A. A Dual System of Government

The United States has a dual system of government, the federal system and the state system. The federal system derives its law from four sources: the U.S. Constitution, federal statutes, administrative regulations promulgated by federal agencies, and federal court decisions. State law is derived from the following four sources: state constitutions, state statutes, administrative regulations promulgated by state agencies, and state court decisions. (See Figure 1-1.) Although states do make their own laws, they still cannot disregard federal law.

Primary Sources of the Law

Federal System	State System
• United States Constitution • Statutory laws enacted by the United States Congress • Common law found in federal case decisions involving special matters (e.g., international disputes) • Administrative regulations promulgated by federal agencies (e.g., the Environmental Protection Agency)	• State Constitution • Statutory laws enacted by a state legislature • Common law found in state appellate court decisions • Administrative regulations promulgated by state agencies (e.g., the Bureau of Motor Vehicles)

Figure 1-1

B. The Constitutionally-Created Three Branches of Government

The U.S. Constitution, which consists of 7 articles and 27 amendments, is the foundation of the U.S. legal system. The Constitution allocates responsibility for governance between the federal and state governments. In its first 10 amendments, known as the Bill of Rights, the Constitution also mandates fundamental rights and protections for people. The Bill of Rights limits the federal government's power by guaranteeing certain rights to the people, including the freedom of speech, the freedom of religion, the freedom of assembly, the freedom of the press, the right to bear arms, the right to be secure from unreasonable searches and seizures, the right to a speedy trial, the right not to make incriminating statements against one's self, the right to a trial by jury, and the right to protection against cruel and unusual punishment. A state constitution can grant additional or greater rights and protections to individuals within its boundaries than does the U.S. Constitution. At a

minimum, though, a state constitution must provide the same degree of rights and protections as is afforded under the U.S. Constitution.

Both federal and state constitutions also provide a framework for governing the jurisdictions to which they apply. The constitutions divide the responsibility of governance into three branches: the executive branch, the legislative branch, and the judicial branch. (See Figure 1-2.) Each branch is assigned a particular role, but all branches may create law. Each one serves as a check and balance of power over the other two.

The legislative branches in both the federal and state legal systems possess supreme law-making powers. The legislative branch may respond to issues and problems by enacting statutes that protect the welfare of the public. These statutes are subject only to the limitations laid down by the federal and applicable state constitutions.

The executive branch's primary role is to enforce the statutes created by the legislative branch. The executive branch and its administrative agencies may be called on by the legislative branch to enforce and implement statutes by promulgating regulations that further define a statute.[1] In 1991, for instance, the U.S. Congress enacted the Telephone Consumer Protection Act (TCPA) and mandated an independent administrative agency known as the Federal Communications Commission (FCC) to promulgate regulations protecting residential telephone subscribers from receiving unwanted telephone solicitations.[2] The regulations promulgated by the FCC under the TCPA have the same force and effect as statutory laws.[3] By promulgating regulations, the administrative agencies create law as they have been assigned to do by statute.

The judicial branch plays a strong role in the U.S. legal system. The judiciary interprets existing statutes and may review statutes to determine whether they are consistent with the federal and state constitutions. The judiciary can declare a statute unenforceable if it finds the statute unconstitutional.[4] In addition, the judiciary possesses the power to create law by establishing rules and principles that respond to issues not otherwise addressed by statute. This body of law created by the judiciary is called the common law.[5] In this way, the U.S. legal system is quite

1. For example, an administrative agency may be directed by statute to create regulations in situations where the legislative branch lacks the technical expertise or the time to create detailed laws that fully address more complex issues or problems.
2. 47 U.S.C. § 227(c)(1-4) (2012).
3. 47 U.S.C. § 227(c)(5) (2012).
4. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
5. Although the United States Supreme Court in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), stated there is no "general common law," federal courts have continued to develop federal common law in limited circumstances involving important federal interests, such as in admiralty and maritime cases and international disputes.

U.S. Dual System of Government

The Constitutionally-Created Three Branches of Government

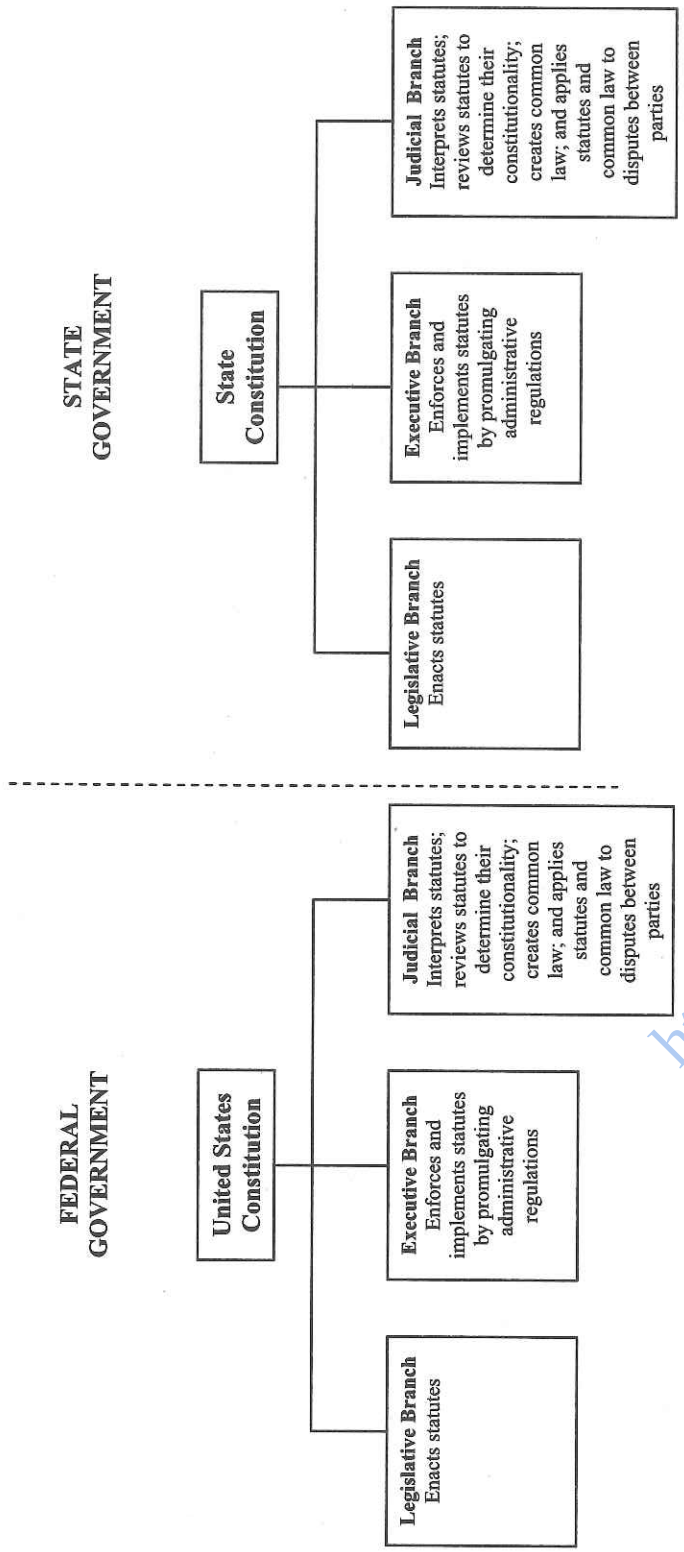


Figure 1-2

different from civil code legal systems where the courts may only interpret and apply the civil code. Because of the judiciary's unusually strong law-making role in the U.S. legal system, the remainder of this chapter will focus on the hierarchal levels in the federal and state court systems.

C. A Dual Court System

Both the federal court system and the state court system comprise a pyramid-like hierarchy of courts, with the trial courts at the base of the pyramid, usually followed by intermediate courts of appeals, and then a court of final appeal at the apex of the pyramid. (See Figure 1-3.) This dual court system reflects the dual law-making authority of the federal and state governments. Generally, the federal courts interpret and apply federal law, while the state courts interpret and apply state law.

Court Hierarchy

Figure 1-3

1. The federal court system

The federal courts hear disputes involving federal law, including those disputes arising from the U.S. Constitution, federal statutes, and federal regulations. A federal court will also hear disputes where the United States is named as a party and will even hear state law issues if the parties are citizens of different states and the dispute involves more than $75,000. For example, if two people, a citizen of Oregon and a citizen of California, are involved in a car accident resulting in injuries and damages exceeding $75,000, a lawsuit can be brought in federal court.

Issues involving federal civil or criminal law are usually heard in a federal trial court, called a district court.[6] Each state has at least one district court. Because each district court serves an approximately equal population, the more sparsely populated states may have only a single district court and the more densely populated states may have several district courts. Oregon, for example, has only one district court, but California has four district courts. These courts may hear civil or criminal cases. The district court's jurisdiction is limited to the area within the territorial boundaries of its district. There are 94 judicial districts located in the United States, the District of Columbia (D.C.), the Commonwealth of Puerto Rico, and the three territories of the United States—Guam, the Virgin Islands, and the Northern Mariana Islands. (See Figures 1-4 and 1-5.)

A party has a right to appeal the final judgment of a district court or, if permitted by statute, certain orders of the court made during the course of the trial to the intermediate court of appeals having jurisdiction over the district court. In the federal court system, the intermediate courts of appeals are known as the United States Circuit Courts of Appeals. Congress has divided the United States into 13 circuits.[7] Eleven of these circuits are numbered. The two other federal circuits are the United States District Court for the District of Columbia and the United States Court of Appeals for the Federal Circuit. (See Figures 1-4 and 1-5.) The total number of judges serving on the court of appeals in each circuit varies from 6 judgeships in the First Circuit to 29 judgeships in the Ninth Circuit,[8] but appeals are heard by three-judge panels.[9]

Each of the numbered circuits includes district courts from various states and sometimes territories, such as Guam. For example, the United States Court of Appeals for the Ninth Circuit hears appeals from district courts located in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington. The United States Court of Appeals for the Second Circuit hears appeals from district courts located in New York, Connecticut, and Vermont. The numbered circuits and the D.C. Court of Appeals also hear appeals from decisions of some federal administrative agencies. (See Figures 1-4 and 1-5.)

Unlike the jurisdictions of the numbered circuits and the D.C. circuit that are based on territorial boundaries, the jurisdiction of the Court of Appeals for the Federal Circuit is nationwide and based on special claims,

6. In addition to district courts that hear disputes involving general federal law, the federal court system includes courts that have jurisdiction over special disputes, such as the military courts, the bankruptcy courts, and the United States Tax Court.

7. 28 U.S.C. § 41 (2012).

8. 28 U.S.C. § 44 (2012).

9. The United States Code provides that the Federal Circuit may have panels of more than three judges, if permitted by the Federal Circuit's court rules. 28 U.S.C. § 46(c) (2012).

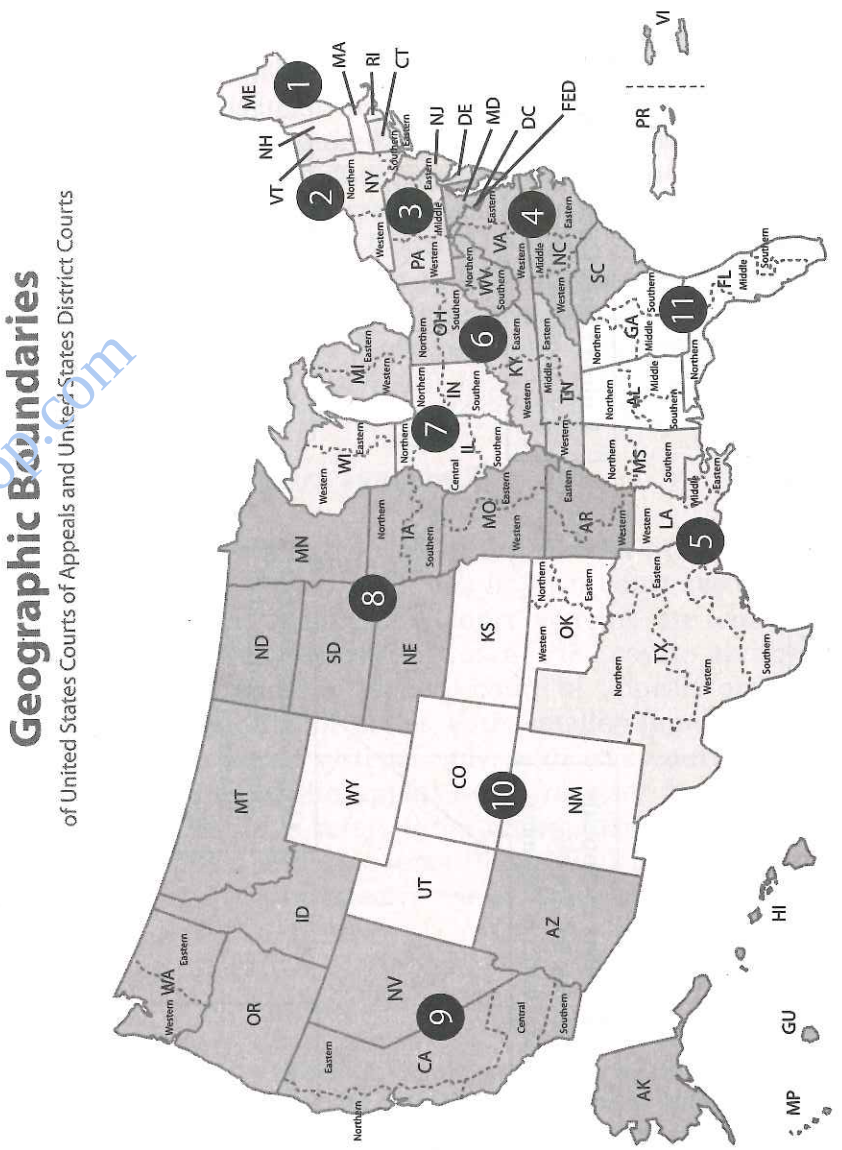


Figure 1-4
Source: Administrative Office of the United States Courts, http://www.uscourts.gov/uscourts/images/CircuitMap.pdf

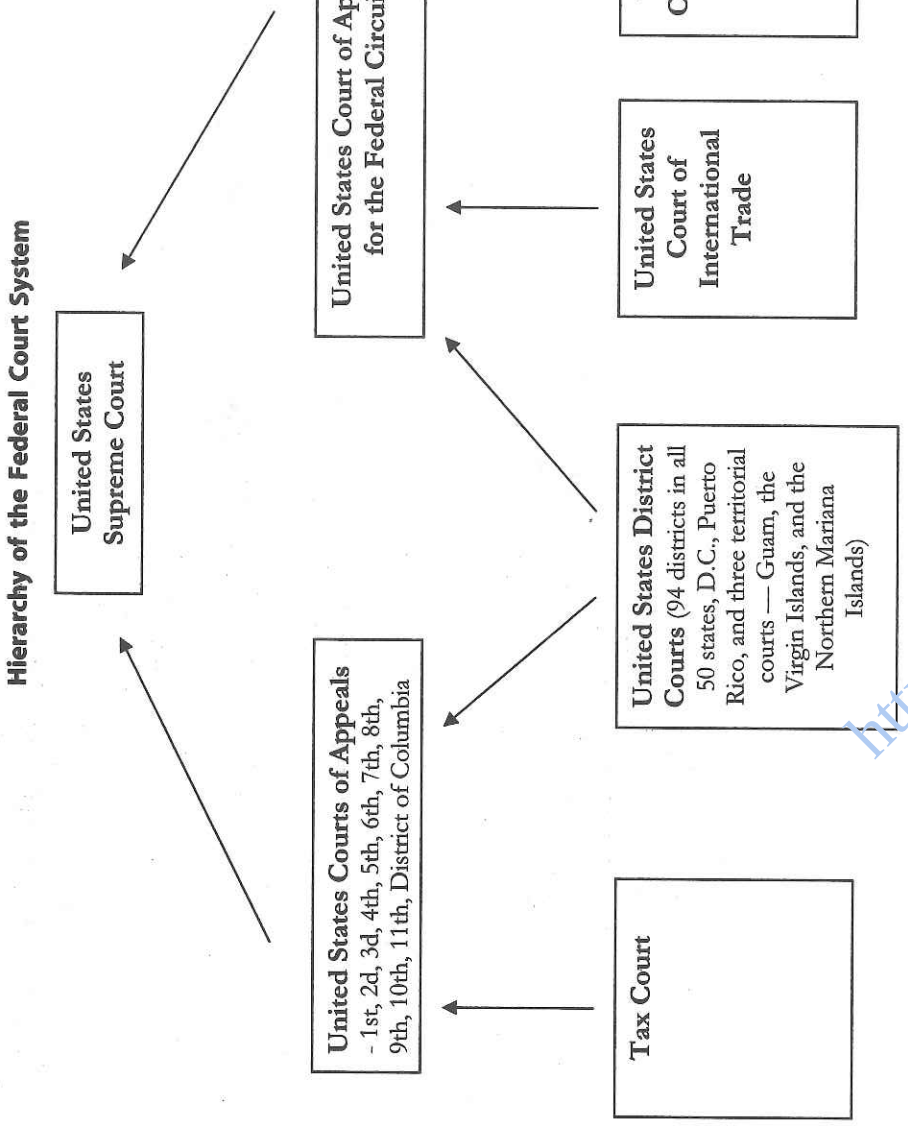


Figure 1-5
Source: Administrative Office of the United States Courts, http://www.uscourts.gov/
Note: Military, Bankruptcy, and Veterans Claims Courts are not shown.

such as those involving international trade disputes and patents. (See Figures 1-4 and 1-5.) In some instances, the Court of Appeals for the Federal Circuit also may hear cases against the U.S. government, including disputes arising out of U.S. government contracts, claims for money from the U.S. government, and claims related to veteran's benefits.

The United States Supreme Court, comprising nine justices, is the court of last resort for appeals in the federal system and for appeals of state court decisions involving federal issues. (See Figure 1-5.) Although the Supreme Court is required by law to hear appeals regarding certain matters,[10] its docket[11] of mandatory cases is quite small. Most of the cases on the Court's docket are discretionary. Thousands of petitions for appeal are filed each year with the Court. The Court is constrained by time, however, and grants permission to hear only a small number of these cases, usually those requiring an interpretation of federal constitutional or statutory provisions, or those requiring the resolution of pressing issues of federal law.[12]

2. The state court system

Each of the 50 states, as well as the District of Columbia and the Commonwealth of Puerto Rico, has its own court system. Similar to the federal system, many state court systems are composed of a three-tiered hierarchy consisting of a trial court, an intermediate court of appeals, and the highest court of appeals or the court of last resort. A minority of states with smaller populations, such as Maine, have two-tiered systems only, with trial courts and appellate courts. The names of the appellate courts vary from state to state. For example, California refers to its intermediate court of appeals as the court of appeal and its court of last resort as the supreme court. (See Figure 1-6.) Conversely, New York refers to one of its

10. *See, e.g.*, 28 U.S.C. § 1253 (2012) (providing for a direct appeal to the Supreme Court for review of decisions from three-judge district courts granting or denying an injunction); 47 U.S.C. § 555(c)(2) (2012) (Cable Act) (providing for a direct appeal to the Supreme Court for review of decisions from a three-judge court holding that section 534 or section 535 of the Cable Act is unconstitutional).

11. A court docket refers to a record of the cases pending in the court.

12. The Court receives annually over 7,500 petitions for certiorari per court term but agrees to hear far less. In the 2012 Term, for example, only 77 cases were argued before the reviewing Court. United States Supreme Court Chief Justice Roberts, *The 2013 Year-End Report on the Federal Judiciary* 12, http://www.supremecourt.gov/publicinfo/year-end/2013year-endreport.pdf

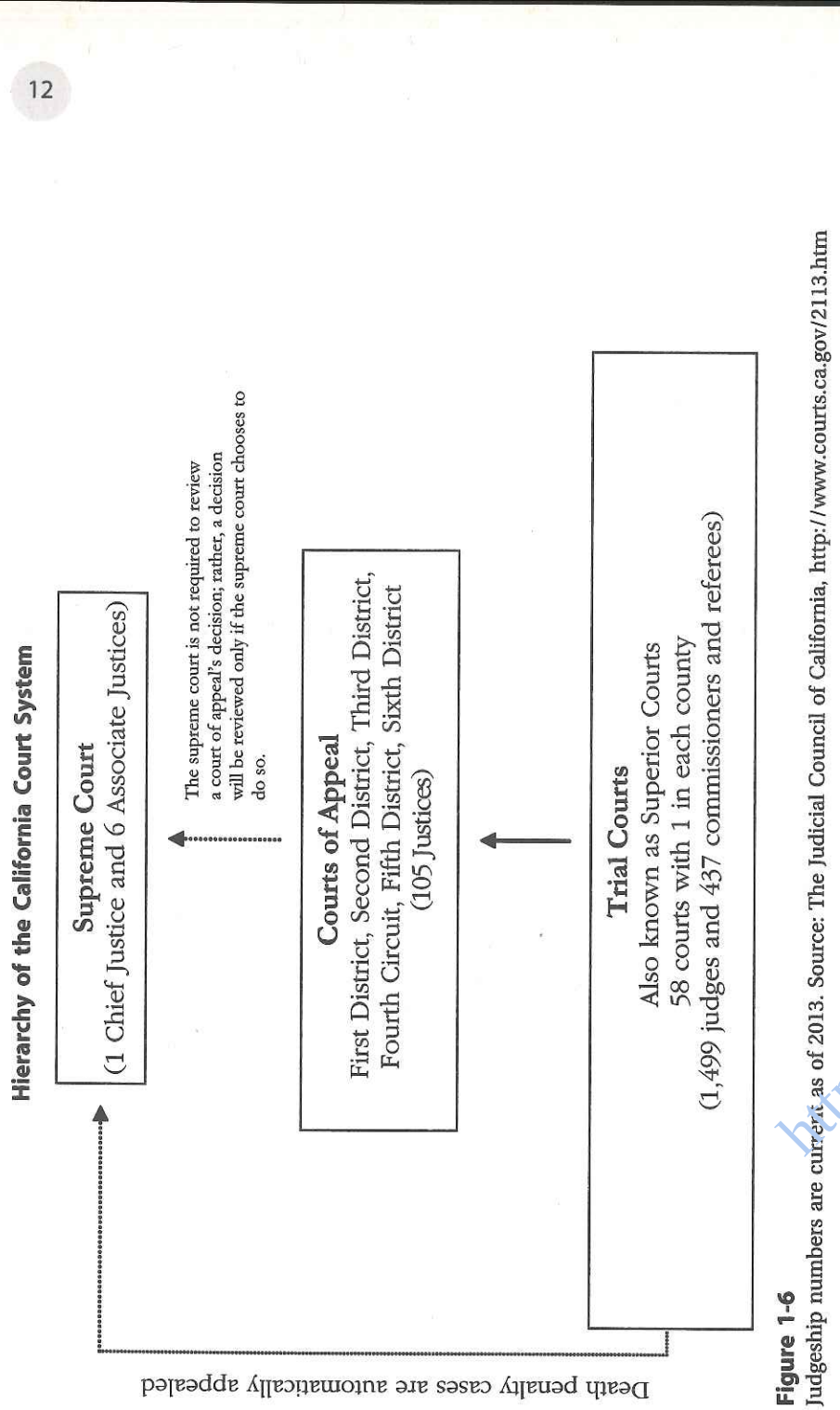


Figure 1-6
Judgeship numbers are current as of 2013. Source: The Judicial Council of California, http://www.courts.ca.gov/2113.htm

intermediate courts of appeals as the supreme court and its court of last resort as the court of appeals.[13]

A trial court may be of general or limited jurisdiction. A court of limited jurisdiction can hear only certain types of cases. For example, a small claims court may hear only cases involving claims for small debts, and a state criminal court of limited jurisdiction may hear only criminal cases. Still other courts have specialized roles, such as a juvenile court, which hears matters involving delinquent or dependent children.

Similar to the federal court system, most states allow a right of appeal to the intermediate appellate court.[14] A party that is dissatisfied with the outcome of a civil case decided by a state trial court may ask an appellate court in the state to review the trial court's judgment, order, or decision to determine whether the trial court committed a legal error that requires a reversal, a modification, or a new trial. If there is a third tier to the state court system, a party dissatisfied with the outcome in the intermediate appellate court may appeal the intermediate appellate court's decision to the state's highest court. In most instances, the highest court in a three-tiered court system is not required to hear an appeal. Like the United States Supreme Court, most dockets are discretionary in state courts of last resort. Unless the decision of a state court involves a federal constitutional question or federal law, the decision of the highest state court is final and cannot be appealed to any other court. For an example of one state's court system (California), see Figure 1-6.

13. A quick way to determine the names of the courts in the various state jurisdictions is to refer to Table 1 in THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (19th ed. 2010) or Appendix 1 in ALWD & COLEEN M. BARGER, ALWD GUIDE TO LEGAL CITATION (5th ed. 2014). The states are listed alphabetically, and as a part of each state entry, the names of the courts in the state that publish decisions are identified along with the names of the reporters in which these decisions are published.

14. There are exceptions: Hawaii and North Dakota, for example, do not provide for a direct right of appeal to the intermediate appellate court. Instead, the state supreme court assigns cases to the intermediate appellate court.

analyzing the law based on the facts of a client's case is that the legal rules and principles established by legislatures and courts often dictate the structure of a legal document. (This structuring concept is addressed in more detail in Chapter 11.)

Another myth worth dispelling is that some people simply can write and others cannot. All of us can become solid, professional writers by choosing to learn and apply the basic rules of grammar and style to our own writing. Anyone in the United States who practices law must write; therefore, any U.S. lawyer must develop the skills necessary to become a professional writer. Professional writers produce quality documents in both substance and form.

If you are one who typically delays writing as long as possible (that is, a procrastinator), try to change your writing process. Pay careful attention not only to *what* you write but also to *how* you write. Any good lawyer's written document must withstand careful scrutiny. Your choices about overall paragraph structure, sentence structure, words, and punctuation all count.

A prime example of the need to pay attention to the details is found in the case, *Rogers Communications v. Bell Aliant.*[1] In this case, Rogers signed a contract to string cable lines across Aliant's telephone poles in the Canadian Maritime provinces. The language establishing the time frame for the contract was as follows.

> This agreement shall be effective from the date it is made and shall continue in force for a period of five years from the date that it is made, and thereafter for successive five year terms, unless and until terminated by one year prior notice in writing by either party.

A few years after Rogers began installing the lines, and prior to the end of the first five-year period, Aliant canceled the contract and increased the amount Rogers would have to pay to use its telephone poles. The overall increase imposed by Aliant would cost Rogers more than $2 million (Canadian dollars).

Rogers Communications filed suit, and the decision by the Canadian Radio-Television and Telecommunications Commission (Commission) was based on the language of the contract. Rogers argued that the contract could not be terminated within the first five years. The termination clause modified only the clause immediately preceding it—the clause covering the renewal of the contract for successive five-year terms. Aliant argued that the termination clause applied to all the language preceding it, so the contract could be terminated at any time, even in the first five years, provided Aliant gave one year's notice.

1. *Telecom Decision CRTC 2007-75*, http://www.crtc.gc.ca/archive/eng/2007/dt2007-75.htm (modified Aug. 20, 2007).

The decision turned on the placement of the comma, boldfaced below, and the rules covering punctuation.

> This agreement shall be effective from the date it is made and shall continue in force for a period of five years from the date that it is made, and thereafter for successive five year **terms, unless** and until terminated by one year prior notice in writing by either party.

The Commission found that the termination clause applied to all five-year terms, including the initial term. Careful drafting, of course, could have prevented this problem. The drafter could have either (1) inserted a semicolon after *made*, eliminated the conjunction *and*, and added "the contract shall continue" or (2) turned the provision into two sentences. If two sentences, the provision would read:[2]

> This agreement shall be effective from the date it is made and shall continue in force for a period of five years from the date that it is made. Thereafter, the contract shall continue for successive five year terms, unless and until terminated by one year prior notice in writing by either party.

Beyond the obvious problem with ambiguous language in contract provisions, which is that the interpretation of language is left to a judicial body, the reasons below also emphasize the need to pay careful attention to your choices about language.[3]

1. Others may read your documents in bad faith rather than in good faith

In the U.S. adversary legal system,[4] lawyers read opposing party documents in hopes of finding mistakes that can be challenged. These mistakes may be flaws in reasoning or gaps in arguments. You must be sure

2. Rogers appealed the Commission's decision, arguing that the French version of the contract had not been considered, but under that version the intent to disallow cancellation during the first five years of the contract was clear. In August 2007 the Commission overturned its decision and ruled for Rogers. *Id.*

3. These suggestions about language matters are based on a talk in the 1980s by Lauren Robel, now Provost and Executive Vice President of Indiana University Bloomington.

4. Adversary systems involve parties who oppose each other. Lawyers representing the parties argue their clients' cases using evidence, witness testimony, legal arguments, and the like before an independent decision maker. At trial, the lawyer for the opposing party may ask questions to challenge the strength of the other side's case.

that your position and the support for your position are both complete and clear.

2. Your readers may be impatient

United States judges and their law clerks[5] may read your document, and both judges and law clerks often feel overworked and underpaid. If your brief to the court is difficult to understand, the judge or law clerk may put down your document and refer to opposing counsel's brief in hopes of understanding the case. If the opposing counsel's brief is clear and complete, it will be more effective; as a result, you may put your client's case at risk. You want judges and their law clerks to understand your story and the legal issues you are explaining the first time they read the information. Your job is to write a clean and clear document.

3. Legal writers must write about complex issues

Lawyers in the United States, like all lawyers, oftentimes write about complex and difficult legal issues. As a U.S. lawyer, the challenge is to write so that even the most complex legal issues can be understood by a reader who is not familiar with your case. If you write your document at the last minute, you may (1) discover that the message is not as complete and logical as you originally thought, and (2) find you don't have the time needed to revise your document so your unfamiliar reader can easily understand it. To avoid this last-minute discovery, draft early, and allow additional time to revise and edit.

4. Your words are powerful and may have far-reaching effects

As a lawyer, your words likely mean more than they have ever meant before. Lawyers are in a position to exercise power, and much of that power is exercised through the written words. As a result of your words in a criminal case, for example, individuals may lose their freedom. As a result of your words in a custody dispute, parents may lose rights and access to their child. And as a result of your words, you may influence the chief executive officer of a company as to whether a product should be manufactured and introduced into the market, even though the new

5. Law clerks are lawyers hired to work for judges, sometimes permanently and sometimes for a limited period of time, such as two years.

product carries a potential risk of harm. When you receive this power, you must also accept the responsibility that comes with it. That responsibility includes making careful choices about the substance of your message and the way in which you present your message to your reader.

B. The Writing Process from Task to Deadline

You have likely developed a technique for your own writing process. You may have developed that technique carefully and consciously, or your technique may have been developed without your thinking about it at all. As a U.S. legal writer, you may find it necessary to begin early and redraft more. Consider the various steps that legal writers oftentimes move through when researching and writing legal documents:

Task → Deadline

Steps:

- Determining whether the question has already been answered
- Considering the question on your own and then talking with others
- Taking notes
- Researching
- Predrafting
- Drafting
- Redrafting
- Revising
- Editing

Finding the correct balance between preparing to write and actually writing is challenging for most writers. Consider writing your first draft no later than halfway through the task-to-deadline time period. Writing early in the process gives you sufficient time to make sure your message is complete, accurate, and easy to understand. Writing early is especially helpful when you speak English as your second language. If you tend to procrastinate, consider applying one or both of the following steps:

1. Divide the steps of your process and set your own deadlines for each stage. For example, you may set separate deadlines for (a) completing the research, (b) drafting, and (c) revising. You may also want to set deadlines for different sections of the document, depending on its length and complexity.

2. Commit the deadlines you set to someone else, for example, a supervising attorney, another attorney working on the same project, or an assistant.

What follows is a suggested step-by-step approach to legal writing. The actual process, however, does not usually follow a step-by-step process in a linear manner as presented below. You are likely to find that your list of issues and legally significant facts changes as you research and learn more about the law relevant to the case. When you read the law, you may discover more questions to ask your client. When you learn these new facts and do additional research, you may find that new legal issues are raised that require additional, different research, which then requires even more new questions for the client. So while the legal process is set out below using a step-by-step, straightforward process, in reality the process involves repeating steps when necessary and is, therefore, quite recursive in nature.

Here are six steps when writing an objective legal analysis:

1. Collect the facts.
2. Analyze the facts.
3. Collect the law.
4. Analyze the law.
5. Organize the law.
6. Apply the law to the client's facts to analyze and predict the likely outcome regarding each legal issue in dispute.

1. Collect the facts

You must talk with your potential client to learn what happened. You collect the facts by asking careful, probing questions during the client intake interview. As a good interviewer, you are an active listener, asking questions to learn the important facts and to make sure that when the interview ends you understand the client's story. Only then can you decide whether you want to take a potential client's case, whether there is even a potential legal issue to explore, or how to best respond to the opposing party's complaint already filed with the court.

2. Analyze the facts

Once you collect the client's facts, you are ready to analyze the facts by turning the simple language of the story into legal categories. For example, in Exercise 2-B, where Nicholas's wife Selena killed Nicholas

and his mistress after Nicholas returned from the war, Selena can be labeled as the wife/killer/potential beneficiary, and Nicholas can be labeled as the husband/victim/decedent. Typical categories in analyzing the facts and preparing to research include the following:[6]

Things
Actions
Relief requested
Parties

Think back to the exercises in Chapter 2 that address the evolving nature of the law. In Exercise 2-C, the Assembly passed a law providing that "[n]o person who intentionally causes the death of another shall in any way benefit by the death." In that exercise, Stephen organized a boar hunt. After Stephen killed the boar, he gave the tusks to Diana, a beautiful huntress and princess who Stephen loved. Stephen's uncles also attended the hunt and also loved Diana. The uncles attacked Stephen with their spears, and one uncle's spear cut Stephen's shoulder. Fearing for his life, Stephen killed both uncles. Both uncles had a Last Will and Testament naming Stephen as a beneficiary.

When determining whether Stephen would be prevented under the law from receiving benefits under each uncle's Last Will and Testament, you might analyze the facts in the following way.

THINGS	ACTIONS	RELIEF REQUESTED	PARTIES
Boar hunt	Killing	Stephen to be denied benefits of uncle's death through inheritance	Nephew
Spears	Self-defense		Nephew's mother
Last Will & Testament			

After analyzing the facts, you may find that some of the words and phrases are more helpful than others. For example, *nephew* and *nephew's mother* are not all that helpful; however, if the parties were *buyer* and *seller*, those neutral, generic references would be helpful when researching. Other terms, such as *killing*, *self-defense*, and *Last Will and*

6. J. Myron Jacobstein & Roy M. Mersky, Fundamentals of Legal Research 16 (7th ed. 1998).

Testament, are key words to use when researching the law relevant to this case.

3. Collect the law

After analyzing the facts and considering the potential legal issues raised by the facts, you will likely need to research the legal issues. Using the list of words and phrases you generated in step two, create a plan for your research before going to the library or sitting down to research online.

a. Creating an issue statement

Consider drafting a preliminary issue statement[7] using the format suggested when drafting a substantive issue in Chapter 4 on briefing cases. The preliminary issue statement reflects both the law and the facts. The legal question identifies (1) the broad area of law at issue and (2) the specific legal issue you are addressing. This helps you to know where in the library (whether in an actual library or the library online) to research. It also helps you focus further on the specific legal question within the broad area of law you will need to research. A list of the facts that help explain why the legal issue is in dispute is also helpful. This list of facts will include both facts that help your client's position and facts that help the opposing party's position. You need both to understand the dispute. The more similar your client's facts are to the facts in the cases you find in your research, the better the case will be in your analysis.

The exercises in Chapter 2 address whether a killer could receive a benefit, such as money or property, from a deceased victim. The preliminary issue statement for Exercise 2-C might look like this:

Legal Question: Under the East Carolina statute that precludes one who caused the death of another from benefiting from the deceased's death, will a nephew receive the assets of his two uncles following their deaths?

Facts: When the nephew, in fear for his life, killed his uncles after they started a fight with the nephew and one uncle cut the nephew's shoulder with a spear.

7. Mary Barnard Ray & Jill J. Ramsfield, Getting It Right and Getting It Written 311 (5th ed. 2010).

If you already know about this area of law and understand the importance of self-defense in analyzing the specific legal question, above, you would likely include self-defense in your legal question.

For example:

Legal Question: Under the East Carolina statute that precludes one who caused the death of another from benefiting from the victim's death, can Stephen prove he acted in self-defense and therefore still receive the assets of his two uncles when . . .

When you combine the relevant law and your client's facts, you can then focus on the legal issues that must be addressed in analyzing your client's case. In Exercise 2-C, the outcome of the case depends on whether the nephew, Stephen, can avoid the slayer statute by showing he acted in self-defense. The statute referred to earlier in the first example above ("slayer statute") does not address what might happen when a killer acts in self-defense. Through the merger of the law and facts, you would realize that the court's decision will depend more on how the statute is interpreted, which is a law-based rather than a fact-based question.[8] The court could decide that only the words of the statute are what matters, so acting in self-defense is not an excuse since it's not mentioned in the statute; alternatively, the court might recognize self-defense as a way to avoid the slayer statute and still take the assets of the victim. This focus on how to interpret the statutory language would change the legal question.

For example:

Legal Question: Is a court likely to create an exception to the statutory provision that prevents anyone who intentionally causes the death of another from benefiting by that death when the killer acts in self-defense?

b. Researching the legal issue

Your goal when researching is always to access the relevant primary authority. Primary sources of authority include constitutions, statutes, cases, and administrative regulations authorized through a statute. Binding primary authority includes constitutional provisions,

8. The analysis of a law-based issue is discussed in detail in Chapter 14.

statutes, and court decisions from higher courts addressing the same legal issues in the controlling jurisdiction.

If you do not know anything about the legal issue, you may choose to research secondary sources first. Secondary sources are not binding authority. These sources are best used to become more familiar with an area of law so your research for primary authority is more focused. Secondary sources will also refer you to useful primary authority. Typical examples of secondary sources include restatements of law, law review articles, encyclopedias, and treatises.

This book does not include research instruction. Numerous books explain all the research sources available to those researching law in the United States.[9]

As an effective researcher, you will want to keep careful notes of your research. By taking careful notes, you avoid looking unnecessarily at the same materials multiple times. Even when researching carefully, however, you may be uncertain when you have researched thoroughly and can stop with confidence. Consider the "backwards and forwards" method. When you have read all the relevant cases cited in the key cases, the "backwards" research, or historical perspective, is likely complete. And when you find that your key cases are the only ones continually cited in the more recent cases, the "forwards" research is likely also complete.[10]

4. Analyze the law

The first step in analyzing the law is to brief the relevant cases. You don't need to fully brief the entire case in detail, only that portion of the case relevant to the legal issue you are researching. A case may address both procedural issues and multiple substantive issues, for example, but you will note only any applicable rules and legal principles addressed in the case along with the key facts, the court's holding, and the court's reasoning regarding the issues involved in your client's case. (Chapter 4 provides instruction on finding these parts of a court opinion.)

5. Organize the law

As you brief the relevant cases you plan to use in your analysis, note the relevant legal test courts use to analyze each legal issue. This legal test

9. Examples of good research texts include Christina Kunz et al., The Process of Legal Research (7th ed. 2008), and Amy Sloan, Basic Legal Research: Tools and Strategies (5th ed. 2012).

10. Credit for the "backwards and forwards" method goes to Andrew Solomon, Professor, South Texas College of Law.

will create the basic structure for the analysis of your client's case. The structure of the legal test, for example may comprise (1) requirements (or elements), (2) a rule with one or more exceptions, or (3) the weighing of factors. The structure of these legal tests is discussed in detail in Chapter 11.

By organizing the law, you can better understand which legal points are truly in dispute. For example, after researching whether Stephen could benefit from his uncles' deaths after killing them, though arguably in self-defense, you may find that different courts focused on the legal issue in different ways. Court A might have focused on whether the killer was convicted of first or second degree murder, or voluntary or involuntary manslaughter; based on the severity of the conviction, the court would or would not allow the killer to benefit from the victim's death. Court B, however, might have focused on the Assembly's intent in enacting the slayer statute, trying to reach a decision consistent with that intent.

The basic structure of a legal test, particularly one developed through the common law, may be introduced in one case and remain constant throughout later cases applying the same test. More likely, however, the legal test is introduced in one case and then further refined in subsequent cases, so the final test is based on synthesizing many court holdings into one legal test. Chapter 10 specifically addresses how to synthesize case holdings to create a single common law rule. When you organize the law, separate the parts of the legal test. You can separate the parts of the test either by outlining or perhaps by charting the law and cases. (For more on charting, refer to Chapters 9 and 12 on analyzing multiple issues using multiple cases.)

6. Apply the law to the client's facts to analyze and predict the likely outcome regarding each legal issue in dispute

At this point, you have thoroughly collected and analyzed the facts, and have collected, analyzed, and organized the law. Now you want to apply the relevant law to the specific facts of your client's case. In this step, you must determine finally what legal points are in dispute and what legal points, if any, are legally relevant but are not in dispute. You will be able to determine disputable and indisputable points by adding the client's facts to the outline or chart you created previously and noting the potential support that exists for each party regarding each legal point. (Most of the chapters in Part Three of this book address in great detail how to organize and analyze legal issues.)

C. The Writing Process

1. Considerations when beginning to write

As with any piece of writing, you must always consider (a) why a document is being written (purpose), (b) the appropriate tone of the document, (c) the potential audience for the document, and (d) any constraints that may exist with respect to the document.

a. Purpose

You must understand *why* you are writing each document. You may be writing a legal document to create a specific outcome (as in a contract or Last Will and Testament), to objectively analyze and predict the strength of your client's position (as in an office memorandum for a supervising attorney), or to persuade (as in a document to the court or a demand letter). You may write other correspondence, such as letters to clients or to opposing counsel, simply to inform, to make a recommendation, or to seek additional information.

b. Tone

The type of document you are writing dictates the appropriate tone. Documents to a court are always written using formal language. Office memoranda may or may not be written as formally, depending on how well you know your reader. However, even if you know your immediate reader well, an office memorandum may be filed away and eventually read by different parties. If you are not sure what tone is appropriate, choose a more formal tone. And all legal documents, regardless of how formally written, should conform to standard rules of grammar and style.

Communicating to clients and other lawyers through email and other forms of Internet media is a frequent occurrence. Even though email communications are generally considered more informal, they must be written professionally and with an understanding that information contained in these forms of communication may be admissible as evidence. More on email communications can be found in Chapter 18.

c. Audience

Always consider your reader, or audience. You may be writing to someone who has a law degree, for example, a lawyer or a judge, but who knows little about the specific law and nothing about the specific facts of the client's case. You may be writing to a nonlawyer who knows

little if anything about the law *and* little or nothing about the facts of the client's case. Your reader may be highly educated or have very little education, requiring you to choose your language more carefully and explain more terms. You want to pay particular attention to your audience during the later stages of your process, when you rewrite, revise, and edit.

d. Constraints

U.S. lawyers are often constrained by specific deadlines, page or word limits set down by a court, and other rules such as those for properly formatting a document. Always allow yourself sufficient time to check that you are abiding by these rules.

2. The creative and critical stages in the writing process

Your goal is a written document, but writing also influences your thinking process. If you understand that writing promotes thinking, you will understand why drafting early and allowing time to redraft is so important to a clear message. Put another way, "Easy reading is damn hard writing."[11] If you are a procrastinator, however, you can't use writing as a means to heighten your analytical thinking. In the end, you may have an analysis that is not as in-depth and well reasoned as it could be.

In the list of the steps from task to deadline, many of the actions occur prior to writing the first draft. If you write earlier rather than later in the process, your focus can be on the content of the message rather than on the presentation of the message. Once you are confident that the message is complete and accurate, you may then focus on ensuring that your message is easy to read and understand. The task-to-deadline process, therefore, includes both a writer-based focus and a reader-based focus.

a. Writer-based (creative) focus

When first drafting, focus on the substance of your message. Early writing allows you to determine whether your message contains the correct substance and is structured appropriately. During this stage of the writing process, you need not worry about details such as using proper grammar or clear topic, thesis, and transitional sentences. If you do concern yourself with the smaller details, you may overlook

11. Nathaniel Hawthorne (1804-1864), as quoted in Terri Guillemets, *The Quote Garden*, http://www.quotegarden.com/writing.html (last updated Aug. 11, 2014).

important substance. By drafting and redrafting early, your own writing helps you to think.

Ernest Hemingway[12] was asked once whether he always thought about how he could use what he observed in his daily life in one of his novels. He responded that he did not need to live his life that way because he knew he could retrieve what he observed later from his memory, if necessary. Hemingway compared the writing process to an iceberg: "The dignity of movement of an iceberg is due to only one-eighth of it being above water."[13] In other words, for every one-eighth of an iceberg that is actually seen above the water, seven-eighths creates the foundation below.

Similarly, a well-written document typically reflects perhaps one-eighth of what you as a writer know and have considered through the writing process. Writing itself creates new thoughts that may be brought up from the far reaches of your memory. And when you reject a word or a thought in a draft, the rejection of those thoughts will often bring forth new thoughts. In the end, just as the tip of the iceberg above water rests on the solid foundation underneath the water, the final written legal document rests on the solid foundation of the writing and rewriting process.

b. Reader-based (critical) focus

Once you have completed drafting your message, you are ready to move to the critical, reader-based stage of the writing process. This stage requires you to revise and edit so your message can not only be read but also be understood by your reader. Explaining the law can be a challenge. Consider the following story.

You own a lovely rose garden. You are feeding your flowers with a liquid fertilizer. The fertilizer spills on ornamental stones in the garden, and you do not have enough fertilizer for the remaining roses. Is your job finished just because you emptied the watering can? When writing, if you simply "pour out" the information on paper and do not pay attention to whether that information can be understood easily by your reader, you have not finished your job. You have potentially wasted your message on the barren stones.

12. Ernest Hemingway (1899-1961) was one of the greatest U.S. fiction writers of the twentieth century, writing great works such as A Farewell to Arms, For Whom the Bell Tolls, and *The Old Man and the Sea*.

13. Ernest Hemingway, Death in the Afternoon (1932).

c. Steps to move through in a task-to-deadline time line

WRITER-BASED STEPS	READER-BASED STEPS
• Determining whether the question has already been answered	• Redrafting
• Thinking about the question and talking with others	• Revising
• Taking notes	• Editing
• Researching	
• Predrafting	
• Drafting	
• Redrafting	

In the best writings, your reader can read straight from the beginning of the document to the end. This straightforward reading can occur only when information is located where most appropriate and when the language used is easy to understand. As an effective writer, you do not want to force your reader to read one reference and then search through the document for information to clarify that reference. You also do not want to force your reader to use a dictionary in order to understand what you are trying to say.

You must also present a legal document that is professional, free of errors in grammar and style. If your presentation is sloppy, your reader may question whether the sloppy, unprofessional presentation carries through to your analysis. Your reader may begin to focus negatively on you, the writer, rather than on the important message located on the computer screen or page. When that happens, your credibility may become an issue. Strive to ensure not only that your message is substantively complete but also that you have conveyed that message in a professional manner.

Thus, this critical reading stage is where you must pay careful attention to detail—to clear topic, thesis, and transitional sentences; to the content and placement of each word, sentence, and paragraph; to citation rules; and to proper grammar, punctuation, and

A. Introduction: The U.S. View of Proper Attribution of Source

1. The importance of avoiding plagiarism

Plagiarism is considered a serious moral and ethical transgression in U.S. culture.[1] A student who plagiarizes can be subject to penalties under an educational institution's student code. Penalties range from failing a paper containing the plagiarized material or failing a course, to suspension or expulsion from school, to withholding a degree.[2] If employed, plagiarists risk losing respect among their colleagues and peers, and even risk losing their jobs.[3]

Software and online services aimed at detecting plagiarism are widely available. Many instructors regularly use these aids to detect plagiarism in student papers. It is far easier today to spot plagiarized passages than in previous years.

Furthermore, giving attribution to respected authorities to support points or ideas in your writing significantly strengthens the likelihood that your reader will accept your argument. Giving appropriate and frequent attribution results in a more persuasive paper.

2. Plagiarism defined

Plagiarism is the use of someone else's words or ideas, whether expressed in writing or orally, without proper attribution to the source.

Written words or ideas found in any public or private document, whether or not published, must be attributed to the source. Even words or ideas taken from a Web site must be given proper attribution. Borrowed words or ideas originally expressed in a live, recorded, or broadcast speech, debate, or conversation must be attributed to the speaker. Charts, graphs, illustrations, photographs, and images, or

1. Joseph Gibaldi, MLA Style Manual and Guide to Scholarly Publishing 151 (2d ed. 1998).

2. Napolitano v. Princeton Univ. Trs., 453 A.2d 263 (N.J. Super. App. Div. 1982) (the court upheld the university's sanction of withholding a student's degree for a period of one year because the student had quoted and paraphrased passages from a book in a class paper and failed to properly attribute these passages to the book's author).

3. Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Williams, 642 N.W.2d 296 (Iowa 2002) (the court suspended an attorney's license to practice law for filing a plagiarized brief in a federal district court); Matikas v. Univ. of Dayton, 788 N.E.2d 1108 (Ohio Ct. App. 2003) (the court granted a summary judgment in favor of the university, finding the university was within its rights to terminate a researcher's employment because he committed plagiarism in a manuscript submitted for publication).

information found in these sources, if borrowed by a writer, must also be properly attributed to the original source.

3. An exception for information of common knowledge

In U.S. culture, matters of common knowledge to the writer's target audience do not require a citation to a source. Unfortunately, what constitutes common knowledge is confusing. This confusion is further compounded by cultural differences. Matters of common knowledge have been defined as "includ[ing] whatever an educated person would be expected to know or could locate in an ordinary encyclopedia."[4] At least one university Web site on plagiarism suggests that a fact or phrase may be of common knowledge if the information can be found undocumented in five different sources.[5] Still other university Web sites on plagiarism are reluctant to be so specific in definition.[6]

The problem is that what someone in the United States considers common knowledge someone from another country may not, and vice versa. For example, the fact that Sandra Day O'Connor was the first woman to serve as a Justice on the United States Supreme Court is common knowledge to most citizens educated in the United States; however, this information may not be common knowledge to people educated outside the United States. Further complicating the situation is that what may be common knowledge to people educated in one particular discipline may not necessarily be common knowledge to people educated in another discipline. For example, it may be common knowledge among U.S. lawyers that there are 13 federal circuits in the United States, but this is likely not common knowledge to U.S. physicians. Therefore, when determining whether information is common knowledge, writers should consider their audience. If in doubt as to whether the information would be common knowledge to the writer's

4. Robert A. Harris, The Plagiarism Handbook 154 (2001).

5. Purdue OWL, *Avoiding Plagiarism, Deciding if Something Is "Common Knowledge,"* http://owl.english.purdue.edu/owl/resource/589/02/ (last visited Aug. 26, 2014) (facts may be of common knowledge if a student "find[s] the same information undocumented in at least five other sources. . . .").

6. *See, e.g.*, UC Davis, Div. of Student Affairs, Office of Student Judicial Affairs, *Avoiding Plagiarism, Guidelines for Avoiding Plagiarism*, http://sja.ucdavis.edu/files/plagiarism.pdf (last visited Aug. 26, 2014) ("[T]he fact must really *be* common. That George Orwell was the author of the anti-totalitarian allegory *Animal Farm* is common knowledge; that Orwell died at 46 in 1951 is not."). *See also* Ind. U. Writing Tutorial Servs., *Plagiarism: What It Is and How to Recognize It and Avoid It*, http://www.indiana.edu/~wts/pamphlets/plagiarism.shtml (last updated Apr. 7, 2014) (common knowledge includes "facts that can be found in numerous places and are likely to be known by a lot of people.").

target audience, the writer should always cite to a source for the information.

4. Intentional plagiarism

Intentional plagiarists knowingly use someone else's document, words, or ideas without attribution. Their intent is to deceive readers into thinking that they, the writers, alone conceived and wrote the material used. Another form that intentional plagiarists use is submitting their own material written for other courses. Unless a professor states otherwise, it is assumed that papers submitted in a course are written solely for the particular purpose of that course.

It may be tempting for you, especially if English is your second language, to turn to writing specialists, tutors, friends, or family members proficient in English to help you write your papers. The pressure to receive a good grade and the awareness that writing concise, grammatically correct sentences will likely improve the paper may induce you to permit others to write or rewrite your papers. You may think that because you performed the research and came up with the essential analysis for the paper, it is permissible for another person to finish the paper by revising phrases, sentences, paragraphs, or sections to make it more readable. Nevertheless, anytime you borrow another person's words without making proper attribution, even when the idea behind the material is your own, you have plagiarized. A paper that you've written for an assignment in a course is expected to be the product of your individual effort, unless the professor states otherwise. Therefore, the temptation to use others to write or rewrite papers, even merely for the purpose of correcting grammar or sentence structure problems throughout the paper, must be avoided. Otherwise, you risk incurring serious penalties that could jeopardize your educational pursuits.[7]

5. Unintentional plagiarism

Most people, however, do not intend to plagiarize. Nevertheless, it is just as serious to unintentionally plagiarize as it is to intentionally plagiarize. Even when their plagiarism has been proved, these unintentional plagiarists may still be convinced that they did not commit any wrongdoing because they never intended to plagiarize. The fact remains, though, that unintentional plagiarists still borrowed text and ideas from other sources without giving proper attribution to the original

7. *See, e.g., supra* notes 2 & 3.

author. Plagiarism "violates the moral code of learning,"[8] regardless of whether the student intentionally committed the plagiarism.

6. Ways to avoid plagiarism

a. Accurate and thorough researching

Plagiarism often results from sloppy or hasty researching. You should give particular attention, therefore, to your note taking while researching. Do not trust that you will remember later which words in your notes are yours and which are an author's. As you research, mark the exact words you have copied, as well as those passages you have paraphrased or summarized. Also, do not trust yourself to remember the source or the page number where you found the information that you have marked in your notes. Write down the source where you found the information while you are creating your notes.[9] When recording the source, be sure to include the complete title of the source, the author's name, and the page number where you found the information. If you are researching in multiple places, such as in the law school library, in the local public library, or on the Internet, note in which location you found the source so that you can easily return if you have questions later on.

b. Special consideration for information found on the Internet

If you found information on an Internet site, note the URL[10] address where you found the information. Plagiarism has become especially troublesome with students' easy access to the Internet. The ease in copying online information and pasting it into your own document heightens the risk of plagiarism. Be especially mindful of noting what has been pasted into your paper. When you are finalizing your paper, you can choose to take the highlighted words or passages and either summarize, paraphrase, or quote them, but you must always include a proper attribution to the Web site where you found the information.

Taking the time while you are researching to note whether you have quoted, paraphrased, or summarized information from a source will save

8. Edward M. White, Student Plagiarism as an Institutional and Social Issue in Perspectives on Plagiarism and Intellectual Property in a Postmodern World 205, 209 (Lise Buranen & Alice M. Roy eds. 1999).

9. Note taking also is discussed in Chapter 5.

10. Uniform Resource Locator, or the string of letters, words, and numbers that usually begins with *http*.

time later because you will not need to find the information again. More importantly, careful documentation while researching will prevent you from attributing text or ideas to the wrong source, or failing to give any attribution at all.

c. Appropriate management of time

Rushing to complete your research or to write your paper to meet a deadline can also give rise to incidents of plagiarism. Give yourself plenty of time to research and write a paper. Realize that most students who read and write English with ease spend many, many hours researching, putting the information together, and drafting and revising their writing in an effort to create well-written papers containing strong legal analyses. If you are not fluent in English, this process may take you even longer. Be honest with yourself about your level of skill in researching and your proficiency in writing, and budget your time accordingly. The research and writing process almost always takes longer than originally anticipated, even for native language learners.

B. Giving Appropriate Attribution

Proper attribution has three basic requirements: (1) the writer must accurately report the borrowed words or ideas in his writing; (2) the writer must notify the reader about any quoted words, phrases, or passages by either placing quotation marks around the quoted text or, if the quotation is 50 or more words, by placing the quoted text in block format; and (3) the writer must accurately and completely cite to the original source at all necessary points in her paper where she has borrowed text or ideas. The importance of accurate citations to the source cannot be overemphasized. Providing inaccurate or fictitious citations to borrowed text or ideas is plagiarism because the writer has failed to give correct attribution to the original source.

1. Quoting

Any words, phrases, or passages that are not your own must be attributed to the source where you found it. When using quoted text in your writing, make sure you comply with the following criteria.

1. *The quoted material accurately reflects the words in the original text.* If you modify anything within the quotation, such as changing the tense of a verb, replacing a proper noun with a pronoun, or omitting words or punctuation, you must note this using brackets or ellipses, as appropriate.[11]

Example:[12]

> In *In re Estate of Blodgett*, 147 P.3d 702, 707 (Alaska 2006), the court stated, "The legislature clearly decided that [where an heir commits a criminally negligent act accidentally causing the deceased's death,] there should be discretion in the court to consider the specific facts of the homicide and, if denial of the inheritance [from the deceased] would be manifestly unjust, to permit it."

2. *If the quotation contains less than 50 words, begin and end the quoted text with quotation marks.*

Example:

> "[T]he legislature broadened the application of the slayer statute — by extending it to unintentional killings — and created an escape clause — by enacting the manifest injustice exception." *Blodgett*, 147 P.3d at 706 (referring to Alaska Stat. § 13.12.803(k)).

3. *If the quotation contains 50 or more words, place the quoted text in block format.* Indent both the left and right margins and use single spacing. Do not use quotation marks around the block quote. The block format signals to the reader that the text is quoted material.

Example:

> In *Blodgett*, the court reasoned:
>
> > The legislature clearly decided that . . . there should be discretion in the court to consider the specific facts of the homicide and, if denial of the inheritance would be manifestly unjust, to permit it. . . . Where the killer's act was not intentional, and especially where the act was not even reckless, and where other circumstances lessen the overall effect of the crime, the application of the slayer statute may lead to unnecessarily harsh results.
>
> 147 P.3d at 707.

11. See ALWD & Coleen M. Barger, *ALWD Guide to Legal Citation* 345-354 (5th ed. 2014), for explanation and examples of the proper use of brackets and ellipses in a quoted passage.

12. The Blodgett passages given in this section were taken from the *Blodgett* case discussed in Chapter 4.

4. *Place the citation either within the sentence containing the quotation* (as shown in the example under 1 above) *or in a separate sentence* (a "citation sentence") (as shown in the example under 2 above). In the case of a block quote, the citation is not included as part of the block quote; following the quote, space down and place the citation at the original left margin (as shown in the example under 3 above). (See Chapter 19 for proper placement of a citation).
5. *Follow accurately an established legal citation style when writing citations.* (See Chapter 19 for the basic rules of proper citation format.)

Note that if the writers in the examples under 1, 2, and 3 above had included the quotation marks or block format but had omitted the citation, the writers still would have plagiarized the material. Also, if the writers in the same examples included the citation but omitted the quotation marks (in the examples under 1 and 2 above) or omitted the block format (in the example under 3 above), the writers still would have plagiarized the material. You must provide quotation marks around the quoted text or, in the case of a quote of 50 or more words, a block format *and* a citation to the source in order to give proper attribution to the source.

Some students, who don't give themselves enough time to complete a paper or are too uncomfortable to paraphrase or summarize information from a source, tend to string one quotation after another. Stringing one quote after another results in a paper that essentially is not the writer's work product. Also, quotations can take up a lot of space in a paper, especially when extraneous words or information are included in the quoted text. Overquoting leaves little, if any, room for the writer's own ideas, thoughts, and analyses, which are the objectives of most written assignments in law school. It is important to use quotations judiciously and only when using the source's exact words.

2. Summarizing

You may summarize the information contained in the original text. A summary is shorter in length than the passage in the original text, allowing more space for the writer to convey analyses or ideas. But you should also be aware that, by virtue of its brevity, a summary cannot convey all the points made by the author in the original text. Therefore, you should use a summary when (1) it is important to be brief and (2) it is unnecessary to convey all the points made by the author in the original text. A few quoted words or phrases may be included in a summary, in which case you must place quotation marks around the quoted text. When summarizing information from another source, comply with the following criteria.

1. Make sure that the summary accurately reflects information conveyed in the original text.
2. Quote any special words or phrases from the original text used in the summary.
3. Insert a citation to the source where you found the information you are summarizing, if required. (See Chapter 19 for the rules regarding when a citation is required in a legal document.)
4. Follow accurately an established legal citation style when writing citations to the information you are summarizing. (See Chapter 19 for the basic rules of proper citation format.)

Example:

The original text from *Blodgett* reads:

> The legislature limited the broad reach of the slayer statute by giving trial court judges the discretion to allow killers to benefit from the victim's assets if manifest injustice would result otherwise. Should an inheritance be denied to the unskilled teenager who drives his car in a criminally negligent manner and accidentally causes the death of his remaining parent? The legislature clearly decided that in such a case there should be discretion in the court to consider the specific facts of the homicide and, if denial of the inheritance would be manifestly unjust, to permit it.

A summary of a passage from *Blodgett* might read:

> The Alaska legislature expanded the coverage of the slayer statute to include unintentional killings but also limited its scope by creating an exception when its application would create a "manifest injustice," such as when a child drives recklessly and accidentally kills her only surviving parent. *Blodgett*, 147 P.3d at 707.

Note that even if the summary had not contained quoted phrases, the summary must include a citation to the original text. Failing to cite to a source when required is plagiarism.

3. Paraphrasing

Rather than directly quoting or summarizing a passage, you may elect to paraphrase the information from the original text. A paraphrase restates the original text in your own words. If the original text is complex or awkwardly worded, you may paraphrase the text, rather than directly quoting it, to convey the information in wording that is easier for the reader to

statute or by an administrative agency required to establish rules based on a statute; the tests may also be created judicially through the common law. A legal test that contains multiple requirements, all which must be met to establish the test, is called an elements analysis. Another legal test, known as a factors analysis, has no requirements but weighs the strength of different factors to determine the outcome. These are just two of the types of legal tests applied to determine the outcome of a legal issue.

Understanding the law and the tests the legislature or the courts have created is vital to an effective analysis and may create a different structure than in non-legal documents. This difference is due to how lawyers and judges solve problems when faced with litigation. In the broadest sense, lawyers and judges strive to resolve conflicts between parties. This definition is itself broad, however, because it includes non-lawyer problem solving such as what psychiatrists and marriage counselors do. The more accurate definition of what lawyers and judges do is to try and solve conflicts between parties using the rules set by the government and the judiciary as their starting point.

This last definition of problem solving provides the key difference between the structure of nonlegal and many legal documents. Understanding the law and the tests the legislature or courts have created in order to analyze the law is vital to a good analysis, since the legal test creates the basic structure of the analysis.

Your goal is to structure your legal analysis to reflect the approach courts in prior binding decisions have used in analyzing and answering a legal issue. If you are not sure how to structure a legal analysis, use the relevant court opinions as your guide. If the court separates its discussion of a legal test by elements or factors, for example, consider doing the same.

As stated in earlier chapters, one of the best guidelines to keep in mind is that as a legal writer you bring in information only when it becomes most relevant to your legal reader. This is why TRAC serves as a logical checklist for your analysis. For example, when analyzing a rule of law that has both a general rule and one or more exceptions to the rule, logic dictates that you would address the general rule before analyzing the exceptions. Or, when analyzing a rule of law with its own multipart test, use the multipart test to create the overall basic structure of your analysis. What follows are suggestions for the basic structure of a discussion, depending on the legal test raised. As discussed in Chapter 9 on using multiple cases in a single analysis, and in Chapter 12 on addressing legal issues that are not in dispute, the final structure may change depending on the specifics of a case.

B. Alternative Ways to Structure a Discussion of a Single Legal Issue

1. Elements analysis

An elements analysis sets out specific requirements that must be met in order to prove a legal test. In the covenant not to compete (CNC) example provided throughout this text, the reasonableness of a CNC is based on three elements: (1) the covenant cannot be broader than necessary for the protection of the buyer/covenantee in some legitimate interest, (2) the covenant cannot have an adverse effect on the seller, and (3) the covenant cannot have an adverse effect on the public interest. The overall basic structure of these elements might look like the following.

(T) Topic/thesis	Legal issue being addressed
(R) Rule	Statement of the elements that must be met in order to satisfy the legal issue

[*Note*: At this point you have identified multiple requirements that must be analyzed in order to answer the legal issue. If you continue by explaining the definitions and explanations of all the cases relevant to the multiple requirements, you may confuse your reader because you are providing more information than your legal reader can grasp or remember. You are not bringing in information where it is most helpful to your reader. Further, because the court must find either that all the requirements have been met in order to find the legal issue satisfied or, alternatively, that one of the requirements has *not* been met in order to find the legal issue is not satisfied, an element-by-element analysis is the most logical way to begin structuring this objective analysis. You may decide later to move various sections around, but it is the most logical way to begin. The overall analysis of this legal issue with multiple requirements, therefore, is composed of the analysis of each legal requirement, each with its own TRAC checklist.]

(A) Analysis/Application of the Law to the Facts

Topic/thesis:	Element #1
Rule:	Any definition or explanation of element #1
Rule explanation:	Any case law relevant to explain how the courts have analyzed the element in different factual situations
Analysis:	Application of the law to the client's facts to provide first the support for the stronger position and then the support for the weaker position
Conclusion:	Regarding element #1 only

Topic/thesis:	Element #2
Rule:	Any definition or explanation of element #2
Rule explanation:	Any case law relevant to explain how the courts have analyzed the element in different factual situations
Analysis:	Application of the law to the client's facts to provide first the support for the stronger position and then the support for the weaker position
Conclusion:	Regarding element #2 only

Topic/thesis:	Element #3
Rule:	Any definition or explanation of element #3
Rule explanation:	Any case law relevant to explain how the courts have analyzed the element in different factual situations
Analysis:	Application of the law to the client's facts to provide first the support for the stronger position and then the support for the weaker position
Conclusion:	Regarding element #3 only

(C) Conclusion	Regarding the main legal issue

What if one of the three elements in the example above has its own elements analysis? As you may guess, this requires a further breakdown in the structure.

(T) Topic/thesis:	Element #3
(R) Rule:	To satisfy element #3, two sub-elements must be met (and state the two elements)

(A) Analysis/application of the law to the facts:

Topic/thesis:	Re: sub-element #1
Rule:	Definition and explanation of sub-element #1
Rule explanation:	Regarding sub-element #1
Analysis:	Application of law to facts to analyze sub-element #1
Conclusion:	Re: sub-element #1

Topic/thesis:	Re: sub-element #2
Rule:	Definition and explanation of sub-element #2
Rule explanation:	Regarding sub-element #2
Analysis:	Application of law to facts to analyze sub-element #2
Conclusion:	Re: sub-element #2

(C) Conclusion	Regarding element #3

Since finding that any one of the elements or sub-elements will defeat a claim that the legal test has been met, the most logical structure is to analyze each requirement separately from all other requirements. By following this structure, you make it easier for your reader to understand the legal significance of your analysis. One word of caution, however: If the first element is obviously in dispute and you conclude that the element is likely not met, you should not stop your analysis there. You need to complete your analysis of the remaining required elements because a court might disagree with you and find that the first element has, in fact, been met.

2. Factors analysis

The structure of a factors analysis often depends on the numbers and complexity of the factors used in determining a legal issue. If a further breakdown of the factors is warranted, the structure of the factors analysis looks much like that of the elements analysis, with one additional component. After assessing the strengths and weaknesses of each factor, it is necessary to weigh the factors together to predict a likely outcome regarding the legal issue. For example, many statutes covering residential burglary require that a burglary takes place in a dwelling. To determine whether a structure legally is considered a dwelling, courts look at factors such as (1) the composition or nature of the structure, (2) the use of the structure, and (3) the frequency of the use of the structure. Not all the factors need to be met in order to satisfy the dwelling requirement; they are only considerations courts use to determine whether the building is a legal dwelling. One basic way to structure a factors analysis is as follows:

(T) Topic/thesis: Legal issue being addressed
(R) Rule: List of factors a court uses to determine the legal issue raised in this example (here based on two factors)
(A) Analysis:

Topic/thesis:	Factor #1
Rule:	Any definition and explanation of factor #1
Rule explanation:	Any case law relevant to explain how the courts have analyzed factor #1 in different factual situations
Analysis:	Application of the law to the client's facts to provide first the support for the stronger position and then the support for the weaker position
Conclusion:	Regarding whether factor #1 is likely to be met

[*Note*: There may be times when a conclusion at this point is not appropriate; rather, a single conclusion after discussing and weighing all the factors together may work best.]

Topic/thesis:	Factor #2
Rule:	Any definition and explanation of factor #2
Rule explanation:	Any case law relevant to explain how the courts have analyzed factor #2 in different factual situations
Analysis:	Application of the law to the client's facts to provide first the support for the stronger position and then the support for the weaker position
Conclusion:	Regarding whether factor #2 is likely to be met

Weighing/balancing factors #1 and #2 to determine whether, collectively, they support a finding that the legal issue had been met.

(C) Conclusion: Regarding the legal issue

Again, remember that the suggested organizational scheme above is not an absolute formula that you must follow in all cases. You may decide, for example, to combine factors, or, if the number of factors is small and the analysis is straightforward, to address all factors together. One of the considerations in determining structure is the actual factor at issue. If the factor to be considered is based on a fact rather than a legal term, it is

more likely that it can be addressed fairly quickly. For example, when addressing a false imprisonment claim, one of the requriements is that the alleged victim be confined. One way to prove confinement is through a threat of physical force. To determine whether a threat of physical force existed, the court will look at factors such as the actions of the defendant, the relative size of the defendant compared to the alleged victim, the language and tone of the defendant, if applicable, and the number of defendants compared to the number of alleged victims. These are all fact-based factors that can likely be addressed in a straightforward manner.

In contrast, the factors used to determine whether an employee who normally could be fired at any time has elevated her status so she could only be fired with cause are based on legal terms. Those factors assess whether the employee left permanent employment, was hired for permanent employment, and was uniquely qualified for the position. All three of these factors require further defining, which means looking for definitions and case explanations to assist. The discussion of these factors, therefore, would take more time and explanation and are more likely to be addressed separately.

Determining the most logical structure is best achieved by reviewing the document from the reader's viewpoint. If you find that the draft is difficult to follow because you have combined factors, rewrite it, separating one or more factors. If, conversely, you find that the factors are introduced separately in a way that makes the final weighing of the factors difficult to follow, rewrite it, combining one or more factors.

A good source in determining this structure is, again, the relevant court opinions. If you find that binding courts tend to separate the factors, do that as well. If, however, binding court opinions tend to group factors together, this is likely the best approach in your own discussion. The final decision may also depend on whether the factor is or is not in dispute.

3. Balancing test

Some legal issues involve balancing the opposing parties' positions to determine which is stronger. This test is often used when assessing the validity of a constitutional claim. For example, let's say that a citizen is prohibited from protesting on a courthouse lawn. To determine whether a citizen's First Amendment right to free speech under the U.S. Constitution has been violated, a court must weigh the government's interest in maintaining a peaceful environment on public, governmental property against an individual's right to speak her own political thoughts. An

example of the need to balance interests in a criminal case may occur when a police officer stops a suspect, searches him, and finds drugs in his pocket. Since the police officer does not have a warrant to search the suspect, the defendant might move to suppress introducing the evidence of drugs in court. The court must balance the governmental interest in bringing to justice criminals against the individual's right under the Fourth Amendment to be free from unwarranted governmental intrusions.

Balancing tests exist in state law issues as well. In a state nuisance action, for example, the court must weigh a plaintiff homeowner's complaint that the defendant neighbor's actions are intruding on the homeowner's right to the peaceful enjoyment of his property against the neighbor's right to use and enjoy her own property.

The structure of a balancing test might look like the following.

Topic/thesis:	Legal question (such as nuisance) that is based on a balancing test
Rule:	Statement of the balancing test
Rule explanation:	Description of relevant case law where courts applied the same balancing test in a similar factual situation (case law may also be introduced when the weaker position is introduced)
Analysis:	Support for the stronger position; support for the weaker position
Conclusion:	Why, when weighing one party's interest against the other, the first position is stronger.

4. Shifting burdens of proof test

Sometimes deciding a legal issue includes both procedural and substantive components. For example, in a lawsuit where a female plaintiff is fired and sues her former employer for sexual discrimination the plaintiff employee bears the initial burden to show that the employer fired her for a discriminatory reason based on her gender. If the employee meets this initial burden, the burden shifts to the defendant employer to prove a nondiscriminatory reason for firing the employee. If the employer is able to meet its burden, the burden shifts again back to the employee, who then has an opportunity to prove that the employer's stated reason for firing the employee is really a pretext (or false reason) for the actual, discriminatory reason for

being fired.[1] The structure of the analysis would follow the structure of the shifting burdens test, as follows.

Topic/thesis:	Re: legal issue being addressed
Rule:	Statement of the shifting burdens of proof test
Rule explanation (optional):	Any case law descriptions where courts have applied the same test to similar factual situations
Analysis:	

Topic/thesis:	Re: first test (plaintiff's burden)
Rule:	Any explanation/definition of the first test
Rule explanation:	Case law descriptions where courts have applied the same test to similar factual situations
Analysis:	Application of the law to the client's facts (stronger then weaker position)
Conclusion:	Regarding first test

Topic/thesis:	Re: second test (defendant's burden)
Rule:	Any explanation/definition of second test
Rule explanation:	Case law descriptions where courts have applied the same test to similar factual situations
Analysis:	Application of law to the client's facts (stronger then weaker position)
Conclusion:	Regarding second test

Topic/thesis:	Re: third test (plaintiff's burden)
Rule:	Any explanation/definition of third test
Rule explanation:	Case law descriptions where courts have applied the same test to similar factual situations
Analysis:	Application of law to the client's facts (stronger then weaker position)
Conclusion:	Regarding third test

Conclusion:	Regarding legal issue

1. The burdens of proof for indirect employment discrimination claims have been established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and later clarified in Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Again, notice in the above examples that the outlines refer only generally to the structure of the objective analysis. The examples do not include where to place specific information such as case explanations, relevant public policy considerations, and the like. Placement of specific information depends on the specific questions raised and the extent of the relevant case law.

C. Tell the Reader What Is to Come: Providing a Framework Section for the Discussion

Again, strive to provide information when it becomes most relevant to the legal reader. This guideline is essential when determining what to provide in the first section of an objective discussion. What to include depends on the result of the merger of the law with the client's facts.

1. A topic or thesis sentence

You always want to tell the reader your purpose in writing a document. The purpose usually originates in the supervising attorney's instructions to an associate in a law firm. It is quite likely, however, that someone other than the supervising attorney ultimately will read the document. Setting out the purpose of the document at the beginning tells the reader the scope of the analysis and helps any reader who is not familiar with the case.

Let's return to the covenant not to compete (CNC) example used in prior chapters. A topic sentence might read as follows.

> The issue is whether the CNC that Ana Hart has been ordered by the court to sign is overbroad in its protection of David Hart's business interests and is therefore unreasonable.

If you wanted to change the topic sentence into a thesis sentence and also include your conclusion on the legal issue, you might write this.

> The CNC that Ana Hart has been ordered by the court to sign is likely overbroad in its protection of David Hart's business interests and is therefore unreasonable.

Include also in the framework paragraph some factual context for the legal issue being addressed. Do not repeat all the facts of the client's case.

You need provide only enough of the client's story to enable the reader to understand why the legal issue is in dispute. This factual context may be included with the main issue statement or it may follow in a sentence or two.

In the CNC example, a thesis provided within the factual context might read as follows.

> The CNC that Ana Hart has been ordered by the court to sign as part of her divorce settlement is likely overbroad in its protection of David Hart's business interests and is therefore unreasonable. David and Ana Hart own a health and exercise club business; David petitioned for and the court ordered that David buy Ana's interest for fair market value and Ana sell her interest and sign a covenant not to compete.

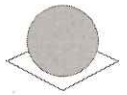
2. Any relevant rules

This framework or introductory section, sometimes also called a roadmap, usually contains the main rule you are applying to resolve the legal issue. This may be a constitutional provision, a statute, or a common law rule. If the main rule used to determine the legal issue has its own constituent parts, as with an elements or factors analysis, setting out the main rule means setting out those elements or factors used to determine the outcome of the legal issue.

An example of a framework section in Ana Hart's CNC case is as follows.

> The covenant not to compete that Ana Hart has been ordered by the court to sign as part of her divorce settlement is likely overbroad in its protection of David Hart's business interests and is therefore unreasonable. David and Ana Hart own a health and exercise club business; David petitioned for and the court ordered that David buy Ana's interest at fair market value and Ana sell her interest and sign a covenant not to compete (CNC).
>
> East Carolina courts use the following three-pronged test to determine whether a CNC signed as part of the sale of a business is unreasonable: "(1) the covenant must not be broader than necessary for the protection of the [buyer] covenantee's legitimate business interest; (2) the covenant cannot have an adverse effect on the [seller] covenantor; and (3) the covenant cannot adversely effect the public interest." *Mats Transp. v. ABC Corp.*, 824 S.E.2d 1467, 1468 (E.C. Ct. App. 1992).
>
> [As discussed earlier, what follows would be a discussion, using the TRAC checklist of each of the three requirements, concluding at the end whether the CNC was or was not reasonable.]

we may be persuasive but not really know why: we just know what works or doesn't work for each of us to persuade someone to do what we want them to do. Think about how you convinced your parents to let you go to a party or stay up later than usual; no doubt you were using some of the known persuasive techniques, even though you may not have realized it. This chapter will focus on persuasive techniques useful when writing about the law (but may also be used when arguing non-legal issues as well).



B. Means of Persuasion: Classical Rhetorical Techniques

Rhetoric is the art of using words effectively in speaking or writing. Aristotle[1] identified three main goals when striving to persuade an audience:

1. Strive to be believed (by appealing to the *ethos* or one's credibility);
2. Strive to tell your story so your reader wants to agree with your position (by appealing to the audience's *pathos* or emotions); and
3. Strive to show why your position is logical (by appealing to the *logos* or sense of logic).

1. Strive to be believed

The appeal to *ethos* focuses on presenting your argument in a way that establishes your own character and credibility in the mind of your audience. Aristotle's appeal to the *ethos*, Latin for "ethics," must permeate the argument. This is essential in both oral and written communications. Oral communication is discussed in detail in Chapter 17. Being credible means simply that your reader believes the truth of what you are saying. If not — if your reader questions the truthfulness of your statements — you will lose your credibility and likely never be convincing. If you are negotiating a contract agreement and you learn that one or more of the other party's representations is untruthful, you will likely be hesitant to move forward with the agreement. At the very least, you will be extremely cautious in moving forward. Or if you receive a letter from opposing counsel, demanding that you pay a certain amount of money or you'll be charged with a crime, and the action has no potential criminal consequences, you will likely distrust everything opposing

1. Linda Levine and Kurt M. Saunders, *Thinking Like a Rhetor*, 43 J. Legal. Educ. 108, 112 (March 1993).

counsel asserts. Once credibility is lost, it's virtually impossible to get back.

To promote credibility when writing about the law, strive to avoid, for example, telling a story that includes misstatements or adds facts that did not actually occur. If that happens, your reader — most likely opposing counsel or a judge — will likely become suspicious of you. That suspicion will carry into the assertions you make and the substantive arguments you develop to support your client's position. To achieve credibility when writing persuasive legal documents, consider the following:

a. Present an honest representation of the case

Your case does not have to be perfect in order to win; your case only needs to be better than the opponent's case. If your case was perfect, you would likely not be writing a document to the court.

Your credibility will be strengthened by recognizing and acknowledging the weaknesses in your case and then arguing why those weaknesses do not change the desired outcome based on the facts, relevant authority, and applicable public policy. By acknowledging the weaknesses, you create an image of objectiveness and believability. Be careful, however, not to acknowledge a weakness in your case that would threaten your desired outcome.

Throughout the remainder of this chapter, two examples will be used based on the Ana Hart covenant-not-to-compete (CNC) case. The first example, introduced in Chapter 7 and again in Chapter 9, addresses the fact-based issue regarding the reasonableness and therefore the validity of the CNC the court was ordering Ana to sign as part of her divorce agreement. The second example addresses a law-based issue introduced in Chapter 14, that is, whether when Ana's husband David wiretapped their home phones and recorded conversations between Ana and her friend, John Sweeney, he violated the Wiretap Act, 18 U.S.C. §§ 2510-2522 (2000 & Supp. III 2003), and is subject to civil action. The legal question is whether the Wiretap Act covers interspousal wiretaps.

When ruling on legal issues involved in a case, the judge must consider both parties' positions. You will do a better job when writing your document in a way that reflects both sides of the case but leads the judge to the conclusion that favors your client. Do not omit key information, even if it is adverse to your client's position, and do not include anything false. Consider yourself as taking on an advisory role. If you were talking to the judge while drinking coffee, how would you convince her to agree with your client's position? You would likely not convince the judge by slamming your fist on the table or by saying, "Take my word for it: I'm correct." Rather, you might explain the key points of the story based on the law in a well-reasoned manner. This explanation would include an

explanation of both sides but would emphasize your own story and why your desired outcome is correct. For more on addressing adverse authority, *see* Section D.10 below.

b. *Don't attack opposing counsel or the lower court judge*

One of the quickest ways to know an argument is weak and not grounded in the law and precedent is when the argument criticizes the other attorney or even the lower court judge. Attacking a human being rather than the argument (known as arguing *ad hominem*) is a clear indication that the writer had little legal basis for his or her position. Further, even though you may be arguing that the lower court ruled incorrectly, be careful not to attack the lower court judge. Stay focused on the argument and not on the individual.

In the Wiretap Act example, as Ana's counsel you might be tempted to say something negative about David as a way to influence the decision; however, this is a question of law—determining whether this case falls within the class of cases intended to be covered by the Wiretap Act. Calling David a "low-life" will not further your argument but may result in your reader's focusing on you, the writer, and not in a good light. Similarly, criticizing the circuit courts that have determined the Wiretap Act does not cover interspousal wiretapping will not accomplish anything. Arguing why those reasons for its being covered by the Act and why those reasons outweigh any countervailing reasons will be more persuasive.

2. *Strive to tell your story so your audience* wants to *agree with your position*

The second rhetorical tool identified by Aristotle is the appeal to *pathos*, or the emotions. Consider today's society and how the world's media plays an important role in influencing the public. Pictures alone can evoke certain emotions. Examples of media coverage that have evoked emotional responses include the joy of the birth of a new emperor in Japan, the funeral of Princess Diana in England, or the pictures of the devastation in Indonesia following the tsunami.

When writing a persuasive document, appealing to one's emotions is perhaps the most challenging tool to use, because when writing about the law you must not be obvious about appealing to the reader's emotion. Rather than telling your reader directly what to feel, strive to tell a story in such a way that it evokes a certain emotional response in your reader. For example, instead of telling a U.S. jury to be angry about what a defendant did, the prosecutor might explain the story and the specific results it had on the victim in an effort to make members of the jury feel angry.

Consider Mark Antony's speech to the citizens of Rome. After Caesar was murdered by his friends, including his best friend Brutus, Mark Antony went before the Roman crowds and made the following speech:

> You all do know this mantle. I remember
> The first time ever Caesar put it on.
> Twas on a summer's evening, in his tent,
> That day he overcame the Nervii.
> Look, in this place ran Cassius' dagger through.
> See what a rent the envious Casca made.
> Through this the well-beloved Brutus stabbed,
> And as he plucked his cursed steel away,
> Mark how the blood of Caesar followed it,
> As rushing out of doors, to be resolved
> If Brutus so unkindly knocked, or no.
> For Brutus, as you know was Caesar's angel.
> Judge, O you gods, how dearly Caesar loved him!
> This was the most unkindest cut of all,
> For when the noble Caesar saw him stab,
> In gratitude, more strong than traitor's arms,
> Quite vanquished him. Then burst his mighty heart,
> And, in his mantle muffling up his face,
> Even at the base of Pompey's statue,
> Which all the while ran blood, great Caesar fell.

William Shakespeare, Julius Caesar, III, ii.[2]

As with many works of Shakespeare, this passage is difficult to understand, even for those who speak English as their first language. The persuasive technique, however, is easy to recognize. Mark Antony did not order the citizens of Rome to be angry at Brutus over the death of Caesar. Rather, Mark Antony told the crowd the story of what happened. He showed the crowd the robe (called a "mantle") that Caesar wore and where Brutus's dagger pierced the cloth and ran through Caesar's skin, shown by the blood stains. Mark Antony also spoke of how Caesar loved Brutus, making the actions of the traitor, Brutus, an even greater betrayal. Mark Antony relayed indisputable facts. And Mark Antony's story—his descriptions of the love shared by Caesar and Brutus and the horrible betrayal by Brutus—were likely designed to evoke the angry response of the crowd.

Any argument relying solely on emotion, however, is a losing argument. So while as an advocate you want to consider how to elicit from

2. Eileen Dunleavy, "*The Art of Swaying a Hostile Crowd: Mark Antony's Funeral Ovation*," http://www1.umass.edu/corridors/secondessay257.html (December 2008).

your audience the kinds of emotions that will help your client's case, you want to be careful about overusing this emotional technique in your persuasive legal argument.

Key to effectively appealing to the emotion of the audience is subtlety. Subtlety requires that your actions are unnoticeable. Once the audience knows that you are trying to elicit a certain emotion, the effectiveness of the appeal is diminished, if not lost. This is one reason why you want to be careful to not blatantly tell your audience how to feel. Further, the level of a subtle emotional appeal will best be applied when arguing a fact-based issue. When arguing a law-based issue, such as the applicability of the Wiretap Act to interspousal communications, an emotional appeal, even a subtle one, is less effective, unless it can be used to emphasize certain policy reasons for reaching the conclusion you desire.

A good way to infuse *pathos* into your argument is to consider what emotion you want to elicit from your reader and then determine how you can achieve that result through the careful use of language and structure in your argument. These techniques are especially helpful when telling the story of your client's case. The desired emotions may be anger, sympathy, or sadness, to name a few. Once you know what emotion you want your reader to feel, strive to achieve this result by considering how to describe the parties and the facts of the case. If your client is the plaintiff, you may want to describe her situation in a way that portrays her as a sympathetic figure who has been wronged. If you are representing a defendant company against a former employee, you may want to describe a company that is fair to its employees and progressive in providing benefits and advancements. Once you know your goal, keep it in mind whenever you are referring to the parties and events in your persuasive document.

Consider the following:

Example: The individual walking across the street
or
The eighty-two year old woman with a cane crossing across the street

If you are trying to convince a jury that a driver was not driving carefully or defensively, you are more likely to provide the factual detail in the second example (provided that the description is accurate). If, however, your client was the driver of the car described above, you are more likely to describe the victim more generally.

When writing an argument, also consider carefully the way you describe the parties in your case. If you are appealing on a personal

level, such as when you want the reader to feel sympathetic toward your client or another party in your case, consider using the individual's given[3] name. You want your reader to remember the human being involved in the story. If, however, your argument is based on more impersonal logic, you may choose to describe one or both parties based on their relationship rather than using their names. Thus, you may refer to the doctor rather than Dr. Hooper; the buyer rather than Dan Jones; or the store owner rather than Leslie Cook. Regardless of your goal, avoid referring to the parties in your client's case as appellant/appellee or petitioner/respondent, or even plaintiff/defendant. Appellant, appellee, petitioner, and respondent are the labels placed on parties to an appeal; plaintiff and defendant are the names of the parties in a civil trial. These general terms are not as helpful to your reader as a generic reference that reflects something substantive about the individual to whom you are referring. This is especially true for the reader who is not familiar with your case or the parties in the relevant case law.

One way to distinguish between the parties in your client's case and the parties in the case law you are explaining in your argument is to refer to the parties in the cited cases using their relationship/status and to refer to the parties in your client's case by their personal given names. That way you will always be emphasizing the client's case in your story. Even if you choose to use personal names for the parties in your client's case, you may make a conscious choice about whether to call an individual by his or her first name, last name, or by using a formal introduction, such as Mr., Miss, Mrs., or Ms.[4]

Consider the following:

John Jacob vs.
John vs.
Jacob vs.
Johnny vs.
Mr. John Jacob vs.
Buyer

3. The "given" name is the first name given to a child at birth, which is usually coupled with the family name.

4. The suggestion in this paragraph and the last may conflict, since you may choose for persuasive reasons to call a part in your client's case using a generic reference. If you make this persuasive choice, be sure to show the distinction between the party in your case and the party mentioned from the cited case, e.g., by referring to "the buyer in *Smith v. Jones*."

Another sign of a weak argument is when the writer exaggerates the facts. Think about the person who calls you on the phone and tries to sell you a product. Even when you say you are not interested, the caller may continue to try and sell the product. As the listener trying to get off the phone, you may likely become highly defensive and unhappy. As a legal writer, you do not want to elicit this type of response from your reader. Once you detect the writer is exaggerating the facts you are likely to question the entire argument.

Example of an inappropriate argument:

> It is clear and obvious that David wants to ruin Ana's career, making it impossible for her to work anywhere in the area where she has lived since arriving in the Unites States, unless she works at McDonald's. Her livelihood has been showing others how to remain fit, and now David wants to take that livelihood away from her. His spite and desire to punish Ana is not a reason to allow such an expansive CNC.

Finally, avoid overusing ineffective emphasis, mechanical contrivances, like *italics*, <u>underlining</u>, **boldface type** — dashes-and exclamation points!!!!! Some writers use these mechanical tools as a way to emphasize information. Instead, use strong nouns and verbs and the other mechanical tools discussed in Section F below.

Consider the following inappropriate paragraph:

> It is **clear** and **obvious** that David wants to RUIN ANA's CAREER! He wants to make it **impossible** for her to work anywhere in the area where she has lived since arriving in the United States — **UNLESS IT'S MCDONALD's!!!** Her ***livelihood*** has been showing others how to remain physically fit, and now ***David wants to take that livelihood away from her***. His **spite** and **desire to punish Ana** is **NOT** a reason to allow such an expansive CNC.

3. Show why your position is logical

The last approach, and the most important, is the appeal to one's logic, or *logos*. If you can persuade your reader, for example, that the first step of your argument compels the next step, which in turn leads logically to the third step, which leads to the conclusion you want your reader to reach, your reader is more likely to agree with you.

Think about telling someone how to get to your home. If you forget to include one turn, or if you tell your friend a wrong turn, he will likely never

reach your home.[5] Just as your directions must be precise and include each step necessary to reach the destination, so must each logical step in your argument be included so your reader can agree with your desired conclusion.

When writing a legal argument, any persuasive argument must be based on the rules set down by society (through constitutions, statutes, cases, and binding administrative regulations). The presentation of your argument based on this precedent must be obvious and blatant to your reader.

For example, be careful to include each relevant part of an applicable legal test and be thorough in your support through relevant fact, law, and policy. This goal is no different than when you wrote an objective document. What is different, however, are the choices you may make in the structure of your document and the way you address opposing counsel's position. Consider the following:

a. Carefully document assertions through logical reasoning

Your job is to express your client's view strongly, not to tear down the opposing client's position. Effective persuasion starts from a logical base rather than an emotional base. Assert only what you can support or prove as you proceed.

As you have read previously in Chapter 9, U.S. lawyers must use both deductive and inductive reasoning in legal analysis. We use deductive reasoning when conclusions are reached by reasoning from the general to the specific, as when we apply statutes and other legislative enactments and common law rules to the facts of each individual case. We use inductive reasoning when conclusions are reached by reasoning from a number of particulars to the general, as when we apply case law precedent to support our arguments through factual analogy and distinction. Legal analysis requires a combination of both types of reasoning. If a relevant statute exists, for example, always begin with the key statutory language. In order to argue that the application of that general language to the facts of our client's case warrants a specific conclusion, we use factual analogies and distinctions from binding, relevant case law to show how our argument based on the client's facts is supported by the court's application of the general language to cited cases with similar facts. The same process applies once a common law rule is recognized; the common law rule provides the general rule, but the case law reveals how the common law rule has been interpreted and applied to different

5. Of course, this story presumes that your friend is without a GPS.

sets of facts. Thus, there's an interweaving of deductive and inductive reasoning in any legal argument.

b. *The use of syllogistic arguments*

The classic example of the logical argument is the syllogism. A syllogism is a form of argument or reasoning consisting of two propositions (the major premise and the minor premise) containing a common term, and a third proposition (the conclusion), following logically from the two propositions. The classical syllogism created by Aristotle follows:[6]

Major Premise(rule):	All Men Are Mortal.
Minor Premise:	Socrates is a Man.
Conclusion:	Therefore, Socrates is Mortal (compelled by the major and minor premises).

The syllogism is a form of deductive reasoning, moving from general principles or rules to particulars (for example, the use of multiple cases compared to the client's case) to compel the conclusion. In the example above, all three statements in the major premise, the minor premise, and the conclusion are fact: none of the assertions can be challenged. In the law, however, each of the steps of a syllogism may be challenged.

For example:

Major Premise:	A fine will be imposed to any person who enters a park on a vehicle.
Minor Premise:	Sally rode her bicycle in the park.
Conclusion:	Therefore, a fine will be imposed on Sally.

First, the major premise, or rule, may be challenged. What if a three-wheeled vehicle drives into the park to empty the trash cans found throughout the park? It is unlikely that the driver would be fined. It is also unlikely that the city would fine itself should it decide to add more public benches to the park and must have those delivered in trucks.

Second, the minor premise may be challenged. Is a bicycle considered a "vehicle" under the law? If the rule contains no definition of vehicle, you will need to learn how courts have interpreted "vehicle" and whether you

6. Ruggero J. Aldisert, Stephen Clowney & Jeremy D. Peterson, *Logic for Law Students: How To Think Like a Lawyer*, 69 U. Pitt. L. Rev. 1, 3-4 (Fall 2007).

are bound by a court decision regarding the status of a bicycle under the rule. If not, you will want to determine why the rule exists and whether that public policy reason for prohibiting vehicles would apply to a bicycle. You will also want to assess how you might argue, based on relevant binding case law, that the bicycle is or is not a vehicle, depending on the outcome you desire for your client. Your argument will rely heavily on analogies and distinctions of your client's facts and the facts of the relevant cases.

In Ana Hart's case based on the Wiretap Act, the law-based argument based on the plain language of the Act might look like the following:

Major Premise:	Except as otherwise specifically provided in this chapter, any person who — (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, oral, or electronic communication . . . shall be punished . . . or shall be subject to suit.
Minor Premise:	David is "any person" David "intentionally intercepts" "oral communication"
Conclusion:	David's interspousal wiretapping is covered by the Wiretap Act

Of course, as we know, opposing counsel is challenging whether the Wiretap Act covers interspousal wiretapping. This would compel a series of syllogisms and would ultimately focus on congressional intent based on the language of the Act and the legislative history that was provided. For more on using logic in a legal argument, see below.

C. *Writing the Persuasive Document to the Court*

Let's take a moment to consider the purpose, the audience, and the tone of the document. The following chart shows the main differences between an objective document, such as an office memorandum, and a persuasive document, such as a brief to the court:

Objective Discussion of an Office Memo:	**Persuasive Argument to a Court:**
Purpose: To inform To predict	Purpose: To inform To persuade

Objective Discussion of an Office Memo:	**Persuasive Argument to a Court:**
Audience: Supervising attorney	Audience: Judge Law clerk Opposing counsel Client
Tone: Can be somewhat informal	Tone: Formal — no contractions, or use of slang or informal language

When writing an objective document, the purpose is to inform the reader about the relevant law and the client's facts in light of that law. The purpose is also to predict a likely outcome in the case or to answer the question posed by the supervising attorney. In a persuasive document, the purpose is also to inform the reader about the relevant law and policies and the client's facts in light of that law. Rather than predicting a likely outcome, however, the purpose is to persuade the reader to decide the case in your client's favor.

The audience is now most likely a judge or a law clerk, an attorney representing the opposing party, or possibly even the client. The tone of a persuasive document, in particular a document to a court, is formal and professional. In the United States, careful attention to language and the presentation of the document is an essential component to persuading the reader that your client's position is correct. You will still be focusing on organizing your writing based on the relevant law and following the TRAC checklist, by leading with the legal conclusion (**T**), explaining the relevant law (**R**) before applying it to the facts of your client's case (**A**), but without providing support for the weaker position, which in an advocacy document is always the opposing client's position, and ultimately concluding (**C**). But even though you are now arguing only on behalf of your client, you must still consider those arguments that support the opposing party's position as well. You can only present your client's position most effectively by first being aware of the opposing party's strongest arguments.

In a persuasive document you are focusing only on your client's argument, even if that argument is not stronger than the opposing party's argument. It is the opposing counsel's job, not yours, to argue the opposing client's position. Further, you will *never* write a topic sentence in a persuasive document. You will only write thesis sentences. Topic sentences provide a neutral statement reflecting the subject of the paragraph or section of the document. Thesis sentences not only inform the reader about the subject of the paragraph or section but also provide your conclusion regarding each point. When writing persuasively, always lead first with an assertion reflecting the legal point you are making, and then provide the appropriate support for those assertions.

Example of a topic sentence:

The issue is whether the covenant not to compete Ana has been asked to sign is unreasonable because it is overbroad in its protection of David's interest.

Converted to a thesis sentence:

The CNC that the court has ordered Ana to sign is unreasonable because it is overbroad in its protection of David's interest.

Finally, to persuade your reader, you must make conscious choices about language and about the placement of that language within each sentence, within each paragraph, and within the entire document, following the techniques found in Section F below.

1. Develop your own persuasive style

It is often when writing persuasively where individual styles and preferences emerge. Some writers develop a more assertive style and others will take a more scholarly approach, leading readers carefully to what they believe is logically the more correct conclusion. Both styles may be effective, as long as the writer is careful not to take either approach too far. If, as a writer, your style is too aggressive (rather than assertive), for example, your reader may question the truthfulness of your argument, putting your credibility (*ethos*) in question. If your writing style is too aggressive, your reader may also respond defensively, reading your document more critically by looking for flaws in your analysis. If you are too aggressive, you may create problems for both you and your client.

Conversely, if your approach is too scholarly, lacking attention to key persuasive techniques, your document may sound too objective and not persuade your reader. This scholarly approach can also lack effectiveness.

2. Consider the applicable standard of review

As discussed in Chapter 3, once a trial court reaches a decision in a case, the losing party may file an appeal. If that appeal is granted by the appellate court, its job is to review the record of the lower court case to determine whether the judge erred to such a degree as to warrant a reversal or modification of the lower court's ruling.[7] The extent of the higher

7. If the error by the lower court did not affect the ultimate outcome in the case it is known as harmless error, and the decision will not be reversed.