should organize the Rule section in broad-to-narrow form, that is, with broader more general concepts preceding narrower more specific ones. In other words, you should use "deductive" or "top-down" reasoning.[25] This type of reasoning is easier to follow than "inductive" reasoning, which starts with details and builds up to the big picture. It makes things clearer and easier for your reader—which is one of the legal writer's primary goals.

One way to achieve a broad-to-narrow layout is to provide your reader with a Rule Overview followed by Rule Examples. The Rule Overview is where you communicate the broad, general ideas, like background information, history, policy considerations, and the overarching legal framework. The Rule Examples are in-depth discussions of specific cases. These cases have facts that you plan to use in the *Application*, or A-of-IRAC, to either analogize to your case or distinguish from it. The Rule Overview states the principles by which your case will be decided; the Rule Examples illustrate how courts have applied those principles to specific fact patterns. Stated differently, the Rule Overview presents pure statements of law; the Rule Examples explain the facts of the precedential cases and how those facts influenced the courts' holdings. The following excerpt is the first R-of-IRAC from the model memorandum.[26] Notice how it moves from broad ideas to narrow ones, i.e., how it presents a Rule Overview followed by Rule Examples.

Model R-of-IRAC: Rule Overview Followed by Rule Example

The Privilege applies when, among other things, a communication has occurred. A communication is "any expression through which [a] . . . person . . . undertakes to convey information to another . . . person." Non-verbal acts qualify as communications if they are "intended to convey information." In State v. Smith, for example, the Supreme Judicial Court of Maine held that a non-verbal act constituted a communication for purposes of the state's marital privilege statute. There, the defendant stole a gun and a camera and showed these items to his wife who was waiting in a getaway car. The court concluded that the defendant's act was the equivalent of spoken words; it was as if the defendant had said "I have stolen a gun and camera."

Rule Overview (Broad)

Rule Example (Narrow)

Figure 7

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[25] Technically, "deductive" reasoning occurs when the conclusion inevitably follows from the premises. Thus, an argument can be deductive regardless whether it proceeds from general to specific ideas, or specific to general ones. DAVID ZAREFSKY, ARGUMENTATION: THE STUDY OF EFFECTIVE REASONING (2d ed. 2005). That said, this Workbook uses the more common, if less sophisticated, definition: that deductive reasoning is reasoning that flows from broad to narrow ideas.

[26] I have removed the citations to facilitate easier reading.

The following subsections take a closer look at these two important components of the R-of-IRAC.

a. Rule Overviews

Now, re-read the Rule Overview from Figure 7 on the last page. Do you see how it starts at the broadest possible idea? For context, recall that, at the very beginning of the Analysis section, I told the reader that I would address four questions: (1) whether Mr. Minot's Act was a communication; (2) whether the Act happened within an attorney-client relationship; (3) whether the Act occurred in confidence; and (4) whether the Act was done for the purpose of obtaining legal assistance. I essentially listed the four elements of the attorney-client privilege for my reader. I then organized my paper around my list. I crafted four separate IRACs—one for each element. My first IRAC—the one from Figure 7—was targeted at whether a communication had occurred. I knew I had to start the R-of-IRAC broadly, with a Rule Overview, so I asked myself *What's the broadest concept connecting communications to my overall project?* The answer to that question became the first sentence of my Rule Overview:

> The Privilege apples when, among other things, a communication has occurred.

We're right back at the most fundamental concept I face, the attorney-client privilege. The broadest concept was a reminder to the reader that the privilege doesn't attach without a communication. In a nutshell, I parsed out the big list I presented to the reader at the beginning of the Analysis section (with all four elements of the privilege), repeating only that portion of the list that was relevant to the first IRAC (the communication element). This will usually be the case; the first sentence of your Rule Overview will probably re-state one element from a list of elements you've already presented.

Then, in the second sentence of the Rule Overview, I started narrowing things down. If the first sentence (re)introduced the reader to the communication concept, then the second sentence would have to define "communication":[27]

> A communication is "any expression through which [a] . . . person . . . undertakes to convey information to another . . . person."

This definition is pretty straightforward, so I didn't have to devote any more sentences to refining it. Sometimes, though, your first definition will contain specialized jargon and you'll need subsequent definitional sentences. Use the precedential cases as your guide on this. If the courts are giving more definitions, you should, too. In this case, since I didn't need those additional definitions, I was able to use my third and final sentence of the Rule Overview to get right down to the crux of the matter, addressing the question whether non-verbal acts can ever amount to communications:

> Non-verbal acts [can] qualify as communications if they are "intended to convey information."

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[27] It would have been wrong to start the Rule Overview with the definition of "communication," because it's not the broadest point. I had to remind the reader why we were even talking about a communication before defining it. Additionally, I needed to define "communication" because, in this context, it has a specialized legal meaning that could be different from the ordinary, lay understanding of the term.

This is the basic broad-to-narrow structure for the Rule Overview. One way to remember it is with the recipe "Remind-Define-Refine." The first part of the recipe—Remind—will help you start the Rule Overview at the broadest point. To start at the broadest point, you must remind the reader why you're talking about a particular area of law. This will often involve repeating one, single element from a list of elements you've already shared with the reader. In Figure 7, for instance, I started my R-of-IRAC by reminding the reader that we were talking about communications because having a communication is one element of the four-element test for attorney-client privilege. The second part of the recipe—Define—will help you begin to narrow the Rule Overview. Narrowing often involves defining terms of art. These terms may be obvious. They may be very specialized, legal terms, with which a sophisticated non-expert would be unfamiliar. On the other hand, they may be seemingly everyday terms that, in the legal context, have precise meanings. Either way, you need to define them. In Figure 7, I defined the term "communication" because this seemingly everyday term has a very precise meaning in the context of the attorney-client privilege. My definition, "any expression through which [a] . . . person . . . undertakes to convey information to another . . . person," did not, itself, contain any additional terms of art. Consequently, I didn't have to add any definitional sentences beyond the first one. However, if your initial definitional sentence contains terms that themselves have specialized legal meanings, meanings that would be unfamiliar to a sophisticated non-expert, then you must define those terms via additional definitional sentences—especially if you saw courts doing so in the opinions you read on the matter. The final part of the recipe—Refine—will help you hone your Rule Overview down to the sharpest point. This is where you target the crux of the matter at hand, i.e., the thorniest or most fundamental question for this particular IRAC. In Figure 7, the most fundamental question for my IRAC was whether a non-verbal act could qualify as a communication. Thus, my "refine" sentence explained the circumstances under which acts can, indeed, do so. Master the Remind-Define-Refine structure and you'll be well on your way to crafting effective Rule Overviews!

Use the "Remind-Define-Refine" recipe to produce Rule Overviews that are easy to follow.

b. Rule Examples

As stated above, you should write the R-of-IRAC in a broad-to-narrow layout. That means breaking it into two major parts. The first part—the broad part—is the Rule Overview. The second part—the narrow part—is one or more Rule Examples. With this in mind, take a look again at the model R-of-IRAC in Figure 7. As you can see, the first part of this R-of-IRAC is a Rule Overview (indicated by the first bracket). The second part is a Rule Example (indicated by the second bracket).[28] Rule Examples are an essential part of the R-of-IRAC. In the common-law system, like the one here in America, where like cases are decided alike, legal writers use Rule Examples to present the cases they plan to either analogize to or distinguish from their client's case. Most cases' outcomes hinge on Rule Examples. Their importance cannot be overstated. Accordingly, you should make your Rule Examples as accessible as possible to your reader.

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[28] There are actually two Rule Examples in this R-of-IRAC in the model memorandum, one in the first and one in the second paragraph. The first Rule Example targets *State v. Smith* and the other a Restatement illustration. For purposes of this conversation, and to simplify it, I've ignored the second Rule Example. This is because the second Rule Example is somewhat unusual, being based on an illustration instead of a case. *See* Appendix 1.

One way to do that is to use a three-part layout like the one I used in Figure 7:

> In *State v. Smith*, for example, the Supreme Judicial Court of Maine held that a non-verbal act constituted a communication for purposes of the state's marital privilege statute. There, the defendant stole a gun and a camera and showed these items to his wife who was waiting in a getaway car. The court concluded that the defendant's act was the equivalent of spoken words; it was as if the defendant had said "I have stolen a gun and camera."

Part One of my Rule Example, highlighted in green, is a broad topic sentence. Part Two, highlighted in yellow, is the word "There" followed by the most important facts from *Smith*. Part Three, highlighted in blue, explains the court's reasons for holding as it did. The diagram below summarizes this layout.

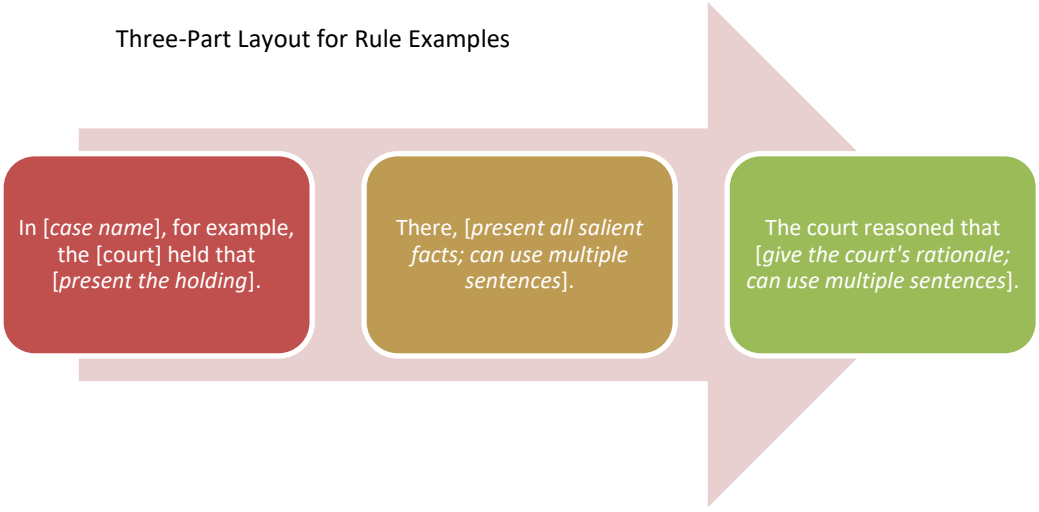

Figure 9

I promise that this layout will make your Rule Examples accessible to your readers. In addition, it will spare you, the author, from inventing new language and a new organizational structure each time you draft a Rule Example. It's a win-win any way you look at it. In fact, I think this layout is so effective both in terms of reader comprehension and authorial efficiency that we're going to treat it as another legal-writing recipe. As a beginning legal writer, you should use this recipe freely.[29] I'll be looking for it when I grade your papers.

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[29] That said, when you're a more experienced legal writer, there will be times when you'll want to modify this three-part layout, as I did in the second Rule Example in the *Minot* memorandum, which I based on the Restatement. *See id.*

In any event, whether you're using the three-part layout or not,[30] choose your Rule Examples carefully. Don't use a case for a Rule Example simply because you cited it in your Rule Overview. It's perfectly fine to use completely different cases for the Rule Overview and the Rule Examples. Choose the cases for your Rule Overview based on how well they articulate the relevant principles. Choose the cases for your Rule Examples based on how well their facts analogize to the facts of your case. For instance, I chose my Rule Example, the one focused on *Smith*, because the facts analogize so well to Mr. Minot's case. In *Smith*, a person reveals contraband to another person, without saying anything, just like Mr. Minot did to Ms. Canterbury. Basically, if *Smith* came out in favor of a "communication" having occurred, then the *Minot* case has to come out the same way. The facts are too similar for any other result. These are the sorts of cases you want for Rule Examples.

Sometimes, it's effective to have one or more "winning" Rule Examples and one or more "losing" Rule Examples. In other words, one technique for the R-of-IRAC is to analyze one or more cases where the person in your client's position won and one or more cases where she lost. This technique creates a continuum. One end of the continuum shows the reader facts that make for a strong case. The other end shows facts that make for a weak case. The reader can then situate your client's case on the continuum. Is it more like the winning or losing case? If you, as author, can answer that question, you're in a good position to advise your client how a court or jury is likely to handle his case.

As a final matter, be aware that, although Rule Examples are certainly necessary in most situations, you don't always need them. It depends on whether your Rule Overview consists of principles that are readily understandable. If it does, then you don't need a Rule Example. Consider a case involving a pedestrian who was stopped briefly by the police at 5:00 p.m. in something called a "*Terry* stop" (you'll likely learn more about these stops in your criminal law or criminal procedure course). The stop occurred after someone called the police and gave them a tip about suspicious activity. This person had no pre-existing relationship with the police, so it was unclear whether the tip was reliable. It was unclear, in other words, whether the police had "reasonable suspicion" (a lesser standard than probable cause), based on the tip, to conduct the stop. Four questions were essential to resolving the issue: (1) whether the hour was late; (2) whether the area had a reputation for criminal activity; (3) whether the police found the person in the vicinity where the tipster said the suspicious activity was occurring within a short time after they received the tip; and (4) whether there were other people in the vicinity. The first question—whether the hour was late—is so obvious in its meaning that no Rule Example was necessary. After all, what would the Rule Example look like? It would say something like this:

> In *Fitzgerald*, the District of Colorado held that the time of day at issue was not late. There, the suspect was taking a walk on a break from work at 3:00 p.m. It was still daylight. Therefore, the court reasoned that the hour was not late.

It's almost like the author is talking down to the reader. As legal writers, we always want to treat the reader as if she's unfamiliar with the legal authorities and the facts of our case, but this would be going too far. Give the reader some credit for having enough common sense to understand basic concepts such as this one. Maybe a Rule Example would have made sense if the client's case had involved a time of day that was questionable, like dusk or dawn, but the stop occurred at 5:00 p.m., during summer, in

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[30] You must use the three-part layout in my class, but you may find yourself developing other preferences and techniques as your writing evolves and when you're writing for yourself or for people other than me.

broad daylight. Those facts can be applied directly to the legal standard about the lateness of the hour without need for a Rule Example.

Consider also a products-liability case where the plaintiff is claiming a manufacturing defect. The case law indicates that the test for a manufacturing defect is "whether the product, as produced, conformed to the manufacturer's specifications." No Rule Example is necessary because the legal standard is so clear. Either the product complied with specifications, or it didn't. If we did a Rule Example, it might look something like this:

> In *Homeowner v. Contractor*, the Colorado Supreme Court held that the product at issue did not comply with the manufacturer's specifications. The specifications called for four-by-fours. The contractor used two-by-fours. The building materials differed from the specifications. Therefore, the court held that there was a manufacturing defect.

As you can see, this Rule Example doesn't add anything to what the reader already knew about deviance from specifications. The bottom line is that you only need Rule Examples if the rule is so complex that it would be helpful to the reader to see how courts have applied it to various fact patterns. This is the case most, but not all, of the time.

With these general considerations out of the way, let's take a closer look at the three parts of our Rule Example recipe.

i. Part One of the Rule Example: a Broad Topic Sentence

The first part of our recipe for Rule Examples demands a broad topic sentence describing the court's holding. This sentence will leave the specifics for later. That's as it should be. Rule Examples, like Rule Overviews, should be constructed in a broad-to-narrow manner. Conceptually, the holding is the place to start, the broadest place, because it's the case's ultimate takeaway. Starting this way makes things clear for the reader, especially the legal reader, because a general proposition, like the court's ruling, establishes an overarching framework into which the reader can later position additional, more specific details. In other words, the reader knows, from the outset, what to look for as she reads on.

You should phrase Part One of your Rule Examples just as I phrased Part One of the model Rule Example. Here's what I said: "In *State v. Smith*, for example, the Supreme Judicial Court of Maine held that a non-verbal act constituted a communication for purposes of the state's marital privilege statute." You should start with the word "In." You should insert a sub-clause consisting of the phrase "for example" or "for instance."[31] You should identify the court—by name if appropriate.[32] You should use the word "held." And you should describe the court's holding as it relates to the issue you're analyzing. If we depicted this phraseology as a flowchart, it would look like this:

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[31] The sub-clause can actually come either before or after the word "In," e.g. you could say "For example, in *State v. Smith,*" or "In *State v. Smith*, for example," (with the commas as indicated).

[32] *See infra* for a discussion of when to identify the court by name and when to simply say "the court."

The Recipe for Part One of the Rule Example

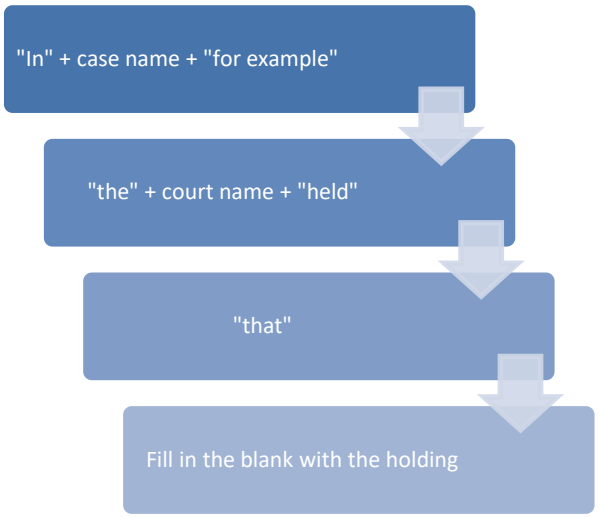

Figure 8

Be sure to follow this flowchart when you draft the first part of a Rule Example for any paper you turn in to me.[33] You can't get a perfect prose score unless you do. That said, there are a few details to pay attention to when using the flowchart. First, pay attention to whether you need to identify the court by name or not. In my class, the rule is that, on the first *textual* mention of a case—as opposed to a mention solely in a citation—you can't just say "the court." You must identify the court by name. I'll permit the generic terminology, "the court," only *after* you've identified the court by name in a textual reference elsewhere in the paper. In fact, I do this very thing in the model memorandum. Remember, in that model, I had four separate IRACs, one for each of the four elements in the test for attorney-client privilege: (1) an IRAC on the communication element (that's the IRAC we're talking about right now from Figure 7); (2) an IRAC on the "privileged persons" element; (3) an IRAC on the confidentiality element; and (4) an IRAC on the "seeking legal advice" element. The first and third IRAC, on communication and confidentiality respectively, show how this rule about stating the court's name in full versus merely saying "the court" plays out. I reference *State v. Smith* for the first time in the first IRAC. This happens in Part One of my Rule Example. My reference to the case is a textual reference, not a citation. Therefore, I must identify the court by name, as indicated by the underscoring in this excerpt:

> In *State v. Smith*, for example, the Supreme Judicial Court of Maine held that a non-verbal act constituted a communication for purposes of the state's marital privilege statute.

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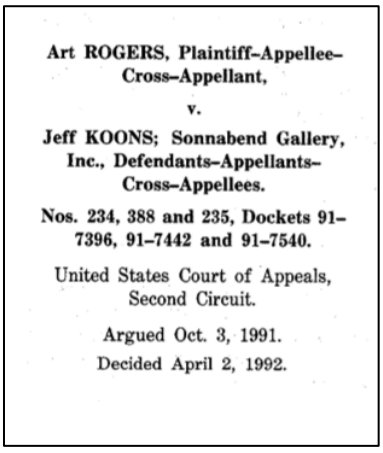
[33] As you become a more experienced legal writer, there may be times when you'll want to deviate completely from the flowchart, saying something like "In [case name], the [court] confronted the same question, holding that ___." This will probably happen in the midst of complicated discussions of the law, where you need a transitional sentence, rather than just a transitional clause.

However, in my third IRAC, where I use *Smith* as a Rule Example again, I can refer to the tribunal simply as "the court" because I've already identified it by name elsewhere in the paper:

> For example, in *Smith*, the case involving the stolen gun and camera, the court determined that the defendant had a reasonable expectation of confidentiality.[34]

The second thing you should pay attention to when using the flowchart is the court's name itself. The caption at the top of the case, like the one in Figure 9, will tell you the court's name, but it will do so very formally and the name will probably be quite long. You'll usually want to abbreviate it to make things easy on your reader. For example, the caption in Figure 9 identifies the court as the "United States Court of Appeals, Second Circuit." If you needed to name this court in Part One of a Rule Example, you would simply say "the Second Circuit," omitting "United States Court of Appeals." This is the pattern for all federal courts of appeal. Call any such court "the ___ Circuit" where the blank will be an ordinal number apparent from the caption. There's a similar pattern for federal trial courts. If you needed to abbreviate something like "the U.S. District Court for the Southern District of New York," you would say simply "the Southern District of New York." In other words, for the sake of brevity, drop the beginning, the part that's the same in the name of any court, at least any federal court. This will be either "the U.S. Court of Appeals for" (or something similar) for federal intermediate courts or "the U.S. District Court for" (or something similar) for federal trial courts.[35]



Art ROGERS, Plaintiff-Appellee-Cross-Appellant,

v.

Jeff KOONS; Sonnabend Gallery, Inc., Defendants-Appellants-Cross-Appellees.

Nos. 234, 388 and 235, Dockets 91-7396, 91-7442 and 91-7540.

United States Court of Appeals, Second Circuit.

Argued Oct. 3, 1991.

Decided April 2, 1992.

Figure 9

The third thing to pay attention to when using the flowchart is your characterization of the court's holding. You should tailor the holding to the precise issue your IRAC targets. In my Rule Example, I phrased the holding this way: "the . . . [c]ourt . . . held that a non-verbal act constituted a communication . . . ." I phrased it, in other words, in terms of the communication issue—the precise issue my IRAC was targeting. I could have said "the court held that the defendant's act of showing his wife the gun and camera was admissible at trial" or "the court held that the marital privilege did not apply." Both are accurate representations of the court's holding. But both would have confused my reader. She would have been wondering *What does admissibility of evidence or marital privilege have to do with whether a non-verbal act is a communication*? She might have guessed that the defendant's act was admissible at trial, or that the marital privilege didn't apply, because revealing the gun and camera wasn't a communication. These would have been reasonable guesses. But they would have been wrong. The defendant's act *was* a communication; it wasn't privileged because it wasn't a *confidential* one.

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[34] *See* Appendix 1 at A-8 (emphasis added). Note also that I remind the reader that she's already encountered the *Smith* case in my paper, refreshing her memory that it was the "case involving the stolen gun and camera." This little snippet allows me to jog her memory without wasting a lot of verbiage re-stating facts from *Smith* that I've already recounted in an earlier IRAC.

[35] I have used federal courts as examples here because they're named consistently no matter which state they're in. The names for state courts vary widely and you'll have to use your judgment on a state-by-state basis about what an appropriate abbreviation would be or if abbreviation is needed at all.

Regardless, even if my reader had guessed correctly, I don't want to put her in that position. I want to walk her through my analysis step by step connecting all of the dots and avoiding assumptions and guessing. To do this, I have to put myself in her shoes. All your reader wants to know, as she reads Part One of the Rule Example, is what the court held with respect to the issue your I-of-IRAC identified. My I-of-IRAC identified "communication" as the issue: "First, this Memorandum analyzes whether the Act was a communication." Consequently, all my reader wanted to know from Part One of my Rule Example was *How did the court hold with respect to communication?* I therefore tailored my description of the court's holding to that specific topic, ignoring the larger questions about admissibility of evidence and marital privilege.

Don't be afraid to tailor a holding in this way. As an attorney, it's your job to interpret judicial opinions and this sort of tailoring is fundamental to that job. The holding isn't simply the last few words of the opinion or the court's decision as to the fundamental issues. The holding includes any conclusion that is a necessary prerequisite to the court's ultimate decision. In *Smith*, for example, the court's ultimate holding was about the admissibility of evidence. In order to decide whether to admit the evidence, the court had to decide whether the marital privilege applied. In order to decide whether the marital privilege applied, the court had to go through the four elements of the test for privilege—including the communication element. In other words, the court had to decide whether the husband had engaged in a communication when he showed his wife the stolen gun and camera; this decision was a necessary prerequisite to deciding the ultimate question.[36] Thus, it was perfectly acceptable for me to characterize the holding in terms of that sub-issue.

A "holding" consists not only of the court's ultimate ruling, but also any conclusion that was a necessary step in reaching that ruling.

The final detail to pay attention to when using the flowchart is the word "held." When the flowchart says *held*, it means it. You shouldn't as a general matter use "found." We'll talk more about this in class, and you'll learn more about it in other classes, as well, but, generally, courts "hold" as to the law and juries "find" as to the facts. This can even be a helpful mnemonic: "courts hold, juries find." It can help you avoid what seems to be our natural tendency to use the words "find" or "found" even when the proper words, assuming we're referring to a court, are probably "hold" or "held."

ii. Part Two of the Rule Example: "There" Plus the Salient Facts

The second part of our recipe for Rule Examples is a description of the precedential case's facts. This description will start with the word "There." It will often consist of more than one sentence. The facts it recounts will be what I think of as "salient" facts, that is, facts that both (1) relate to the issue you identified in your I-of-IRAC and (2) analogize to or can be distinguished from your client's case. They'll be material, outcome-determinative facts, but only those that parallel your client's facts and only those

[36] The *Smith* court concluded that the act was a communication, even though, ultimately, because the act didn't satisfy one of the other three criteria for the privilege to attach (confidentiality), the court held that the act was not protected. But, even though the defendant lost, the court's conclusion about the communication issue was necessary to its ultimate decision and, therefore, was part of the holding.

that relate to the specific issue your IRAC is targeting. If they fit into one sentence, the same one that begins with the word "There," fine. If not, use multiple sentences (but only the first should start with "There").

Part Two of the Rule Example from Figure 7 follows this paradigm: "There, the defendant stole a gun and a camera and showed these items to his wife who was waiting in a getaway car." First, it begins with the word "There." Second, it presents the salient facts that the defendant revealed objects connected to a crime to a potentially privileged person, without saying anything. These facts are salient because (1) they relate to the communication issue I identified in my I-of-IRAC ("First, this Memorandum analyzes whether the Act was a communication") and (2) they analogize to the facts that my client showed a potentially privileged person (an attorney) the remains of a murder victim (objects connected to a crime) without saying anything.

As stated, the salient facts are the material facts. But, remember, they're only those material facts that relate to the issue you identified in your I-or-IRAC. In other words, you need to tailor your recitation of facts, just like you tailored your identification of the court's holding, to the specific IRAC you're writing. The material facts for one IRAC will be different from those for another IRAC. For example, in the model memorandum, recall that I had four IRACs. In the first IRAC, which targets communication, the salient facts are the defendant revealing objects connected to a crime to his wife without saying anything. In the third IRAC, which targets confidentiality, the salient facts are location-related:

> There, the defendant's disclosure occurred in a public dumpsite, inside a car. Others might have been present at the site, but there was no one in the car's immediate vicinity.

These facts are salient because (1) they relate to the confidentiality issue I identified in my I-of-IRAC ("Mr. Minot's non-verbal communication was made in confidence") and (2) they analogize to the fact that although Mr. Minot and Ms. Canterbury were in the latter's private office when the disclosure occurred (like the *Smith* players were in a private car), the office had glass windows through which others could peer (like the car being parked in a public place). So, when you draft Part Two of a Rule Example, choose your facts carefully so that they are appropriate for the particular IRAC you're writing.

Finally, as always, be precise. In Part Two of a Rule Example, you'll want to use the same techniques you're using elsewhere in the paper, like in the Question and Facts sections. Write for a sophisticated non-expert, someone unfamiliar with the precedents. In addition, avoid conclusory statements. For instance, in my IRAC targeting confidentiality, I didn't say "There, the defendant showed his wife the contraband in a private place." That would have been conclusory. The reader would have had to take my word for it that the "place" was "private." Instead, I said that the two were in a "car" at a "public dumpsite." I let the reader decide for himself whether this was a private place. The *Fernandez-Caro* case[37] might serve as an even better example of this concept. If I were writing Part Two of a Rule Example based on that case, I wouldn't say "There, Mr. Fernandez-Caro was tortured." Instead, I'd say "There, Mr. Fernandez-Caro was threatened with death, beaten about the head and face, water-boarded, and electrocuted." I'd give my reader the hard (evidentiary) facts and let her make her own decision about whether these facts amount to "torture."

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[37] *See* Appendix 3.

iii. Part Three of the Rule Example: The Court's Rationale

The final part of our recipe for Rule Examples should be a sentence, or multiple sentences, that sum everything up, providing some closure. Usually, this is a good place to explain the court's rationale—its reasons for holding the way it did. If you want to, you can even start the sentence with the phrase, "The court held as it did because." Let's take a quick look at Part Three of my Rule Example:

> The court concluded that the defendant's act was the equivalent of spoken words; it was as if the defendant had said "I have stolen a gun and camera."

I use only one sentence, beginning with a clear reference to the court's conclusion. Then, I explain the court's reasoning. I explain that the court saw the act as (1) the equivalent of speech and (2) as a specific admission about stealing. I even quote the court translating the defendant's act into speech. This is something that works well in Part Three of the Rule Example: you'll usually find good quotes in the precedential cases explaining why the court held the way it did and you shouldn't be afraid to use them. They're the perfect touch for the end of the Rule Example.

c. Stylistic Considerations for Rule Overviews & Rule Examples

Now that we've discussed the content and layout of the R-of-IRAC, let's talk a bit about its tone and style. Remember when I said that I should be able to tell, by reading a single sentence plucked at random from your IRAC, which part it is? The organizational decisions we've been talking about will get you part way there, but using the right tone and style will get you all the way there.

One important stylistic aspect of the R-of-IRAC is that it is the only place in the entire memorandum where we cite to the legal authorities that will govern our client's case. And it needs to have a lot of citations. In fact, it should have a citation after almost every sentence of both the Rule Overview and the Rule Examples. (But remember, don't put citations anywhere else in the memorandum.) For the Rule Overview, use binding case law, like statutes and cases from your jurisdiction, unless you absolutely can't find any or there's some independent reason for not doing so. For the Rule Examples, though, use the cases that have the best facts, i.e., the facts most analogous to your own case. This means, for Rule Examples, it's perfectly fine to use non-binding, persuasive authorities so long as those authorities are applying the same rules you set forth in your Rule Overview. You may want to follow citations to these persuasive authorities with "see also" citations to binding authorities (explained in more detail in the Bluebooking section of this Workbook), indicating to the reader that the same laws apply in both jurisdictions, but, other than that, don't hesitate to use a non-binding case that is "on all fours" with yours.

You should have a citation after every almost every sentence in the R-of-IRAC.

In addition, in the Rule Overview, craft your sentences as pure statements of the law. Don't discuss any facts from the cases you're citing. You've chosen your cases because they articulate the relevant legal principles well, not because they have useful facts. So don't bog your Rule Overview down with facts. Save that for the Rule Examples.

Relatedly, you usually don't need to mention case names or identify courts in the text of your Rule Overviews. The citations will do all the necessary attribution. Take my Rule Overview from Figure 7:

> The Privilege applies when, among other things, a communication has occurred. A communication is "any expression through which [a] . . . person . . . undertakes to convey information to another . . . person." Non-verbal acts qualify as communications if they are "intended to convey information."

I don't say "According to the Restatement (Third) of the Law Governing Lawyers, the Privilege applies when . . . ." I simply say "The Privilege applies when . . . ." I don't say, "The Restatement defines a 'communication' as . . . ." I simply say "A communication is . . . ." I don't say "According to the Supreme Judicial Court of Maine, non-verbal acts qualify as communications . . . ." I just say "Non-verbal acts qualify as communications . . . ." This is how you should write your Rule Overviews. Don't feel the need to put every statement into a court's mouth. Your citations are already doing that. Your job is to state the rules as rules, not to attach them to some particular court as if that's the only court in the universe that uses the rule. If these really are the rules, and they really are generally applicable, there's no need to talk about the specific court that did the best job articulating the rule.

That said, though, in Rule Examples you *do* need to mention the case names and identify the courts in your textual sentences.[38] You also need to do it in your citations. So, when I'm grading your Rule Examples, I should see *both* textual attributions and attributions in citation form. In Rule Overviews, however, I should only see the latter.

Another stylistic consideration you should make as you draft the R-of-IRAC is choosing the proper tense, present or past. If you're talking about what a *case* does (so long as the case hasn't been reversed or overruled), you should use present tense, e.g., "The *Smith* case stands for the proposition that non-verbal acts can under certain circumstances qualify as communications." This is because the case is effective right now; it's always acting; it's always alive. The same is not true for people and entities. If you're talking about what a *court* or *judge* or *person* or *business* did, you should use past tense. You should use past tense when recounting the facts of precedential cases. You should use past tense when talking about what the plaintiff did. You should use past tense when talking about what the defendant argued. You should even use past tense when talking about what the court held. And this shouldn't really be *that* difficult (although I admit to struggling with it myself!) because it follows the normal rules for tense. Everything that happened in a precedential case happened in the past. Every action taken by the plaintiff or defendant happened in the past. Everything the court did, it did in the past. Consequently, past tense makes sense.

One trick for choosing the proper tense is to use present tense as your default tense in the Rule Overview and past tense as your default tense in the Rule Examples. This trick works because, as explained above, Rule Overviews discuss legal principles without connecting them to specific cases, except via citation. They don't talk about courts or judges or recite case names. They only talk about principles. The principles, which presumably come from cases that haven't been overruled or reversed, have continuing vitality. So, we use present tense when describing them. Rule Examples, in contrast, do

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[38] This will occur in Part One of the Rule Example and, if you follow our recipe for that part, you'll automatically be providing the necessary information.

mention past occurrences: they talk about what courts did and what parties did. Past tense is therefore appropriate.

Take another look at my Rule Overview in Figure 7. In my Rule Overview, I say "The Privilege applies" (not "applied"), "A communication is" (not "was"), and "Non-verbal acts . . . are . . . ." (not "were"). But in my Rule Example, I say the "Court held" (not "holds"), "a non-verbal act constituted" (not "constitutes"), "the defendant stole" (not "steals"), and "The court concluded" (not "concludes"). This is how tense typically plays out: In Rule Overviews, we usually use present tense and in Rule Examples, past tense.

An additional stylistic consideration you should make as you draft the R-of-IRAC is how to best transition into each of your Rule Examples. Your first Rule Example will directly follow your Rule Overview. If you model it on the recommended flowchart, it will have a built-in transitional clause, right after the case name, as indicated by the example in the first column in Table 1 below.[39] Note that you can vary the location of this transitional clause if you want to by putting it *before* the independent clause instead of after it, as indicated by the example in the second column. If you have multiple Rule Examples in one, single IRAC, use "For instance" in place of "For example," as needed, to avoid unnecessary repetition.

Transitioning from the Rule Overview into a Rule Example	
Flowchart Model	*Variation*
In *State v. Smith*, for example, the Supreme Judicial Court of Maine held that a non-verbal act constituted a communication for purposes of the state's marital privilege statute.	For example, in *State v. Smith*, the Supreme Judicial Court of Maine held that a non-verbal act constituted a communication for purposes of the state's marital privilege statute.

Table 1

Think too, about how to transition between Rule Examples in a single IRAC. You can't use "For example" or "For instance" for Rule Examples subsequent to the first; they won't make sense. To understand this concept, imagine that I had just written my Rule Example for *Smith* in one of the forms that appears in the table above. Now, I'm writing another Rule Example, for *Doe*. It's going to appear right after the Rule Example for *Smith*. If *Doe* is similar to *Smith*—say, the defendant was able to establish that a wordless gesture qualified as a communication—I might want to use the transition "Similarly" or "Likewise," as in the first two columns in the Table 2 below. If *Doe* is dissimilar to *Smith*—say, the defendant lost on the communication element—I might want to use the transition "In contrast," as in the last column.

Transitioning Between Multiple Rule Examples		
Similar Case: Transition #1	*Similar Case: Transition #2*	*Dissimilar Case*
Similarly, in *Doe v. Roe*, the Colorado District Court held that a non-verbal act constituted a communication for purposes of the attorney-client privilege.	Likewise, in *Doe v. Roe*, the Colorado District Court held that a non-verbal act constituted a communication for purposes of the attorney-client privilege.	In *Doe v. Roe*, in contrast, the Colorado District Court held that a non-verbal act was not a communication for purposes of the attorney-client privilege.

Table 2

[39] The underscoring in this section is being added to facilitate quick comprehension; you shouldn't underscore transitions in your papers.

All of these examples, from Table 1 and Table 2, are for Part One of the Rule Example. As an aside, note that they're written in conclusory terms. I talk about "non-verbal acts," not about showing someone a gun, camera, or other object. This is a departure from our normal rule about using hard facts, about giving readers the evidence that grounds our conclusions and not merely the conclusions themselves. But it's an intentional departure. This is how you *should* phrase Part One. You're going to give the hard facts in Part Two immediately after this conclusory sentence. Part Two, in other words, is where you "Show, don't tell." Part One is a set-up for Part Two and it's easier on the reader if you keep it non-substantive and conclusory. In a sense, in Part One, you *are* telling; you're telling the reader where you're about to go. You're also using deductive reasoning, starting with a general claim in Part One and then breaking that claim down into specifics—showing, not telling—in Parts Two and Three.

With that, we've covered the basics of the R-of-IRAC. The graphic on the next page summarizes what we've learned.

HOW TO CRAFT AN EFFECTIVE R-OF-IRAC

A Summary

#1

Put Broad Ideas Before Narrow Ones

Be kind to your reader. Use a broad-to-narrow or "funnel" type layout.

#2

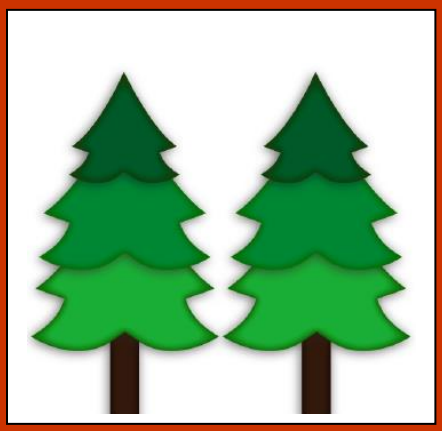
Lead With a Rule Overview

- Start broad
- Define & refine
- Put authorities in cites, not text
- Ignore precedential facts
- Use present tense

#3

Follow With Rule Examples

- Use cases that have facts similar to your case
- Put authorities in both cites & text
- Use the 3-part layout from the CG
- Discuss the precedential facts w/ precision; assume the reader hasn't read the cases
- Use past tense



The three parts of the Rule Example

In [case name], the [court name] held that _____.	*There, [discuss case's facts].*	*The court held as it did because _____,*

Figure 10

3. The A-of-IRAC

The third part of the IRAC is the Application, or A-of-IRAC. This is where we interpret the facts of our case in the context of the governing legal principles. Some people call this the "Analysis" section, but "Application" is better because that's what we're really doing. In the Rule section, you gave the reader a set of general principles that he could apply to any set of facts. Now, he's ready to do that application; he's ready to see how the principles apply to the facts at issue in *your* case. The terminology is important. It reminds us that, in the A-of-IRAC, we're not just "analyzing" things in an abstract sort of way. We're engaging in a very particular type of reasoning: applying law to facts. That's the big picture. Now, let's talk about the specifics of form and content.

You should start the A-of-IRAC with a broad topic sentence. And you should begin that sentence with the word "Here." This has become conventional in memo-writing. "Here" is a road sign. It tells your typical reader, a lawyer, that he's about to read the A-of-IRAC. Don't start any of your other sentences with the word "Here." Reserve it for the first word of the first sentence of the Application section. If we use it elsewhere, it loses its power as a road sign.

Subsequent sentences should situate your client's case within the legal framework you presented in the R-of-IRAC. This is the most important thing to do in the A-of-IRAC. You must revisit your Rule Examples and analogize them to or distinguish them from your case. Organizationally, you should parallel the R-of-IRAC.[40] In other words, you should basically present the same ideas in the A-of-IRAC that you presented in the R-of-IRAC, in the same order. I say "basically" because there is one caveat: you probably wouldn't revisit the rules you stated in the Rule Overview. Instead, you would compare or contrast your client's case to the cases in your Rule Examples.

If you were writing the As-of-IRAC in the *Minot* case, your opening sentences would look something like this:

- Here, Ms. Canterbury might argue that the Act was not a communication because it did not involve either spoken or written words.
- Here, Ms. Canterbury might argue that she and Mr. Minot were not privileged persons because they had never met before and she did not formally represent Mr. Minot.
- Here, Mr. Minot's Act was made in confidence.
- Here, Mr. Minot showed Ms. Canterbury the bones for the purpose of obtaining legal advice.

Subsequent sentences would compare the facts of Mr. Minot's case to the facts from your Rule Examples. To illustrate this concept, let's look again at the model memo. For context, read the R-of-IRAC on the left side of Table 3. It has a Rule Overview followed by two Rule Examples. Then, read the corresponding A-of-IRAC, on the right side of Table 3 (I'll explain the highlighting later).

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[40] Use parallelism unless there's a compelling reason not to; in other words, it's okay to deviate from a parallel construct if you must.

Rule Examples	A-of-IRAC
The Privilege applies when, among other things, a communication has occurred. A communication is "any expression through which [a] . . . person . . . undertakes to convey information to another . . . person." Non-verbal acts qualify as communications if they are "intended to convey information." In State v. Smith, for example, the Supreme Judicial Court of Maine held that a non-verbal act constituted a communication for purposes of the state's marital privilege statute. There, the defendant stole a gun and a camera and showed these items to his wife who was waiting in a getaway car. The court concluded that the defendant's act was the equivalent of spoken words; it was as if the defendant had said "I have stolen a gun and camera." The Restatement provides an illustration that supports the outcome in Smith. In it, an attorney learns that the perpetrator of the crime her client is accused of committing had a tattoo on his right forearm. The attorney asks the client if his right forearm is tattooed. In response, he rolls up his right sleeve, revealing a tattoo. The client's act is a communication.	Here, Ms. Canterbury might argue that the Act was not a communication because it did not involve either spoken or written words. But Mr. Minot has two strong counter-arguments. First, the Act, like the disclosure of the gun and camera in *Smith*, was the equivalent of words spoken in confidence. If the defendant's act in *Smith* was the equivalent of saying "I have stolen a gun and camera," then Mr. Minot's Act in this case was the equivalent of saying "I have possession of human remains." Second, when Mr. Minot unzipped the duffel bag, he did so in response to a question. Mr. Minot had just told Ms. Canterbury that he had not approached the police and Ms. Canterbury had asked "Why not?" The Act was the answer to that question—just like, in the Restatement illustration, the client's act of rolling up his sleeve to reveal a tattoo was an answer to the question whether he had a tattoo.

Table 3

As you can see, my A-of-IRAC starts with the word "Here." It ignores the Rule Overview and jumps right into the Rule Examples.[41] And it makes very specific comparisons. I compare revealing human remains to disclosing a gun and camera (in yellow).[42] I compare the translation given by the *Smith* court to the translation that seems apt in my case (in green). I compare unzipping the duffel bag to rolling up a sleeve (in purple). I compare Ms. Canterbury's question to the other attorney's question (in blue). Whenever I have powerful quotes, I use them; I'm always looking for hard facts and quotes are quintessential hard facts. In addition to all of that, I use parallelism: I present ideas in the same order I presented them in my Rule Examples. Moreover, I'm actually doing what the IRAC acronym suggests I should be doing: I'm *applying law to facts*. I'm discussing both the facts of my case *and* the facts of the precedential case. The latter facts, those from the precedential case, are really "law." They will control my case. If my facts are like the precedential case's facts, then my case must be decided the same way as the precedential case.

This brings me to a common mistake many law students make. If, in the Analysis section, we're applying law to facts, then our discussion must necessarily contain both law and facts. Many students, however, draft Application sections that consist solely of the facts of their case. Legal writing professors call this a "fact dump" and you should avoid it. If the A-of-IRAC is made up of facts alone, the reader can't see the connections to the legal framework. You're not applying at all. You're stating facts and expecting your

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[41] There may be times, though, where you want to briefly revisit some of the principles from the Rule Overview.

[42] Remember, in the model memorandum, I explained to my reader that I was going to use the nickname "Act" for Mr. Minot's disclosure of human remains.

reader to fill in gaps, to flip back and forth between your Rule and Application sections, to apply the law himself. That's too hard on him, and it breaks our cardinal rule to make things easy on our readers. You may feel like you're spoon-feeding, but do it. Walk your reader step-by-step through your reasoning, from your issue to your conclusion. Don't say that your case is "like" a precedential case with nothing more;[43] explain *why* it's like that case. Use the word "because," if necessary, to force yourself to explain your thinking: say your case is "like" a precedential case "because" and then list the similarities between the two cases. It's essential, in the A-of-IRAC, that you make precise fact-to-fact comparisons between your facts and the facts you recounted in your Rule Examples. Be precise. Be explicit. Remember Professor Summers' statement, "God is in the facts."[44] Cases are won and lost on factual subtleties.

One technique for doing a real application, rather than presenting the reader with only a fact dump, is to use hybrid sentences. These sentences combine discussion of your client's facts with discussion of the precedential cases' facts. Stated differently, these sentences combine facts and law. (Remember, the facts from the precedential cases are actually "law" in this context.) Let's see an example of a hybrid sentence from my A-of-IRAC:

> If the defendant's act in *Smith* was the equivalent of saying "I have stolen a gun and camera," then Mr. Minot's Act in this case was the equivalent of saying "I have possession of human remains."

It appears to have an approximately fifty-fifty balance between law (in yellow) and facts (in blue), which is ideal. In fact, if you re-read the model A-of-IRAC in Table 3, you'll see that it doesn't have any sentences that are composed solely of law. If we highlighted all the law in yellow and all the facts in blue, there wouldn't be one sentence that was all yellow. There would be some that were all blue, but that's okay. You can have some sentences that are composed solely of the facts from your case. What you don't want, though, are any sentences that are composed solely of law. Using hybrid sentences will help you avoid that pitfall.

Another common mistake law students make in the A-of-IRAC is to provide only superficial comparisons to the Rule Examples. They'll just throw the name of a precedential case out there, without explaining exactly how it relates to their client's problem. In other words, they'll just go through the motions of applying law to facts, without actually doing it. Take a look at Table 4 below.

True Application of Law to Facts	Superficial Application of Law to Facts
The disclsoure of human remains, like the disclosure of the gun and camera in *Smith*, was the equivalent of words spoken in confidence.	Like *Smith*, the act of disclosing human remains was the equivalent of words spoken in confidence.

Table 4

The left column shows a true, substantive application of law to facts. The right column shows a superficial one. In the left column, I compare an act—disclosing human remains—to another act—disclosing stolen property. In the right column, I compare an act to a whole case. I discuss facts from my

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[43] If your professor has written "conclusory" in the margins of an A-of-IRAC, this is what he means: you're stating a conclusion, but not showing how you reached it, not explaining the "why" or "because" of things.

[44] *See supra* § II(B)2.

case, i.e., my client's disclosure of human remains, but I don't discuss any facts from *Smith*. I say my case is "like" *Smith*, but I leave my reader wondering how, exactly, it is. The situation is similar to situations we've discussed before, where the reader simply has to take my word for something. Typically, this is a situation we want to avoid as legal writers.

So, if you're only recounting *your* facts in the A-of-IRAC, you're not truly applying law to facts. You're not making the crucial fact-to-fact comparisons between your case and the precedential case that can impact whether your client wins or loses. And you're asking the reader to work way too hard to figure out how your case is similar to (or different from) the precedential case.

But there is a way to avoid this problem: remember to always compare facts to facts. For example, compare people to people, acts to acts, agreements to agreements, qualities to qualities, and so on. Don't compare entire cases to particular facts. Don't, for instance, compare a case name, like *Smith*, to a fact, like the disclosure of a body.[45]

Compare a fact to a fact, not a fact to a case name.

4. The C-of-IRAC

The fourth section of the IRAC is the Conclusion, or C-of-IRAC. This section should be one sentence that starts with a road sign, such as "Therefore." It should clearly state how you think the judge, jury, or other decision-maker will resolve the issue.[46] As for form, take a look at my Cs-of-IRAC from the model memorandum:

- Therefore, based on *Smith* and the Restatement, a court hearing this case will likely hold that the Act, albeit non-verbal, was a communication.
- Therefore, a court hearing this case will likely hold that the parties had formed an attorney-client relationship when the Act occurred.
- Therefore, a court hearing this case will likely hold that Mr. Minot's non-verbal communication was made in confidence.
- Therefore, a court hearing this case will likely hold that Mr. Minot's Act occurred while he was seeking legal advice.

If these Cs seem formulaic, it's because they are. And you may want to use the recipe for your own Cs. Here it is:

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[45] That said, it is, sometimes, appropriate to compare a case to a case. But you really must be doing that, comparing a whole case to a whole case. For example, it might be appropriate to say something like "In both *Minot* and *Smith*, courts confronted the question whether a non-verbal act could qualify as a 'communication' for purposes of the attorney-client privilege." The facts about what question the courts were confronting are the same in both cases so this sentence does make a true, substantive comparison between the facts of these cases, and comparing whole case to whole case works.

[46] The best quality Cs-of-IRAC parallel one another, just like good Is-of-IRAC do, so use the echoing techniques discussed below when you have multiple Cs-of-IRAC. *See infra* § V(B).

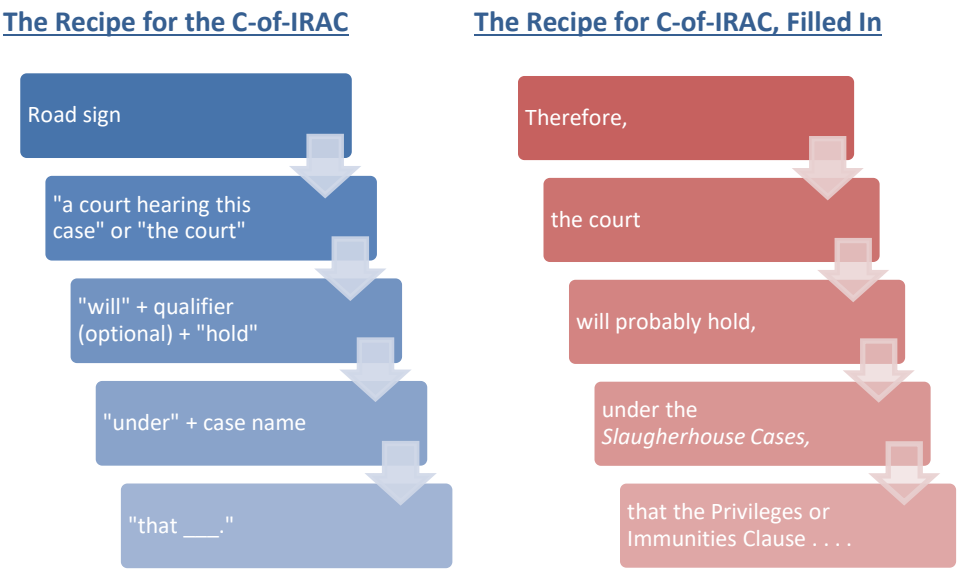


Figure 11

For the first bubble, you can use "Therefore," as I did. Other options include "Thus," "Consequently," "Hence," "Accordingly," and, for closer calls, "On balance," "Overall," "Ultimately," "All in all," and "All things considered."

For the second bubble, use "a court hearing this case" when a complaint has not yet been filed. This is what I did in the bullet points above. I used "a court hearing this case" because no lawsuit had been filed. Mr. Minot was just thinking about suing and wanted to know how good his case was. When a complaint *has* been filed, and there is consequently a specific court assigned to the case, use "the court." If Mr. Minot had actually filed a complaint, my first C-of-IRAC would have read like this: "Therefore, based on *Smith* and the Restatement, the court will likely hold that the Act, albeit non-verbal, was a communication." It's the difference between the indefinite article, "a," and the definite article, "the." We use the indefinite article when the thing to which we're referring is an unknown. We use the definite article when the thing is a specific individual, entity, object, etc. To put it more simply, it's the difference between talking about a specific sandwich you put in the breakroom refrigerator and any old sandwich at all. It's the difference between saying "the sandwich I'm going to eat for lunch is in the refrigerator" and "I wonder if there's a sandwich in the refrigerator."

Additionally, still focused on the second bubble, keep in mind that sometimes a judge or court will be resolving the issue and sometimes a jury will be resolving it. Many questions that come up in lawsuits are "fact questions" normally reserved for the jury. There may be some situations, therefore, where you want your C-of-IRAC to start by saying "Therefore, the jury will find" instead of "Therefore, the court will hold." That said, judges can resolve fact issues traditionally reserved for juries on summary judgment if no reasonable juror could find for the nonmoving party. So, sometimes it is appropriate to refer to the judge even if the question is normally one for the jury. This goes back to what I was saying earlier about the mnemonic "courts hold, juries find." All that said, if this seems too confusing, you can dodge this bullet entirely by using "trier-of-fact" or "fact-finder" instead of "judge" or "jury" and "conclude" or "decide" instead of "find" or "hold." That way, regardless whether the judge or jury is acting as the trier-of-fact, you've got it covered.

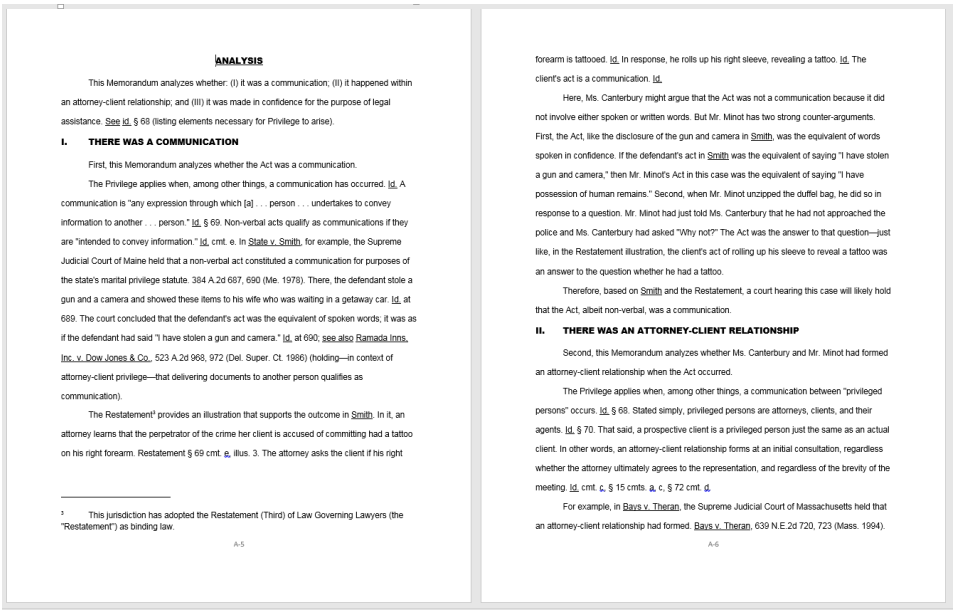
For the third bubble, you can drop the qualifier depending on your confidence in the outcome of the case. For example, I could say something like "the Court will probably hold . . . ." if it doesn't seem like an absolutely sure thing. But if it is a sure thing, like I think it is in the *Minot* case, I could drop "probably" and just say "the Court will hold . . . ."

You can drop the fourth bubble entirely if you want; it's not necessary to specify the authority on which the court will rest its decision.

B. Using Roadmaps and Headings

Well, now you know the secret of the IRAC layout and you're well on your way to writing clear, cogent legal analyses. You've learned a number of recipes that will give each IRAC section the appropriate flavor. You've got a handle on the basic form and content for a memorandum. Looking at things through the lens of our "recipe" metaphor, if a memorandum were cake, you'd be ready to start baking. What you're not ready for, though, is the finishing touches. In other words, it's time to talk about putting the icing on the cake. In particular, it's time to talk about roadmaps and headings.

Suppose you're a clerk of court and your judge has just been assigned the *Minot* case. She wants you to write a memorandum analyzing the issues likely to arise at trial. You decide, as I did, to break your analysis into four IRACs, one for each element in the test for attorney-client privilege. This means you'll have four headings in your Analysis section, one for each IRAC. The first part of your Analysis section would probably look something like the two-page spread in Figure 12 below:



ANALYSIS

This Memorandum analyzes whether: (I) it was a communication; (II) it happened within an attorney-client relationship; and (III) it was made in confidence for the purpose of legal assistance. See id. § 68 (listing elements necessary for Privilege to arise).

I. THERE WAS A COMMUNICATION

First, this Memorandum analyzes whether the Act was a communication.

The Privilege applies when, among other things, a communication has occurred. Id. A communication is "any expression through which [a] . . . person . . . undertakes to convey information to another . . . person." Id. § 69. Non-verbal acts qualify as communications if they are "intended to convey information." Id. cmt. e. In State v. Smith, for example, the Supreme Judicial Court of Maine held that a non-verbal act constituted a communication for purposes of the state's marital privilege statute. 384 A.2d 687, 690 (Me. 1978). There, the defendant stole a gun and a camera and showed these items to his wife who was waiting in a getaway car. Id. at 689. The court concluded that the defendant's act was the equivalent of spoken words; it was as if the defendant had said "I have stolen a gun and camera." Id. at 690; see also Ramada Inns, Inc. v. Dow Jones & Co., 523 A.2d 968, 972 (Del. Super. Ct. 1986) (holding—in context of attorney-client privilege—that delivering documents to another person qualifies as communication).

The Restatement[3] provides an illustration that supports the outcome in Smith. In it, an attorney learns that the perpetrator of the crime her client is accused of committing had a tattoo on his right forearm. Restatement § 69 cmt. e, illus. 3. The attorney asks the client if his right

[3] This jurisdiction has adopted the Restatement (Third) of Law Governing Lawyers (the "Restatement") as binding law.

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forearm is tattooed. Id. In response, he rolls up his right sleeve, revealing a tattoo. Id. The client's act is a communication. Id.

Here, Ms. Canterbury might argue that the Act was not a communication because it did not involve either spoken or written words. But Mr. Minot has two strong counter-arguments. First, the Act, like the disclosure of the gun and camera in Smith, was the equivalent of words spoken in confidence. If the defendant's act in Smith was the equivalent of saying "I have stolen a gun and camera," then Mr. Minot's Act in this case was the equivalent of saying "I have possession of human remains." Second, when Mr. Minot unzipped the duffel bag, he did so in response to a question. Mr. Minot had just told Ms. Canterbury that he had not approached the police and Ms. Canterbury had asked "Why not?" The Act was the answer to that question—just like, in the Restatement illustration, the client's act of rolling up his sleeve to reveal a tattoo was an answer to the question whether he had a tattoo.

Therefore, based on Smith and the Restatement, a court hearing this case will likely hold that the Act, albeit non-verbal, was a communication.

II. THERE WAS AN ATTORNEY-CLIENT RELATIONSHIP

Second, this Memorandum analyzes whether Ms. Canterbury and Mr. Minot had formed an attorney-client relationship when the Act occurred.

The Privilege applies when, among other things, a communication between "privileged persons" occurs. Id. § 68. Stated simply, privileged persons are attorneys, clients, and their agents. Id. § 70. That said, a prospective client is a privileged person just the same as an actual client. In other words, an attorney-client relationship forms at an initial consultation, regardless whether the attorney ultimately agrees to the representation, and regardless of the brevity of the meeting. Id. cmt. c, § 15 cmts. a, c, § 72 cmt. d.

For example, in Bays v. Theran, the Supreme Judicial Court of Massachusetts held that an attorney-client relationship had formed. Bays v. Theran, 639 N.E.2d 720, 723 (Mass. 1994).

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Figure 12

First, your Analysis section would have a roadmap. You can see the roadmap in Figure 12; it's the paragraph right under the *Analysis* heading. Don't worry if you can't read it now. It's reproduced in a more readable form below. Second, your Analysis section would have four IRACs, each with its own

customized heading, phrased in whatever words you deemed best. Each heading would be preceded by a Roman numeral. You can see the first IRAC and part of the second in Figure 12. The first IRAC has the heading "THERE WAS A COMMUNICATION" preceded by the Roman numeral I. The second IRAC has the heading "THERE WAS AN ATTORNEY-CLIENT RELATIONSHIP" preceded by the Roman numeral II. I wanted to provide you with this image of an Analysis section because roadmaps and headings are interrelated and I thought the visual information would illustrate that concept for you. The next two subsections will explain this interrelationship, and other rules related to roadmaps and headings, in more detail.

1. Rules for Roadmaps

Your Analysis section is likely to have at least one roadmap. A *roadmap* gives the reader a preview of what's to come. However, despite what you may have heard or seen elsewhere, roadmaps should not (at least in my view) be mini-IRACs. Instead, they should follow a precise recipe: an introductory clause followed by a colon followed by a list of the headings the reader is about to encounter. The numbers (or letters) in the list should match the numbers (or letters) that precede the relevant headings. And each item in the list must fit grammatically with the introductory clause as if it were the only thing in the list.

for example, if you were writing the *Minot* memorandum, your roadmap might look something like the one in Figure 12, reproduced and color-coded here:

> This Memorandum analyzes whether Mr. Minot's Act: (I) was a communication; (II) happened within an attorney-client relationship; and (III) was made in confidence for the purpose of legal assistance.

The first part of the roadmap, in yellow, is an introductory clause followed by a colon. The second part of the roadmap, in green, is a list of items you plan to discuss. This list, linguistically speaking, mirrors your headings. So, the first item in the list—was a communication—mirrors the first heading in Figure 12: *THERE WAS A COMMUNICATION*. The second item in the list—happened within an attorney-client relationship—mirrors the second heading: *THERE WAS AN ATTORNEY-CLIENT RELATIONSHIP*. Usually, the items in your list will be near verbatim copies of your headings. This is an example of a rhetorical device we've talked about before, called "parallelism," where an author uses the same phrases, clauses, or grammatical structures repeatedly for rhythmic effect and enhanced reader comprehension. You can also see parallelism in the roadmap's numbering system. The roadmap uses Roman numerals and so do the headings. In other words, the first item in the roadmap is preceded by Roman numeral I and the first heading in the Analysis section is preceded by Roman numeral I. If I had used the letter A, or the Arabic numeral 1, or some other letter or number for the heading, then I would have done the same for the roadmap. This makes the relationship between the roadmap and headings crystal clear for readers. If I'd used the Arabic numeral 1 in the roadmap and the Roman numeral I in the heading, it might have been confusing.

Moreover, each of the three items highlighted in green in the roadmap fits, grammatically, with the introductory clause as if it were the only thing in the list. To illustrate this concept, suppose we removed everything from the roadmap but the introductory clause and the third item in the list. We would have a complete, grammatically correct sentence: *This Memorandum analyzes whether Mr. Minot's Act was made in confidence for the purpose of legal assistance*. We'll see some examples of roadmaps that *fail* to do this—that are grammatically incorrect—in the Exercises, below.

2. Rules for Headings

As you know from the last section, it's often useful to break an Analysis section down into subsections, particularly when you're analyzing a legal test with several elements. Often, you'll want to devote one IRAC, and one subsection of your Analysis section, to each element. You'll also want to give each subsection its own heading. This is a great way to enhance the clarity of your analysis. You should therefore feel free to use headings liberally; they're viewed favorably in legal circles. They make things easier on the reader, which is one of the legal writer's primary goals.

Regarding format, different audiences will have different preferences. My preferences are explained fully in Appendix 5. You should read it prior to turning in your first memorandum.

In terms of content, be careful of one thing. Make sure your headings aren't replacing your topic sentences. The body of your analysis—the text itself, *minus* the headings—must stand on its own. Imagine your memorandum without any headings at all. Have you lost any content? Any crucial transitions? If so, your headings are doing the work that your text should be doing. Retain the headings, but add the missing material to your text. If you think the missing material should be inserted right after a heading, it's okay to model the heading's language, but you probably don't want to repeat the heading verbatim.

In other words, your Is-of-IRAC should parallel your headings and vice versa. Suppose again that you're a clerk of court and suppose further that your judge just got a new case: *Kaplan v. Stock Market Photo Agency, Inc*.[47] The case involves a copyright-infringement claim and an unfair-competition claim and the judge wants you to research both. Your Analysis section might start with a roadmap like that in the first column in Table 5 below. Your headings would resemble those in the second and third columns. They would echo the language highlighted in blue and green in the roadmap. Your Is-of-IRAC would look like those in the second and third columns. They would use the same introductory clause used in the roadmap (in yellow); thus, they would echo the roadmap and one another. They would end with a clause that strongly resembled the relevant item in the roadmap's list of items (in blue and green); thus, they would echo the roadmap as well as their respective heading.

Roadmap	Heading & Issue Statement for Subsection I	Heading & Issue Statement for Subsection II
This Memorandum analyzes whether Mr. Kaplan can prove that Defendants: (I) infringed his copyright under the federal Copyright Act and (II) engaged in behaviors that amount to "unfair competition" under New York law.	I. THE DEFENDANTS DID NOT INFRINGE THE COPYRIGHT First, this Memorandum analyzes whether Mr. Kaplan can prove that Defendants infringed his copyright.	II. THE DEFENDANTS DID NOT ENGAGE IN UNFAIR COMPETITION Second, this Memorandum analyzes whether Mr. Kaplan can prove that Defendants engaged in behaviors that amount to unfair competition.

Table 5

[47] *Kaplan v. Stock Mkt. Photo Agency, Inc.*, 133 F. Supp. 2d 317 (S.D.N.Y. 2001).

In short, roadmaps, headings, and Issue Statements are all interrelated. A good heading will echo the roadmap and the I-of-IRAC that appears immediately below it. A good Issue Statement will echo the roadmap, the heading that immediately precedes it, and the other Issue Statements in the paper. If you use this sort of parallelism, it will help your reader keep track of where she is.[48] And it will make your job much easier: you won't have to work very hard on crafting the language in the I-of-IRAC.

C. Common Problems in Using the IRAC Layout

Now that you're familiar with the IRAC layout, let's talk about the biggest problems students have with it. First, they resist it. For some reason, many people don't want to use the IRAC layout. I'm not sure why because it makes our job as writers a whole lot easier. With IRAC, we don't have to create an analysis from scratch each time. The architectural work (more on this later) has already been done. This is a good thing. It saves us time and headaches. Take advantage of it. Additionally, your reader is most likely an attorney. She's expecting to see an IRAC. If you don't give it to her, she'll be confused and irritated. Believe me, you don't want your partners feeling confused and irritated after reading your work! So, if you ever feel yourself fighting IRAC, stop. It's yet another thing that accomplishes our primary goal of making things easy on our readers, because it delivers what they're expecting, and our secondary goal of making things easy on ourselves.

The second big problem students have with IRAC is deviating from the layout. IRAC is just that. It has four parts. If we wanted to see IRARARAC, we'd have a different acronym. So, make sure, for each IRAC you set forth, that you only have one I, one R, one A, and one C. Don't worry about this on your first draft of the paper (I'm talking here about your first draft for *yourself*, not your first draft for the professor); you'll get writer's block if you worry about it then. But at some point during your editing process, take a look at your IRACs. If you see anything that deviates from the four-part IRAC structure, like IRARAC, there's an easy fix: break the discussion up into subsections. Count the pairs of RAs. You need one full IRAC for each RA you find and you need one full subsection for each IRAC. For instance, if you find an I-RA-RA-RA-C, you've found three pairs of RAs and you therefore need three full IRACs and three full subsections. The IRACs don't have to be big. Some of them might be small enough to fit in a single paragraph. But, if you're flip-flopping from RA to RA to RA, without any accompanying Is or Cs, you need to break your discussion into smaller parts.

Suppose, for instance, that I'm writing a memorandum on a negligence issue. I've gotten it down on paper, but it's still pretty rough. I'm going through it, looking for things to edit, and I find an I-RA-RA-C. You can see a graphical representation of this idea in Figure 13, below.

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[48] Speaking of parallelism, note how, in Table 5, I began the first Issue Statement with the word "First" and the second Issue Statement with the word "Second." This is a type of parallelism called "sequential enumeration," and it often works well for Issue Statements. If you use the echoing type of parallelism discussed here in the text, along with sequential enumeration, it will help you create high-quality Is-of-IRAC.

Changing an Incorrect IRARAC to a Correct IRAC

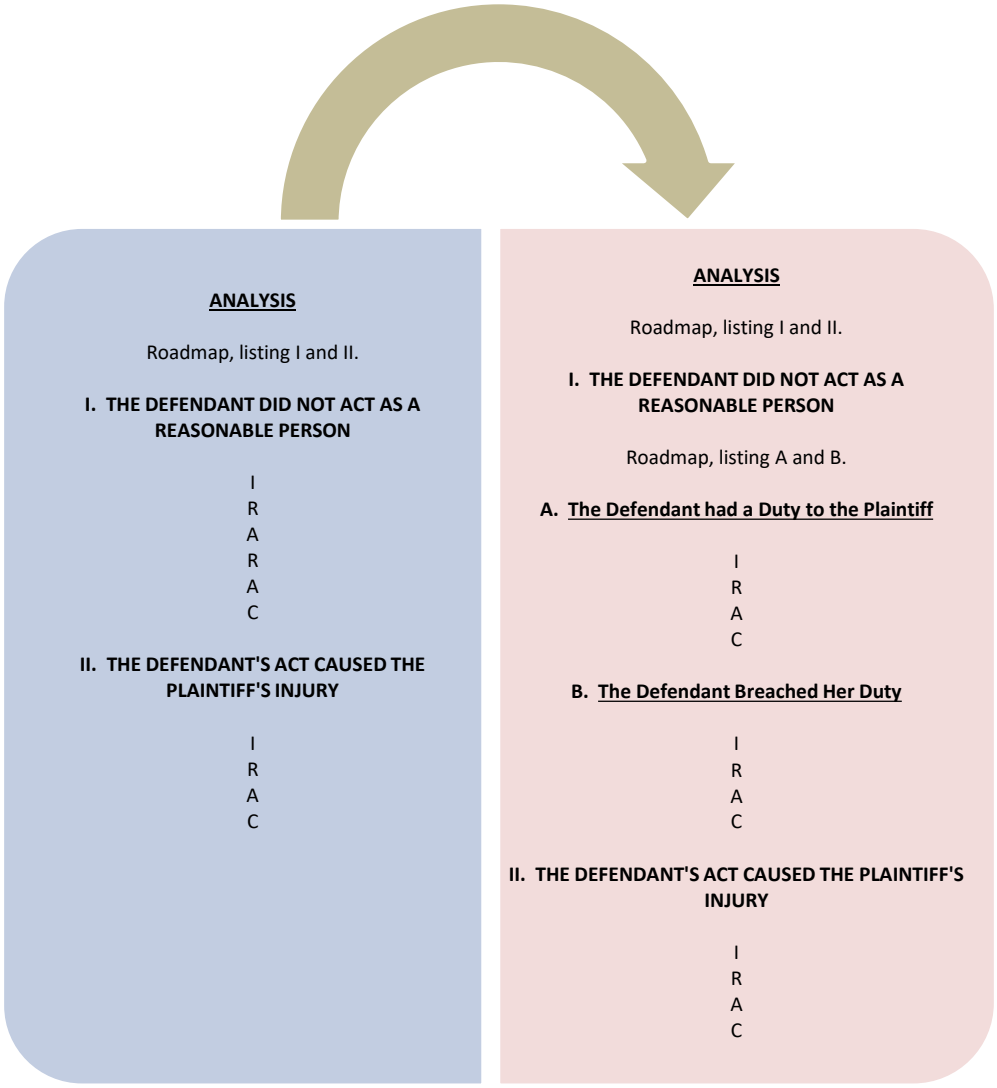

Figure 13

The left side of Figure 13 shows what my memorandum looks like right now. Subsection II is okay: it has a strict, four-part IRAC. But subsection I has two pairs of RAs. Therefore, I need to edit subsection I so it has two full IRACs. This will require breaking it up into subparts A and B. The right side of the Figure shows what my paper looks like after I make the necessary changes. The RAs in the new (pink) version are for the most part the same as they were before in terms of content, except for, perhaps, some different transitions. But I've added headings A and B and made sure I have an I-of-IRAC and a C-of-IRAC for each of my RAs. I've also added a roadmap under Roman numeral I, giving the reader a preview of

the new subsections, A and B.[49] It's good to have a roadmap like this whenever you're breaking a more major section down into subsections. For more information, and another example, on this issue, see Appendix 6.

[49] Note that, if you have a subsection I, you must also have a subsection II. You might also have subsections III, IV, and etc., but these are optional. We'll talk more about this in class.

Part One, § V, Exercises (The Analysis Section)

1. *The following paragraph has all four IRAC sections, but they are out of order. Draw a line around each section and label it with I, R, A, or C:*

The U.S. Congress has the power, under the Commerce Clause, to regulate commerce between the states. [cite]. In Wickard v. Filburn, the U.S. Supreme Court held that the Commerce Clause allows Congress to regulate farmers' purely personal crops. [Cite]. There, the farmer sold some of his crops in interstate commerce. [Cite]. But he reserved the rest, grown on only twelve acres, for his family's personal use. [Cite]. He never sold those crops and they never left his state. [Cite]. The Court held that the crops were nevertheless a part of interstate commerce. It reasoned that, if the farmer were not growing his own crops, he would have to buy crops or other products on the open market and, thus, engage in, and have an impact on, interstate commerce. [Cite]. Therefore, the Front Ten is almost certainly subject to congressional regulation. This Court must consider whether produce grown on the Front Ten is in interstate commerce. Here, the Greens reserve ten acres for personal use; they never sell crops grown on the Front Ten and those crops never leave their state. The situation is almost identical to the situation in Filburn. The acreage at issue in the Greens' case is slightly less than the acreage at issue in the Filburn case – ten acres compared to twelve – but the difference is probably insufficient to distinguish the two cases. The rationale applied in Filburn appears to apply equally forcefully to the Greens' case: if the Greens did not grow crops on the Front Ten, they would have to buy crops or other products on the open market and, consequently, they would affect interstate commerce.

2. *The following high-quality R-of-IRAC is based on one by Sarah, a student. Read it, and we'll discuss it in class.*

Colorado recently enacted Colorado Revised Statutes section 13-21-402.5 (the "Misuse Statute"), which serves as an absolute bar to certain product liability claims:

> A product liability action may not be commenced or maintained against [the] . . . manufacturer . . . of a product that caused . . . property damage if, at the time the . . . property damage occurred, the product was [being] used in a manner or for a purpose other than that which was intended and which could not reasonably have been expected, and such misuse of the product was a cause of the . . . property damage.

See Colo. Rev. Stat. § 13-21-402.5 (2007).[50] Stated plainly, the Misuse Statute applies where: (1) the plaintiff misused the product at issue; (2) a reasonable manufacturer would not have

[50] No court has yet interpreted the Misuse Statute. However, the Statute apparently codifies a pre-existing common-law defense, which the Colorado Supreme Court has addressed fairly thoroughly. See, e.g., Armentrout v. FMC Corp., 842 P.2d 175, 187-89 (Colo. 1992). Thus, this Analysis utilizes cases discussing the common-law misuse defense to interpret the Misuse Statute.

expected the misuse; and (3) the misuse caused the plaintiff's damages. See id.; cf. Armentrout, 842 P.2d at 187 (listing only two elements, but including all three requirements). A defendant can establish the second element—no expectation of misuse—only if it can show that it "could not [have] foresee[n] the possibility of misuse." See Armentrout, 842 P.2d at 188; White v. Caterpillar, Inc., 867 P.2d 100, 107 (Colo. Ct. App. 1993).

Courts have approached the foreseeability question in different ways. Some courts have focused on evidence of a manufacturer's actual awareness, knowledge, or prior notice of a particular kind of misuse. See, e.g., Armentrout, 842 P.2d at 188-89 (considering defendant's actual awareness); White, 867 P.2d at 108 (discussing manufacturer's lack of prior notice or knowledge). For example, in Armentrout, the Colorado Supreme Court held that the manufacturer could reasonably foresee an accident because it had actual knowledge of similar prior accidents. Armentrout, 842 P.2d at 189. There, the plaintiff, a crane oiler, was hit by the crane's rotating superstructure after becoming stuck in the "pinch point," the space between the crane's superstructure and its base. He sued the crane manufacturer, alleging that the crane's pinch point was a design defect. Armentrout, 842 P.2d at 178-79. The court held that the oiler's misuse was reasonably foreseeable because testimony established that oilers commonly worked on the crane while the crane was operating, the manufacturer was aware that oilers often worked where the crane's rotating superstructure might strike them, and the manufacturer had received several reports of workplace accidents occurring around the crane's pinch point. See id. at 189; cf. Walcott v. Total Petroleum, Inc., 964 P.2d 609, 612 (Colo. Ct. App. 1998) (holding that gas station operator could not foresee consumer's decision to use gasoline to set woman on fire where no evidence showed previous similar criminal acts); White, 867 P.2d at 104, 108 (holding that truck manufacturer could not foresee that truck driver would overfill gasoline storage tank causing large spill and explosion because manufacturer was unaware of other similarly large spills).

More recently, in HealthONE, the Colorado Supreme Court applied a broader definition of foreseeability, explaining that a defendant need not predict precisely how or when an accident will occur to foresee the accident. See, e.g., HealthONE v. Rodriguez, 50 P.3d 879, 889 (Colo. 2002). There, a doctor injected a patient with the wrong medication after another doctor left the medication on a common cart. See id. at 884-85, 889. The non-treating doctor knew that different vials had similar labels and that other doctors used the same cart to administer different medications. See id. at 889. Additionally, the hospital had a policy requiring doctors to discard medication after each dosage to prevent erroneous injections and had discussed the policy with the non-treating doctor. See id. According to the court, the improper injection was foreseeable because foreseeability "'includes whatever is likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in guiding practical conduct.'" See id. (quoting Taco Bell, Inc. v. Lannon, 744 P.2d 43, 48 (Colo. 1987)); cf. Walcott, 964 P.2d at 612 (noting that foreseeability "depends in part on the common sense consideration of the risks created by various conditions and circumstances").

3. *The following procedural postures are from the ends of the Fact sections for two different memoranda. Imagine yourself writing the Analysis section and, in particular, the C-of-IRAC, for each of the memoranda. You'll be writing either "Therefore, the court will probably hold that . . . ." or "Therefore, a court hearing this case will probably hold that . . . ." Which phrasing will you chose, "the court" or "a court hearing this case"?*

- Mr. Kaplan recently filed a Complaint in the U.S. District Court for the Southern District of New York alleging copyright infringement and unfair competition. He wants to know whether he will win on the copyright claim.
- Mr. Kaplan wants to sue Defendants in the U.S. District Court for the Southern District of New York. He has asked this firm to determine whether he can prevail on copyright and unfair-competition claims.

4. *Roadmaps must be grammatically sound and streamlined. Each item in a roadmap's list must work grammatically with the introductory clause as if it were the only item in the list. And the roadmap's author should avoid redundancy. The three roadmaps below each suffer from one of the problems (grammatical inconsistency or redundancy). Edit the text to fix the problem.*

- Roadmap #1. Evidence obtained in a foreign search cannot be used in an American proceeding if the evidence: (1) was obtained in a manner that shocks the judicial conscience or (2) American officials participated in the search or used the foreign actors as their agents.
- Roadmap #2. This Memorandum analyzes whether the artist formerly known as "Prince" can show that the color *Purple Rain Purple* is: (I) distinctive and that it (II) does not serve a functional purpose, the requirements for trademarking a color.
- Roadmap #3. Prince can trademark *Purple Rain Purple* if he can establish that: (I) the color is distinctive and (II) the color is nonfunctional.

5. *This high-quality R-A section is based on a student-authored brief. Read it and, in the first paragraph (the R-of-IRAC), identify the two rules presented by the writer.*

In Camacho, the Colorado Supreme Court held that, when a product suffers from a manufacturing defect, the driving question is "whether the product as produced conformed with the manufacturer's specifications." Camacho v. Honda Motor Co., 741 P.2d 1240, 1249 (Colo. 1987). Moreover, the Tenth Circuit has observed that manufacturing defects "usually occur because of insufficient quality control." Oja v. Howmedica, Inc., 111 F.3d 782, ___ (10th Cir. 1997) (applying Colorado law).

Here, the evidence is not only sufficient but entirely one-sided that Manufacturer's latch did not conform to specifications and, thus, suffered from a manufacturing defect under Camacho. Manufacturer's own written specifications for the latch call for a maximum phosphorus level of 0.04 pct. But the Metallurgical Experts all agree that the latch had phosphorus levels of 0.073 pct., nearly twice the maximum level Manufacturer specified. In addition, Manufacturer's admissions show, in keeping with Oja, that it did not employ sufficient quality-control procedures. First, Manufacturer admits that it did not receive any quality-assurance certification, related to the latch's chemical composition, from its casting vendor – even though industry regulations require such certifications. Second, the certification Manufacturer did receive was both for the wrong activity and in a language that no one at the company understood. Finally, Manufacturer admits that, absent a chemical certificate, it could not know the make-up of the latch because Manufacturer does not perform its own chemical analysis on its products.

6. *This R-A section, based on a student-authored brief, needs improvement. Read it and, in the first paragraph (the R-of-IRAC), identify the four rules presented by the writer.*

In a manufacturing-defect case, the plaintiff must prove that the product it believes to be defective, was not produced in compliance with the manufacturer defendant's specifications. See Camacho v. Honda Motors Co., 867 P.2d 1241, 1247 (Colo. 1987). The word "defective" also includes imperfections created by the manufacturer and products containing, "a material which may not be safely used for the purpose intended." Bradford v. Bendix-Westinghouse, 517 P.2d 406, 410 (Colo. Ct. App. 1973). A product is also defective if it differs from similar products. See id at 410.

Here, the undisputed evidence proves that that Manufacturer's latch was defective as a matter of law. First, all of the expert metallurgists agree that a high level of phosphorous existed in Manufacturer's latch, making the metal defective, and causing the latch to completely fail. Second, the Excessive phosphorous caused embrittlement in the metal of the latch, weakening it. Third, Manufacturer's chemical analysis of Manufacturer's latch also reveals that the phosphorous levels were as high as 0.073 pct – not only excessive, but much higher than the 0.04 pct stated in Manufacturer's specifications. Fourth, the cracks or fractures formed in the metal where the excessive phosphorus atoms were located, and spread, intergranularly, until complete failure of the latch occurred while Manufacturer's latch was being used in demanding oilfield operations. Finally, Dr. Danielson also stated that intergranular fractures did not, and do not, appear in steel products that have normal phosphorous levels.

Part One, § V, Answers (The Analysis Section)

1. Parts of IRAC, Commerce Clause Problem (with the citations removed):

   - yellow = R
   - green = C
   - blue = I
   - gray = A

   The U.S. Congress has the power, under the Commerce Clause, to regulate commerce between the states. In Wickard v. Filburn, the U.S. Supreme Court held that the Commerce Clause allows Congress to regulate farmers' purely-personal crops. There, the farmer sold some of his crops in interstate commerce. But he reserved the rest, grown on only twelve acres, for his family's personal use. He never sold those crops and they never left his state. The Court held that the crops were nevertheless a part of interstate commerce. It reasoned that, if the farmer were not growing his own crops, he would have to buy crops or other products on the open market and, thus, engage in, and have an impact on, interstate commerce. Therefore, the Front Ten is almost certainly subject to congressional regulation. This Court must consider whether produce grown on the Front Ten is in interstate commerce. Here, the Greens reserve ten acres for personal use; they never sell crops grown on the Front Ten and those crops never leave their state. The situation is almost identical to the situation in Filburn. The acreage at issue in the Greens' case is slightly less than the acreage at issue in the Filburn case – ten acres compared to twelve – but the difference is probably insufficient to distinguish the two cases. The rationale applied in Filburn appears to apply equally forcefully to the Greens' case: if the Greens did not grow crops on the Front Ten, they would have to buy crops or other products on the open market and, consequently, they would affect interstate commerce.

2. We'll talk about this problem in class.

3. Procedural-Postures Problem:

   - You would use "the" court in this example. The author has stated that Mr. Kaplan "recently filed a Complaint" in the Southern District. This means the case is live and there actually is a definite court hearing it. Therefore, you should use the definite article, "the."

   - You would use "a court hearing this case" in this example. The author has stated that Mr. Kaplan "wants to sue Defendants" in the Southern District. That means there is no live lawsuit and the court that might someday hear the case is indefinite. Therefore, you should use the indefinite article, "a."

4. Roadmap problem:

   - Roadmap #1: Evidence obtained in a foreign search cannot be used in an American proceeding if ~~the evidence~~: (1) the evidence was obtained in a manner that shocks the judicial conscience or (2) American officials participated in the search or used the foreign actors as their agents.

- Roadmap #2: This Memorandum analyzes whether the artist formerly known as "Prince" can show that the color *Purple Rain Purple* ~~is~~ satisfies the requirements for trademarking a color, i.e., that it: (I) is distinctive and ~~that it~~ (II) does not serve a functional purpose~~, the requirements for trademarking a color~~.

- Roadmap #3: Prince can trademark *Purple Rain Purple* if he can establish that the color is: (I) ~~the color is~~ distinctive and (II) ~~the color is~~ nonfunctional.

5. We'll talk about this problem in class.

6. We'll talk about this problem in class.

VI. The Conclusion

Learning Objective: To teach you to write a Conclusion that has the three required parts in the right order.

The Conclusion is organized very much like the Answer, except that it has three parts instead of four: (1) a sentence that answers ultimate question; (2) a test; and (3) a rationale. As with the Answer, you must take a stand. Don't be afraid to do so. Your boss will appreciate it.

In the following example, from a hypothetical products-liability case centered on the misuse defense,[51] parts #1, #2, and #3 are shown in blue, grey, and yellow, respectively. The "stand" is shown in green.

> Plaintiff can almost certainly prove that using a hammer with a screwdriver is reasonably foreseeable. Courts assess foreseeability by asking whether a challenged activity is "likely in the setting of modern life." Plaintiff can meet this "likeliness" test in three ways. First, Plaintiff can introduce lay testimony that hammers and screwdrivers are used together frequently in the construction industry. Second, Plaintiff can introduce expert testimony that "screwdrivers and hammers are used together everywhere, every day." Finally, Plaintiff can produce several construction-industry manuals that recommend and describe using a screwdriver with a hammer. Overall, Plaintiff has an excellent chance of prevailing on this matter.

The only problem that arises in writing Conclusion sections is that, because of the similarity in format between the Answer and the Conclusion, they can become very redundant of one another, too "matchy-matchy," a fashionista might say. One way to avoid this is to provide more depth and nuance in the Conclusion. Remember, by the time your reader gets there, she's much more familiar with the problem than she was when she was reading the Answer.

VII. Final Thoughts About Memo-Writing

Now that we've talked about what a memorandum is, each of its six parts, the IRAC acronym, and various style rules, I'd like to share three thoughts with you. The first is that, as a teacher, it's always hard to decide in which order you should deliver information. What should you share with your students first and what should you share later? For a legal-writing professor, the question "Where to start?" is a particularly difficult one. This is because the parts of the memoranda are all connected to one another. Understanding one part requires understanding the other parts. Consequently, I always feel, no matter where I start, that the informational waters will be muddy for my students. The learning curve in law school is steep. In reading this chapter, you've seen that curve go up quite a bit but, still, some of the things you read in the beginning of the chapter would probably sink in better now than they did when

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[51] A manufacturer can potentially prevail on a strict-liability claim, even if its product was defective, if the plaintiff misused the product. This is called a "misuse defense." If, however, the plaintiff can show that its misuse was foreseeable, the manufacturer cannot prevail; manufacturers must design their products to be safe for foreseeable misuses. This (hypothetical) case involved the misuse defense and questions about foreseeability.

you first read them. Granted, I told you to read the model memorandum in Appendix 1 at the very beginning of this chapter, so that you would have the big picture, but the remainder of the chapter gave you pieces of that picture, one by one, in bits. This, I suppose, is the nature of the beast. As teachers, we wish we could magically infuse our students' brains with all of the information all at once. But we can't. So, we do the best we can, going through things one step at a time, in an order we think makes sense. Ideally, if you had all the time in the world, you'd go back right now and re-read this entire chapter. Of course, you can't do that and I wouldn't ask you to. But what I will ask you to do is to read an Appendix you haven't yet read, Appendix 2. It presents the model memorandum in *annotated* form—in other words, in a form that explains the editorial choices I made when I authored the paper. Now that you really do have the big picture, I think those annotations will makes sense in a way they wouldn't have earlier. And they'll refresh your memory about many of the things this chapter covered.

My second thought has to do with an article by English Professor Betty Flowers. The article, *Madman, Architect, Carpenter, Judge: Roles and the Writing Process*, postulates that authors go through four stages each time they write something. When I first read Professor Flowers' thesis, it resonated strongly with me. I think it's accurate, and I think it's accurate not only for creative writers but for legal writers, as well. It's available at http://www.ut-ie.com/b/b_flowers.html. I've provided the link for you on my TWEN site. You should read it. It will be helpful as you write your first memorandum. It will alleviate some of your anxieties and it will show you how to avoid writer's block.

The final thought I'd like to share with you involves returning to the quote at the beginning of this chapter:

> Writing . . . is in many ways similar to executing a piece of carpentry. If you take some wood and nails and glue and make a bookcase, only to find when you're done that it topples over when you try to stand it upright, you may have created something really very beautiful, but it won't work as a bookcase.

The quote is from William Goldman, a screenwriter known for such films as *Butch Cassidy and the Sundance Kid*, *The Princess Bride*, and *All the President's Men*. It comes from his book, Adventures in the Screen Trade, a Personal View on Hollywood and Screenwriting. His point is that screenplays have to follow a certain format. No matter how beautiful the writing, no matter how good the story, if the piece doesn't follow the proper form, it's not a screenplay and the movie studio executive who's reading it is going to put it in his "duds" pile. The same thing is true of legal writing. If you discard the recipes I gave above, ignoring the memorandum's required structure, you may create a piece of writing that's very beautiful indeed. But it won't function as a memorandum. A memorandum, like a bookcase, must serve a certain purpose. Bookcases must hold books. They cannot topple over. Memoranda must predict the outcome of a legal dispute. They must have an introduction, a question, an answer, facts, analysis, and a conclusion. They must use IRAC. They must apply law to facts. When they don't, they disappoint the partners, judges, and professors who read them, and they do a disservice to the clients who depend on them.

Complete Guide, Takeaway

You should be able to do the following things after finishing the readings, lectures, and exercises related to The Complete Guide to Legal Writing (the "CG"). These are the things I'm either expressly looking for when grading your papers or that I would test you on if I were to give you a quiz:

1. Discuss the primary differences between memoranda and briefs.
2. Explain the "caveman test."
3. State our mantra for the semester.
4. Write the introduction to a memorandum patterned on the example in the CG; identify errors in introductions that deviate from the pattern given in the CG (e.g., non-generic introductions and introductions that exceed one sentence in length).
5. Explain why Prof. Bruce does not want her students starting their Question sections with the word "Whether."
6. List the three parts of a syllogism in the correct order.
7. Write a "Garnerized" Question section patterned after the example(s) in the CG; identify errors in Question sections that deviate from the pattern given in the CG (e.g., questions that start with "whether," that don't call for a "yes" or "no" answer, that don't have at least three sentences/sections, that exceed 100 words, that don't provide for an inevitable question, that embed the answer, and/or that don't provide enough law and/or facts so that the reader can predict the answer).
8. Write an Answer section that follows the four-part layout set forth in the CG (in the correct order) *and* that takes a clear stand one way or the other.
9. When given a sample Answer section, identify each of the three parts discussed in the CG, and, if applicable, where the writer has taken his/her stand.
10. Write an Answer section that provides a legal test that is more in-depth than the test stated in the Question section's major premise (if any), that provides more focus on the precise question at issue than that test, or both.
11. Use one of the following words or phrases for the first part of your Answer section: Yes, No, Almost certainly, Almost certainly not, Probably, Probably not, Maybe; avoid using "Probably yes" or "Yes probably" (because of redundancy).
12. Discuss and recognize the difference between "material" and "storytelling" facts, e.g., if given a set of facts to be applied to a particular legal framework, you should be able to identify which facts are material and which are for storytelling.
13. Write a Facts section that includes all material facts and that provides enough additional storytelling facts to give a sophisticated non-expert the appropriate context for understanding the legal and factual issues.
14. Organize a Facts section in pure chronological order.
15. Define IRAC.

16. Organize an Analysis section with IRAC, not with I-RA-RA-RA-C or the like (in other words, each R-A should be prefaced by an I and followed by a C, so that you have a full, strict, formal I-R-A-C).

17. Craft IRACs that have at least four paragraphs, one for the I and the C and one or more for the R and the A.

18. Use a one-sentence, stand-alone Issue Statement (I-of-IRAC), patterned on the recipes in the CG.

19. Phrase the Issue Statement appropriately for a memorandum (don't use the terminology suggested for a brief).

20. Use parallelism ("echoing" or "repeating refrains") in roadmaps, headings, and issue statements.

21. Write an R-of-IRAC the complies with the guidelines set forth in the CG:

    a. Organize the R-of-IRAC in a broad-to-narrow format, where broad ideas precede details, where, in other words, a "Rule Overview" precedes "Rule Examples"; you should use this broad-to-narrow format to discuss individual cases, as well.

    b. Use a three-part structure for your Rule Examples: (1) an initial sentence that says "In [case name], the [court] held ____" (where, for the second brackets, you identify the court by name on its first mention); (2) a second sentence that begins with the word "There" followed by a clause, and possibly additional sentences, that set forth the relevant facts of the case; and (3) subsequent sentences that communicate the court's rationale.

    c. Refrain from mentioning your case, or the parties involved, in the R-of-IRAC. In other words, don't personalize it.

    d. Provide citations for all material assertions you make in the R-of-IRAC (after we discuss Bluebooking, your citations should comply with The Bluebook or ALWD).

    e. Use at most three paragraphs.[52]

22. Write an A-of-IRAC the complies with the guidelines set forth in the CG:

    a. Start with a broad topic sentence that begins with the road sign "Here."

    b. Parallel the R-of-IRAC: apply all of the principles, rules, and/or tests you recited in your R-of-IRAC[53] in the same order you recited them in that section.

    c. Compare and/or contrast the facts of the your case with the facts, rules, tests, and/or principles described in the R-of-IRAC (i.e., apply the facts of the case at issue to the governing law). Make precise fact-to-fact comparisons between the facts of your case and the facts of the precedential cases.

    d. Mention the authorities you discussed in your R-of-IRAC, and/or the related "buzz words," but don't formally cite those authorities.

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[52] Unless you have the rare situation where it's impossible to do so.

[53] Except, perhaps, for very broad rules recited in your "Rule Overview."

e. Use mostly hybrid sentences, i.e., sentences that contain both "rules" and facts.[54]

f. Be objective: present all sides of the argument(s).

g. Make appropriate word choices for a memorandum (don't be argumentative like you would be in a brief).

h. Use at most three paragraphs.[55]

23. Write a C-of-IRAC the complies with the guidelines set forth in the CG:

a. Start with an appropriate road sign.

b. Draft it as a one-sentence, stand-alone paragraph, patterned on the examples and formulae given in the CG.

c. Make it bookend the I-of-IRAC.

d. Make appropriate word choices for a memorandum (don't use the phraseology suggested for briefs until next semester) and also based on whether the client has already filed a lawsuit or is just considering doing so.

24. Write a Conclusion (to the entire memorandum) in the format set forth in the CG.

25. Recognize that the format for the Answer and the Conclusion sections of a memorandum are the same except for the initial short answer in the Answer section.

26. Use headings logically and to enhance clarity. You should break your Analysis section into meaningful, headed subsections, if it will help your reader *and*:

a. avoid headings that replace topic sentences, i.e., avoiding putting headings against headings without some text in between and

b. insert at least two headings at every level you choose to create, e.g., if you have a I you must have a II, if you have an A you must have a B, if you have a 1 you must have a 2, etc.

27. Write roadmaps that are patterned after the roadmaps in the CG, i.e.:

a. they are not mini-IRACs;

b. they start with an introductory clause that ends in a colon;

c. the colon is followed by a list of the headings being roadmapped (but the list and headings are not verbatim copies of one another);

d. The letters or numbers used in the list duplicate the letters or numbers that precede the headings being roadmapped; and

e. every individual item in the list fits, grammatically, with the introductory clause; in other words, if each item in the list were the ONLY thing following the introductory clause, the clause and the item would, together, be grammatically correct.

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[54] I'm using the word "rules," here, to mean principles, tests, rules, or even facts from the governing authorities. I'm using the word "facts" to mean the facts of your case.

[55] Unless you have the rare situation where it's impossible to do so.

Appendices

Appendix 1, *Model Memorandum*

A *memorandum* is a research paper authored by an attorney. It focuses on a legal problem, but it doesn't take a side or argue a point. Instead, it predicts objectively how a judge or jury will resolve the problem. Law students spend the first semester of their 1L legal-writing course learning how to write memoranda.

This Appendix contains a model memorandum drafted by your professor. It's based on a closed assignment, one where the professor gave her students all the legal authorities they needed to write their papers. The problem itself came from *Baggage*, an episode of *Canterbury's Law*, a television program. Notice, as you read, how formulaic the memorandum is. It has six parts: an introduction, a question, an answer, facts, analysis, and a conclusion. The analysis also follows a set format. For example, it recounts the legal framework first and *then* applies that framework to the facts at hand. We'll talk and read about how to best craft each part of a memorandum as the semester progresses. For now, focus on the big picture, the complete memorandum with all of its parts.

MEMORANDUM

TO: Teresa M. Bruce, Esq.

FROM: Laura Law, Esq.

DATE: August 16, 2016

RE: *Minot v. Canterbury*: Possible Improper Disclosure of Client Communication

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This Memorandum analyzes whether the attorney-client privilege (the "Privilege") protects a prospective client's non-verbal actions.

QUESTION

The Privilege protects communications, between lawyers and clients, made in confidence for the purpose of legal assistance. The firm's client, Louis Minot ("Mr. Minot") arrived unannounced at Elizabeth Canterbury's ("Ms. Canterbury's") law office. The two had never met before. After some small talk, Mr. Minot told Ms. Canterbury that he had information about an unsolved murder. Ms. Canterbury asked him why he had not gone to the police. He replied that he was worried he would become a suspect—and he unzipped a duffle bag, revealing a human skeleton (the "Act"). Was the Act privileged?

ANSWER

Yes. Ms. Canterbury had a duty to keep the Act confidential. The Privilege is triggered when, among other criteria, the following two are met: (1) there is a communication and (2) the communication transpires between an attorney and client.[56] A communication can be a non-verbal act, so long as the act is intended to convey information. And an attorney-client

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[56] The Privilege is triggered when four elements are present. For the sake of brevity, this Answer section only targets two of the elements (the existence of a communication and an attorney-client relationship). However, all four of the elements are discussed in the Analysis section, below.

relationship begins at the initial client meeting, regardless whether the parties ultimately formalize the relationship. Mr. Minot's Act meets these requirements. First, it was a communication: it was a direct response to a question from Ms. Canterbury, essentially an answer to that question, and, as such, it was intended to convey information. Second, it occurred in the context of an attorney-client relationship. The parties had never met before, but their meeting had all of the hallmarks of an initial client interview: Mr. Minot needed a criminal-defense attorney and he went to see Ms. Canterbury after reading a newspaper article about her criminal-defense work. The clear implication from the situation is that Mr. Minot wanted Ms. Canterbury to represent him. Accordingly, assuming the parties' interaction meets the other requirements for Privilege, Ms. Canterbury should have kept the Act confidential.[57]

FACTS

Some time ago, Mr. Minot learned about a murder. He knew who the murderer was and wanted to help the police make an arrest. So, he collected the victim's remains (by then skeletal) and placed them in a duffel bag. At that point, though, he did not know how to proceed. He did not want to become a suspect, but realized that having possession of human remains would seem suspicious.

Then, he saw a newspaper article featuring Ms. Canterbury, a prominent criminal-defense attorney. The article discussed Ms. Canterbury's successful defense of a man charged with abducting and murdering a child. Shortly after seeing the article, Mr. Minot went to Ms.

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[57] The Privilege does not protect a client's identity unless its disclosure would convey the contents of a privileged communication. In re Grand Jury Subpoenas, 803 F.2d 493, 496, 498 (9th Cir. 1986); see also Restatement (Third) of Law Governing Lawyers § 69 cmt. g (2011) (stating that identity is privileged if disclosure would "directly or by reasonable inference . . . reveal . . . a confidential communication."). This Memorandum assumes that Mr. Minot's identity is so intertwined with the Act that, if the Act is privileged, then so is the identity.

Canterbury's law office. He took the duffel bag with him. The two had never met before and Mr. Minot did not have an appointment.

When Mr. Minot arrived, Ms. Canterbury was in a meeting. Eventually, though, the two met in the lobby. Mr. Minot introduced himself and told Ms. Canterbury about seeing her picture in the newspaper. He said the picture made her look "stubborn and bossy, but still nice." Ms. Canterbury then escorted Mr. Minot to her office. No one else was present and the office door was closed. The door was, however, made largely of glass and bordered by two floor-to-ceiling glass windows, so people outside the office could potentially see inside of it.

Ms. Canterbury took out a legal pad and pen and asked "What can I do for you?" Mr. Minot told Ms. Canterbury that he had information about an unsolved murder. She asked if he had approached the police and he said "No." Ms. Canterbury asked "Why not?" Without saying anything, Mr. Minot unzipped the duffel bag, revealing the skeleton. Mr. Minot was standing in between the duffel bag and the door, and he did not take anything out of the bag. Ms. Canterbury immediately called the police and, when they arrived, turned over the duffel bag and its contents to them. She also told them that Mr. Minot was the source of the remains. Shortly afterward, the police arrested Mr. Minot on suspicion of murder.

Mr. Minot was eventually absolved of any wrongdoing, after the real murderer was apprehended. However, being wrongly accused of a crime was a traumatic experience for Mr. Minot. He has, consequently, approached the firm about the possibility of suing Ms. Canterbury. The cause of action would be legal malpractice, i.e., he would argue that Ms. Canterbury improperly disclosed privileged attorney-client communications to the police.

ANALYSIS

Attorneys cannot disclose privileged attorney-client communications except in relatively rare situations not applicable here.[58] Restatement § 60(1)(a). Consequently, if the Act was privileged, Ms. Canterbury was forbidden from disclosing it. In order to determine whether the Act was privileged, this Memorandum analyzes whether: (I) it was a communication; (II) it happened within an attorney-client relationship; and (III) it was made in confidence for the purpose of legal assistance. See id. § 68 (listing elements necessary for Privilege to arise).

I. THERE WAS A COMMUNICATION

First, this Memorandum analyzes whether the Act was a communication.

The Privilege applies when, among other things, a communication has occurred. Id. A communication is "any expression through which [a] . . . person . . . undertakes to convey information to another . . . person." Id. § 69. Non-verbal acts qualify as communications if they are "intended to convey information." Id. cmt. e. In State v. Smith, for example, the Supreme Judicial Court of Maine held that a non-verbal act constituted a communication for purposes of the state's marital privilege statute. 384 A.2d 687, 690 (Me. 1978). There, the defendant stole a gun and a camera and showed these items to his wife who was waiting in a getaway car. Id. at 689. The court concluded that the defendant's act was the equivalent of spoken words; it was as if the defendant had said "I have stolen a gun and camera." Id. at 690; see also Ramada Inns, Inc. v. Dow Jones & Co., 523 A.2d 968, 972 (Del. Super. Ct. 1986) (holding—in context of attorney-client privilege—that delivering documents to another person qualifies as communication).

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[58] For example, an attorney can disclose a privileged communication when doing so is necessary to prevent reasonably certain death or serious bodily harm. Restatement § 66 (2011). The victim in this case already died; therefore, Ms. Canterbury cannot rely on this exception.

The Restatement[59] provides an illustration that supports the outcome in Smith. In it, an attorney learns that the perpetrator of the crime her client is accused of committing had a tattoo on his right forearm. Restatement § 69 cmt. e, illus. 3. The attorney asks the client if his right forearm is tattooed. Id. In response, he rolls up his right sleeve, revealing a tattoo. Id. The client's act is a communication. Id.

Here, Ms. Canterbury might argue that the Act was not a communication because it did not involve either spoken or written words. But Mr. Minot has two strong counter-arguments. First, the Act, like the disclosure of the gun and camera in Smith, was the equivalent of words spoken in confidence. If the defendant's act in Smith was the equivalent of saying "I have stolen a gun and camera," then Mr. Minot's Act in this case was the equivalent of saying "I have possession of human remains." Second, when Mr. Minot unzipped the duffel bag, he did so in response to a question. Mr. Minot had just told Ms. Canterbury that he had not approached the police and Ms. Canterbury had asked "Why not?" The Act was the answer to that question—just like, in the Restatement illustration, the client's act of rolling up his sleeve to reveal a tattoo was an answer to the question whether he had a tattoo.

Therefore, based on Smith and the Restatement, a court hearing this case will likely hold that the Act, albeit non-verbal, was a communication.

II. THERE WAS AN ATTORNEY-CLIENT RELATIONSHIP

Second, this Memorandum analyzes whether Ms. Canterbury and Mr. Minot had formed an attorney-client relationship when the Act occurred.

The Privilege applies when, among other things, a communication between "privileged persons" occurs. Id. § 68. Stated simply, privileged persons are attorneys, clients, and their

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[59] This jurisdiction has adopted the Restatement (Third) of Law Governing Lawyers (the "Restatement") as binding law.

agents. Id. § 70. That said, a prospective client is a privileged person just the same as an actual client. In other words, an attorney-client relationship forms at an initial consultation, regardless whether the attorney ultimately agrees to the representation, and regardless of the brevity of the meeting. Id. cmt. c, § 15 cmts. a, c, § 72 cmt. d.

For example, in Bays v. Theran, the Supreme Judicial Court of Massachusetts held that an attorney-client relationship had formed. Bays v. Theran, 639 N.E.2d 720, 723 (Mass. 1994). There, a condominium owner contacted an attorney about a dispute with condominium developers. Id. at 722. The owner wrote a letter to the attorney and spoke with him on the telephone two or three times for less than ten minutes each time. Id. The two never met in person, the attorney never billed the owner for his time, and no money ever changed hands. Id. The court concluded that an attorney-client relationship had arisen, nevertheless, because the owner sought "advice or assistance from an attorney," the advice was related to "matters within the attorney's professional competence," and "the attorney expressly or impliedly agree[d] to give . . . the desired advice." See id. at 723.

Here, Ms. Canterbury might argue that she and Mr. Minot were not privileged persons because they had never met before and she did not formally represent Mr. Minot. Mr. Minot, however, has a very strong counterargument: that he was, as a prospective client, as much a "privileged person" as an actual client. In fact, he can point to the same three criteria that suggested an attorney-client relationship in Bays.

First, Mr. Minot sought "advice or assistance from" Ms. Canterbury: He wanted to help the police solve a murder, but he did not want to become a suspect. In other words, he needed a good criminal-defense attorney. He saw a newspaper article discussing one of Ms. Canterbury's criminal cases and he thought she fit the bill. He even commented that she seemed "stubborn and bossy, but still nice"—indicating that he was evaluating her professional demeanor. Second, the advice Mr. Minot sought related to an area that was, to borrow the Bays

court's terminology, within Ms. Canterbury's "professional competence." Mr. Minot knew of Ms. Canterbury's expertise in this area because the newspaper article discussed how she had successfully defended a man charged with abducting and murdering a child. Finally, Ms. Canterbury "impliedly agree[d] to give . . . [legal] advice" when she escorted Mr. Minot to her private office, took out a legal pad and pen, and asked "What can I do for you?" Mr. Minot's situation, even more than the situation in Bays, suggests an attorney-client relationship because, unlike the parties in Bays, these parties met in person.

Therefore, a court hearing this case will likely hold that the parties had formed an attorney-client relationship when the Act occurred.

III. THE OTHER REQUREMENTS OF PRIVILEGE WERE MET

Finally, this Memorandum analyzes whether the parties' interaction met the other requirements for Privilege, that is, whether: (A) the communication was made in confidence and (B) the communication occurred for the purpose of legal assistance.

A. The Communication was Made in Confidence

Mr. Minot's non-verbal communication was made in confidence.

The Privilege applies when, among other things, a communication is made in confidence. Restatement § 68. A communication is made in confidence if, at the time and under the circumstances, "the communicating person reasonably believes" that no one except a privileged person will learn the contents of the communication. Id. § 71. The location of the communication is important to determining confidentiality; however, courts look primarily at the communicator's reasonable expectation of privacy. Smith, 384 A.2d at 691 (discussing issue in context of marital privilege). The actual or constructive presence of a non-privileged third party destroys confidentiality. Id. at 692.

For example, in Smith, the case involving the stolen gun and camera, the court determined that the defendant had a reasonable expectation of confidentiality. Id. (holding

ultimately, however, that the constructive presence of a third party destroyed that confidentiality). There, the defendant's disclosure occurred in a public dump site, inside a car. Id. Others might have been present at the site, but there was no one in the car's immediate vicinity. Id. The court concluded that the defendant's conduct "was entirely consistent with the objective expectation of confidentiality." Id.

Here, Mr. Minot's Act was made in confidence. Mr. Minot unzipped the duffel bag, revealing the bones, in Ms. Canterbury's private law office, behind a closed door, with just himself and Ms. Canterbury present. There were windows so that people could have potentially seen the Act, but, to the extent that those present in the law office were Ms. Canterbury's agents, they, too, were bound to preserve privileged information. See supra § II (citing Restatement § 70). Moreover, Mr. Minot was standing in between the duffel bag and the door, and he did not take anything out of the bag, so it would have been difficult for anyone to fully observe the Act. Mr. Minot, like the defendant in Smith, ensured that he and Ms. Canterbury were inside of a private space, even though that space itself might have been in a more public setting, before he revealed the bones. In other words, he, like the defendant in Smith, had a reasonable expectation of confidentiality when he engaged in the Act.

Therefore, a court hearing this case will likely hold that Mr. Minot's non-verbal communication was made in confidence.

B. The Communication was Made to Obtain Legal Advice

Mr. Minot's Act was made for the purpose of obtaining legal assistance.

The Privilege applies when, among other things, a communication is made for the purpose of obtaining legal assistance. Restatement § 68. Legal assistance includes any services customarily performed by lawyers in their professional capacity. Id. § 72 cmt. b. In other words, when a "lawyer's professional skill and training would have value in the matter" at

hand, the lawyer is providing legal assistance. Id. "Preparing to conduct litigation should always be regarded as legal assistance." Id. cmt. c, illus. 1.

Here, Mr. Minot showed Ms. Canterbury the bones for the purpose of obtaining legal advice. As discussed above, Mr. Minot sought out Ms. Canterbury's services because he needed a good criminal-law attorney. Ms. Canterbury "customarily performed" the services of a defense attorney and her skill and training would "have value" in any criminal-law case. Furthermore, Mr. Minot, having information about an unsolved murder, and facing the risk of being accused of the crime, was facing potential litigation. As the Restatement makes clear, preparation for litigation should always be regarded as legal assistance.

Therefore, a court hearing this case will likely hold that Mr. Minot's Act occurred while he was seeking legal advice.

CONCLUSION

Ms. Canterbury improperly disclosed Mr. Minot's Act. The general rule is that attorneys cannot disclose privileged attorney-client communications. The rule is triggered when four elements are present: (1) there is an attorney and a client; (2) the client is seeking legal advice from the attorney; (3) the client communicates something to the attorney; and (4) that communication is confidential. Mr. Minot can establish all four elements. First, the parties were an attorney and a client. The Privilege extends to prospective clients, like Mr. Minot; it is irrelevant that he had no appointment and no pre-existing or continuing relationship with Ms. Canterbury. Second, Mr. Minot was seeking legal advice from Ms. Canterbury: he knew about her expertise in criminal matters and he was afraid of being accused of a crime. Third, Mr. Minot's Act was a communication, even though it did not involve words. It was an answer to Ms. Canterbury's question, *Why haven't you gone to the police?* Thus, like words, it conveyed information. Finally, the Act took place in a private setting. No one other than Ms. Canterbury or Mr. Minot observed it. All in all, Mr. Minot has a very strong case against Ms. Canterbury.

Appendix 2, *Model Memorandum, Annotated*

This Appendix presents the Model Memorandum—the same one you read in Appendix 1—with marginalia (notations in the margins) that discuss the editorial choices I made as an author.

MEMORANDUM

TO: Teresa M. Bruce, Esq.

FROM: Laura Law, Esq.

DATE: August 16, 2016

RE: *Minot v. Canterbury*: Possible Improper Disclosure of Client Communication

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This Memorandum analyzes whether the attorney-client privilege (the "Privilege") protects a prospective client's non-verbal actions.

QUESTION

The Privilege protects communications, between lawyers and clients, made in confidence for the purpose of legal assistance. The firm's client, Louis Minot ("Mr. Minot") arrived unannounced at Elizabeth Canterbury's ("Ms. Canterbury's") law office. The two had never met before. After some small talk, Mr. Minot told Ms. Canterbury that he had information about an unsolved murder. Ms. Canterbury asked him why he had not gone to the police. He replied that he was worried he would become a suspect—and he unzipped a duffle bag, revealing a human skeleton (the "Act"). Was the Act privileged?

ANSWER

Yes. Ms. Canterbury had a duty to keep the Act confidential. The Privilege is triggered when, among other criteria, the following two are met: (1) there is a communication and (2) the communication transpires between an attorney and client.[1] A communication can be a non-verbal act, so long as the act is intended to convey information. And an attorney-client

[1] The Privilege is triggered when four elements are present. For the sake of brevity, this Answer section only targets two of the elements (the existence of a communication and an attorney-client relationship). However, all four of the elements are discussed in the Analysis section, below.

Commented [TB1]: Use nicknames to shorten up terms of art

Commented [TB2]: Notice that I used the law for the major premise & the facts for the minor premise. Keep this 100 words or less.

Commented [TB3]: Use nicknames for people; always nickname on first mention if you will be using the name a lot

Commented [TB4]: Use "hard" facts, e.g., he did not have an appointment, it was a law office (not a grocery store or something), the two had never met before, he said he had info about an unsolved murder, she asked him a question, he replied and then engaged in some conduct without speaking. Be sure to choose the facts that relate to the legal elements (here, whether they qualified as "atty" and "client" and whether acting w/o speaking can be a "communication").

Commented [TB5]: Part 1: short answer.

Commented [TB6]: Part 2: narrative sentence answering question

Commented [TB7]: Part 3: the legal "test." Here, I start w/ a broad overview, but narrowed from the test in the question to the 2 most difficult issues (communication and "privileged persons"). Then, I provide EVEN MORE DETAIL about these two issues (see sentences 4 and 5).

relationship begins at the initial client meeting, regardless whether the parties ultimately formalize the relationship. Mr. Minot's Act meets these requirements. First, it was a communication: it was a direct response to a question from Ms. Canterbury, essentially an answer to that question, and, as such, it was intended to convey information. Second, it occurred in the context of an attorney-client relationship. The parties had never met before, but their meeting had all of the hallmarks of an initial client interview: Mr. Minot needed a criminal-defense attorney and he went to see Ms. Canterbury after reading a newspaper article about her criminal-defense work. The clear implication from the situation is that Mr. Minot wanted Ms. Canterbury to represent him. Accordingly, assuming the parties' interaction meets the other requirements for Privilege, Ms. Canterbury should have kept the Act confidential.[2]

Commented [TB8]: Sequential enumeration can work well in an answer.

Commented [TB9]: don't just say it was a communication; explain why

FACTS

Some time ago, Mr. Minot learned about a murder. He knew who the murderer was and wanted to help the police make an arrest. So, he collected the victim's remains (by then skeletal) and placed them in a duffel bag. At that point, though, he did not know how to proceed. He did not want to become a suspect, but realized that having possession of human remains would seem suspicious.

Commented [TB10]: don't use dates unless they're relevant to the analysis, like a statute-of-limitations problem.

Commented [TB11]: Usually, chronological order works best in a facts section, even if you have to rearrange the story from the way it was told to you.

Then, he saw a newspaper article featuring Ms. Canterbury, a prominent criminal-defense attorney. The article discussed Ms. Canterbury's successful defense of a man charged with abducting and murdering a child. Shortly after seeing the article, Mr. Minot went to Ms.

Commented [TB12]: Again, avoid dates unless relevant.

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[2] The Privilege does not protect a client's identity unless its disclosure would convey the contents of a privileged communication. In re Grand Jury Subpoenas, 803 F.2d 493, 496, 498 (9th Cir. 1986); see also Restatement (Third) of Law Governing Lawyers § 69 cmt. g (2011) (stating that identity is privileged if disclosure would "directly or by reasonable inference . . . reveal . . . a confidential communication."). This Memorandum assumes that Mr. Minot's identity is so intertwined with the Act that, if the Act is privileged, then so is the identity.

Canterbury's law office. He took the duffel bag with him. The two had never met before and Mr. Minot did not have an appointment.

When Mr. Minot arrived, Ms. Canterbury was in a meeting. Eventually, though, the two met in the lobby. Mr. Minot introduced himself and told Ms. Canterbury about seeing her picture in the newspaper. He said the picture made her look "stubborn and bossy, but still nice." Ms. Canterbury then escorted Mr. Minot to her office. No one else was present and the office door was closed. The door was, however, made largely of glass and bordered by two floor-to-ceiling glass windows, so people outside the office could potentially see inside of it.

Ms. Canterbury took out a legal pad and pen and asked "What can I do for you?" Mr. Minot told Ms. Canterbury that he had information about an unsolved murder. She asked if he had approached the police and he said "No." Ms. Canterbury asked "Why not?" Without saying anything, Mr. Minot unzipped the duffel bag, revealing the skeleton. Mr. Minot was standing in between the duffel bag and the door, and he did not take anything out of the bag. Ms. Canterbury immediately called the police and, when they arrived, turned over the duffel bag and its contents to them. She also told them that Mr. Minot was the source of the remains. Shortly afterward, the police arrested Mr. Minot on suspicion of murder.

Mr. Minot was eventually absolved of any wrongdoing, after the real murderer was apprehended. However, being wrongly accused of a crime was a traumatic experience for Mr. Minot. He has, consequently, approached the firm about the possibility of suing Ms. Canterbury. The cause of action would be legal malpractice, i.e., he would argue that Ms. Canterbury improperly disclosed privileged attorney-client communications to the police.

Commented [TB13]: Shows he chose her specifically because of the newspaper article about her criminal defense work (goes to seeking legal advice and privileged persons prongs).

Commented [TB14]: shows he's evaluating her professional demeanor (goes to seeking legal advice prong).

Commented [TB15]: Shows they are in private (goes to confidentiality prong)

Commented [TB16]: This is a possible counterargument to the confidentiality issue. You must discuss weaknesses in a memo!

Commented [TB17]: Shows they are acting like atty and client

Commented [TB18]: shows she's acting like an atty; quotes are great hard facts. Don't be afraid of quotes!

Commented [TB19]: shows he's seeking legal advice

Commented [TB20]: Shows that his act was the answer to a question, goes to communication prong

Commented [TB21]: This makes any argument about glass doors weaker

Commented [TB22]: End with a procedural posture. What's happening now? Why are you writing the memo?

ANALYSIS

Attorneys cannot disclose privileged attorney-client communications except in relatively rare situations not applicable here.[3] Restatement § 60(1)(a). Consequently, if the Act was privileged, Ms. Canterbury was forbidden from disclosing it. In order to determine whether the Act was privileged, this Memorandum analyzes whether: (I) it was a communication; (II) it happened within an attorney-client relationship; and (III) it was made in confidence for the purpose of legal assistance. See id. § 68 (listing elements necessary for Privilege to arise).

I. THERE WAS A COMMUNICATION

First, this Memorandum analyzes whether the Act was a communication.

The Privilege applies when, among other things, a communication has occurred. Id. A communication is "any expression through which [a] . . . person . . . undertakes to convey information to another . . . person." Id. § 69. Non-verbal acts qualify as communications if they are "intended to convey information." Id. cmt. e. In State v. Smith, for example, the Supreme Judicial Court of Maine held that a non-verbal act constituted a communication for purposes of the state's marital privilege statute. 384 A.2d 687, 690 (Me. 1978). There, the defendant stole a gun and a camera and showed these items to his wife who was waiting in a getaway car. Id. at 689. The court concluded that the defendant's act was the equivalent of spoken words; it was as if the defendant had said "I have stolen a gun and camera." Id. at 690; see also Ramada Inns, Inc. v. Dow Jones & Co., 523 A.2d 968, 972 (Del. Super. Ct. 1986) (holding—in context of attorney-client privilege—that delivering documents to another person qualifies as communication).

Commented [TB23]: Use a roadmap that follows the Bruce-preferred layout: an introductory clause followed by a colon followed by a list of items (headings) that you're roadmapping. If there are only 2 items in the list, don't separate them w/ any punctuation. If there are more than 2, use semi-colons.

Commented [TB24]: The I of IRAC should be a one-sentence paragraph that follows the formula in the CG. It should parallel (echo) the roadmap.

Commented [TB25]: Rule Overview (RO): Start at the broadest point – reiterate that one element of the Privilege is "communication."

Commented [TB26]: Follow the RO with Rule Examples (REs). Use the three-part layout. Part 1 follows this pattern: In [case name], for example, the [identify court] held . . .

Commented [TB27]: identify the court on first textual mention of a case

Commented [TB28]: The second part of the RE is There plus the salient facts

Commented [TB29]: Part 3 of the RE is explaining why the court held as it did.

Commented [TB30]: quoting the court is very effective here; don't be afraid of quotes.

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[3] For example, an attorney can disclose a privileged communication when doing so is necessary to prevent reasonably certain death or serious bodily harm. Restatement § 66 (2011). The victim in this case already died; therefore, Ms. Canterbury cannot rely on this exception.

The Restatement[4] provides an illustration that supports the outcome in Smith. In it, an attorney learns that the perpetrator of the crime her client is accused of committing had a tattoo on his right forearm. Restatement § 69 cmt. e, illus. 3. The attorney asks the client if his right forearm is tattooed. Id. In response, he rolls up his right sleeve, revealing a tattoo. Id. The client's act is a communication. Id.

Here, Ms. Canterbury might argue that the Act was not a communication because it did not involve either spoken or written words. But Mr. Minot has two strong counter-arguments. First, the Act, like the disclosure of the gun and camera in Smith, was the equivalent of words spoken in confidence. If the defendant's act in Smith was the equivalent of saying "I have stolen a gun and camera," then Mr. Minot's Act in this case was the equivalent of saying "I have possession of human remains." Second, when Mr. Minot unzipped the duffel bag, he did so in response to a question. Mr. Minot had just told Ms. Canterbury that he had not approached the police and Ms. Canterbury had asked "Why not?" The Act was the answer to that question—just like, in the Restatement illustration, the client's act of rolling up his sleeve to reveal a tattoo was an answer to the question whether he had a tattoo.

Therefore, based on Smith and the Restatement, a court hearing this case will likely hold that the Act, albeit non-verbal, was a communication.

Commented [TB31]: Start the A of IRAC with "Here." Then, make precise fact-to-fact comparisons between the facts in the precedential cases and your client's case. See highlighting.

Commented [TB32]: The C of IRAC is a 1-sentence paragraph that follows the formula from the CG, and bookends the I of IRAC.

II. THERE WAS AN ATTORNEY-CLIENT RELATIONSHIP

Second, this Memorandum analyzes whether Ms. Canterbury and Mr. Minot had formed an attorney-client relationship when the Act occurred.

The Privilege applies when, among other things, a communication between "privileged persons" occurs. Id. § 68. Stated simply, privileged persons are attorneys, clients, and their

Commented [TB33]: Rule Overview. Notice how all of the attribution is in the cites. None is in the text. For example, I don't say, "According to the Restatement, the Privilege applies when, among other things, ..." I just state the rule as a rule and let the cite tell the reader what my backup is.

---

[4] This jurisdiction has adopted the Restatement (Third) of Law Governing Lawyers (the "Restatement") as binding law.

agents. Id. § 70. That said, a prospective client is a privileged person just the same as an actual client. In other words, an attorney-client relationship forms at an initial consultation, regardless whether the attorney ultimately agrees to the representation, and regardless of the brevity of the meeting. Id. cmt. c, § 15 cmts. a, c, § 72 cmt. d.

For example, in Bays v. Theran, the Supreme Judicial Court of Massachusetts held that an attorney-client relationship had formed. Bays v. Theran, 639 N.E.2d 720, 723 (Mass. 1994). There, a condominium owner contacted an attorney about a dispute with condominium developers. Id. at 722. The owner wrote a letter to the attorney and spoke with him on the telephone two or three times for less than ten minutes each time. Id. The two never met in person, the attorney never billed the owner for his time, and no money ever changed hands. Id. The court concluded that an attorney-client relationship had arisen, nevertheless, because the owner sought "advice or assistance from an attorney," the advice was related to "matters within the attorney's professional competence," and "the attorney expressly or impliedly agree[d] to give . . . the desired advice." See id. at 723.

Commented [TB34]: Rule Example. It's in the REs that you start putting the attribution into the text. This is where I say "the Supreme Judicial Court of Massachusetts held that . . . ." But I still have to give a cite, too.

Here, Ms. Canterbury might argue that she and Mr. Minot were not privileged persons because they had never met before and she did not formally represent Mr. Minot. Mr. Minot, however, has a very strong counterargument: that he was, as a prospective client, as much a "privileged person" as an actual client. In fact, he can point to the same three criteria that suggested an attorney-client relationship in Bays.

First, Mr. Minot sought "advice or assistance from" Ms. Canterbury: He wanted to help the police solve a murder, but he did not want to become a suspect. In other words, he needed a good criminal-defense attorney. He saw a newspaper article discussing one of Ms. Canterbury's criminal cases and he thought she fit the bill. He even commented that she seemed "stubborn and bossy, but still nice"—indicating that he was evaluating her professional demeanor. Second, the advice Mr. Minot sought related to an area that was, to borrow the Bays

court's terminology, within Ms. Canterbury's "professional competence." Mr. Minot knew of Ms. Canterbury's expertise in this area because the newspaper article discussed how she had successfully defended a man charged with abducting and murdering a child. Finally, Ms. Canterbury "impliedly agree[d] to give . . . [legal] advice" when she escorted Mr. Minot to her private office, took out a legal pad and pen, and asked "What can I do for you?" Mr. Minot's situation, even more than the situation in Bays, suggests an attorney-client relationship because, unlike the parties in Bays, these parties met in person.

Therefore, a court hearing this case will likely hold that the parties had formed an attorney-client relationship when the Act occurred.

III. THE OTHER REQUREMENTS OF PRIVILEGE WERE MET

Finally, this Memorandum analyzes whether the parties' interaction met the other requirements for Privilege, that is, whether: (A) the communication was made in confidence and (B) the communication occurred for the purpose of legal assistance.

A. The Communication was Made in Confidence

Mr. Minot's non-verbal communication was made in confidence.

The Privilege applies when, among other things, a communication is made in confidence. Restatement § 68. A communication is made in confidence if, at the time and under the circumstances, "the communicating person reasonably believes" that no one except a privileged person will learn the contents of the communication. Id. § 71. The location of the communication is important to determining confidentiality; however, courts look primarily at the communicator's reasonable expectation of privacy. Smith, 384 A.2d at 691 (discussing issue in context of marital privilege). The actual or constructive presence of a non-privileged third party destroys confidentiality. Id. at 692.

For example, in Smith, the case involving the stolen gun and camera, the court determined that the defendant had a reasonable expectation of confidentiality. Id. (holding

Commented [TB35]: If your facts are even more compelling (or less) than those of the precedential case, that's important. Spell it out for the reader!

Commented [TB36]: Notice how this second roadmap uses A and B instead if I, II, and III like the first roadmap did. That's because I'm roadmapping second-level headings which begin with A, B, etc.

Commented [TB37]: If you've already discussed a case, there's no need to re-identify the court, or rehash all the facts, but do remind the reader what the case was about.

ultimately, however, that the constructive presence of a third party destroyed that confidentiality). There, the defendant's disclosure occurred in a public dump site, inside a car. Id. Others might have been present at the site, but there was no one in the car's immediate vicinity. Id. The court concluded that the defendant's conduct "was entirely consistent with the objective expectation of confidentiality." Id.

Here, Mr. Minot's Act was made in confidence. Mr. Minot unzipped the duffel bag, revealing the bones, in Ms. Canterbury's private law office, behind a closed door, with just himself and Ms. Canterbury present. There were windows so that people could have potentially seen the Act, but, to the extent that those present in the law office were Ms. Canterbury's agents, they, too, were bound to preserve privileged information. See supra § II (citing Restatement § 70). Moreover, Mr. Minot was standing in between the duffel bag and the door, and he did not take anything out of the bag, so it would have been difficult for anyone to fully observe the Act. Mr. Minot, like the defendant in Smith, ensured that he and Ms. Canterbury were inside of a private space, even though that space itself might have been in a more public setting, before he revealed the bones. In other words, he, like the defendant in Smith, had a reasonable expectation of confidentiality when he engaged in the Act.

Therefore, a court hearing this case will likely hold that Mr. Minot's non-verbal communication was made in confidence.

B. The Communication was Made to Obtain Legal Advice

Mr. Minot's Act was made for the purpose of obtaining legal assistance.

The Privilege applies when, among other things, a communication is made for the purpose of obtaining legal assistance. Restatement § 68. Legal assistance includes any services customarily performed by lawyers in their professional capacity. Id. § 72 cmt. b. In other words, when a "lawyer's professional skill and training would have value in the matter" at

Commented [TB38]: part 2 of RE

Commented [TB39]: part 3 of RE.

Commented [TB40]: You MUST discuss weaknesses in the case

Commented [TB41]: I present a counterargument for the weakness, but I'm not spinning things. I'm candidly assessing the situation and concluding that, even though this is a weakness, it's only a slight one. But I would assess this the same way if I represented the other side. It's crucial to understand that. I am being objective in my assessment.

Commented [TB42]: Be sure to make fact-to-fact comparisons (indicated in yellow). Compare people to people, not people to whole cases. Use hybrid sentences that combine your facts and the facts/holdings from the precedential cases into one single sentence.

hand, the lawyer is providing legal assistance. Id. "Preparing to conduct litigation should always be regarded as legal assistance." Id. cmt. c, illus. 1.

Here, Mr. Minot showed Ms. Canterbury the bones for the purpose of obtaining legal advice. As discussed above, Mr. Minot sought out Ms. Canterbury's services because he needed a good criminal-law attorney. Ms. Canterbury "customarily performed" the services of a defense attorney and her skill and training would "have value" in any criminal-law case. Furthermore, Mr. Minot, having information about an unsolved murder, and facing the risk of being accused of the crime, was facing potential litigation. As the Restatement makes clear, preparation for litigation should always be regarded as legal assistance.

Therefore, a court hearing this case will likely hold that Mr. Minot's Act occurred while he was seeking legal advice.

CONCLUSION

Ms. Canterbury improperly disclosed Mr. Minot's Act. The general rule is that attorneys cannot disclose privileged attorney-client communications. The rule is triggered when four elements are present: (1) there is an attorney and a client; (2) the client is seeking legal advice from the attorney; (3) the client communicates something to the attorney; and (4) that communication is confidential. Mr. Minot can establish all four elements. First, the parties were an attorney and a client. The Privilege extends to prospective clients, like Mr. Minot; it is irrelevant that he had no appointment and no pre-existing or continuing relationship with Ms. Canterbury. Second, Mr. Minot was seeking legal advice from Ms. Canterbury: he knew about her expertise in criminal matters and he was afraid of being accused of a crime. Third, Mr. Minot's Act was a communication, even though it did not involve words. It was an answer Ms. Canterbury's question, *Why haven't you gone to the police?* Thus, like words, it conveyed information. Finally, the Act took place in a private setting. No one other than Ms. Canterbury or Mr. Minot observed it. All in all, Mr. Minot has a very strong case against Ms. Canterbury.

Commented [TB43]: I did not use an RE here because the RO was so clear I didn't need any examples. Particularly, once I discovered the preparing for litigation was always regarded as seeking legal assistance, I didn't think an RE on what that meant was needed.

Commented [TB44]: use the terms of art from the R of IRAC

Commented [TB45]: use the terms of art

Commented [TB46]: Start by answering the question you were assigned.

Commented [TB47]: provide the legal test

Commented [TB48]: Explain why the winning party will win or the losing party will lose.

Commented [TB49]: be detailed; don't just say they were an atty and client, explain WHY

Commented [TB50]: Be specific; use hard facts

Commented [TB51]: If you can, sum it all up by stating how strong a case it is.

Appendix 3, *United States v. Fernandez-Caro*

677 F. Supp. 893 (S.D. Tex. 1987)

In *United States v. Fernandez-Caro*, the Southern District of Texas held that actions taken by the Mexican Federal Judicial Police "shocked the judicial conscience," and that, therefore, the Fourth Amendment to the U.S. Constitution prohibited the use of evidence obtained via those actions in an American prosecution. This is one of very few cases to suppress evidence based on the shocks-the-conscience concept. The case is reproduced below in its entirety, except parallel citations have been removed.

U.S. District Court
for the Southern District of Texas

UNITED STATES
v.
FERNANDEZ–CARO

Sept. 2, 1987.

Defendant moved to suppress evidence obtained as a result of confession obtained from defendant by Mexican authorities through the use of physical torture. The District Court, Kazen, J., held that although there was no evidence that American officials participated in abuse of defendant or that they asked Mexican officers to coerce information from defendant, conduct of foreign officers was sufficiently shocking to require suppression of evidence.

Motion granted.

Attorneys and Law Firms

Joe Sepeda, Asst. Public Defender, Laredo, Tex., for Fernandez–Caro.

Carlos Martinez, U.S. Atty., Laredo, Tex., for the U.S.

Opinion

MEMORANDUM AND ORDER

KAZEN, District Judge.

Pending is Defendant's motion to suppress. The evidence reveals that on July 15, 1987, United States Immigration officials obtained from United States Magistrate Notzon a search warrant to search Room 152 at the Border Inn in Laredo, Texas. This room was being rented by the Defendant. As a result of the search, the agents found two fraudulent rubber stamps, purporting to be those used for certain immigration purposes.

It is undisputed that the search warrant was based on representations to the Magistrate by United States officials that the Defendant had confessed to Mexican Federal Judicial Police (FJP) that these stamps were indeed in his hotel room in Laredo. A commandante of the FJP notified Oscar Garza of the United States Border Patrol about the confession late on the evening of July 14, 1987. Apparently the confession had just been given by the Defendant while in the custody of the FJP in Nuevo Laredo, Mexico. Defendant now seeks to suppress the fruits of the search.

It is undisputed that the confession was obtained from the Defendant by the FJP through the use of physical torture. The Defendant's undisputed evidence is that the police threatened to kill him, beat him about the face and body, poured water through his nostrils while he was stripped, bound and gagged, and applied electrical shocks to his wet body, among other things. The Government does not dispute this evidence. Indeed, Agent Garza confirmed that when the Defendant was physically delivered to American officials by Mexican officials, physical signs of abuse were readily apparent on Defendant's body. Under these circumstances, the motion is easily resolved.

Ordinarily the provisions of the Fourth Amendment to the United States Constitution do not apply to arrests and searches made by foreign authorities in their own country and in enforcement of foreign law. Similarly statements obtained by foreign officers conducting interrogations in their own nations have been held admissible despite a failure to give *Miranda* warnings to the accused. *United States v. Heller,* 625 F.2d 594, 599 (5th Cir. 1980). Two exceptions to the general rule have long been recognized. One is that if American law enforcement officers participated in the foreign search or interrogation, or if the foreign authorities were acting as agents for their American counterparts, the exclusionary rule can be invoked. *United States v. Morrow,* 537 F.2d 120, 139 (5th Cir. 1976), *cert. denied,* 430 U.S. 956 (1977).

The first exception is inapplicable. While the Mexican officials had apparently been working closely with American officials concerning the immigration stamps in question as well as other immigration matters of interest to both countries, the Court concludes that no American officials participated in the abuse of the Defendant nor did they ask the Mexican officers to coerce information from him.

There is, however, a second exception to the general rule. If the conduct of the foreign officers "shocks the conscience of the American court, the fruits of their mischief will be excluded." *Heller,* 625 F.2d at 599; *United States v. Morrow, supra; United States v. Hawkins,* 661 F.2d 436, 456 (5th Cir. 1981), *cert. denied,* 456 U.S. 991 (1982). That exception clearly applies here. The conduct of the Mexican police officials violated even minimal standards of decency expected in a civilized society. Certainly the abuse of this Defendant exceeded the conduct which "shocked the conscience" of the United States Supreme Court in *Rochin v. California,* 342 U.S. 165 (1952). Even more than in *Rochin,* the methods employed here were "too close to the rack and the screw" to be acceptable. 342 U.S. at 172.

The motion to suppress is GRANTED.

Appendix 4, *How to Write a Traditional Question Section*

This excerpt was taken from Legal Writing: Examples & Explanations by Terrill Pollman, Judith M. Stinson, Richard K. Neumann, Jr., and Elizabeth Pollman. It's optional reading, mainly just something for you to keep as a reference in case you work for someone in the future who wants the Question sections of memoranda written in a traditional style. Our class will be using a more modern, syllogistic style.

EXAMPLES & EXPLANATIONS

Legal Writing

Terrill Pollman
Ralph Denton Professor of Law
Director of the Lawyering Process Program
William S. Boyd School of Law
University of Nevada, Las Vegas

Judith M. Stinson
Clinical Professor of Law
Sandra Day O'Connor College of Law
Arizona State University

Richard K. Neumann, Jr.
Professor of Law
Hofstra University

Elizabeth Pollman
Teaching Fellow
Stanford Law School

Wolters Kluwer
Law & Business

CHAPTER 13

Writing the Question Presented (Objective)

Throughout law school, you're asked to answer difficult questions. This section of the memo lets *you* be the one to ask the question. So even if the issue—the disputed legal question—is provided to you, your task as a writer is to craft a useful "Question Presented." The Question Presented poses the legal question the memo resolves. It identifies the governing authority, tells the reader the precise legal question, and includes the key facts that control the outcome.

Terminology Notes: Sometimes the Question Presented is called the "Issue," and sometimes it's referred to by its acronym, "QP."

WHAT YOU NEED TO KNOW ABOUT AN OFFICE MEMO'S QUESTION PRESENTED

A Question Presented includes three parts: (a) the applicable law, (b) the legal question, and (c) the determinative facts. Writers sometimes use a shorthand formula, called "Under/Does/When," to express all three of these parts:

Under: the applicable law

Does: the legal question

When: the determinative facts

Using this structure, the Question Presented is framed like this: "Under (*the applicable law*), does (*the legal question*) when (*the determinative facts*)?" The three parts aren't always in this order. Any logical order is fine as long as the Question Presented contains all three components. The "under/does/when" format and other formats are discussed more fully later in this chapter.

A Question Presented should generally be one complete sentence, phrased as a question. Readers need to quickly grasp the issue your memo addresses. Most writers therefore draft the Question Presented as one sentence, although some writers use two or more sentences. Also, the Question Presented is usually a complete sentence (rather than a phrase). The "under/does/when" formula is inherently a question and whether you use that formula or not, the Question Presented is generally just that—a question.

Try to phrase the Question Presented so that the answer would be either "yes" or "no" or a qualified "yes" or "no" (such as "likely yes" or "probably no"). The reader needs to see, as quickly as possible, what your bottom-line answer is. As we explain in Chapter 14 on Brief Answers, you'll add a little more explanation soon after the Question Presented. But the Question itself should be framed so the answer can be a simple yes or no.

Generally include only main issues in the Questions Presented. For instance, when you have two main issues—such as whether the plaintiff can prevail on a breach of contract claim and whether she can prevail on a tort claim alleging intentional interference with a contractual relationship—you would have two Questions Presented.

If you have more than one issue, call this section "Questions Presented" (or "Issues") and number them. As suggested previously, each separate issue addressed should be a separate Question Presented. If you have three main issues (as opposed to one issue with two sub-issues, which would mean you have only one issue), you should have three Questions Presented. Number them 1, 2, and 3, and number the Brief Answers (and call that section "Brief Answers," not "Brief Answer") to correspond to these Questions Presented.

If you write your Question Presented before writing your Discussion section, remember to go back to review and revise it. There's no particular order in which you must write the components of your memo. You'll generally want to have a draft Question Presented to get you started and guide your analysis, but after you've completed your full analysis you'll better understand the key facts and issues. For this reason, it's a good idea to review and revise your Question Presented after you've finished writing the Discussion section.

HOW TO WRITE AN OFFICE MEMO'S QUESTION PRESENTED

Using a social host scenario and the cell phone manslaughter problem in Appendix A, we'll walk you through the process of writing an objective Question Presented. To use the "Under/Does/When" format, follow the steps below.

Problem

PROBLEMS

Here is a quick overview of the cell phone manslaughter problem (for details see Appendix A). Allison King used her wireless phone, without a hands-free device, while driving in dense fog on a winding road on the edge of an ocean cliff. King placed the call to warn her friends about the dangerous conditions, as they would be meeting later. While she was making the call, she hit and killed a bicyclist. The prosecution will attempt to convict King of vehicular manslaughter by showing that she drove while committing an illegal act (driving while using a wireless phone without a hands-free device) and with gross negligence. King will argue that her actions fit within the emergency exception to the wireless phone prohibition. She will also argue that she did not act with gross negligence.

Step 1: Articulate the applicable law—the "under" component. In this part of the Question Presented, identify the relevant jurisdiction and the controlling legal authority in a broad sense. You generally won't identify the specific statutory citation or the controlling cases, unless the case is so central to the analysis that the case name serves as a shorthand to the reader for the governing principle (as might be the case with *Miranda* for confessions).

Some readers prefer—and some situations lend themselves to—using a relatively generic description of the applicable law. For instance, if you're asked to research whether there's any theory of liability under South Dakota law under which your client could make a claim, you would probably identify the applicable law very generally:

> Under South Dakota law . . .

On the other hand, often you will have a more discrete problem to address. For instance, imagine your client has been sued for providing alcohol to a minor at a party, and one of his guests that evening caused a car crash that seriously injured the plaintiff. Assume that the party and accident occurred in New Jersey, and that social host liability in New Jersey, when the

host provides alcohol to a minor guest, is governed by common law (and not a statute). That section might look something like this:

> Under New Jersey common law . . .

Now we'll draft a Question Presented for the cell phone manslaughter problem in Appendix A. That case is governed by a California statute, which makes it illegal to drive "a vehicle in the commission of an unlawful act, not amounting to felony, and with gross negligence." Another California statute makes it illegal (not a felony) to "drive a motor vehicle while using a wireless telephone unless that telephone is specifically designed and configured to allow hands-free listening and talking, and is used in that manner while driving." That section creates an exception when the driver is using the cell phone for "emergency purposes." You need interpretive case law to finally resolve the issue, but in this step identify only the applicable law for the main issue. That law is California's vehicular manslaughter statute, so you could phrase the "under" portion of the Question Presented like this:

> Under California's vehicular manslaughter statute . . .

This wording doesn't refer to the governing statute by its citation. Instead, it's referred to by name, which the reader will understand much more easily. (Few readers memorize statutory citations.)

If the issue were simply whether the cell phone use was for "emergency purposes," the first section might be phrased like this:

> For purposes of California's vehicular manslaughter statute, under the prohibition on using a cell phone while driving . . .

Step 2: Determine the specific legal question—the "does" component—and state it as briefly as possible. Here, identify for the reader the underlying legal issue that's in dispute. Use the rule's actual language. If the rule comes from a statute, refer to the legal issue in statutory language, not in the generic wording that you might otherwise use (such as "homicide" for the cell phone manslaughter problem). If your rule comes from court opinions, use the terms of art the courts use. Using these "buzz words" helps the reader understand the key elements you're going to address.

This section of the "under/does/when" formula of the Question Presented might be written like this for the cell phone manslaughter problem:

> . . . does a person commit vehicular manslaughter . . .

Similarly, for the social host issue, you might write:

> . . . is a person liable as a social host . . .

Generally, you'll refer to the main rule in this section, although some readers will expect more detail here, including the terms of art from the disputed element or elements. (In the latter situation, the main rule's terms of art would be included in the "under" section.) There, the "under" and "does" components might look like this:

> Under the fair use exception of the Copyright Act, does a new song target and transform the original without taking too much or becoming a substitute in its market . . .

Similarly, if you're focusing on the "emergency purposes" exception outlined in the cell phone manslaughter problem, this section might look like this:

> For purposes of California's vehicular manslaughter statute, under the prohibition on using a cell phone while driving does a person use a cell phone for "emergency purposes" . . .

Note how the statute's terms of art are included (both "vehicular manslaughter" and "emergency purposes"). If this were the only contested issue, a Question Presented framed this narrowly immediately lets the reader know the exact issue you're discussing.

Step 3: Identify the determinative facts—the "when" component—and state them as briefly as possible. Determinative facts are the key facts that most affect the outcome. You can't include every fact, and you don't need to. But you should remain objective and include the key favorable and unfavorable facts. In addition, the facts should be actual *facts*, not legal conclusions. Similarly, principles of law, like "damages have to be mitigated," aren't facts. Save them for the Discussion section of your memo instead. And what's a fact versus what's a conclusion depends, in part, on your legal issue. For instance, whether a person was "negligent" is generally a legal conclusion, not a fact (the underlying fact creating negligence may be that the defendant ran a red light, for instance). But imagine that the negligence of the plaintiff is uncontested and the issue is whether the negligent plaintiff is barred from suing the defendant, who also caused the plaintiff's injuries. In that case, the plaintiff's own negligence is a fact. Including the determinative facts in the Question Presented allows the reader who doesn't know your facts to still understand the issue.

Let's consider the relevant facts in the cell phone manslaughter problem in Appendix A. If the issue was whether King acted with "gross negligence," this section of the "under/does/when" formula might be written like this:

> . . . when she dialed her cell phone while driving on a winding two-lane road on the edge of a cliff in dense fog?

If, on the other hand, the issue you're concerned with is whether King was entitled to the "emergency purpose" defense, this section might look like this:

> . . . when she placed the call in order to warn her friends not to drive because road conditions were so dangerous?

For the social host hypothetical mentioned earlier in this chapter, the determinative facts component might look like this:

> . . . when he provided alcohol to the minor guest after the minor displayed signs of intoxication, including slurred speech, and the minor later killed another motorist?

Notice how the relevant facts change depending on the issue. The facts necessary to resolve the "gross negligence" element are different from the facts necessary to resolve the "emergency purposes" defense.

Step 4: Put them all together. Simply add the three sections to make one complete sentence phrased as a question. You may need to rearrange the order or edit for conciseness, but generally, you can just plug the steps in using the same order you drafted them. Hence, the Question Presented for the California cell phone manslaughter problem might look something like this:

> Under California's vehicular manslaughter statute, does a person commit vehicular manslaughter when she hit and killed a bicyclist as she dialed her cell phone while driving on a winding two-lane road on the edge of a cliff in dense fog?

Assume you are focusing on the narrow "emergency exception" issue, the final Question Presented might look something like this:

> For purposes of California's vehicular manslaughter statute, under the prohibition on using a cell phone while driving, does a person use a cell phone for "emergency purposes" when she placed the call in order to warn her friends not to drive because road conditions were so dangerous?

And for the New Jersey social host hypothetical, the complete Question Presented might look like this:

> Under New Jersey common law, is a person liable as a social host when he provided alcohol to the minor guest after the minor displayed signs of intoxication, including slurred speech, and the minor later killed another motorist?

You can also switch the order of the sections. For instance, in the context of a contract dispute, you could draft the Question Presented like this:

> Is there consideration for a contract under New York common law when an uncle promises to give his nephew money in exchange for the nephew refraining from drinking, smoking, and swearing?

Each of these Questions Presented works, because the reader understands all of the components (the "under," the "does," and the "when").

EXAMPLES

Here are some examples of objective Questions Presented. For each example, choose the best answer. Explain to yourself why you've chosen that answer. Then read the explanations in the last section of this chapter to check your work.

Example 13-1

> Is King likely guilty when she made a cell phone call while driving on a narrow winding road in dense fog, but did so to warn her friends of the dangerous driving conditions?

This is an . . .

A. effective Question Presented because it includes the determinative facts.
B. effective Question Presented because it poses the key legal question—whether King is guilty.
C. ineffective Question Presented because it omits the applicable law.
D. ineffective Question Presented because it provides too much detail in terms of the determinative facts.

Example 13-2

> The issue is whether Jones is liable for negligent infliction of emotional distress under Indiana common law, considering the fact that the plaintiff was not married to the deceased when he died, and whether Sanchez is barred from suing because the statute of limitations has expired.

This is an . . .

A. effective Question Presented because it includes the applicable law, the legal questions, and the determinative facts.
B. ineffective Question Presented because it omits determinative facts.
C. ineffective Question Presented because it isn't phrased as a question.
D. ineffective Question Presented for the reasons stated in both B and C.

Example 13-3

Under California's vehicular manslaughter statute, does a person commit vehicular manslaughter when she violates a traffic law and drives with gross negligence, killing someone?

This is an . . .

A. ineffective Question Presented because it fails to identify the specific legal question.
B. ineffective Question Presented because it fails to include the determinative facts.
C. effective Question Presented because it includes all three components of a good question presented: under, does, and when.
D. effective Question Presented because it's short and easily readable.

Example 13-4

Under California's vehicular manslaughter statute, does a person commit vehicular manslaughter when she makes a cell phone call while driving on a narrow, foggy road, or does she have to do more than drive unsafely even though she thought she was driving safely?

This is an . . .

A. effective Question Presented because it includes the applicable law, the specific legal question, and the determinative facts.
B. effective Question Presented because it identifies both the main legal question and the potential defense.
C. ineffective Question Presented because it isn't capable of being answered with a yes/no answer.
D. ineffective Question Presented because it omits the applicable law and specific legal question.

EXAMPLES

Example 13-5

Under Indiana common law, can a bystander recover for negligent infliction of emotional distress when the person the defendant negligently killed was the bystander's fiancée rather than legal spouse?

This is an . . .

A. effective Question Presented because it includes the applicable law, the specific legal question, and the determinative facts.

B. effective Question Presented because it's short and easy to read, even though it omits some determinative facts.

C. ineffective Question Presented because it omits the determinative facts.

D. ineffective Question Presented because it's too long.

EXPLANATIONS

EXPLANATIONS

Explanation 13-1

A is incomplete, and therefore wrong. This Question Presented does describe the determinative facts, and it does so objectively by including facts that suggest King might have acted with gross negligence as well as facts that suggest she may be eligible for the "emergency purposes" exception. But this Question Presented does not identify the applicable law, so it is not effective. **B** is also wrong. As with answer A, this answer is incomplete. The Question Presented is ineffective for other reasons. And the ultimate legal question can be phrased more clearly than "is King guilty." The reader doesn't know what King might be guilty of. In the broadest sense, the legal question is more clearly phrased as "does a person commit vehicular manslaughter." In a more narrow sense, the underlying legal question may be whether King acted with gross negligence or whether King made the call for an emergency purpose. Any of these three options would provide the reader with more guidance than the generic "is she guilty" phrase. **C** is correct. This Question Presented doesn't identify the applicable law, which is the California vehicular manslaughter statute. The Question Presented could also be improved by phrasing the ultimate legal question more clearly, as explained in B. **D** is wrong. As noted in the explanation for answer A, the determinative facts are well described.

Explanation 13-2

A is wrong. Although the Question Presented includes the applicable law for the first issue, it doesn't for the second. It's also phrased as a statement rather than a question, and it doesn't include sufficient determinative facts to understand the issues. It's therefore ineffective. In addition, some professors might expect this Question Presented to be divided into two separately numbered questions (one for each issue), although this varies. **B** is true, but it isn't the correct answer because **C** is also true; hence, ***D*** is the correct answer. This Question Presented includes two separate legal questions—negligent infliction of emotional distress and the statute of limitations. But as noted in B, the example omits determinative facts. How long after the incident occurred was the suit filed? And what was the relationship between the plaintiff and the deceased? The Question Presented tells us they weren't married, but it doesn't tell us what their relationship was. In addition, as noted in C, a Question Presented isn't usually phrased as a statement. Readers will generally expect a question that is answered by the Brief Answer (see Chapter 14).

Explanation 13-3

A is wrong. This Question Presented does identify the specific legal question —vehicular manslaughter. **B** is correct. The phrases "violates a traffic law" and "drives with gross negligence" are legal conclusions, not facts. The reader needs to know the underlying determinative facts, such as "when she uses a cell phone while driving" (the act that violates the traffic law) or "when she places a call while driving on a narrow two-lane road over a cliff in a dense fog" (the acts that constitute gross negligence). In addition, this Question Presented merely states the elements of the statute, making the answer an indisputable "yes": if a person violates a traffic law and drives with gross negligence and kills someone, she has committed vehicular manslaughter. But the reader needs to know whether, in *this* case, the defendant has in fact violated the traffic law and driven with gross negligence. More facts are necessary to answer that question. **C** is wrong. Although the Question Presented uses "under," "does," and "when," for the reasons stated in B the determinative facts are absent. **D** is also wrong. This Question Presented is short, which is good, but it omits determinative facts, which outweighs the benefit of having a shorter and easily read Question Presented.

EXPLANATIONS

Explanation 13-4

A is wrong. Although this Question Presented includes all the necessary components, it's ineffective for the reason C is correct. **B** is also wrong. Having to "do more than drive unsafely" isn't a defense. To the extent it infers a lack of gross negligence it's simply the absence of an element. **C** is correct. This Question Presented isn't capable of being answered with a simple yes/no answer. It is also phrased a bit casually for a Question Presented. **D** is wrong. The applicable law and specific legal question are included. But they are clouded by the complex question.

EXPLANATIONS

Explanation 13-5

A is correct. This Question Presented includes all the necessary components —the under/does/when sections—and they are properly developed. **B** is wrong. The Question Presented is relatively easy to read, but it doesn't omit any determinative facts. Although it describes the defendant's actions as "negligently" killing the deceased, for purposes of this issue—who can recover—his negligence is a fact, not a legal conclusion. **C** is wrong for the same reasons that the explanation for B stated. **D** is also wrong. Make your Questions Presented as short as possible, but they need to contain all three parts of the "under/does/when" formula, and this example does in one sentence.

Appendix 5, *Memo on Memo-Writing*

This memorandum provides an overview of the various memorandum sections, as well as explicit instruction on how to format your headings. Formatting generally counts for 10% of the grade on any paper, so adherence to the rules on heading format can be quite beneficial. Many students get the heading format wrong. If yours is right, it will help your paper stand out from the crowd.

MEMORANDUM

TO: Associates

FROM: Partners

DATE: September 9, 2016

RE: Standard Memorandum Format

Start all memoranda with a brief statement of the assignment; your introductory sentence should be something like the following: "This Memorandum analyzes whether an act, unaccompanied by words, can qualify as a *communication* for purposes of the attorney-client privilege."

QUESTION

In the Question section, present a syllogistic statement of the question you are researching. This statement should adhere to the guidelines discussed in the Complete Guide Workbook and lecture series. In particular, it should have at least three sentences and it should not exceed 100 words. (If your partner does not want a syllogism, consult the workbook for examples of Question sections that are written in the traditional style. If you have more than one question, present them in a numbered list. If you only have one question, do not number it.)

ANSWER[60]

In the Answer section, present a brief, one-paragraph summary of your analysis and conclusion in the four-part layout described in the Complete Guide Workbook and lecture series. (As with the Question section, if you have more than one answer, present them in a numbered list. Otherwise, do not use numbers.)

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[60] To conserve trees, the Firm asks that you do not put a blank line between sections.

FACTS

In the Facts section, present all facts upon which you rely in the A-of-IRAC. Write for a sophisticated non-expert. Do not include superfluous facts, but do not assume the reader knows any facts. In other words, present enough facts to tell the story. You may not mention some of the "story-telling" facts, directly, in your analysis, but they may nevertheless be necessary to give the reader the whole picture. You can organize a Facts section in a number of ways, such as chronologically or issue-by-issue. Chronological organization is probably the most common.

ANALYSIS

You may want to start your Analysis section with a roadmap, like this one: "This Analysis section discusses: (I) analysis section basics and (II) stylistic considerations." If you have a two-item list, as here, do not use a comma or other punctuation before the word "and" (unless there is a more complicated grammatical structure with a sub-clause that needs to be set off by commas on both sides). If you have more than two items in the list, separate them with semi-colons.

I. ANALYSIS SECTION BASICS

In the Analysis section, apply the facts of your case to the governing law. Use the IRAC organizational method or some variation of it. With the IRAC method, you: (1) state the issue; (2) state the rule of law; (3) apply the facts of your case to the rule stated; and (4) present a conclusion.

II. STYLISTIC CONSIDERATIONS

This section discusses: (A) rules on headings and (B) miscellaneous rules.

A. Rules on Headings

Use headings liberally, if they add clarity, but do not view them as part of the text. In other words, do not rely on them the way you would text: do not assume the reader has read

them. Underline, and capitalize all letters in all words of, the memorandum's major headings, i.e., the "QUESTION," "ANSWER," "FACTS," "ANALYSIS," and "CONCLUSION" sections. Do not use a heading unless you have at least two headings at its level. For example, do not use a heading that begins with Roman numeral I unless you also have a heading that begins with Roman numeral II, do not use a heading that begins with "A" unless you also have a heading that begins with "B," etc. Headings should be single spaced if they consist of multiple lines; the words in subsequent lines should start at the same place as the words in the first line.

1. first level subsection headings

For the first level of subsections, start at the left margin, with Roman numerals, and capitalize all letters in all words of the heading. Heading I, *Analysis Section Basics*, above, and heading II, Stylistic Considerations, also above, are examples of first level subsections.

2. second level subsection headings

For the second level of subsections, start one tab in, with capital letters (A, B, C, etc.), capitalize the heading like a book title (i.e., capitalize the first letters of the important words), and underline the heading. Heading A, *Rules on Headings*, above, is an example of a second level subsection.

3. third level subsection headings

For the third level of subsections, start two tabs in, with Arabic numerals (1, 2, 3, etc.), and italicize the heading (but do not underline it). Do not capitalize the first letters of words, unless a word is a proper noun (e.g., a name). This heading, 3, *third level subsection headings*, is an example of a third level subsection.

B. Miscellaneous Rules

Number your pages. Use one-inch margins on all sides. Use Arial eleven-point font for all text, except headings. For headings, use Arial Black eleven-point font. Double space your

work, except headings and indented quotations. Use left justification, not full justification; studies have shown that it is much easier to read materials that have a staggered right margin.

CONCLUSION

The Conclusion section should mirror the Answer section, but may be a bit longer and more in-depth.

Appendix 6, Avoiding I-RA-RA-C

This Appendix presents the same analysis in two different forms, IRARAC and IRAC. You should strive for the latter layout.

An Incorrect IRAC (I-RA-RA-C)

Mr. Perot can probably assert a successful affirmative defense based upon the seizures he experienced while driving, even though the seizures did not cause unconsciousness. § 1 = Issue

In Lehman v. Haynam, the Ohio Supreme Court expressly held that a negligent driver can completely escape liability by proving "'fainting or momentary loss of consciousness . . . if such loss of consciousness was not foreseeable.'" § 2 = Rule

Mr. Perot was undoubtedly negligent when his car veered into oncoming traffic, and he did not suffer any loss of consciousness. Thus, at first blush, it appears that Mr. Perot cannot escape liability under Lehman. § 3 = Application

On the other hand, although the Lehman court spoke narrowly in terms of unconsciousness, it appears to have done so only because that was the condition suffered by the defendant in that case. The court's rationale actually appears to rest on a broader foundation: the court expressly approved the rule that excuses negligence where a driver "'is suddenly stricken by an illness which he [or she] has no reason to anticipate and which renders it impossible . . . to control the car.'" § 4 = Rule

Here, although Mr. Perot was conscious throughout the accident, the seizures caused confusion, disorientation, muscle spasms, impaired physical reflexes, and an inability to control a vehicle. He had no reason, moreover, to anticipate the seizures because he had no personal or family history of such episodes. § 5 = Application

Consequently, even though there is no Ohio case squarely on point, an Ohio court would probably interpret Lehman to extend not only to situations in which unconsciousness causes an inability to obey traffic laws, but to any physical incapacitation that does so, so long as the condition arises suddenly and unexpectedly, as it did here. § 6 = Conclusion

A Correct IRAC (IRAC)[61]

Mr. Perot can probably assert a successful affirmative defense based upon the seizures he experienced while driving, even though the seizures did not cause unconsciousness. § 1 = Issue

In Lehman v. Haynam, the Ohio Supreme Court expressly held that a negligent driver can completely escape liability by proving "'fainting or momentary loss of consciousness . . . if such loss of consciousness was not foreseeable.'" Although the court spoke narrowly in terms of unconsciousness, the condition suffered by the defendant in Lehman, its rationale appears to rest on a broader foundation: the court approved the rule that excuses negligence where a driver "'is suddenly stricken by an illness which he [or she] has no reason to anticipate and which renders it impossible . . . to control the car.'" § 2 = Rule

Here, Mr. Perot was undoubtedly negligent when his car veered into oncoming traffic. But he has a very strong argument that the court should excuse his negligence because the seizures that precipitated the negligence were sudden and unexpected and made it impossible for him to comply with traffic laws. The petit mal seizure caused confusion and disorientation. The myoclonic seizure caused muscle spasms, impaired physical reflexes, and an inability to control the vehicle. Although Mr. Perot never lost consciousness, as the Lehman defendant did, he was "'suddenly stricken by an illness which . . . render[ed] it impossible'" for him to steer his vehicle. He could not, in addition, have foreseen the incident: he had never previously experienced any epileptic seizure, had no family history of such disease, and had no other reason to anticipate a seizure. § 3 = Application

Consequently, even though there is no Ohio case squarely on point, an Ohio court would probably interpret Lehman to extend not only to situations in which unconsciousness causes an inability to obey traffic laws, but to any physical incapacitation that does so, so long as the condition arises suddenly and unexpectedly, as it did here. § 4 = Conclusion

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[61] Note that, due to the brevity of this analysis, I didn't need to break my original IRARAC into two IRACs—and two subsections—to address the problem. However, as indicated in the main text, above, that strategy is often needed when you're trying to turn an IRARAC into an IRAC.