CHAPTER 1

INTRODUCTION TO PROFESSIONAL ROLE AND IDENTITY

A. The Reflective Practitioner of Law

You go to a doctor and describe the symptoms that bother you. After examining you and perhaps detecting a few symptoms that you had not noticed before, the doctor names a disease, writes a prescription, tells you how many days it should take for the prescription to work, and asks you to telephone by then if it has not. Does the doctor know for certain that you in fact have this disease? Probably not.

The late Donald Schö
 Finding that other professionals in general think. Among many things, he asked doctors to estimate the proportion of their patients who present problems that “are not in the book” in the sense that the doctor needs to “invent and experiment on the spot” to figure out what treatment will work. The estimates he received ranged from 30% to 80%, and he said that the 80% estimate came from “someone whom I regard as a very good doctor.”

This is typical of the problems faced by a professional in any field, whether it is medicine or architecture or law. To a layperson, it seems that the distinguishing mark of a professional is knowledge that other people do not have—almost like a sorcerer’s secret book of magical formulas. Certainly, professionals do have specialized knowledge. But in professional work there are very few, if any, cookbook answers. Instead, what really distinguishes a professional is a way of thinking that enables the professional to solve problems even when a situation is wrapped in a fog of “uncertainty, uniqueness, and conflict.”

1. Donald A. Schö
2. Id.
3. Donald A. Schö
People who have never practiced law—which means both law students and the laypeople who become clients—easily underestimate the amount of uncertainty inherent in nearly every situation presented to a lawyer for solution. The law may be unclear. The facts may be difficult to ascertain. And most often, it is hard to make precise predictions about how judges, juries, administrative officials, adversaries, and opposing parties will react to evidence and arguments. None of that is an excuse for the lawyer to say, “We’ll try the first thing that looks good and hope for the best.” Professionalism means, among other things, finding a solution that is hidden inside all that uncertainty and conflict.

Schön used the term “reflection-in-action”4 to describe the process through which professionals unravel problems and solve them. This is not the kind of abstract and academic reflection that you went through when you wrote a term paper in college. Instead, it is a silent dialogue between the professional and the problem to be solved. In that dialogue, the professional uses what is already known in order to learn what is not yet known, through experimentation or some other form of investigation, until a solution is found. (Remember the doctor who does not really know what is making you feel sick. If the medication prescribed works, the doctor has solved the problem. If not, the doctor will experiment with something else.)

The reflective practitioner is one who can reflect while acting. To do that well we need “the ability to think about what we are doing while we are doing it, to turn our thought back on itself in the surprising situation.”5 We need to examine our own conduct, self-critically. Effective professionals never stop doing that, no matter how experienced they become.

As Paul Brest has written, “good lawyers bring more to bear on a problem than legal knowledge and lawyering skills. They bring creativity, common sense, practical wisdom, and that most precious of attributes, good judgment.”6 Good lawyers bring as well some characteristics explained in Section 1.B, such as prudence and a wariness about assumptions.

B. Some Things Effective Lawyers Know

Together with the subjects discussed elsewhere in this chapter, in Section 4.A (clients), in Section 4.B (legal problem-solving), in Section 4.C (communications skills), and in Section 4.D (multicultural skills), the ideas mentioned below are among the themes of this book. We will return to them often.

4. Id. at 22.
5. Schön, supra note 1, at 244.
1. The Most Important Thing That a Lawyer can Bring to Any Situation is Good Judgment

Good judgment is “the [legal] profession’s principal stock in trade.”\(^7\) It is “the most valuable thing a lawyer has to offer clients — more valuable than legal learning or skillful analysis of doctrine.”\(^8\)

Good judgment causes us to do “precisely the right thing at precisely the right moment.”\(^9\) Good judgment is the ability to know what actions are most likely to solve problems. It operates on several levels at once — the practical, the ethical, and the moral — and it includes “appreciating the hidden complexity in questions that seem easy when they are posed in the abstract.”\(^10\)

Good judgment is also the ability to recognize the wrong things to do, no matter how tempting they might seem. The phrase a prudent lawyer is a term of art used to describe an attorney whose judgment is reliably good in this respect. A prudent lawyer makes sure that mistakes do not happen.

If you are a novice hiker with a dozen other novice hikers high in the mountains when a sudden and unpredicted blizzard traps all of you in snowdrifts so deep that you can barely walk, good judgment is what you most hope to find in the guide your group hired to lead you through the mountains. As you glance at this guide and feel cold and hungry, you do not want the guide to make foolish decisions that would make a bad situation much worse, such as by taking you through places where your own movements can set off an avalanche. Instead, you want a guide who is calm; thinks carefully before acting but does act decisively; sees, several steps ahead, the consequences of actions; and can quickly understand all the forces and factors, including human nature, that can influence events. You want this person to get you out, and that requires more than knowledge of the geography of the mountains and the rescue policies of the Forest Service. It requires the ability to make decisions for which there is no script and no formula. Should you try to hike out, for example, or wait where you are on the theory that movement expends energy you need to survive in the cold? How much food should you eat each day? You need to eat enough to keep from succumbing to the cold but not so much that you run out of food before help arrives — and no one can predict how long it will take for rescuers to find you. Judgment is the ability to make these decisions well.

Judgment is the ability to figure out what to do and say. Because “it is possible to have knowledge but lack judgment,”\(^11\) knowing the law (or the geography of the mountains) is not enough.

\(^8\) Id. at 31.
\(^10\) Luban & Millemann, supra note 7, at 71.
\(^11\) Mark Neal Aaronson, We Ask You to Consider Learning about Practical Judgment in Lawyering, 4 Clinical L. Rev. 247, 262 (1998).
2. A Lawyer’s Job is to Find a Way — To the Extent Possible — For the Client to Gain Control over a Situation

Often, the situation is already out of control when the lawyer is hired. An obvious example would be any situation in which the client is in conflict with somebody else. To an individual or a small business, few things are as frightening as a situation so out of control that lawyers are being called in. To a large business, it might be more routine, but to the employees of a large business, their careers might be on the line.

At the opposite extreme, things might be happy now, and the client might want to make sure that they stay that way in the future. Here are some examples: The client wants an estate plan that will distribute her assets to her heirs in a way that conforms to her feelings about them. Or the client has agreed to a commercial transaction with someone else and wants that agreement reduced to a written contract in a way that best protects the client. Or the client is a business that wants to know how it can most inexpensively conform to the regulations of the Environmental Protection Agency.

In all these situations, what the client wants from the lawyer is a method of controlling — to the extent possible — what happens. That requires more than knowledge of statutes and case law. It requires the ability to plan ahead, a refusal to place yourself at the mercy of events, decisiveness (the capacity to act under pressure), presence of mind (the capacity to reflect among options while under pressure), and the problem-solving skills explained in Section 4.B.

3. Effective Lawyers Work to Achieve Specific Goals

The client wants something — win this lawsuit, merge with that other company, or stop cattle from overgrazing publicly owned range land. Whatever the client wants is the overall or ultimate goal. To achieve it, the lawyer must do a number of things along the way — develop evidence that justifies summary judgment, persuade the Antitrust Division of the Justice Department to allow the merger, see whether the ranchers and environmentalists have some interests in common. Those are interim, strategic, or tactical goals. Effective lawyers know exactly what the goals are and focus their work on accomplishing them. They do not work aimlessly on whatever is in the office’s file.

4. Success in the Practice of Law Depends on Efficient Work Habits

Efficiency is getting the most result from a unit of work. The world is becoming a much more competitive place. In every industry — and law is an industry — only the efficient are able to compete successfully. Many businesses now audit their own law firms’ bills to figure out whether the lawyers involved have used the most cost-effective ways of solving problems, and law firms that fail this scrutiny lose clients. The efficient lawyer prospers while the inefficient lawyer just works hard without having much to show for it. It is difficult to be efficient without
working hard, but hard work is not the same as efficiency. Many inefficient lawyers work long hours without serving their clients well (and without getting repeat business from clients who have figured that out).

5. **Thorough Preparation is Essential**

“Winging it” is sloppy and dangerous lawyering. Many lawyering tasks are like icebergs: What the bystander sees (the tip of the iceberg or the visible part of the lawyer’s performance) is a tiny fraction of what supports it (the undersea part of the iceberg or the preparation for the performance). In lawyering, the ratio of preparation to performance can easily reach 15 or 20 to 1. It might take 10 hours to prepare for a half-hour counseling session with a client, and it might take 15 hours to prepare for a negotiating meeting that lasts 2 hours. (That is why this book devotes entire chapters to preparing to counsel and preparing to negotiate.)

In preparation, resourcefulness counts more than brilliance does. Few legal problems are solved by astute insights that no one has thought of before. Most legal problems are solved by diligently learning the details that matter and putting them together into a package that gets results.

6. **Everything Revolves Around Facts**

Law school can mislead you. You are spending so much time learning law and how to analyze law that you might get the impression that factual issues are easy. They are not easy, and they are not marginal, either. The analysis of facts permeates this book because the analysis of facts permeates the practice of law.

![Diagram of gathering and using facts](image-url)
7. Assumptions can Sabotage Good Lawyering

You realize that you need to make a decision soon. You also realize that you need to know six things to make this decision. You already know five of them. You have made a guess about the sixth thing, and you are confident that your guess is accurate. You could rely on your guess (make an assumption), or you could devote some effort to finding out what the truth is.

When lawyers make assumptions, they and their clients can get hurt. That is because our guesses turn out to be wrong surprisingly often. It is also because clients hire lawyers for important matters, where mistakes cause real suffering.

Not all assumptions are bad. Sometimes, a lawyer will properly make a temporary assumption because the truth cannot yet be ascertained and work must proceed in the meantime. Sometimes a lawyer will balance risks and make an assumption because the decision involved is small and the cost of learning the truth is too large. And sometimes a lawyer will have to make an assumption because the truth cannot be learned.

But most of the assumptions you will be tempted to make should not be made. As a general rule, if you do not know whether something is true, find out. And if you must make an assumption, do it explicitly so that you and the people who rely on you know what is happening.

The most dangerous assumptions are the unconscious ones—the ones you do not even realize you are making. Suppose that you are chatting with someone in a social situation. Some of the things the other person says are derived from matters that you do not fully know. You might ask a few questions, but for the most part you assume underlying facts without even realizing that you are doing it. You make these assumptions for three reasons. You do not want to appear dumb. You do not want to be a pest, constantly interrupting with questions. And most of the subjects of social conversations are not important enough to merit the kind of thorough exploration that would have to be undertaken if we made no assumptions.

In lawyering, an unconscious assumption is especially dangerous because you do not realize you are making it and therefore cannot control it. You cannot gauge the risk posed by an unconscious assumption, for example, and you cannot commit yourself to learning the truth as soon as possible.

The only way to overcome this problem is to learn to recognize what you do not know and consciously decide what to do about what you do not know.

8. Representing Clients in Disputes is Only Part of What Lawyers Do — The Rest is Transactional

Movies and television almost invariably portray lawyers as cross-examining witnesses and making arguments to judges and juries—in other words, litigating. And law school law is taught through cases, or more precisely through judicial opinions that resolve litigation. But many lawyers almost never go near a courtroom. The practice of law is divided into two parts. One is the resolution of disputes, often through litigation. The other is transactional: advising and
representing clients in situations where there is no dispute. Sometimes the situation is contractual: two companies have agreed to do business with each other, for example, and the lawyer will turn the agreement into a contract. Sometimes, it involves noncontractual transfers, such as will-drafting and other forms of estate planning. And sometimes it involves advising the client on how to behave to avoid liability of some kind. Some lawyers do only dispute work. Some do only transactional work. And some do both.

Dispute lawyers and transactional lawyers approach legal problems differently and in some respects see the world differently. Most fundamentally, dispute lawyers fight to protect clients who are already in conflict with somebody else. (Transactional lawyers plan and draft documents to achieve the client’s goals while minimizing the risk of conflict, because conflict could prevent or make more expensive the accomplishment of those goals.) Dispute lawyers try to beat the other side through public performances in courtrooms. Or they negotiate settlements in which one side takes something from the other (though perhaps not as much as the taker had hoped to get).

Either in the courtroom or in negotiation, a dispute is what social scientists call a zero-sum game: what one side gains is what the other side loses, averaging out to zero. If a plaintiff gains $100,000, the defendant loses $100,000. (Actually, the average is less than zero because each side has to pay its lawyers and other expenses to resolve the conflict.) Transactional work, however, usually is not a zero-sum game. If two companies do a deal—agree to trade money for goods, services, or other things of value—each of them anticipates becoming better off as a result. If the deal works as planned, it is a win-win situation. The deal lawyer’s job is to plan and draft to increase the odds that the deal will work as the client had planned. The lawyers still struggle for control and advantage, but a client who considers a proposed deal a loss can simply walk away and deal with someone else.

9. To Be Effective, A Lawyer must Know How — and When — To Function in Inquiring Mode as well as in Persuasion Mode

Persuasion mode is the thinking and talking that manipulates a situation. Persuasion is one of the cores of lawyers’ work, and the persuasion mode obviously is valuable to lawyers. But it also has disadvantages.

12. Lawyers do not use the term persuasion mode. Persuasion-mode behavior was first described by Chris Argyris & Donald Schön, Theory in Practice: Increasing Professional Effectiveness (1974), although Argyris and Schön used different terminology to describe it. Robert Condlin was the first to discuss it in the legal literature. See Condlin, The Moral Failure of Clinical Legal Education in The Good Lawyer: Lawyers’ Roles and Lawyers’ Ethics 318 (D. Luban ed. 1983) [hereinafter Condlin, Moral Failure] and Condlin, Socrates’ New Clothes: Substituting Persuasion For Learning in Clinical Practice Instruction, 40 Md. L. Rev. 223 (1981) [hereinafter Condlin, Socrates’ New Clothes]. Schön later explored the subject in further detail. See Donald Schön, Educating the Reflective Practitioner (1987). Condlin’s term for this model is used here only because it is more descriptive than that of Argyris and Schön.
A person in persuasion mode tends to act more or less continually on hidden agendas and strategies, “to minimize self-analysis and to reserve it for private moments when it will not weaken instrumental effectiveness,”\(^{13}\) to argue in ways that are subtle but “needlessly stylized and hyperbolic,”\(^ {14}\) and to treat others often as objects and as types, rather than as individually unique. When a person in persuasion mode listens, it is less out of curiosity than out of a search for ammunition that can be used to gain or maintain control. Persuasion-mode behavior is profitable in situations where the struggle is for control rather than insight, and where the “self-sealing properties of persuasion-mode habits”\(^ {15}\) minimize tentativeness, doubt, and perplexity over the unknowable and gray areas of life.

Persuasion-mode behavior can be destructive in other ways as well. Unrestrained persuasion-mode behavior produces over-simplified reasoning, self-serving speech, and a reduced loyalty to truth. “Persuasion-mode habits predispose lawyers to take evaluative stands automatically” so that they “make statements that, on reflection, they know to be false.”\(^ {16}\) “It causes one to impute rather than explore others’ ends, shut off rather than encourage legitimate objection, . . . and accumulate rather than share decision-making authority.”\(^ {17}\) Other people see it as manipulative and controlling.

\[T]\)he persuasion mode is not always associated with bad, unpleasant, aggressive behavior. The mode is just as often a low-visibility, indirect, and even cordial method of manipulating others. . . . The persuasion mode is used among friends as well as enemies and people feel good about it as often as they feel resentful. . . . \[T]\)he true test of persuasion-mode behavior is in what it seeks to accomplish (e.g., victory rather than understanding or uncoerced agreement) and by what strategies (e.g., private, unilateral, competitive, and self-sealing actions rather than public, bilateral, cooperative, and self-reflective ones).\(^ {18}\)

Even when accompanied by pleasantness and charm, persuasion-mode behavior is recognized by others, who often react defensively.

The opposite pattern of behavior might be called the inquiring mode:\(^ {19}\) open-ended curiosity and an interest in exploring things regardless of the consequences. A person in inquiring mode is not trying to accomplish anything except learn. The following illustrates the difference. In each column, a lawyer is asking questions.

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14. *Id.* at 326.
15. *Id.*
16. *Id.*
17. *Id.* at 329.
18. *Id.* at 328.
<table>
<thead>
<tr>
<th>Persuasion Mode</th>
<th>Inquiring Mode</th>
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<tbody>
<tr>
<td>Q: Didn’t your company’s lab tests show that this tire disintegrates at 90 miles per hour?</td>
<td>Q: Could you tell me everything you know about how this tire was tested in the lab?</td>
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<tr>
<td>Q: And didn’t your company advertise this tire as suitable for use on police cars?</td>
<td>Q: What were the results of those tests?</td>
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<tr>
<td>Q: Police sometimes have to chase criminals at high speeds, don’t they?</td>
<td>Q: What did the advertisements say about using the tire on police cars?</td>
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<tr>
<td>(Are you persuaded that the tire manufacturer did something wrong?)</td>
<td>Q: Where were the advertisements placed?</td>
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<td></td>
<td>Q: How was the decision made to advertise the tire that way?</td>
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<td></td>
<td>Q: Could you tell me everything you know about the stresses tires are subjected to when used on police cars?</td>
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<td>(Would you learn more from the answers to these questions than from the answers to the questions in the other column?)</td>
<td>(Would you learn more from the answers to these questions than from the answers to the questions in the other column?)</td>
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Although the answers are omitted here, you can easily imagine what they might look like. The answers to the persuasion-mode questions will typically be short and perhaps defensive. (At trial, that might persuade a fact-finder to agree with the lawyer.) The answers to the inquiring-mode questions will typically be much longer and include far more information. From the answers to the inquiring-mode questions, you would know much more about what really happened than you would from the answers to the persuasion-mode questions.

The persuasion mode and the inquiring mode both have their uses in the practice of law. To be an effective lawyer, you need to know how to function well in both modes. The problem is that many lawyers are so locked into persuasion mode that they do not know when or how to switch into inquiring mode.

In the skills covered in this book, the inquiring mode is more valuable than you might at first think. Most — but not all — of what a lawyer does in interviewing and counseling is best done in inquiring mode. In those and similar situations, the very qualities many lawyers use to project forcefulness can inhibit open-ended inquiry. Negotiation, on the other hand, is often primarily persuasion. But even in negotiation, there are times when it is best to stop trying to persuade and instead to switch into the inquiring mode.
10. **Numbers Matter**

A great deal of what lawyers do involves reallocating money. In counseling, you develop a list of options from which the client will choose. If money is a significant part of the decision, each option can be valued in money terms. Suppose that Option A offers a 50% chance of getting $100,000, while Option B offers a 75% chance of getting $50,000. If you dislike numbers, you might describe the options only in words and never do the math. But that would be an incomplete job of counseling. Without the numbers, the client cannot decide. (By the way, the expected value of Option A is $50,000 because the client has a 50% expectation of getting $100,000, and the expected value of Option B is $37,500 because the client has a 75% expectation of getting $50,000.)

In negotiation, you might be taken advantage of if you are bargaining about money and if the other lawyer is much better at numbers than you are. Suppose you represent a plaintiff and have reached a tentative agreement with the defendant that will produce $500,000 for your client. The defendant’s lawyer proposes that the money be paid out in five annual installments of $500,000. Why should you consider resisting this proposal? Money paid out over time is worth less than the same amount paid in one lump sum. Wherever the money is, it can grow because it can earn interest. While the defendant keeps some of the money, it earns interest for the defendant and not for your client. This is called the time value of money.

Except in a few fields where money is usually not the focus, an effective lawyer knows how to work out the numbers and how to present and explain numbers to other people.

11. **Taxes Matter**

Whenever money changes hands, the transaction might have tax consequences, and you cannot counsel or negotiate without knowing what those consequences are. Suppose you represent a plaintiff who has pleaded claims of wrongful discharge and battery. The defendant offers to settle by paying an amount of money that your client finds satisfactory, and the defendant prefers to pay the money entirely as back pay. He would rather be thought of as someone who fires an employee illegally than as someone who swings a tire iron at an employee while screaming “You’re fired.” “It’s a good amount of money,” your client tells you. “Does it matter whether we call it back pay or damages for battery?” “Yes,” you reply. “It does matter. The $100,000 they are offering is worth only $65,000 to you because you’ll pay federal and state income tax on it. But $100,000 in damages for battery is $100,000 because it’s not taxed.” If you fail to tell your client that, you have committed malpractice. And when you do say it, your client will probably send you back to tell the defendant that the money will be acceptable only as damages for battery.
12. **Overlawyering can be as Damaging as Underlawyering**

Underlawyering is doing a cursory or half-hearted job. Overlawyering is making an issue out of everything, whether it really matters or not.

Business people use the term “deal killers” to refer to lawyers who regularly overlawyer. Suppose that Dynamo Electric, Inc., a chain of retail stores, wants to rent a warehouse to store household appliances such as refrigerators and stereos. The most suitable warehouse is owned by Belinsky Properties, Inc. Dynamo talks to Belinsky, and they agree on how much rent Belinsky will receive and how many years Dynamo will occupy the building. Because a lease must be drawn up, each company calls in its lawyers. The lawyers start by arguing with each other over who will bear the risk of loss to Dynamo’s merchandise if the warehouse burns down. This is a useful argument. Lawyers are paid to identify potential problems like that and then make sure that harm is minimized.

But we are long past the point of diminishing returns when Belinsky’s lawyer demands that Dynamo post a bond to indemnify Belinsky in case Belinsky is ever named as a defendant in a products liability suit concerning an appliance stored in the warehouse by Dynamo. When the clients learn of this, Dynamo will think that if Belinsky is this unreasonable now, things will only get worse later. So Dynamo will instead rent a different warehouse from Franken & Partners. And Belinsky will want to know what went wrong.

“It isn’t that the lawyers are actually trying to kill the deal. They just want to . . . dot the ‘i’s [and] cross the ‘t’s . . . And they love to ‘one-up’ the other party’s lawyers; in this game, being the last one to add a clause gains them great face.”20 This can get so bad that “some business people . . . never allow[] their own lawyer to talk to someone else’s without supervision — the goal is to keep the lawyers from arguing back and forth until the contract is [too] long and the deal is dead.”21 “Friends who practice law in Canada have commented that ‘The American lawyers do seem to try and squeeze every drop out of a deal.’”22 From the client’s point of view, the last few drops are rarely cost-efficient: they cost too much in legal fees, in deal-killing risk, and in damage to the ongoing relationship between the parties (if there is one).

Focus on what is really needed to accomplish the client’s goals. Provide just the right amount of lawyering to do that — not more and not less.

13. **For Most Lawyers, It’s a Struggle to Lead a Balanced Life, but it’s a Struggle You can Win**

Your family and the other people you care about are not less important than lawyering. Each day that you do not spend time with them is a day you cannot recover later, no matter how much you might want to. Do some things that have nothing to do with law — sports, cooking for the pleasure of it, gardening,

21. Id. at 61.
22. Id. at 60.
something artistic or spiritual. Not only will they refresh you, but they will also help you become a happier and more complete person.

14. **Integrity is Your Most Valuable Asset as a Lawyer**

A lawyer who is respected for honesty and fair dealing will be believed and trusted when other lawyers are not. That makes integrity a professional asset, but it is also one of the keys to happiness generally. If you know that you have acted with integrity, you can have greater respect for yourself and know that you have truly earned the love and affection of others.

If the preceding paragraph resonates with you, we recommend that you read two articles by Patrick J. Schiltz, previously a law school teacher and now a federal judge: *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 Minn. L. Rev. 705 (1998), and *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 Vand. L. Rev. 871 (1999).

C. **What is Happening to You**

Gary Bellow and Bea Moulton began their path-breaking lawyering skills textbook with this quote from Coles’s biography of Erik Erikson:

> In this life we prepare for things, for moments and events and situations. . . . We worry about things, think about injustices, read what Tolstoi or Ruskin . . . has to say. . . . Then, all of a sudden, the issue is not whether we agree with what we have heard and read and studied. . . . The issue is us, and what we have become.23

That is really what any professional school is all about. In seemingly little ways, you are already making choices about the kind of lawyer you will become.

You have been making these choices, for example, since the first day of law school, when teachers began to pressure you to listen and speak — and to read and eventually write — with more precision than had ever been expected of you before. If you rose to that challenge, you have made one choice about the kind of lawyer you want to be, and you have probably become stronger for it and learned to see everything around you with greater clarity.

That goes to analytical and communicative skills. There are other choices, too.

What will be your lawyering style? For example, will you prefer to solve problems through conflict, through conciliation, or flexibly using whatever method works best in the circumstances? Will there be some kind of distinctive personal characteristic in your lawyering?

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In addition to obeying the rules of ethics embodied in your state’s law of professional responsibility, will you be able to maintain “personal integrity [and] an inner moral compass”? That does not mean refusing to pursue client goals that are lawful but of which you do not happen to approve. (A lawyer is obligated to pursue any lawful goal the client wants, although the lawyer is free to try to persuade the client otherwise.) It means having an honesty so thorough that anyone who knows you trusts you; a sense for what is right and fair so unerring that others respect your moral voice; and an understanding of appropriateness that prevents you from crossing over into questionable conduct.

The manner in which we win a victory becomes a fact that affects the situation that follows, the client’s appreciation of it, and — ultimately, after many such victories — the kind of people we are. Victories won by bullying and deceit leave a residue that is very different from victories won with integrity.

CHAPTER 2

INTRODUCTION TO LEGAL ANALYSIS
AND LEGAL WRITING

A. Overview of the Lawyer’s Role

Most students entering law school would not call themselves writers; nor would they expect that in three years they will be professional writers, earning a significant part of their income by writing for publication. Yet that is precisely what lawyers do. Most lawyers write and publish more pages than do novelists, and with greater consequences hanging in the balance.

This book introduces the critical skill of legal writing. In this chapter, we begin with an exploration of the kinds of writing lawyers do, both in litigation and in other kinds of law practice. Understanding this legal landscape will help you understand the legal issues of the cases you read and the various research and writing tasks you will be asked to perform.

1. Writing and a Lawyer’s Roles

Lawyers write many kinds of documents—court papers, letters, legal instruments, and internal working documents for the law firm. As different as these documents are from each other, they all fall into one of three categories defined by the lawyer’s primary role when writing them: (1) planning and preventive writing, (2) predictive writing, and (3) persuasive writing. A lawyer’s writing differs significantly depending on which of these three roles the lawyer is performing.

### A Lawyer’s Writing Roles

- Planning and Preventive Writing
- Predictive Writing
- Persuasive Writing
Planning and Preventive Writing. Lawyers engage in planning and preventive writing when they draft transactional documents such as wills, trusts, leases, mortgages, partnership agreements, and contracts. Planning documents define the rights of the parties and the limits of their conduct, much as case law and statutes do for society at large. Thus, planning documents create what is, in effect, the “law” of the transaction. In some ways, planning and preventive writing is the most satisfying of the lawyering roles. Through planning and preventive writing, the lawyer creates and structures some of the most important transactions and relationships in an individual client’s life or in the commercial world. Also, with careful planning, the lawyer can forestall future disputes, and most lawyers would rather help clients prevent injury than recover for injury.

Predictive Writing. Predictive writing is part of another satisfying task—client counseling. Clients often seek a lawyer’s advice when they must make an important decision. When that decision has legal implications, the lawyer must research the law and predict the legal result of the contemplated action.

Lawyers engage in predictive writing in both transactional and litigation settings. In transactional settings, the lawyer must predict legal outcomes in order to analyze and prevent possible problems. In litigation, the client and the lawyer must decide many questions, ranging from relatively routine matters of litigation management (such as which motions to file) to such fundamental matters as whether to settle the case. To resolve any of these questions, the lawyer must predict the legal outcomes of the possible courses of action and must communicate those predictions to the client or to another lawyer working on the case.

In predictive writing, the lawyer must analyze the relevant law objectively, as a judge would do. The most common documents for communicating predictive analysis are the office memo (addressed to another lawyer who has requested the analysis) or the opinion letter (addressed to the client). The lawyer’s role is to predict a legal result as accurately as possible, objectively weighing the strengths and weaknesses of the possible arguments. The answer might not be the answer the client or the requesting lawyer wants to hear, but it is the answer they need in order to make a good decision.

Persuasive Writing. Legal problems cannot always be prevented, and some of them inevitably result in litigation or a proceeding before some other decision-maker. When that happens, the lawyer takes on a persuasive role. No matter what result the lawyer might have predicted, the lawyer now must try to persuade the decision-maker to reach the result most favorable to the client. The lawyer must marshal the strongest arguments in her client’s favor and refute opposing arguments. The most common persuasive document is the brief (also called a memorandum of law).

Although the goals of prediction and persuasion differ, on a fundamental level predictive (objective) analysis and persuasive analysis cannot be separated. To predict a result, a writer must understand the arguments each side would present. To persuade, a writer must understand how the argument will strike a
neutral reader. Thus, as you improve your predictive analysis, you will be improving your persuasive analysis as well, and vice versa.

Before you go on, turn to Appendix A, which contains a sample office memo. We will study the parts of each document in more detail later. Your goal at this point is simply to understand the function of each kind of document and to see what the end products will look like before beginning the process of creating them.

2. Overview of a Civil Case

Because most of your first-year courses focus on reading appellate opinions, your understanding of those cases will be improved if you have an overview of how a civil case proceeds through the litigation process. This section summarizes the course of a fairly simple personal injury lawsuit with only one legal claim against only one defendant and raising no ancillary issues. As you read it, notice how many litigation stages require legal research and the writing of a legal document (identified by italics), even in a relatively simple case.

Initial Research. A civil case begins when a client consults a lawyer about a legal problem. Usually the client has been injured and believes that his injury was caused by the wrongful conduct of someone else. The client wants to know whether he has any legal recourse and, if so, whether he should pursue it.

To decide these questions, the lawyer must gather all the relevant facts and research the relevant legal issues. Rarely will the lawyer already know all the law that will be required to answer these initial questions, and the lawyer might not have time to research all of them herself. She might ask an associate to research some of them for her. The requesting lawyer will write file memos to the associate, providing the necessary information and setting out exactly what she needs to know. After finishing the requested research, the associate will write an office memo to the requesting lawyer, communicating the results of the research.

The first lawyer will review the research, analyze the client’s possible claims, and provide that analysis to the client. The lawyer and client are likely to discuss the analysis face to face, but often the lawyer also writes an opinion letter memorializing the results of the research and her advice to the client. Together the client and the lawyer decide whether to proceed with the claim.

Initial Negotiation Process. The next step is writing a demand letter to the party whose conduct appears to have caused the injury (the defendant). Typically, the demand letter will explain the legal basis for believing that the defendant’s conduct was wrongful; the legal and factual basis for believing that the conduct caused the plaintiff’s injury; and the kinds of damages the law permits in such a case. The lawyer for the defendant will write a response to the demand letter explaining the legal and factual bases for the defendant’s defenses. The negotiation process may continue for some time, with settlement offers and counteroffers
communicated by additional settlement letters between the lawyers and client letters conveying settlement offers.

**Filing a Lawsuit and Resolving Initial Defenses.** If the case does not settle, the plaintiff's lawyer chooses the appropriate court and files a *complaint*, a document that sets out the facts of the case and the legal basis for the claim. Once the defendant's lawyer receives the complaint, he has only a few weeks to draft and file a response. His research might have shown that the defendant has one or more defenses that can be raised immediately. If so, the lawyer will raise these defenses in documents called *motions*, which state the defense and ask the court for some kind of action, such as dismissal of the case. Each motion will be supported by a *brief* (also called a *memorandum of law*), explaining the legal and factual basis for the defense. The motions may also be accompanied by other supporting documents, such as affidavits from witnesses and copies of evidentiary documents bearing on the defense.

Each time one party files a motion asking the court to take some action, the other party must file a *responsive brief*, usually explaining the legal and factual basis for the argument that the court should deny the motion. The responsive brief may be accompanied by other supporting documents such as affidavits. The party who filed the motion (the moving party) will file a *reply brief* addressing the arguments raised in the responsive brief, and there might be a hearing on the motion, after which the court will decide the issue.

Assuming that the court declines to dismiss the case, the defendant’s lawyer must file an *answer*, a document that admits or denies all the facts alleged in the complaint and may raise additional defenses as well. The defendant’s lawyer also may file a *counterclaim*, a document that alleges some wrongful and injurious conduct on the part of the plaintiff. The plaintiff will then file an *answer* to the defendant’s counterclaim. The answer admits or denies all the facts alleged in the counterclaim and raises all possible remaining defenses against the counterclaim.

**Factual Discovery.** Now the case is ready for the discovery phase. In this phase, the parties gather all the available evidence in an effort to prepare for trial. During discovery, both parties draft and file *interrogatories* (questions directed to each other) and *responses to interrogatories* (answers to the questions). They draft and file *requests for production of documents, requests for admissions, and notices of depositions* (occasions for oral questioning of witnesses under oath). Parties can file *requests for entry on land* (to inspect the premises) or *requests for medical examination* (to subject a person to a physical or psychiatric examination). During the discovery phase, disputes might arise over how much or what kind of information can be sought. These disputes can become the subject of *motions to compel* (filed by the party seeking discovery) or *motions for a protective order* (filed by the party seeking to prevent discovery). Like other motions, discovery motions and responses to them are accompanied by supporting briefs and affidavits.
**Motions for Summary Judgment.** After the discovery phase, the parties often draft and file motions for summary judgment. A party seeking summary judgment is asking the court to rule on some or all of the claims or defenses without the necessity of a trial. Summary judgment motions are supported by briefs, by statements of uncontested facts, and by affidavits, excerpts from depositions, evidentiary documents, and excerpts from written discovery. The opposing party files a responsive brief, affidavits, and other supporting documents resisting the motion, to which the moving party files a reply brief. Oral argument is often held. The court might resolve the entire case at the summary judgment stage, or it might resolve some of the claims or defenses, thus narrowing the issues remaining for trial.

**Trial.** If the parties do not reach a settlement, they continue with trial preparations. If the case will be tried to a jury, both parties draft and file a set of proposed jury instructions. Jury instructions are statements to be read to the jury to help them understand the law governing the case and their role in the process. Each party also drafts and files a trial brief, a document that summarizes the evidence expected to be introduced, raises and argues any evidentiary issues the party anticipates, and argues for the adoption of that party’s version of the jury instructions.

Trial begins with jury selection (if the case will be tried to a jury) and opening statements by each party’s lawyer. Then the parties call their witnesses and offer their evidence. The trial concludes with closing statements from each lawyer, the reading of the jury instructions (if the case is tried to a jury), and a decision by the judge or the jury. Some post-trial motions may be decided, and then a final judgment will be entered.

**Appeal(s).** A party who is dissatisfied with the result of the trial court proceedings usually can file a notice of appeal to a higher court. This party is called the appellant. The other party (the appellee) may file a notice of appeal as well, raising other objections to the trial court result. A series of documents identify the issues to be argued in the appeal and designate the record of the trial court proceedings that will be sent to the appellate court.

After the record has been prepared and filed, the parties each file briefs, responsive briefs, and reply briefs arguing the issues raised in the appeal. Oral argument is often held, after which the appellate court issues an opinion. In some circumstances, either or both parties may seek to appeal the appellate court’s decision to an even higher court. If so, the procedure described in this paragraph is repeated there. When all appeals are completed, the losing party either complies with the judgment (if applicable) or enforcement proceedings begin. After the judgment has been paid, a satisfaction of judgment is filed, and the case is closed.

3. **Ethical Duties**

Your legal practice, including your legal writing, will be governed by the ethical standards your jurisdiction has adopted for lawyers. Most jurisdictions have
adopted a version of either the American Bar Association’s Model Rules of Professional Conduct or the earlier Model Code of Professional Responsibility. Sanctions for violation of these rules range from private censure to disbarment. No matter what your jurisdiction’s ethical rules or your lawyering role, your legal writing must meet at least the following professional obligations:

1. **Competency.** A lawyer must provide competent representation, including legal knowledge, skill, thoroughness, and preparation.¹

2. **Diligence.** A lawyer’s representation must be diligent.²

3. **Promptness.** A lawyer must do the client’s work promptly.³

4. **Confidentiality.** Generally, a lawyer must not reveal a client’s confidences except with the client’s permission.⁴

5. *All lawyers are bound by the rules of ethics.* Every lawyer is bound by the rules of professional conduct, no matter whether that lawyer is in charge of the case or working under the direction of another lawyer.⁵

6. **Loyalty.** A lawyer’s advice must be candid and unbiased. The advice must not be adversely influenced by conflicting loyalties to another client, to a third party, or to the lawyer’s own interests.⁶

In addition to these general standards, your predictive legal writing must meet at least the following ethical standards dealing with giving advice:

7. **Moral, economic, and political factors.** While a lawyer’s advice must provide an accurate assessment of the law, it may refer also to moral, economic, social, and political factors relevant to the client’s situation.⁷ However, the lawyer’s representation of a client does not constitute a personal endorsement of the client’s activities or views.⁸

8. **Criminal or fraudulent activity.** A lawyer must not advise or assist a client to commit a crime or a fraud.⁹ When the client expects unethical assistance, the lawyer must explain to the client the ethical limitations on the lawyer’s conduct.¹⁰

Finally, your persuasive legal writing must meet at least the following ethical standards:

9. A brief-writer must not knowingly make a false statement of law.¹¹

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¹ Model R. Prof. Conduct 1.1 (2007).
² Model R. Prof. Conduct 1.3 (2007).
³ Model R. Prof. Conduct 1.3 (2007).
⁴ Model R. Prof. Conduct 1.6 (2007).
⁵ Model R. Prof. Conduct 5.2 (2007).
⁶ Model R. Prof. Conduct 1.7 and 2.1 (2007).
⁸ Model R. Prof. Conduct 1.2(b) (2007).
⁹ Model R. Prof. Conduct 1.2(d) (2007).
10. A brief-writer must not knowingly fail to disclose to the court directly adverse legal authority in the controlling jurisdiction.¹²

11. A brief-writer must not knowingly make a false statement of fact or fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client.¹³

12. A brief-writer must not assert a legal argument unless there is a non-frivolous basis for doing so.¹⁴

13. A brief-writer must not communicate ex parte¹⁵ with a judge about the merits of a pending case, unless the particular ex parte communication is specifically permitted by law.¹⁶

14. A brief-writer must not intentionally disregard filing requirements or other obligations imposed by court rules.¹⁷

These ethical standards will apply to your legal writing after you are a lawyer. They will also apply, directly or indirectly, to the legal writing you do as a law clerk before you are admitted to the bar. They will be among the standards by which your legal writing teacher evaluates your law school writing. Be sure that every document you write meets these standards of professional responsibility.

B. The Facts

1. Investigating the Facts

You are in your office. Your client arrives with a problem, seeking your help. Maybe he wants compensation or other redress for an injury he believes another caused him; or maybe he has been sued but doesn’t believe he caused the injury alleged. He seeks your legal advice about what to do.

Regardless of how knowledgeable you are about the law in any given field, all of that knowledge is of limited use until you learn what the client’s problem is. Finding out what the problem is begins with interviewing the client—but it by no means ends there. The reality is that clients bring to the lawyer only their perception of some of the facts. Thus, after hearing the client’s version of the story, the lawyer must do additional factual research and some targeted research into the law. We want to focus on how to gather all of the facts that you need to effectively represent your client.

The facts that the client conveys to the lawyer during the initial client interview are usually insufficient in a number of ways:

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¹³ Model R. Prof. Conduct 3.3(a)(1) and (2) (2007).
¹⁵ Ex parte, in this context, means without notice to other parties in the litigation.
¹⁶ Model R. Prof. Conduct 3.5(b) (2007).
¹⁷ Model R. Prof. Conduct 3.4(c) and 3.2 (2007).
• The client most likely does not know what facts are relevant to the governing law. Thus, he may withhold information because he doesn’t believe it is relevant.
• The client may believe that he has done something wrong or embarrassing and may prefer not to disclose those adverse facts to the lawyer. This characteristic of human nature may operate despite reassurances that everything the client says is confidential and explanations that the lawyer needs to know everything so that she can prepare the best possible presentation of his case.
• The client may actually believe things that are not provable or even are not true. Clients are only human, after all. They can perceive only what they perceive. Other people may tell the client things that the client later recalls incorrectly or translates in his head using whatever filters and predispositions he may have. While the client may sincerely believe what he tells the lawyer, that version of the facts will often include information that is unsupported by the other facts.
• And unfortunately, a few clients purposely lie to the lawyer to get the lawyer to do something she would not do if she knew the truth.

Why lawyers need to listen carefully to their client’s stories

It is not always the bad facts that the client doesn’t reveal at first. Sometimes there are helpful facts that the client doesn’t realize are helpful.

Julia (not her real name) sought help from a domestic violence pro bono project to get protection from her abusive domestic partner. She told her lawyer about some mild physical abuse that caused minor injuries. The lawyer prepared a motion for a protection from abuse order, although he worried that the evidence they would be able to present might not be enough to get the order.

On the day set for hearing, as they waited in the coffee shop at the courthouse for the case to be called, Julia mentioned in casual conversation that it was sometimes difficult to manage her life since she was often unable to drive. Her lawyer asked her why she was unable to drive. “Well,” she said, “most of the time when my boyfriend leaves for work, he takes the spark plugs out of my car so I can’t go anywhere.”

Needless to say, the lawyer’s plan for direct examination of his client changed immediately. The court granted the motion.

At least the first three problems are not only common, they are almost universal. In practice, a lawyer who does no fact investigation beyond what the client tells her is a lawyer who is probably committing malpractice. As a result, a typical day in the life of a practicing lawyer involves the lawyer engaged in the process of fact investigation. And, that is why fact investigation is one of the most important jobs a lawyer has. Regardless of the type of legal practice. A lawyer engaged in a business or transactional practice rather than litigation nevertheless needs to
understand the business deal, or the family relations, or whatever kind of facts will determine how the client’s rights might be affected in the future.

You can learn the critical skill of fact investigation in elective courses that include live-client clinics and externships, which allow you to engage in actual fact investigation. Simulation courses such as interviewing and negotiations, trial strategy, pretrial discovery, and the like also teach fact investigation. Your legal writing courses cannot cover the topic in depth, and we encourage all law students to take courses that concentrate on fact investigation opportunities because the skill is so critical for your future careers. Our purpose in this section is merely to introduce you to the idea that facts are not always as they seem, and that you, even while in law school, need to think critically about what the facts appear to be, as well as what the opposing party may perceive them to be. Professor Brian Foley has described this condition as “factual indeterminacy”: facts are never “fixed” and may be other than what the client would prefer.18

While very few required law school courses focus on fact investigation, the good news is that it is not hard to learn this. In fact, since you were a human being before you went to law school, you already know most of what you need: a healthy dose of common sense. You just need to practice using it in a legal context.

a. Facts Require Context to Understand Them

Imagine that a person in a uniform is walking toward you, holding a pad of paper and a pen.19 What does she want?

Although your mind probably jumped to one conclusion, there are many possibilities, of course. To come up with the best answer, however, you need more context. Where are you as the person approaches? What are you doing? Do you know the person approaching, or is she a stranger?

Suppose you are sitting in a restaurant with a menu in your hand. Or you are in a coffeehouse, standing at a counter. The situation makes more sense now: the person approaching will be asking you what food or beverage you would like to order.

Suppose instead you are sitting in your car on the side of a road and you have just turned off your engine. You pulled over moments ago when a black and white car behind you flashed red and blue roof lights while closely following you. Obviously, the person approaching is a police officer who will be giving you a traffic ticket.

You are able to fill in the details of these scenes because they are “stock structures,” also sometimes called “stock stories,” “idealized cognitive models,” or “schema.” Everybody recognizes thousands, maybe hundreds of thousands, of these stories. They help us make sense of the world around us. They represent patterns of normal human behavior that we have all seen many times before. Stock

19. This example was initially suggested in Steven Winter, The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning, 87 Mich. L. Rev. 2225, 2233 (1989), although we have expanded it for our purposes here.
stories help facilitate human interaction. For example, imagine that we had no stock structure for “police officer writing a ticket.” To make sense of this interaction, we would need a much more explicit explanation. The officer might have to say something like this:

Sir, please roll down your window. Thank you. I am a police officer. I have been appointed by the state to patrol this highway to be sure that motorists obey the speed limits. I have received training to do this. I use a radar gun that emits radio waves and measures the time it takes for them to echo back to determine the speed of passing vehicles. The state has given me authority to use this device to measure the speed of all vehicles traveling on this highway and to stop any vehicle that I determine to be traveling in excess of the speed limit that the state has posted on this road. I used this device on your car when you passed me just a moment ago . . .

And on and on. We couldn’t get anything done if we always had to stop and analyze every interaction and every experience in our day. Stock structures allow us to make assumptions about a scenario and to proceed according to our understanding of what to do in analogous situations.

The lesson for legal writing, then, is this: in the absence of context, the audience will invent context, probably using stock structures that are already in their minds. Those contexts may be based on societal norms (such as what we expect when “being pulled over”), or they may be based on readers’ personal experiences. But a writer cannot know for certain what stock structure his readers will use to invent the context. For that reason, the legal writer needs to provide readers with sufficient factual detail and context to trigger the stock structure that accurately reflects the actual situation he is describing.

This also means that the lawyer must have first identified, during the interviewing process, the lawyer’s own assumptions about the stock structures that she is calling on while imagining the client’s situation as the client described it. To use a simplistic example, if a client says to his lawyer “I fell on the rug,” it might be worth investigating where the rug was and what it looked like. Falling on a bunched-up runner in a supermarket is very different from falling on wall-to-wall carpet in the client’s own house. Likewise, the picture of “falling” could trigger images of someone ending up prone on the floor or someone ending with one knee on the floor but otherwise upright. Whether a lawyer is learning the story from her client or explaining the story to the court, she wants to be sure it contains enough detail to trigger the correct stock structures.

b. A Four-Step Process to Thinking about Fact Investigation

Unlike the law school casebook, in the real world, facts rarely present themselves in a tidy package. Once you’re a practicing lawyer, you may learn the basics of your client’s story from interviewing him, but as we saw in the example above, that could easily result in an incomplete, and possibly inaccurate, account of what actually happened. You will need to dig deeper.


i. First step: what facts are legally relevant?

Just as the facts don’t magically appear on your desk, your client most likely won’t walk into your office and say, “I have a question about the enforceability of a liquidated damages clause in a contract.” The client’s view is more like this: “This hotel that my organization had a conference at wants to charge us for rooms that they sold to other people! Can they do that?” Your job as the attorney is to elicit more of the facts from the client, to think about what the client may be overlooking, and to inquire further.

Once you have learned what you can from your client, the next place to look is into the substantive law that appears, at first glance, to govern the client’s problem. Thus, in our hotel reservations example, you would need to learn more from the client about the dispute. Was the contract in your client’s personal name or in the name of the organization? What was the purpose of the contract? When and where was it negotiated? Was there any prior dealing between the hotel and the client? Were the terms of the contract explained to the client? Did the client read the contract before signing it? How does the client know that the hotel sold rooms that the organization might have used? What explanation did the hotel give for seeking additional payment?

Many of these questions come from what you know about the law of contracts. You are looking to find who made an offer, whether it was accepted, whether the terms were sufficiently definite, and whether the contract was supported by adequate consideration. You would also ask some questions about whether a breach occurred and, if so, whether the hotel had been damaged by the breach.

All of these questions probably popped into your head based on what you learned in your course in contracts. But you may not know the law of the particular jurisdiction or the related relevant laws of discovery or evidence. More research might be in order. And the legal research is likely to suggest that there are more facts needed to help answer the legal questions. Thus, learning the facts helps you frame the scope of the research, but the two processes are recursive. The more you research, the more facts you may discover you need to determine. The first interview with the client is unlikely to be your only interview of her.

Your initial research into the law might suggest that there was no “meeting of the minds” between the hotel and your client, and that therefore no contract exists. Second, you might wonder whether the contract was imposed on your client by a party in a stronger bargaining position; this would make it a “contract of adhesion” that might be voidable at least in part by the weaker party (your client). Third, your research may suggest that the clause in the contract that calls for the payment of “liquidated damages” in the event of a breach might not be enforceable. Fourth, you may wonder whether, if the hotel was able to sell all of its rooms during the nights of your client’s conference, it suffered any damages. Fifth, given your client’s claim that some of her organization’s members were turned away by the hotel because it was sold out on the nights of the conference, you may consider the defense of “impossibility of performance.” All of these legal theories will likely suggest additional questions about the facts of the case that you need to seek answers to, either from your client or from some other source.
In addition to researching the substantive law, you may need to think about the law of evidence. Which of the relevant facts do you have admissible evidence for? Can you prove those facts in court? For example, returning to the hotel reservation example, your client claims that her organization was prevented from performing because the hotel was sold out on the night of the conference. How does your client know that? What admissible evidence do you have to prove that? If you have only hearsay evidence, how can you go about obtaining direct evidence? All of these questions may lead you to additional fact investigation as well.

You will also want to investigate facts that technically may not be legally relevant. For example, you may want to find facts that explain your client’s behavior or that of the opposing party. Background details might also be useful to humanize the client and to create visual imagery in the reader’s mind. During the fact investigation phase, you need to open your mind to a wide array of possibly relevant or helpful facts. You will sort out later on which ones actually to use.

**ii. Second step: what is the chronology?**

We humans are hardwired to think in chronological terms; that’s how we experience the world. When you hear a story out of sequence, you will struggle to rearrange it sequentially in your mind so that it makes sense to you. But given the way we gather facts and must present them at trial, it is likely that the facts of the case will come at you in random order. Your client will tell you certain things, often not chronologically. You will then fill in the gaps by talking to other witnesses, reading documents, or doing other investigation, discussed below.

At some point in your investigation, after you have gathered enough of the facts to have a sense of what is going on, but before you get too far into the investigation, you will need to prepare a chronology of what happened. It is often helpful to use a visual aid of some sort—a chart, spreadsheet, timeline, storyboard, sketch—to help you see the progression of events. Table 2-1 provides an example of a chart that you might compile based solely on what the client, Pat Freebird, explained during the initial client interview about events leading up to a dispute between her organization and the hotel holding rooms for the organization’s conference.

As you do additional fact investigation, you can insert additional rows to the chart. Using a spreadsheet allows you to sort information later, an advantage because many Statements of Facts are organized other than as straight chronologies. To create a visual image of how the facts can be organized, you may create a storyboard. Write each fact on an index card and lay them out in the order you want to tell them. Storyboarding can help you visualize each fact and easily

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20. As you will learn in your course on evidence, hearsay is an out-of-court statement by somebody other than the witness, offered to prove that what the other person said is true. In our example, the fact that an unknown hotel clerk made a comment to a conference attendee that the hotel was sold out, which information was then relayed to Pat Freebird, contains multiple layers of hearsay and therefore might not be admissible at trial.

21. Thank you to Professors Stefan Krieger and Reza Rezvani at Hofstra School of Law, for this idea. These professors teach the system to their clinic students as part of trial preparation.
move facts to create a different sequence. You will discover which of these organizing tools works best for you. Whether you prefer charts, timelines, or spreadsheets is less important than whether the tool you use helps you visualize the facts in a way that leads to an effective story.

Ultimately, these tools will help you write a coherent story. But their initial purpose is to help you see some of the gaps that need to be filled. This step may also reveal some of the stock structures in your understanding of the facts. For example, Table 2-1 contains certain assumptions that will need some unpacking. What stock structure does the client mean when she says, “guests couldn’t check in on time”? Was it fifteen minutes after the stated hotel check-in time? Two hours? And how many guests were told this? Two? Fifteen? Fifty? All of those facts might make a difference with regard to the issue of “substantial performance” and therefore might merit exploration. As you can see, this process of mapping the facts will help you see the gaps in your evidence. Filling in those gaps will change your map, and you will repeat the analysis again.

Table 2-1 Sample spreadsheet timeline for hotel reservations case

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
<th>Proof</th>
</tr>
</thead>
<tbody>
<tr>
<td>Early Jan. 2012</td>
<td>Freebird talks to reservation agent for Gloucester in Indianapolis; confirms dates for conference and room rate</td>
<td>Freebird testimony</td>
</tr>
<tr>
<td>About one week later</td>
<td>Proposed contract for room reservations arrives from Gloucester; Freebird looks it over briefly but does not read it carefully</td>
<td>Freebird</td>
</tr>
<tr>
<td>Jan. 24, 2012</td>
<td>Freebird signs contract and mails it back to Gloucester</td>
<td>Freebird; signed copy of contract</td>
</tr>
<tr>
<td>June 2012 (approx.)</td>
<td>Freebird gets calls from SOFT members reporting that the Gloucester block has sold out; Freebird suggests they book rooms in other nearby hotels</td>
<td>Freebird</td>
</tr>
<tr>
<td>July 19, 2012</td>
<td>Conference opens; many guests cannot get into rooms on time; some guests told that hotel was sold out</td>
<td>Freebird</td>
</tr>
<tr>
<td>July 30, 2012</td>
<td>Freebird receives invoice from Gloucester for $9480.38 for “attrition for unsold rooms”</td>
<td>Freebird; invoice</td>
</tr>
</tbody>
</table>
iii. Third step: does it all make sense?

Once you think you have uncovered all of the legally relevant facts, as well as sufficient background details for the story to make sense, you should take a step back and look at what you have found. Think in story terms:

- Who are the characters?
- What are their goals?
- What obstacles do they face?

Then, do a thought experiment, trying to get inside the heads of each of the characters in the story. Do each character’s actions make sense? Are they acting as one would expect a character to act in that situation? Would other people in the character’s situation typically feel the same way the character feels? Try to perceive the situation from the perspective of every important character in the story. We discuss how to conceive the roles of the different characters in Chapter 6 (Ruth Anne Robbins, et al., Our Client’s Story: Persuasive Legal Writing, 1st ed., (2013)), but for this thought experiment, the precise role they play in the final story is less important than seeing the story from each character’s point of view.

During the process, keep notes about whether the story makes sense. If there are gaps or problems, make notes about that as well. Those notes will lead to more fact investigation necessary to complete the picture.

iv. Step four: have you made any assumptions that might suggest more fact investigation?

We want to stress, again, the importance of recognizing your own assumptions about the facts. Because of the way our minds operate, every story involves each listener filling in gaps with our own mental images or experiences.

Here are two simple examples to remind you:

- **Picture a parking lot**

  What do you see? Is it an open, expansive lot such as one in front of malls or big-box stores? Or is it a small lot near your law school? Is it at ground level? In a multilevel structure? Is it the kind of parking lot one might find in a different country that is narrow and alley-like?²²

- **Picture someone ripping the phone away from another person**

  Again, what do you see? Who are the people? Where are they? Is the phone a cell phone? A cordless phone? A traditional landline phone? A wall-mounted phone in a person’s house? Or at a large store as part of the intercom system? Was

²². Thanks to Jason Eyster for this example from his excellent article. James Parry Eyster, The Lawyer as Artist: Using Significant Moments and Obtuse Objects to Enhance Advocacy, 14 Leg. Writing 87, 96 (2008).
it just the receiver/speaker that was taken away or was a cord disconnected from
the wall? Or, if it was the wall-mounted sort of phone, was the whole system
pulled off a wall?

While these examples may seem pedestrian, they are taken from real cases
where those particular facts were critical to the outcome of that case and where
law students needed to conduct a thorough fact investigation to ascertain a clear
picture of the events. Recognizing the assumptions we make is an important law-
nering skill. Many times, the facts that your client is visualizing will surprise you
because you will be visualizing something very different.

Fact investigation is never a linear process. Lawyers typically learn things out
of chronological sequence and often need to adjust, on the fly. That is part of
what makes a lawyer’s job interesting: using “people skills” to identify facts that
will then help solve the client’s problem.

c. Tools for Fact Investigation

The previous section suggested ways to think about what lawyers need to look
for during fact investigation. In this section, we briefly suggest methods to go
about looking for those facts.

i. Two types of facts: adjudicative and legislative

First, we need to define what we mean by “facts.” While the word “facts” may
seem clear and not requiring definition, most cases really deal with two different
types of facts. The most common types of facts are what some scholars call “adju-
dicative facts.”23 These are the facts of the case before the court: essentially, the
story of what happened between the parties that caused the dispute. Adjudicative
facts must be proven through admissible evidence, unless stipulated or assumed
as part of a motion standard—motions to dismiss or summary judgment are
prime examples.

Less common, but still sometimes important, are “legislative facts.” These are
“outside world” facts that are not specific to the dispute before the court but that
may shed some light on an issue that the court needs to decide. An example of a
legislative fact is a census statistic, such as the fact that November 21, 2011, was a
Monday or that July 2009 had some of the hottest days on record in Portland, Ore-
gon. Lawyers may use legislative facts to argue for a specific interpretation of a
statute, by offering those facts as context for the problem in society that the legisla-
ture attempted to address through legislation. Or legislative facts may describe a
scientific principle that a lawyer may use to help the court understand what likely
happened in the case. Legislative facts may also help describe the “setting” in
which a dispute takes place—the demographics, zoning, weather conditions, or
the like, which could help explain why events unfolded as they did. We explain
more about specifically writing about these types of facts in the context of making

23. Ellie Margolis, Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate
Briefs, 34 U.S.F. L. Rev. 197 (2000). This is another one of the articles that we recommend reading,
in full.

For the purposes of familiarizing yourself with the two different types of facts, keep in mind that adjudicative facts inform the court about the specific dispute it must resolve, while legislative facts are used primarily as background or supplemental explanation, often in the context of making a policy argument in a brief.

Second, the two types of facts require different types of proof. Adjudicative facts must be provided to the court through the tools provided by the applicable rules of civil procedure. Adjudicative facts are adduced through interrogatory answers; responses to requests for production of documents; admissions in the pleadings or through a request for admission, deposition, or trial testimony; exhibits identified during depositions or at trial; documents attached to affidavits; and in a myriad other ways. Collectively, all of these materials form the “record” of a case.

Legislative facts, on the other hand, do not require proof in the same way that adjudicative facts do, but they do require authentication. The authentication could be accomplished via the credibility of the source in which they are published. Statistics housed on websites that have a .gov extension carry the imprimatur of that government entity’s ethos, and a court will likely take judicial notice of the fact. In other words, lawyers who use legislative facts research and cite to reliable authorities. Even when lawyers do not introduce legislative facts, judges regularly research legislative facts as a tool to help them decide cases.24

ii. Tools for discovering facts beyond what the client knows

Most of the time, when lawyers think about how to discover the facts of the case, they focus on the formal tools of discovery provided by the rules of procedure for whatever court the case may be pending in. And certainly, these tools are very powerful and helpful; they may be the only way to determine facts that your opponent knows or believes. You have been introduced to — or will be introduced to — some of these tools in your courses on civil and criminal procedure. We do not have the ability to talk about them in detail here other than to mention them by name: interrogatories, depositions, affidavits, subpoenas for testimony or documents, and motions to compel (a last-resort technique).

### Some introductory ethos considerations during witness investigation

1. Your contact with these potential witnesses is not protected by attorney-client privilege. Assume the opposing counsel will learn that you contacted these people.

2. If you ask too many leading questions (questions that obviously suggest the answer), you risk planting false ideas or compromising the witness’s recollection. Recollection is a fragile thing to begin with. The goal of interviewing a potential witness is to gather facts, not to educate the witness.

3. People are nervous to speak with lawyers, and the more a lawyer is able to put the person at ease, the more the person will probably be able to access their recollections. The worst thing a lawyer can do is to be pushy or unfriendly: that can turn a neutral witness hostile.

4. You may not directly contact people who are represented by counsel. You must go through their lawyer. (ABA Model R. Prof. Conduct 4.2)

5. If you contact people who are unrepresented by counsel, you must be clear that you do not represent their interests. (ABA Model R. Prof. Conduct 4.3)

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Beyond the formal methods for discovery, there are many informal tools for discovering facts, which lawyers use every day as part of deciding whether to use more formal means to bring the facts into the official record.

#### iii. Client interview

The first and most obvious source of information is your client. During the initial interview with your client, you need to accomplish several things:

- Develop a trusting relationship with the client.
- Gather information about what happened, from your client’s perspective. Start to identify sources for additional information (documents, other witnesses, etc.).
- Attempt to identify your client’s goal.
- Differentiate roles. What is your client supposed to do to assist in developing the case, and what will you do as her lawyer?
- Establish your fee arrangement and other practical details relating to the representation.

#### iv. Witness interviews

Often you will next talk to other people who were present or who otherwise have knowledge of the events leading to the lawsuit. Some of those witnesses may be known to the client, and some may be easily ascertained via common sense
research. In the hotel example, a quick phone call to one of the organization members might help you learn how long the guests had to wait to get into their rooms.

v. Document review

Another important source of facts will be documents, many of which you will be able to obtain without formal discovery. For example, in a contract case like the hotel reservation example, the client should have a copy of the written agreement. In a personal injury action, a police report may describe the accident, and even though your client may not have a copy of it, a simple call or visit to the police station should be sufficient to get a copy.

vi. Informal discussion with opposing counsel

Most states have adopted some version of the Model Rule of Professional Conduct 3.2, which states, “A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.” Lawyers representing the plaintiff in an action might not know until initial demands or complaints are sent who opposing counsel is or whether there is opposing counsel. Assuming both sides to an action have retained lawyers, there is a good chance that the lawyers will be able to work together, without formal discovery requests, to help expedite litigation through candid exchanges of information without resort to demanding the information through motions to the court. Experienced lawyers know that it is in their client’s interest to voluntarily provide such information if the court would ultimately demand that they do so anyway. This saves both clients time and money.

vii. Electronic sources

Finally, in today’s Information Age, electronic sources of information are readily accessible and can be highly useful. The events that are in dispute may have been reported in the news media, so there may be newspaper reports, television clips, or YouTube videos of the incident. The event may have been discussed in blogs. The possibilities here are potentially endless. You probably are also aware that lawyers—just like employers—regularly look at the websites, online bios, and Facebook or other social media pages of parties and witnesses. In some cases, a lawyer may even hire companies that specialize in unlocking the privacy controls of those pages.

Conclusion

As you gather facts, a picture of the case—and your client—begins to emerge. The next step in the process is to think about what all of this information means in the context of the law. What legal theories or remedies might be available to assist your client in achieving her goal?
C. The Law

1. Interpreting Statutes

While the roots of the American legal system remain in the common law, the 1930s saw the beginning of “an orgy of statute-making.” Today, most legal issues are controlled or significantly affected by statutes. Thus, your skills of statutory analysis will be crucial to your success as a lawyer. The skills basic to statutory analysis are (1) reading the statute, (2) identifying the issues, and (3) interpreting the statute’s language.

a. Reading Statutes

The starting point for reading a statute is understanding the legislature’s relationship to the courts. An applicable statute binds the courts of that jurisdiction, but a court has the authority to interpret the statute’s language. Once a court has interpreted the statute, the doctrine of stare decisis applies, and the court’s interpretation binds all other courts for whom the opinion is mandatory authority. If the legislature disagrees with the court’s interpretation, the legislature is free to amend the statute to clarify its intended meaning. The court is then bound once again, this time by the newly amended statute.

Also, a court has the authority to rule on the constitutionality of the statute. On the question of constitutionality, the court has the last word. The legislature can amend the statute to cure the constitutional infirmity the court identified, but the legislature cannot enact another statute declaring the original statute constitutional. A statute that has been held unconstitutional will not be enforced within the jurisdiction of the court that issued the opinion.

Within the boundaries set by these interlocking roles, courts must read statutory language and tell litigants whether the statute applies to their situation, and if so, what that language means. To advise clients and represent litigants, therefore, lawyers must read statutes precisely, accurately, and sometimes creatively. You can think of the questions critical to this inquiry as similar to the famous five Ws that guide a journalist:

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26. A journalist asks “five Ws and an H”: who, what, when, where, why, and how.
The Five Ws of Reading a Statute

<table>
<thead>
<tr>
<th>Who?</th>
<th>Whose actions are covered?</th>
</tr>
</thead>
<tbody>
<tr>
<td>What?</td>
<td>What kinds of actions are required, prohibited, or permitted?</td>
</tr>
<tr>
<td>When?</td>
<td>When was the statute effective?</td>
</tr>
<tr>
<td>Where?</td>
<td>Where must the actions have taken place to be covered?</td>
</tr>
<tr>
<td>What then?</td>
<td>What consequences follow?</td>
</tr>
</tbody>
</table>

Often, the scope of the material you must read closely is larger than the specific statutory provision you first identify. If you are dealing with an act containing individual separately numbered provisions, you must read carefully at least the following parts of the act:

Read These Parts of a Statute

1. The language of the individual provisions that appear to deal directly with the legal issue;
2. The language of any other individual provisions expressly cross-referenced by the directly applicable provisions;
3. The titles of these individual provisions and of the entire act;
4. Any set of definitions applying to the individual provisions or to the act as a whole;
5. Any statement of purpose and any preamble to the individual provisions or the act as a whole;
6. If length is not prohibitive, read the entire act;
7. If the entire act is too long to read, at least read carefully the titles of all other individual provisions to identify any that might relate to the issue at hand;
8. The dates on which the act as a whole and the individual provisions were enacted and on which they became effective;
9. All of the same information for any amendments to important provisions;
10. If available, read the same information for any prior versions of important provisions (to understand what changes the legislature intended to make when it enacted the current version).

Read each of these parts of the statute word by word and phrase by phrase, paying attention to every detail. Reading a statute is more like reading an algebraic formula than it is like reading standard prose. Each word and punctuation mark is important. Even the internal tabulation (numbering or lettering)
can be significant. Pay particular attention to words that signal structural information.

<table>
<thead>
<tr>
<th>Some Words that Signal Structural Information</th>
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<tr>
<td>and include unless other</td>
</tr>
<tr>
<td>or limited to outweighs shall</td>
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<tr>
<td>either except all May</td>
</tr>
</tbody>
</table>

Also, notice whether any list set out in the statute is meant to be exclusive. The statute might tell you expressly that the list is not exclusive, using such language as the phrase “and any other factors relevant to the child’s best interests.” Or the statute might merely imply whether the list is exclusive, for instance, by introducing the list with a word like “including.”

**b. Identifying Issues**

Recall that when you brief cases, you should read the whole case through once before you begin to prepare your brief. Similarly, when you are ready to identify statutory issues, read through all the material identified on page 33 to establish the context for your analysis and to identify the key provisions of the statute. When you have identified the provisions that will govern your issue, return to those provisions for another and even more careful reading. Read with a pen or pencil in your hand. Read the text of the statute word for word, looking for key terms that tell you what conduct the statute covers.

One way to find the key terms is to focus on the answers to the 5 Ws set out on page 33. Another way is to ask yourself what someone would have to prove to show that the requirements of the statute were or were not met. If you can mark on the actual text of the statute, underline each word that tells you something about the answers to those questions. Then circle all the terms that tell you something about the relationships among the key terms (words like “and,” or “or”). If you are working from hard copy library materials, write these words on a sheet of paper instead of underlining them. Here is an example:

**The statute:**

No cemetery shall be hereafter established within the corporate limits of any city or town; nor shall any cemetery be established within two hundred and fifty yards of any residence without the consent of the owner of the legal and equitable title of such residence.27

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Notice that each of the key terms raises an issue. Something other than a cemetery would not be covered by this statute, so to know whether this statute would apply to your client’s facts, you must find out what the term “cemetery” means in this context. There might be a definition section in this same act, or there might be cases in which prior courts have defined the term. Either way, the term “cemetery” raises an issue you must resolve.

The same is true with the word “hereafter.” The statute does not prohibit all cemeteries; it prohibits only those established “hereafter.” After what? The date of the statute’s passage? Or the date on which the statute became effective? What are those dates? Another issue to resolve. And what does the term “established” mean? Is a cemetery “established” when construction begins? Ends? When the cemetery first opens for business? Each key term identified above raises an issue the lawyer must resolve before the lawyer can know whether and how the statute might apply to her client’s facts.

Are you surprised to find so many issues raised in one statutory sentence? Statutes are packed tightly with key terms, each of which sets out an important component of the statute and each of which raises an issue. If you were analyzing whether and how this statute applies to your client’s facts, you would have at least twelve issues to consider.

One word of caution about identifying key terms: You might be tempted to treat a phrase as a single key term. For example, consider a statute providing that a donor must transfer possession of the gifted item with “a manifested intent” to part with ownership. You might first think of the words “manifested intent” as a single key term. However, that phrase would require the party seeking to establish the gift to prove two things, not one: (1) that the donor actually intended to part with ownership and (2) that this intent was sufficiently “manifested” to others. This phrase raises two issues, not one. Your list of key terms should treat these words separately.

One more strategy is helpful for reading statutes and identifying issues: rewriting the statute in your own words. Restating the rule in your own words is an effective tool of analysis, and you often can state the rule more simply and clearly than its original writer did. Do not, however, rephrase the key terms of the statute. Those terms will be defined and explained by the authorities; thus, they will have developed their own meaning, and as we saw above, that meaning is the critical question of the analysis.
c. Interpreting the Statute’s Language

Statutes are interpreted by case opinions. If case authority has already told you what the statute means, you can rely on that case law to the extent of its precedential value. But if no binding case law has answered your particular question, you must use other tools of interpretation. The most important of these tools are (1) the text itself, (2) the intent of the legislature, (3) the policies implicated by the possible interpretations, (4) the interpretation of any governmental agencies charged with enforcement of the statute, and (5) the opinions of other courts and of respected commentators.

The Text Itself. The most important inquiry is the “plain meaning” of the text itself. When the plain meaning is unambiguous, a court generally will give effect to the plain meaning unless the result would be absurd. Look first at the plain meaning of the statute’s text. Also look for other parts of the statute or act that might tell you more about the language you are concerned with, such as the section explaining the act’s purpose. Many acts contain separate definition sections. Even when your term is not defined, other parts of the statute could give you clues about what the term means.

The Legislature’s Intent. Often, the text of the statute will be unclear. In such a case, many courts will try to decide what the legislature intended by the text’s language. This search for the legislature’s intent is problematic at best. The statute was probably enacted by a large group of elected officials who were serving in that office some years ago. The particular language you are concerned with could have been the result of political compromise, and various factions of the legislature might have had vastly different intentions surrounding that language. Quite possibly, your question never occurred to them at all. How can one decide the intent of the legislature as if the legislature were an entity with one mind? Yet, when a statute’s language is unclear, a court applying the statute will have to have some basis for a decision. In such a circumstance, the court often will try to discern the legislature’s intent.

Many courts are willing to consider the legislative history of the statute as evidence of legislative intent. Legislative history consists primarily of the documents or other records generated by the legislative body during its deliberations about the bill that ultimately became the statute. Legislative history comes in many forms, such as committee reports, speeches, witness testimony, or studies introduced into the record. Your research text will tell you more about legislative history and how to find it.

Policy. The fourth tool for statutory interpretation is analysis of the policy concerns implicated by a particular construction of the statute. Some implicated policies probably were part of the legislature’s intent, but the legislature might not have foreseen all the policy concerns. Issues of interpretation implicating these other policies may arise. If the legislature has not spoken on the issue, the court is free to consider its own view of which possible interpretation of the statute would produce the best overall results for society.
In addition to the policies specifically applicable to a statute, some kinds of statutes carry a general policy leaning applicable to all statutes of that particular kind. These policies call for either a strict or a liberal construction of that kind of statute. The most common of these policies are:

- Statutes that change long-standing case law (statutes “in derogation of the common law”) should be strictly construed. (A statute is strictly construed when it is read narrowly, so that it changes the legal environment as little as possible.)
- Statutes intended to remedy a problem (“remedial statutes”) should be liberally construed to accomplish their remedial purpose. (A statute is liberally construed when it is read broadly to include more kinds of situations than a narrow reading would allow.)
- Statutes making certain conduct a crime (“penal statutes”) should be narrowly construed, out of concern for the rights of the citizen-accused.

Finally, courts are guided by the general policy that, if possible, the meaning of a statute should be construed in a way that will render the statute constitutional.

**Agency Interpretation.** When enforcement of a statute is assigned to a particular agency, that agency must decide what the statute means to enforce it. Courts often look to this agency as the entity with the most expertise in the relevant issues and thus might give deference to the agency’s interpretation. The court also may consider the interpretation of an agency that has no authority to enforce the statute but nonetheless works with the statute routinely. Look for agency interpretations in the agency’s regulations, in the agency’s decisions, and in case law.

**Commentators and Other Courts.** Finally, courts may recognize persuasive value attaching to the opinions of other courts and of respected commentators. The persuasive value of a commentator’s opinion depends on the reputation of the commentator and on the commentator’s well-reasoned reliance on the other tools of construction.

d. Canons of Construction

To decide how to construe a statute, a court also may consider commonly accepted maxims of interpretation known as “canons of construction.” Here are some of the most generally applicable:

- Read the statute as a whole.
- Give effect to rules of grammar and punctuation.
- Construe technical terms technically and ordinary terms in their ordinary sense.
- When the same language is used in various parts of an act, the language is presumed to have the same meaning throughout.
Where general words (such as “and any other”) follow a list, the general words should be construed to refer to things similar to the items in the list. This principle is sometimes called the principle of “ejusdem generis,” meaning literally “of the same genus.”

Modifying words or phrases refer to the possible referent immediately prior to the modifier.

Where a statute from state X is adopted in state Y, the construction given the statute by the courts of state X should be followed in state Y.

If the statute does not contain an exception for a particular situation, the courts should apply the statute to that situation.

Absent clear indication, the court should presume that the legislature did not intend to enact a statute that impairs fundamental and commonly held societal values.

Specific description of one or more situations in the text of a statute implies the exclusion of other kinds of situations not mentioned.

Different statutes on the same legal issue (statutes “in pari materia”) should be read consistently, especially where the legislature intended to create a consistent statutory scheme.

Sometimes the courts of state X will have interpreted a particular word or phrase in a certain way. If, subsequently, the legislature of state X enacts a different statute using that word or phrase, the language in the new statute should be interpreted as having the meaning previously given it by the courts.

Although not technically part of the statute’s text, such items as titles, preambles, and section headings are persuasive evidence of legislative intent.

Sometimes courts will have construed the language of a statute in a particular way. Subsequently the legislature may amend the statute in ways that change or clarify other issues but do not address the issue the courts have interpreted. A later court might conclude that the legislature’s lack of action to change the judicial construction is evidence of the legislature’s approval of the court’s construction.

Where courts have relied on these maxims, they are treated as legal principles in and of themselves. Therefore, when you rely on one of them as part of the analysis of a rule, cite to a persuasive case opinion that adopts that maxim if you can. Even if you cannot find case authority adopting the maxim, however, a court still will be willing to consider the maxim’s logic.

None of these guidelines for interpreting statutes will provide a certain answer. As a matter of fact, when you apply several, they might support contradictory results. However, courts generally will consider these guidelines, so they will help you to predict what a court might decide or to persuade a court to interpret a statute favorably for your client.

2. Synthesizing Cases

Case briefing will help you understand a single case, but a lawyer faced with multiple authorities must do more than analyze each authority separately. Such a discussion would be little more than reading a series of case briefs. Instead, she must explain how the cases fit together to create the law governing her client’s issue. She must compare the authorities to find and reconcile any seeming inconsistencies and to combine the content of the authorities so she can present a unified statement of the governing rule of law. Therefore, after you have identified the cases that will be important to your analysis, you must consider how they fit together. This process is called “synthesizing” cases.

a. Using Consistent Cases

Sometimes the cases will use similar language to state the governing rule and will apply that rule consistently. Or perhaps some jurisdictions follow one rule and others follow a different rule. However, the cases within each jurisdiction are consistent with each other. In either of these situations, it will not be difficult to combine the language of the cases into one explanation of the law with a consistent explanation of how the courts have applied it. Simply identify the points you want to make about the law and its application, and select and discuss the cases that best illustrate each point. Usually those points will include each element or factor and may include other observations about how the rule is usually applied. For example, recall our rule on whether a person had effectively revoked her will:

To revoke a will, a testator must have the intention to revoke and must take some action that demonstrates that intent.

Your written analysis would discuss each element (intention and action) separately. For each element you would identify several cases that best explain that element and discuss them in your description of that element.

Similarly, if jurisdictions are split between two different approaches, your written analysis would discuss each approach separately. For each approach, you would identify several cases that best explain that approach and discuss them in your description of that element. For instance, assume you are writing an office memo on the question of whether parents can recover for the wrongful death of a fetus. You might find that some jurisdictions do not permit recovery at all, whereas others permit recovery if the fetus was medically viable at the time of the injury. You would explain to your reader that jurisdictions disagree and then discuss separately each of the two approaches. For each approach, you would select and discuss the several cases that best illustrate that approach.

b. Reconciling Seemingly Inconsistent Cases

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

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

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

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

The lawyer researches the issue and finds *Coffee System of Atlanta v. Fox*[^29] and *Clein v. Kapiloff*[^30], two Georgia cases dealing with enforcement of covenants not to compete. In *Fox*, the court uses the following language to articulate the rule governing when a covenant is enforceable:

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

[^29]: 176 S.E.2d 71 (Ga. 1970).
[^30]: 98 S.E.2d 897 (Ga. 1957).
If *Fox* were the only authority, the lawyer would use this rule to analyze Watson’s question. He would analyze the reasonableness of each of the identified characteristics of the Watson covenant. But *Fox* is not the only authority. The lawyer also found *Clein*, and there the court seems to articulate the governing rule differently. In *Clein*, the court stated:

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

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

**Is the Watson covenant not to compete enforceable?**

1. The rule in the *Fox* case: The covenant is enforceable if
   a. the kind of activity restrained is reasonable;
   b. the geographical area of restraint is reasonable;
   c. the duration of the restraint is reasonable.

2. The rule in the *Clein* case: The covenant is enforceable if
   a. it is reasonably necessary to protect the employer’s interests;
   b. it does not unduly prejudice the interests of the public; and
   c. it does not impose greater restrictions than are necessary.

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

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

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

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

**Is the Watson covenant not to compete enforceable?**

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

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

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

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

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

Consider this example: To establish adverse possession of land, a claimant must prove several things, one of which is “possession.” The kind of possession that will ripen into title is gauged by the kind and degree of the claimant’s use of the land. Here are summaries of two hypothetical cases dealing with the issue of whether the kind and degree of use was sufficient. Do they seem inconsistent? If so, can you reconcile them?
Allen v. Baxter: Fifteen years ago, Anne Allen bought Lot A in a suburban neighborhood. Lot B, the vacant and overgrown lot next door, was owned by Jacob Baxter. Allen built a house on lot A and moved in. In 1981, Allen began gardening on Lot B. During the eight-month growing season, she worked in the garden nearly every day, growing vegetables for herself and her neighbors. During the four remaining months, she seldom went on the lot. The court held that this use did not establish a sufficient degree of “possession” for the purposes of adverse possession.

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

The results in these two cases seem inconsistent. The degree of possession in Allen seems much greater than the degree of possession in Clay. Allen was physically present on the land for many more days of the year than was Clay, and Allen did more to the land than did Clay. Yet the court held that Clay possessed the land to a sufficient degree, and Allen did not. Reconciling these cases requires you to search for differences that could explain this seeming inconsistency. Perhaps the court will be satisfied with a lesser degree of possession in the case of vacation property, where an owner would not be expected to be in possession year round. Perhaps the court counted the continuous presence of Clay’s improvements as part of Clay’s possession. Or perhaps the court will require a greater degree of possession in the case of a possessor who knows she does not have record title. Any of these explanations could reconcile Allen and Clay.31

3. Forms of Legal Reasoning

Lawyers and judges use a number of kinds of reasoning to argue and decide cases. They reason by relying on a statement of the law, like a statute or a common law rule articulated in a case (rule-based reasoning). They reason by comparing the facts of earlier cases to the facts of the present case (analogical reasoning). They reason by pointing to a desirable social or economic result, like promoting economic efficiency (policy-based reasoning). They reason by alluding to norms of conduct and customary expectations common in our society, such as how we expect people to act in certain circumstances (custom-based reasoning). They reason by appealing to a moral principle such as honesty or fairness or a political principle such as equality or democracy (principle-based reasoning). They reason by deciding whether a particular factual conclusion would explain the available evidence (inferential reasoning).

31. If you study adverse possession in your property class, you might learn more about how to reconcile these two cases. The purpose of this exercise is simply to give you some practice in imagining possible reconciliations.
In practice, these forms often overlap, but it is helpful to identify them separately in this chapter so that you can learn to recognize them and to use them in your own analyses. Mastering their use is one of the most important goals of a law school education.

This chapter will also cover one more important way lawyers advocate for a result: narrative. Today, we usually use the term “reasoning” to describe only logical processes like those described above, but an earlier understanding of “reasoning” was much broader. It included processes that transcend logical arguments and may even resemble intuition. For lawyers and judges, the most powerful of these nonlogical processes is narrative. No matter what understanding of the term “reasoning” one prefers, lawyers and judges know that narrative functions just as the logical forms do, to justify and persuade. Therefore, this chapter includes narrative along with the logical forms of reasoning. Together, these forms will provide you with a powerful set of tools for analyzing legal issues and for advocating for a particular legal outcome.

a. Rule-Based Reasoning

Rule-based reasoning is the starting point for legal analysis. It justifies a result by establishing and applying a rule of law. It asserts, “X is the answer because the principle of law articulated by the governing authorities mandates it.”

<table>
<thead>
<tr>
<th>Rule-Based Reasoning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Harold Collier should not be bound by the contract he signed because he is a minor, and A v. B establishes that minors do not have the capacity to execute binding contracts.</td>
</tr>
</tbody>
</table>

**Example of Rule-Based Reasoning**

“[T]he only lawful means to dispossess a tenant who has not abandoned nor voluntarily surrendered . . . is by resort to judicial process . . . . Applying [this principle of law] to the facts of this case, we conclude, as did the trial court, that because Wiley failed to resort to judicial remedies against Berg . . . , his lockout of Berg was wrongful as a matter of law.” Berg v. Wiley, 264 N.W.2d 145, 151 (Minn. 1978).

b. Analogical Reasoning (Analogizing and Distinguishing Cases)

Analogical reasoning is another major form of legal reasoning. The most common variety of analogical reasoning justifies a result by making direct factual comparisons between the facts of prior cases and the facts of the client’s situation. The comparison can demonstrate factual similarities (leading to a similar result) or factual differences (leading to a different result). A comparison that points out similarities asserts, “X is the answer because the facts of this case are just like

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32. Comparisons that show differences are often called “disanalogical” or “counterana-logical” reasoning. For simplicity, however, we use “analogical” reasoning to refer both to pointing out similarities and pointing out differences.
the facts of A v. B, and X was the result there.” Comparing cases to point out similarities is often called “analogizing” cases.

<table>
<thead>
<tr>
<th>Analogical Reasoning</th>
<th>(Similarities)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Harold Collier should not be bound by the contract he signed because, like the defendant in only sixteen, and in A v. B the defendant was not bound by the contract she signed.</td>
<td></td>
</tr>
</tbody>
</table>

A comparison that points out differences asserts, “Even though X was the answer in A v. B, that is not the appropriate answer here because the facts in this case are different from the facts in A v. B. Comparing cases to point out differences is often called “distinguishing” cases.

<table>
<thead>
<tr>
<th>Analogical Reasoning</th>
<th>(Differences)</th>
</tr>
</thead>
<tbody>
<tr>
<td>In C v. D, the minor was bound by his contract. However, Harold Collier’s situation is unlike the situation in C v. D because there the defendant had signed a statement asserting that he was nineteen, thus deliberately misrepresenting his age. Harold Collier, however, never made any statement about his age. Therefore, the result in C v. D does not control Collier’s case.</td>
<td></td>
</tr>
</tbody>
</table>

**Example of Analogical Reasoning**

“[In Fahmie,] property was conveyed to [Fahmie], who had no knowledge of the installation of the culvert [or the violation of state law]. Fahmie made application to the development commission to make additional improvements to the stream and its banks. It was then that the inadequate nine foot culvert was discovered, and the plaintiff was required to replace it.

The case before us raises the same issues as those raised in Fahmie. Here, the court found that in 1978 the wetlands area was filled without a permit and in violation of state statute. The alleged violation was unknown to the defendant and was discovered only after the plaintiff attempted to get permission to perform additional improvements to the wetlands area. ”[The court went on to assert that the result in the pending case should be the same as the result in Fahmie.] Frimberger v. Anzelotti, 594 A.2d 1029, 1033 (Conn. 1991) (ellipses omitted).

c. **Policy-Based Reasoning**

Policy-based reasoning justifies a result by analyzing which answer would be the best for society at large. It asserts, “X is the answer because that answer will encourage desirable results for our society and discourage undesirable results.”
**Policy-Based Reasoning**

Harold Collier should not be bound by the contract he signed because he is only sixteen, and people that young should be protected from the harmful consequences of making important decisions before they are mature enough to consider all the options. Further, contract defaults are likely when minors undertake contractual obligations, and contract defaults dampen economic growth and decrease productivity levels.

**EXAMPLE OF POLICY-BASED REASONING**

“To approve this lockout [of a defaulting tenant by a landlord] . . . merely because in Berg’s absence no actual violence erupted while the locks were being changed would be to encourage all future tenants, in order to protect their possession, to be vigilant and thereby set the stage for the very kind of public disturbance which it must be our policy to discourage. . . .” *Berg v. Wiley*, 264 N.W.2d 145, 150 (Minn. 1978).

d. **Principle-Based Reasoning**

Principle-based reasoning justifies a result by appealing to a broad principle or character trait valued by our society, such as a principle of morality, justice, fairness, or democracy. It asserts that “X is the answer because that answer upholds notions of morality, justice, fair-play, equality, democracy, or personal freedom.”

**Principle-Based Reasoning**

Harold Collier should not be bound by the contract he signed because enforcing contracts like his would encourage sales agents to lie and would reward unfair and dishonest sales practices.

**EXAMPLE OF PRINCIPLE-BASED REASONING**

“A succession of trespasses . . . should not . . . be allowed to defeat the record title . . . . [T]he squatter should not be able to profit by his trespass.” *Howard v. Kunto*, 477 P.2d 210, 214 (1970).

e. **Custom-Based Reasoning**

Custom-based reasoning justifies a result by reliance on cultural and societal norms of behavior. It asserts, “X is the answer because that result is consistent with what we expect of people in this society.” Custom-based arguments often are phrased as statements about what is and is not “reasonable.” Some legal rules directly incorporate custom-based reasoning as the operative legal standard, such as the negligence standard (“the reasonable person”) or the constitutional standard for judging pornography (“falls outside contemporary community standards”) or rules that protect people from “undue” influence.
Harold Collier should not be bound by the contract he signed because it is unreasonable to expect a minor to be able to match wits with an experienced and overreaching sales agent. In our society, people do not make contracts with minors; they deal with the minor’s parent or guardian.

**Custom-Based Reasoning**

**Example of Custom-Based Reasoning**

“[T]here is no . . . reason to deny plaintiff relief for failing to discover a state of affairs which the most prudent purchaser would not be expected to even contemplate.” *Stambosky v. Ackley*, 572 N.Y.S.2d 672, 676 (1991).

**f. Inferential Reasoning**

Lawyers often use inferential reasoning (abduction) when analyzing a set of facts to decide whether those facts meet the requirements of a rule of law. If a particular factual conclusion would be consistent with the available evidence, that consistency provides some reason to believe that the factual conclusion is true. The possible conclusion would explain the observable facts. For example, assume that a patient had normal blood pressure during all prior phases of treatment and then the doctor changed one of the patient’s medications. Immediately after taking the first dose, the patient developed high blood pressure. No other changes in treatment or lifestyle occurred. One could infer from this set of facts that the new medication caused the high blood pressure.

Inferential reasoning is important in analyzing many legal issues. It is especially important when the legal rule calls for a conclusion that cannot be directly observed — questions like causation (as in our prior example), knowledge (whether a person was aware of a certain fact or situation), or motive or intent (whether a person intended to cause a certain result).

**Inferential Reasoning**

(used to establish whether the sales agent knew or should have known that Collier was a minor)

Collier is a short, smooth-faced boy who looks and acts like the sixteen-year-old he is. He told the agent about his hopes to be selected next year for the high school cheerleading squad. That hope would make no sense if he were already a senior, the year when most students turn eighteen. He said that he should probably call his parents to ask their advice. He said that he had never dreamed that he would have a car sooner than any of his friends, a puzzling comment for an eighteen-year-old to make because many high school students have a car shortly after turning sixteen. Most telling of all, the sales agent asked to see Collier’s driver’s license to make a copy of it for the dealership’s files. Under these circumstances, the sales agent surely either knew or suspected that Harold Collier was a minor.
EXAMPLE OF FACTUAL INFERENCE

A will is invalid if it was written when the testator was under the undue influence of someone. In Estate of Lakatosh, 656 A.2d 1378 (Pa. Super. 1994), the issue was whether Roger exercised undue influence over Rose. The court noted that Roger had met Rose, a woman in her seventies and living alone, and had immediately begun to visit her daily. Within a couple of months, Roger had suggested to Rose that she give him a power of attorney, which she did. A mere eight months after they met, Rose executed the will at issue in the case. The will left all but $1,000 of Rose’s $268,000 estate to Roger. The lawyer who drafted the will was Roger’s second cousin, to whom Roger had referred Rose.

Identify and explain the inferences implied by this description of the Lakatosh facts.

g. Narrative

Narrative justifies a result by telling a story whose theme implicitly calls for that result. Narrative uses the components of a story (characterization, context, description, dialogue, theme, and perspective) to appeal to commonly shared notions of justice, mercy, fairness, reasonableness, and empathy. In this sense, narrative is closely related both to principle-based reasoning and to custom-based reasoning, but narrative is far more contextual, placing these other forms of reasoning in a specific situation. Narrative tells the client’s story in a way that encodes but does not directly articulate the commonly held principles and values on which these two logical forms rely.

The governing rule might directly adopt a legal standard easily communicated as a narrative theme. For instance, assume that the applicable rule about the enforcement of contracts made by minors allowed enforcement only if the other party to the contract did not use “undue” influence to convince the minor to enter into the contract. Narrative would use storytelling techniques such as description, dialogue, characterization, perspective, and context to establish that the other party’s conduct was or was not “undue.”

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**Narrative**

(where the use of undue influence is an issue in the governing rule)

Harold Collier should not be bound by the contract he signed because Jenkins, a car dealer for twenty-two years, discouraged Harold from calling his parents to ask advice and told him that another purchaser was looking at the car at that very moment. Jenkins lowered his voice and said, “Tell you what I’ll do. I’ll knock off $1,000 just for you — just because this is your first car. But you can’t tell anyone how low I went. This will have to be our secret.”

Even if the applicable rule does not articulate a legal standard based on a particular narrative theme, however, narrative still persuades. A narrative
demonstrating the fairness of a particular result can convince a judge to exercise any available discretion in favor of the client, to create an exception to the general rule of law, or to reinterpret or overturn the rule. The law is not insensitive to justice, mercy, fairness, reasonableness, and empathy, even when those commonly shared values are not directly incorporated in the legal rule. As a matter of fact, those notions underlie much of the more abstract rationales in policy-based or principle-based reasoning. Narrative can serve as a powerful partner with policies or principles, providing a real-life example of the policy or principle that justifies the desired result.

For example, recall that the rule prohibiting enforcement of contracts made by minors is supported by the policy rationale that minors should be protected from the harmful consequences of making important decisions before they are mature enough to consider all the options. Narrative reasoning can bolster that policy point:

<table>
<thead>
<tr>
<th>Narrative</th>
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<tbody>
<tr>
<td>(consequences to minor not part of rule, but part of policy behind rule)</td>
</tr>
<tr>
<td>Harold Collier should not be bound by the contract he signed because he is only sixteen; he has never before shopped for a car; he was pressured by a sophisticated sales agent; he did not have the benefit of advice from any advisor; and the car purchase will exhaust the funds he has saved for college.</td>
</tr>
</tbody>
</table>
CHAPTER 3

FUNDAMENTAL LAWYERING SKILLS:
WRITING THE PREDICTIVE
INTEROFFICE MEMO

THE STRUCTURE AND STYLE OF LEGAL WRITING

1. The Writing Process and Law-Trained Readers

Now that you understand the legal authorities and the kinds of legal reasoning you will be working with, it is time to turn your attention to the document you will write and to the reader for whom you will write it.

a. The Writing Process

Writing is a process with distinct stages and distinct goals at each stage. Each writing stage serves an important function as you work toward a finished document. This chapter identifies five main stages of a writing task and invites you to use each stage consciously as an opportunity to strengthen your writing.

STAGES OF THE WRITING PROCESS

1. Reading and analyzing the materials.
2. Creating an annotated outline.
3. Writing a working draft of the analysis.
4. Converting that analysis into a document designed for a reader.
5. Editing for style and technical correctness.

Two caveats about this description of the writing process are in order, however. First, writing processes are as personal as signatures and fingerprints. The stages presented here represent a common way of approaching a writing task, but
your own process will be unique to you. What is important is that you find places in your own writing process for the activities described here.

Second, the writing process is recursive. While you are working on the tasks of one stage, you often will find yourself returning to the tasks of an earlier stage and anticipating those of a later stage. Writing requires you to circle back again and again as you come to understand more about your legal issue, your client’s facts and goals, and the available legal strategies. Your willingness to construct, dismantle, and reconstruct your document will be crucial to achieving a good written product.

**Stage 1: Reading and Analyzing the Materials.** Start by reading carefully all parts of your assignment, paying particular attention to the assignment’s articulation of the issue(s). If you have any trouble understanding the issues, try writing them out in your own words and comparing them to the issue statements in the relevant case law. In a law office, you will be encouraged to talk to the assigning lawyer to clarify any confusion over the scope of the issue. In law school writing, to the extent permitted, clarify any questions with your professor.

Then read all of the relevant legal sources, briefing the cases and taking notes on the statutes as section 2.C.1 explained. Use a separate sheet of paper for each source so you can sort them later. Be sure to keep your legal issue in mind, and look particularly for the ways in which each legal source might tell you something about your legal issue. You are looking generally for answers to the following questions:

**KEY INFORMATION ABOUT LEGAL AUTHORITIES**

1. What is the governing rule?
2. What do its important terms mean?
3. What are some examples of facts that have satisfied the rule’s requirements?
4. What are some examples of facts that have not satisfied the rule’s requirements?
5. What policies or principles does the rule serve?

Make a note about each thought or question that occurs to you, whether you think it might have merit or not. There will be time later for sorting and discarding. This is the time for wide, creative perception.

**Stage 2: Creating an Annotated Outline.** At some point, you must arrive at an outline of your analysis. It is ideal if you can create the outline before you begin to compose a draft, even if later you find you must change it. Start by formulating and outlining the governing rule. Then use a version of the rule’s outline to create the main categories of your outline. Section 3.B.1 will explain this process in
more detail, but an example here might help. Assume that you have outlined a rule setting out the requirements for revoking a will. The outline of that rule gives you a good starting outline for a written discussion of that issue. Under each element, you would discuss whether your client’s facts establish that element.

**OUTLINE OF WILL REVOCATION ISSUE**

To revoke a will, a testator must
1. have the intention to revoke, and
2. take some action that demonstrates that intent.

Once you have the main categories in place, select one of your authorities and ask yourself what it tells you about the first category (the intention to revoke). Does it help you answer any of the five questions we identified in the box labeled “Key Information About Legal Authorities”? If so, write that information on your case brief or other notes for that authority. *Note the page number on which you find the noted information.* You will have to cite to it when you begin to write, and you will save valuable time if you do not have to look for it again. Then move to the second category (an action demonstrating that intent), and go through the same process. Does this legal authority tell you any of the five kinds of information about the second category? Go through this process with each authority, keeping in mind that some authorities will give you information about more than one category.

When you have finished examining each authority, gather all relevant information under the appropriate categories. Use a separate sheet of paper for each category. For each point you have learned, write a complete sentence expressing that information. For instance, under the “intent” category, you might write: “The testator must intend to revoke the will now, not in the future.” Under the “action” element, you might write: “The action must not be consistent with any interpretation other than the intent to revoke.” These sentences will be the bases for the *thesis sentences* of your paragraphs.

Now you are ready for the last step in the outlining stage: selecting the authorities you actually will discuss in your analysis. For each piece of information you have listed, select the sources that give you the best support or the most important information for that point. Notice that you do not select the authorities you will discuss until you have identified the points you plan to make. This writing strategy will help you organize according to the relevant substantive points and not simply list and describe cases.

One more point about outlining your analysis: Outlining comes easily for some people; others find it difficult. If you are in the latter group, there is good news and bad news. The bad news is that a tight, linear structure is essential for a good office memo or brief. The good news is that you do not have to create that structure first. Many people find that they must write a very rough draft before they are ready to create an outline. Writing before you outline usually takes
longer, but often the resulting outline is more reliable. The key is finding the method that works best for your own writing process.

**Stage 3: Writing a Working Draft of the Analysis.** Your first job as a writer is working out your own analysis of the issue. Your primary purpose in writing a working draft is to use the writing process as an analytical tool. Dean and former Judge Donald Burnett put it this way:

Clear expression . . . is not merely a linguistic art. It is the testing ground for ideas. Through the discipline of putting an argument into words, we find out whether the argument is worth making . . . . The secret . . . is to start verbalizing early — while there is still time to learn from the discipline of forming ideas into words. You must begin by identifying your client’s goal and the issues to be resolved. Each issue is defined by a cluster of facts and governing legal principle. If you cannot articulate this nexus of law and fact, you do not yet have a grasp of the case.¹

Your working draft is where you “grasp the case.” It guides, deepens, and tests your analysis, and it forms your ideas into the kind of structured, linear reasoning that lawyers must master. Ultimately, your analysis will take the form of a document designed to communicate with your reader, but do not worry yet about creating that document. First concentrate on working out your own analysis.

Write out your analysis, putting flesh on the outline’s bones. In the working draft stage, focus your attention on the substance and structure of your analysis. Each time you write a statement about what the law is or what an opinion said, note a source and page number. While you are writing your working draft, you need not stop to look up the rules explaining how to cite correctly. The revision stage will give you the chance to correct citation form, spelling, punctuation, and legal usage. In the working draft stage, do the best you can on those matters, but do not let them distract you from your primary task at this stage: creating a solid analysis of your issue.

Try to arrive at the end of Stage 3 with enough time to put down the document for a while. Then return to your draft and revise it, based on what you see when you read with fresh eyes.

**Stage 4: Turning the Analysis into a Document Designed for Your Reader.** After your analysis is solid, turn your attention toward your reader. The working draft of your analysis will become the Discussion section of your office memo or the Argument section of your brief. In Stage 4 you will check your organization to be sure that it will meet your reader’s needs. You will complete the document by writing its statement of facts and its other components.

**Stage 5: Editing for Style and Technical Correctness.** In this last stage, turn your attention to the fine points of writing. Edit to achieve clarity and correct citation form, punctuation, and grammar. These technical matters are the most easily

¹ Donald L. Burnett, Jr., *The Discipline of Clear Expression*, 32 The Advocate 8 (June 1989).
visible criteria for judging writing. Readers will notice these matters first and draw from them conclusions about the skill and care of the writer. A sloppy document causes a reader to doubt the document’s substantive accuracy.

Suggestions for Consciously Using the Writing Process. First, be alert for signs that you need to revisit earlier stages. Although the completed document should take the reader on a linear journey toward the document’s conclusion, you will find that the process of creating the document is far from linear. Rather, the process returns you again and again to earlier stages to reconsider earlier decisions. The willingness to reconsider earlier writing decisions and to revise existing material is one of the hallmarks of a good writer.

Second, experiment with different writing strategies, and observe your own writing process. What works well for you at each stage? Do you work better if you dictate a draft first? Does free-writing help you? How about charts or colored pens? Each writer’s creative and analytical processes are unique. Part of your goal in your first few years of legal writing should be to observe as much as you can about your own process so that you can adopt writing strategies that work for you.

Third, be patient. On your first few writing assignments, take the stages in order without trying to combine or compress them. Your goal on these first assignments is to let each stage of the writing process teach you some critical skills. Soon you will have developed those skills well enough to speed up each stage. You will learn to customize each stage to fit your own skill level, the complexity of the assignment, and your own unique creative processes.

Fourth, master the general principles before you decide to try something new. This introductory course on legal writing teaches the basic principles that operate in most situations. First master the basic substantive and organizational principles covered in this course. Soon you will develop the judgment to know when and how you can depart from them.

Finally, start early. Good writing takes time — almost always more time than the writer first expects.

b. Law-Trained Readers

i. Focus on the Reader

The goal of an office memo or a brief is to communicate with a reader. As a matter of fact, you can think of a memo or brief as a conversation with your reader. As in any conversation, the better we know our conversational partners, the more effectively we can communicate. The characteristics of your reader will govern many of the choices you make as a writer.

We do not have to be reminded to write to a reader. Whether we realize it or not, we always write to someone, but sometimes we find that we are writing to ourselves rather than to the real reader. We are having a conversation with ourselves. Or we might write to the real reader but with inaccurate or incomplete information about that person. We forget to stop before we write and ask, “Who is this person, and what is she likely to be concerned about?”
When you undertake a legal writing task, you might not know your reader well—perhaps not at all. But you can still write with a fairly accurate focus on this unfamiliar reader because law-trained readers share certain characteristics. Even in large cities, lawyers and judges live in a legal community that shares certain values, customs, and forms of expression. Understanding these values, customs, and forms of expression will help you present your message effectively.

The general characteristics of law-trained readers in this chapter introduce you to the study of readers, but do not just accept the principles that follow. Notice your own reactions when you read. Try to be a participant-observer of the reading process. Your observations of your own reactions as a reader will be your best writing teacher. Observe, too, the other law-trained readers you know. This way, as the years of your legal practice go by, your writing will become better and better.

ii. Attention Levels

Before a speaker can communicate, the audience must be listening. Here is some information about the attention levels of law-trained readers:

1. A reader’s attention is finite. Even the most diligent reader will eventually run low or run out.
2. A reader’s investment in the nuances of the topic might not be as great as the writer’s. Although the law-trained reader will have a particular need to understand the material, these readers are extraordinarily busy. The judge has many other cases and does not have a personal investment in this one. The senior partner has many other obligations and depends on the memo writer to analyze thoroughly but communicate succinctly.
3. A reader’s attention is not evenly distributed. It is greatest in the first several pages, and it decreases rapidly from then on.
4. Readers generally save some attention for the conclusion. They are willing to invest attention there, but only if they can locate the conclusion easily and if the conclusion is clear and compelling enough to warrant the investment.
5. Although readers spend more attention on the document’s first few pages and on a compelling conclusion, attention levels revive a bit at internal beginnings and endings, like the start of a new issue or the last few paragraphs of a statement of facts. This revival is more likely if the new issue is marked by a heading or subheading.
6. Stories, especially real-life stories, are engrossing. Many readers pay more attention to facts than to abstract legal concepts. This means, for instance, that attention levels are higher in the middle of an effective Statement of Facts than in the middle of the Argument or Discussion section. It also means that, even in the middle of a Discussion or Argument section, a reader’s attention level will rise a bit when the material begins to apply law to fact.
7. A reader’s attention level is lowest about three-fourths of the way through the Discussion section of an office memo or the Argument section of a brief.
These observations about readers underlie an important writing principle: Placement of material is one of the important decisions a writer must make. A good writer places the most important parts of the analysis where the reader can find them quickly and give them first priority for her attention.

**iii. Road Maps**

Most readers want a road map — some sense of where they are and where they are headed. But law-trained readers have an even greater need for an organizational structure. Here’s why:

1. A reader’s first priority is to understand the law. A law-trained reader’s first step in the process of understanding the law is an outline. This process of learning and applying law set out in outline form is how most lawyers and judges studied law. It is basic to the way law-trained readers think. In the first few semesters of law school, this learning style and thinking process probably came more naturally to some than to others, but by the end of law school virtually all lawyers approach legal analysis by some variation of this method. This process is one of the primary components of “thinking like a lawyer.”

2. Lawyers and judges do not read the law out of intellectual curiosity but because they have a problem to solve. They are looking to your memo or brief to help them solve it. This means that your discussion of the law must be clearly and closely tied to the facts and issues of the case. Your organizational structure serves as the continuing reminder of how your legal discussion relates to the problem to be solved.

3. A law-trained reader constantly assesses the strength and accuracy of the analysis and the credibility of the writer. The most visible part of the analysis, the part the reader first evaluates, is its organization. Here the law-trained reader expects to find the outline of the law. If a reader doubts the organization of the analysis, the reader wonders whether the content of the analysis is reliable.
4. At some point in their legal education or practice, law-trained readers have studied many of the more common rules of law. Such readers will be used to thinking of those rules in a familiar order or structure. Even if a reader is not already familiar with a particular rule of law, a statute or a leading case might set out the rule in a particular structure. A law-trained reader will be expecting to analyze the issue in this familiar order or structure. Many law-trained readers are not comfortable with organizational surprises, and an uncomfortable reader is an unreceptive reader.

iv. Readers as Commentators

It is easy to assume that writing is a one-way street, with the discourse all flowing in one direction. We tend to think that we, as writers, are the only speakers. We think this because we cannot hear anyone else talking. In reality, the most important party to the conversation, the reader, is talking, but we can’t hear her. Each of us has a voice in his or her mind—an opinionated, talkative “Commentator.” We’ve already observed this character at work because when a writer mistakenly begins writing to herself, she is writing to her own internal Commentator.

The reader has such a Commentator too, and that little voice will chatter at every opportunity. The Commentator will be saying things like “No, that’s not right, because . . .” or “What in the world do you mean by that?” or “But wait, where is the discussion about . . .?” Think of yourself as a reader. Haven’t you been reading this chapter listening to both the written word and to your own Commentator?

The reader’s Commentator will not remain completely silent, and there is nothing the writer can do to change that. The Commentator’s participation can even be helpful. Yet each time the Commentator speaks, the reader must listen to two voices at once; the writer must compete with the Commentator for the reader’s attention.

The writer, then, has two objectives: (1) The writer wants to keep the reader’s Commentator relatively quiet, resolving its concerns at the points where they arise, and (2) when the Commentator does speak, the writer wants it to be saying “OK,” “right,” or “yes,” or perhaps even arriving at the writer’s conclusions moments before the writer states them. As a writer, you must anticipate the Commentator’s chatter before the conversation occurs and try to preempt that chatter. Your goal is to craft your side of the conversation to keep the Commentator as quiet and agreeable as possible.

v. Judges as Readers

Judges share the characteristics of other law-trained readers. Their attention is finite. They are busy and may become impatient with delay in getting to the bottom line. They generally focus more attention on the beginning and end of a
document or a section than on the middle. They find facts engrossing. They want a road map. They value clear organization that sets out the rule of law. But judges tend to have some additional characteristics as well. Here are some other observations about how judges read.

1. Although any law-trained reader tests the analysis at each step, a judge is particularly apt to do so. This skeptical testing is the heart of a judge’s job. Girvan Peck explained it by describing judges as “professional buyers of ideas.” However, even a skeptical judge will be less skeptical of the analysis of a lawyer known for careful and honest work than of the analysis of a lawyer with a poor reputation for either competence or candor.

2. Because judges are human, a judge who is already convinced of the equities of your position will be more receptive to your legal arguments. This judge will want you to be right on the law. This human desire can help to overcome a little of the judge’s natural caution.

3. Most of us are more willing to accept the analysis of someone we like and someone who has been considerate of our needs. This is true of judges as well. This does not mean that judges decide cases on the basis of social and political connections. But a lawyer who treats the judge professionally, with respect and consideration, will be a more effective advocate than the lawyer who does not.

4. As public servants with public responsibilities, judges are concerned about the policy implications of their decisions. However, trial judges and judges serving on intermediate appellate courts often see their role as requiring them to apply the law the way the jurisdiction’s highest court would. Not only do judges prefer hearing that they were right, but reversals often mean having to deal with the case again. A judge’s goal is to resolve cases, not prolong them.

   Therefore, trial judges and judges serving on intermediate appellate courts are most persuaded by authorities that help them predict how the higher court would decide the question. For judges at these levels, policy arguments are less persuasive than clear mandatory authority. Judges serving on the highest appellate court in the jurisdiction are much more amenable to policy arguments than are their colleagues on lower courts.

5. Because most judges plan to spend many years on the bench, they take a long-term view of each legal issue. Judges are concerned about how an individual ruling could constrain or empower them in future cases.

6. Judges as a group tend to be personally conservative (although not necessarily politically so). Because of the public nature of their job and the fact that they are seen as safeguarders of public morality, lawyers who become judges tend to be conservative in their personal lifestyle.

7. People tend to cling more tenaciously to conclusions they think they have reached by themselves than to those asserted by others. Judges are no different. Thus, when a judge notices that the writer is using a particular

technique for persuasion, the technique loses its effectiveness. Heavy-handed use of a persuasive technique usually hurts more than it helps. The most effective persuasive techniques are invisible to the reader.

8. A reader who feels pushed will resist. An effective legal argument will not push an unwilling reader down a path. Rather, an effective legal argument will place the reader at a vantage point that allows the reader to see and choose the best path. Thus, as a brief writer, you must decide how far you can take the judge without losing the judge’s cooperation in the process. The consequences of pushing a judge to accept an unreasonable argument go beyond the judge’s rejection of the unreasonable parts of the argument. The judge will tend to reject the reasonable parts of the argument as well.

9. Judges read briefs to decide between legal positions. When such readers are presented with categories, particularly categories identified with point headings, they tend to keep score. They might not even realize they are doing it, and they often will not observe that the rhetorical effect of keeping score is to weight each category equally. Knowing this tendency can help a writer select an organizational plan and decide how to subdivide the argument.

10. As decision-makers encounter arguments one by one, they tend to label each argument as “weak” or “strong” before going on to the next argument. Decision-makers are more likely to be convinced by one strong argument than by a series of weaker ones. Also, a strong argument will lose some of its force if it follows or is followed by weak arguments on the same point.

11. The reader’s perception of the strength of the first argument affects the reader’s perception of the strength of the arguments that follow. As law-trained readers, judges expect to find the strongest argument first. Unless the judge knows of a reason the weak argument had to be discussed first, the judge will presume that the strongest argument is first and thus that subsequent arguments are even weaker.

12. Judges often relate to the lawyers who practice in their courts in much the way that parents relate to children. If you are a parent, you know that there is nothing quite as tiresome and irritating as constant fighting and bickering among children. Most judges have little tolerance for bickering and blustering lawyers. Judges prefer to focus on legal issues rather than personalities.

13. One final observation about judges: The judge may skim the briefs and then ask a law clerk to read and summarize them. The impact of a law clerk on the brief-reading process is a bit of a wild card, but there are two general observations that you should keep in mind. First is the relative inexperience of most law clerks as compared to most judges. Remembering this inexperience will help you to take care not to leave out steps in the analysis on the assumption that your reader is an expert on your issue. Second, although these readers are often inexperienced, they also tend to be bright. Many judicial clerks served on their school’s law review and received much of their formative training in that context. Thus, they expect the details of a brief to be right. They tend to draw conclusions about the reliability of the analysis based on the lawyer’s attention to these details. They may well scrutinize every aspect of your brief more thoroughly than a busy judge could.
Law Professors as Readers

Your primary readers for law school documents will be law professors. Undoubtedly, these professors already understand a great deal about the relevant area of law and about the particular authorities on which your analysis will be based.

Ordinarily, a writer should tailor the document to the reader’s pre-existing knowledge. If the writer is certain that the reader knows some of the relevant information, the writer would refer generally to the information only when necessary to put new information in context. However, law school writing is a different matter. Unlike most readers, your professor is not reading to learn particular information. Instead, your professor is reading to evaluate what information you have learned and how well you can communicate it. If the information is not set out in your document, your professor will not know whether and how well you understand it.

Therefore, in law school writing, assume that you are writing to a law-trained reader who has no particular expertise in the area you are discussing. Your goal is to include the information your professor wants to evaluate without explaining more than the assignment asks.

Writing an Office Memo

The Function of an Office Memo

An office memo is an internal working document of a law firm or other office. It is not designed for outside readers, although clients and others might receive a copy if the need arises. The function of an office memo is to answer a legal question, usually for a particular client in a particular situation. Often, it will be the primary basis for making a decision with both legal and nonlegal consequences. Also, the firm might have a “form file” in which it keeps, for future use, office memos dealing with particular legal questions. Therefore, your document could have a long life, impact many clients, and create impressions about you in the minds of many future readers.

When you write an office memo, your role is predictive rather than persuasive. You must try to take an objective view of the question you are asked. The client and the requesting attorney need an accurate understanding of the situation. Learning bad news later could be costly for the client, for the firm, and for you. Making an accurate prediction, then, is the function of an office memo.

An Overview of the Memo Format

The format of a memo is designed to fit its function and its reader’s needs. Because a memo is an internal document, law firms are likely to have a preferred memo format. The firm’s preferred format may use various words for the section titles, it may place the sections in an order different from that described here, or it may include other sections. If your reader (your teacher or law firm) has a particular format preference, use it. If not, you can use the standard memo format this text describes. Variations in format are much less important than the accuracy and thoroughness of the analysis. The components of a standard office memo are
1. **Heading**
   
2. **Question Presented**
   
3. **Brief Answer**
   
4. **Fact Statement**
   
5. **Discussion**
   
6. **Conclusion (when appropriate)**

Look at the sample memo in Appendix A to locate and review each component.

**Heading.** The function of the heading is to identify the requesting attorney, the writer, the date, the client, and the particular legal matter.

**Question Presented.** The Question Presented identifies the question(s) you have been asked to analyze. It allows your reader to confirm that you have understood the question(s). It also might remind a busy reader of the question(s) he or she asked you to analyze.

**Brief Answer.** The Brief Answer provides your answer quickly and up front. The reader then can decide how much attention to invest in the explanation that follows.

**Fact Statement.** This section sets out the facts on which your answer is based. You probably obtained the facts from your reader (the requesting attorney) in the first place, but your memo must repeat them. Your reader will want to be sure you have not misunderstood any important facts. Also, your reader, who has been busy working on other cases, might need a review of the facts, and other attorneys working on this case or future cases might need access to your analysis. Finally, reading your fact statement in conjunction with your legal analysis could cause your reader to realize that she has neglected to give you a critical fact.

As the writer, you have an interest in reciting the facts as well. Your legal analysis will be based on the facts as you understand them. If the facts were to change, the result might change. If you memorialize the facts you have been given — the facts on which your answer is based — you insure that your work will be evaluated with reference to those facts. No future reader will think you had access to other, different facts and therefore expect you to have reached a different answer.

**Discussion.** The Discussion section explains to your reader the analysis that led to your answer.

**Conclusion.** You may choose to end with a Conclusion section, a summary of the main points of your analysis. A Conclusion section can be helpful in two ways. First, if the analysis has been complex, a Conclusion section can tie together and summarize the Discussion section. Sometimes, this summary can add a clarity that the Discussion alone might not be able to achieve. Also, a
Conclusion can increase your reader’s options for deciding how much attention to invest in understanding the details of your analysis. A Conclusion would be a summary with more detail than the Brief Answer but not as much as the Discussion. Therefore a law-trained reader could read your Brief Answer first, then proceed to your Conclusion for somewhat more depth, and finally read your Discussion for even more depth. After reading each section, your reader can decide how far and how deeply to read on.

A. Introduction to the “CRRACC” Paradigm for Written Legal Analysis

By now, you are probably familiar with “IRAC,” the acronym for Issue, Rule, Application, Conclusion. These words represent the stages of the most commonly accepted way to organize a written legal analysis: first, articulate an important legal issue or question; next, state and explain the relevant legal rule; next, apply the rule to your facts; finally, conclude by explicitly answering the question or taking a position on the issue. IRAC is the most popular form of organization because it is usually the one that makes it easiest for the reader to follow your analysis. Following the IRAC structure will provide a framework around which to organize your writing, thus making your discussion easier to write (and read). IRAC is the preferred framework for a written essay exam answer.

CRRACC is an elaborated form of IRAC. CRRACC stands for Conclusion, Rule, Rule Explanation, Application, Counterargument, Conclusion. At CUNY Law, we recommend and teach the CRRACC paradigm for organizing your written legal analysis in a memo or brief.

C: Conclusion Your legally trained reader will look for the “bottom line” first. Your analysis of a particular issue would begin with a conclusion that conveys the relevant legal rules and legally significant facts.

R: Rule The rule statement synthesizes key elements of the legal authorities relevant to the issue in your case into a general statement of the rule. To produce an accurate and well-crafted rule statement, you must have a good understanding of the existing legal authority on which your rule statement is based.

Existing legal authority consists of constitutions, statutes, regulations, and decisional law, as well as past judicial decisions that have interpreted other sources of legal authority such as constitutions and statutes. The ostensible job of the court is to give effect to the intent of past lawmakers, e.g., legislators and regulators, in the context of a novel set of facts. Nonetheless, judges can sometimes make or change law themselves, acting on the same motives that legislators and regulators have: they want to address social problems, clarify, modify, or set aside lawmaking efforts of the past, or establish fair and efficient rules to help resolve novel disputes. However, all judicial decisions must rest upon and incorporate some preexisting legal rules and the rationale or policy behind those rules.
When the source of a rule is decisional law, keep in mind that a rule might not be stated explicitly or completely in a single case or group of cases; rather, it must be drawn out from the factual context in which the holdings in these cases have arisen. The writer of a rule statement engages in rule synthesis, pulling together common threads from multiple statutes and cases and reconciling discrepancies among them. A complete articulation of a synthesized rule accounts for all these threads and discrepancies. Accurate rule synthesis certainly requires the writer to consider the hierarchy of authorities, including the primary or secondary nature of the authority, the mandatory or persuasive nature of the authority, and the recency of the authority.

It is considered good form in memo writing to make a clear statement about the synthesized rule before you provide the rule explanation, i.e., before you discuss the cases from which you have distilled your rule statement. This format may seem counterintuitive to some. After all, you first have to read the cases and identify the guidelines and reasoning applied by those courts before you can distill from all those opinions the components of the synthesized rule. Nonetheless, from the reader’s standpoint, your discussion is most understandable when you first state the main, organizing idea (extracted from the supporting cases) and then follow that statement with a discussion of the case law that supports and elaborates upon the main idea.

What does a good rule statement sound like? The answer depends in part on the purpose for which you are writing. When you write predictively, as in a law office memorandum that addresses an issue of common law, your rule statement should summarize the recurring elements (common threads) in judicial decisions involving that issue. It works best as a general statement of law that is phrased as a definition rather than as a question or a remark about what the court might consider or do.

R: Rule Explanation  If the rule statement serves as the thesis sentence for a longer discussion about a legal rule that has developed over time in a series of cases, the rule explanation serves as your explanation and elaboration of that thesis sentence. In the rule explanation you can support the rule statement by reference to a statute or to judicial holdings and opinions, further explain key terms or phrases you have used in the rule statement, or define the scope of the rule by more detailed reference to judicial opinions, including the holdings and the factual contexts in which they arise. In this section, you discuss case facts, holdings, and reasoning only to support and explicate the rule statement.

As you are writing the rule explanation section, remember the reader is best served (i) when you emphasize those case facts or extracts of the opinions that support or explain your rule statement; and (ii) when you make an explicit statement about the relationship of the case to your rule; in fact, this is an excellent way to introduce a case because it tells the reader right at the outset why you are bringing up that case at all.

In other words, you do not want your readers to be thinking, "Why am I reading this?" as they read about the cases. Do not make them wonder about the relevance of what they are reading, even for a short time, or make them do the
work of inferring the relevance themselves. And, as you move from paragraph to paragraph in a longer rule explanation, use thesis sentences to connect important ideas in the rule statement with an elaboration of these ideas in the rule explanation. Each paragraph should develop a single concept (thesis); successive paragraphs should have a demonstrable relationship to that concept - providing an additional illustration of it, extending it, contrasting it, or moving to a related but different category of idea.

A: Application Once you have completed your discussion of all legal authority relevant to the issue, you then must explain how your facts fit in with the existing law. Your goal here is to return to and resolve the issue. In this section, you predict (in a law office memo), or argue for (in a brief to court), a particular resolution of your facts by the court. Here you recount those facts that are relevant to the issue and the subsequent rule/rule explanation section.

A good application section weaves the cases into your facts. Language from the cases should be prominent and woven into your discussion of these facts. In the rule explanation you discuss cases to support the rule statement. In the application section you might draw analogies or contrasts between the existing cases and your facts as a way to reach your conclusion. (NOTE: if you mention the holding, reasoning, or facts of a case in the application, you should first introduce these aspects of the case in the rule explanation; do not use the application section to introduce new case discussion.)

C: Counterarguments The use of a counterargument is a good way to convey that the existing legal authority is not clear, unequivocal, or unified when applied to facts like yours. It may be the case that you cannot predict with certainty the outcome of your case, given your facts. There may be competing lines of authority, competing policy rationales, and/or a dearth of cases on point in your jurisdiction. Use of counterarguments is also an effective way to address, and then dispose of, the perspectives of those with whom you differ.

Counterarguments function differently in predictive and persuasive writing. In a law office memorandum, identifying counterarguments helps your client assess the strength of a legal position, the availability of defenses to a claim, and alternative ways of analyzing a situation. In persuasive writing such as a brief to a court, counterarguments address and dispose of likely arguments that the opposing side will advance. In advocacy, treatment of counterarguments typically is briefer and more conclusory than in a law office memorandum because the purpose of including them is to limit, distinguish, or neutralize arguments that your opponent has marshaled.

C: Conclusion The conclusion is a short statement of your position on the question or issue explored in a given IRAC/CRRACC. Your application section should be written in a way that leads the reader inexorably to your conclusion. Likewise, the conclusion statement at the end of the discussion should contain language that refers to the application section. It should read as the natural concluding statement of your application section.
In your application section you may have struggled with areas of uncertainty in the legal doctrine and/or competing policy rationales. You may have also grappled with a seemingly contradictory assortment of facts: some seem to fit into the requirements of the rule; others suggest that the rule is not satisfied. You may have weighed arguments against counterarguments. After you have done all this, you must take a position and make a statement about how the court will/should apply the law.

As a legal writer, it helps to have an assortment of qualifiers to acknowledge how certain or uncertain you are of the actual judicial outcome. Your conclusion can convey that your argument in that CRRACC is a slam-dunk—you are completely confident the court will rule the same way—or that the outcome is really a toss-up and could go either way. Or you can convey any level of confidence in between. Keep in mind that the reader will be judging your credibility as a legal thinker based on (among other things) the congruity of your tone with the data at hand.

To reiterate, as a legal writer, you will be presented with a set of facts and will be expected to answer legal questions about them in either a predictive or a persuasive voice (unless your task is to draft legislation, a will, or an agreement, which involves a different set of writing, analytic, and planning skills that are beyond the scope of this discussion). As a law student, sometimes you will be asked to write something that addresses a narrow range of issues (e.g., a short memo); sometimes you will be asked to spot all the legal issues you can and then address them (e.g., an answer to one kind of exam question). Larger legal questions can usually be broken down into a series of smaller ones, such that you can break off each component sub-question in turn, “IRAC” or “CRRACC” it, dispose of it, and then turn your full attention to the next sub-question. As you tease apart the sub-questions, you must define and organize them in a way that covers all the relevant legal rules and also makes it easy for the reader to follow. A good legal analysis of a set of facts is usually structured as a series of IRAC or CRRACC units.

Finally, try to remember that the CRRACC structure is a guideline, and that all of the comments in this document are also guidelines. They exist to help you reason in a more orderly way and to allow that reasoning to be as understandable and accessible to your reader as possible. As you become more adept at organizing and conveying legal analysis you will find ways to modify and adapt the traditional paradigm. Your goal is to reason in a deep and well-organized way, and to write so as to convey your reasoning clearly. Your use of CRRACC should serve these goals.

B. The Rule

1. Large-Scale Organization: Creating an Annotated Outline

An annotated outline is the most reliable method for making your legal analysis complete and coherent. Without it or its equivalent, you are likely to miss
issues and to wander off track as you write. Also, it will provide the structure of the discussion section of your memorandum. If you have carefully prepared the annotated outline, writing the memorandum will flow easily. Your topic headings, thesis sentences, and case citations in support of your explanation and application of the law will already be laid out. This chapter first explains how to identify the structure of a legal rule and to write it out in outline form. Then, the chapter explains how to use that structure to create an annotated outline for your particular assignment.

**a. Rule Structures**

Rules of law adopt particular structures. Familiarity with these structures will help you in several important ways. First, recognizing a rule structure is a method for quickly deepening your understanding of the rule. This study tool will work well for virtually all of your law school classes. If you are preparing a course outline for contracts, for instance, your outline will be more effective if you consciously outline the legal rules you are studying. Second, the rule’s structure will become the basis for the large-scale organization (the outline) of your memo or brief, or even the relevant part of your contracts final exam.

Therefore, when you formulate a legal rule from a case opinion, try to express it in an outline format. Use any version of traditional outline form, with roman numerals, large case letters, Arabic numerals, and small case letters, as necessary. If the rule takes the form of a simple list, you can denote the list using Arabic numbers. This outline of the relevant rule will allow you to focus your analysis on each element in an orderly way, not forgetting any element and not confusing your analysis of any one element with that of any other element.

As you gain experience in outlining legal rules you will notice certain common rule structures. Becoming familiar with these common structures early in your legal training will help you to recognize them quickly and to outline the rule and your legal analysis more easily.

**A Conjunctive Test.** This kind of rule sets out a test with a list of mandatory elements. For example, consider the following rule: To revoke a will, a testator must have the intention to revoke and must take some action that demonstrates that intent. The outline for this rule would set out each of the required elements like this:

<table>
<thead>
<tr>
<th>To revoke a will, a testator must</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. have the intention to revoke and</td>
</tr>
<tr>
<td>2. take some action that demonstrates that intent.</td>
</tr>
</tbody>
</table>

**A Disjunctive Test.** This kind of rule sets out an “either/or” test. It identifies two or more subparts and establishes a certain result if the facts fall within any one subpart. For example, consider the following rule: A lawyer shall not collect a
contingent fee in a criminal matter or a divorce. You might outline the rule like this:

<table>
<thead>
<tr>
<th>A lawyer shall not collect a contingent fee in either of the following kinds of cases:</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. a criminal matter or</td>
</tr>
<tr>
<td>2. a divorce.</td>
</tr>
</tbody>
</table>

Notice that the difference between the first two rule structures lies in the introductory language specifying whether all subparts are required or whether any single subpart is sufficient.

A Factors (Aggregative) Test. This kind of rule sets out a flexible standard guided by certain criteria or factors. Some rules condition the legal result on a more or less objective standard. A burglary statute, for instance, defines burglary using a number of fairly objective criteria. Was it a dwelling? Did it belong to another? Did the defendant enter it? However, some rules condition the legal result on a much more flexible standard, giving more discretion to the decision-maker. To keep judges from being totally arbitrary and to help them exercise their discretion wisely and uniformly, rules using flexible standards often identify factors or criteria to guide the decision-maker. Here is an example of such a rule:

Child custody shall be decided in accordance with the best interests of the child. Factors to consider in deciding the best interests of the child are: the fitness of each possible custodian; the appropriateness for parenting of the lifestyle of each possible custodian; the relationship between the child and each possible custodian; the placement of the child’s siblings, if any; living accommodations; the district lines of the child’s school; the proximity of extended family and friends; religious issues; any other factors relevant to the child’s best interests.

Placed in outline form, the rule would look like this:

<table>
<thead>
<tr>
<th>Child custody shall be decided in accordance with the best interests of the child. Factors to consider in deciding the best interests of the child are:</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. the fitness of each possible custodian</td>
</tr>
<tr>
<td>2. the appropriateness for parenting of the lifestyle of each possible custodian</td>
</tr>
<tr>
<td>3. the relationship between the child and each possible custodian</td>
</tr>
<tr>
<td>4. the placement of the child’s siblings, if any</td>
</tr>
<tr>
<td>5. living accommodations</td>
</tr>
<tr>
<td>6. the district lines of the child’s school</td>
</tr>
</tbody>
</table>

4. Some scholars use the term “rule” to refer only to fairly objective, concrete legal tests and use the word “standard” to refer to more flexible tests like a factors test or a balancing test. To avoid confusion, however, we use the term “rule” to refer to both kinds of legal tests.
Notice the critical difference between this rule structure and a conjunctive test (a rule with mandatory elements). In a conjunctive test, all of the subparts must be met, but here the subparts are just factors to consider rather than separate individual requirements. One or more can be absent from a particular case without necessarily changing the result. The decision-maker has the discretion to gauge the relative importance of each factor.

**A Balancing Test.** This kind of rule balances countervailing considerations against each other. A rule setting out a balancing test is also inherently flexible, so such a rule often includes factors or guidelines to assist the decision-maker in weighing each side of the balance.

For example, consider this dispute over legal procedure. Prior to trial, parties in civil litigation try to obtain information from each other by using interrogatories (written questions directed to another party and calling for answers under oath). Sometimes, the party receiving a set of interrogatories will object to certain interrogatories, arguing that answering would be unduly burdensome. To decide whether the party must answer the interrogatories, the judge applies the following rule:

A party must respond to properly propounded interrogatories unless the burden of responding substantially outweighs the questioning party’s legitimate need for the information.

To measure “burden,” the judge might consider a number of factors, such as the time and effort necessary to answer; the cost of compiling the information; any privacy concerns of the objecting party; and any other circumstances particular to the objecting party’s situation. To measure “legitimate need,” the judge might consider a number of other factors, such as how important the information would be to the issues of the trial, whether the information would be available from some other source or in some other form, and any other circumstances relating to the party’s need for the information. Placed in outline form, the rule would look like this:

A party must respond to properly propounded interrogatories unless the burden of responding substantially outweighs the questioning party’s legitimate need for the information.

### A. The burden of answering:
1. the time and effort necessary to answer
2. the cost of compiling the information  
3. any privacy concerns of the objecting party  
4. any other circumstances raised by that particular party’s situation  

B. The questioning party’s need for the information:  
1. how important the information would be to the issues of the trial  
2. whether the information would be available from some other source or in some other form  
3. any other circumstances relating to the party’s need for the information

Compare this rule structure with the factors test. In a factors test, the decision-maker gauges a single interest, for example, “the best interest of the child.” In a balancing test, the decision-maker balances two competing and different interests, comparing the strength of each interest against the other. In the discovery rule above, these two interests are the burden of answering and the need for the information.

A Defeasible Rule. A defeasible rule is a rule with one or more exceptions. Here is an example of a rule with an exception:

A lawyer shall not prepare any document giving the lawyer a gift from a client except where the gift is insubstantial or where the client is related to the lawyer.

Placed in outline form, the rule would look like this:

A lawyer shall not prepare any document giving the lawyer a gift from a client except  
A. where the gift is insubstantial or  
B. where the client is related to the lawyer.

Again, notice that the critical distinction between this structure and the others lies in the introductory language defining the subparts as exceptions to a general principle. Notice also that you can accurately articulate some rules using different structures. For instance, do you see how you could easily articulate this rule using a disjunctive rule structure?

A Simple Declarative Rule. A simple declarative rule contains no elements, factors, or other subparts. For example, if you are analyzing the validity of an unsigned will, you might be dealing with a rule like this:
To be valid, a will must be signed.

If you have looked carefully and find no subparts, factors, or other criteria for applying the rule, you can assume that your rule is a simple declarative rule. In such a case, your structure will be a simple one-point structure. However, take care to assure yourself that your rule has no lurking elements or other subparts. Overlooking elements or other subparts is a common mistake for beginning legal writers.

**Rules Combining Several Structures.** Some rules use more than one rule structure. Such a rule will use a larger structure like one of the examples set out above. However, the rule’s subparts might use another rule structure. For instance, consider this rule governing attacks on the credibility of criminal defendants who testify at trial:

Evidence that the accused previously was convicted of a crime shall be admitted if the crime involved dishonesty or false statement or if the crime was punishable by death or imprisonment in excess of one year and the conviction’s probative value outweighs its prejudicial effect.

This rule uses the disjunctive (either/or) structure for its larger structure, like so:

Evidence of a prior conviction may be admitted if it falls within either of the following categories:
A. if it involved dishonesty or false statement, or
B. if it was punishable by death or imprisonment in excess of one year and its probative value outweighs its prejudicial effect.

Notice, however, that subpart B contains two requirements (the punishment requirement and the comparison of probative value to prejudicial effect). Notice also that the inquiry about probative value and prejudicial effect is a balancing test. What’s more, the cases interpreting this rule probably describe the factors to be considered in gauging “probative value” and “prejudicial effect.” Thus, a more detailed outline of the rule might look like this:

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5. At a trial, the judge decides what testimony or documents can be admitted into evidence by applying the rules of evidence in effect for that court. If the judge refuses to admit a document into evidence, that information cannot be considered when deciding the case.

6. See Fed. R. Evid. 609(a) (paraphrased).
Evidence of a prior conviction may be admitted if it falls within either category A or category B:
A. if the conviction involved dishonesty or false statement; or
B. if both of the following are true:
   1. the conviction was punishable by death or imprisonment in excess of one year; and
   2. its probative value outweighs its prejudicial effect
      a. probative value is gauged by:
         [List factors set out in the cases.]
      b. prejudicial effect is gauged by:
         [List factors set out in the cases.]

b. Creating an Annotated Outline
   As you know, outlines divide material into topics and organize them, using levels to show how the topics relate to each other. The first level of distinction is reserved for the broadest categories. The second level represents the largest distinctions within each of the broad categories. Those second-level topics can be subdivided even further. We begin with the first level of distinction for a legal analysis: the legal question(s) you have been asked to address.

   i. The First Level: The Legal Questions You Have Been Asked to Address
   Your writing assignment probably identified the legal question or questions you are to address. If you have been asked to analyze whether William Levitt’s actions constituted burglary, you have been asked to address only one legal question. But if your assignment also asks you to address whether his statement to Delores Corbitt, his alleged common law wife, will be admissible at trial, you have been asked two legal questions. The first question will be governed by the rule identifying the elements of burglary. The second question will be governed by a different rule — a rule of evidence.

   Use your outline’s first level of distinction (roman numerals) to identify the separate legal questions you have been asked to address. At the outline stage, you can phrase these issues as questions or, if you are ready, as your answers to the question. In the example above, the outline’s first level of distinction would be:

   I. Do William Levitt’s acts constitute burglary?
   II. Will Levitt’s statements to Delores Corbitt be admissible at trial?

   If you have been asked only one question, use a roman numeral “I” for that question, and do not be concerned that you will not have more than one roman numeral. Let the use of the roman numeral assure you and your reader that this is
the issue you were given and, therefore, that this is the point of connection between that question and your own analysis.

**ii. The Second Level: Governing Rules**

Whether or not your assignment identifies separate legal questions, your research might reveal that the answer will depend on two different legal issues governed by two different legal rules. Your assignment might ask, “Can our client succeed in a claim for negligence against the other driver?” This is one legal question. However, you might discover that its answer will depend on the answers to two separate legal questions governed by two separate legal rules: (1) whether your client can establish the elements of a negligence claim; and (2) whether the applicable statute of limitations has expired. If your answer to the question will require analysis under two different and unrelated legal rules, use the next level of distinction (uppercase letters) to represent the discussions of these two different rules.

For instance, in our prior example, assume that the second question (admissibility of Levitt’s statements) will require analysis using two different governing rules: the rule of evidence that prohibits admission of statements made to a common law spouse and that jurisdiction’s rule defining a valid common law marriage. Our outline now looks like this:

<table>
<thead>
<tr>
<th>I. Do William Levitt’s actions constitute burglary?</th>
</tr>
</thead>
<tbody>
<tr>
<td>II. Will Levitt’s statements to Delores Corbitt be admissible at trial?</td>
</tr>
<tr>
<td>A. Are Levitt and Corbitt married according to common law?</td>
</tr>
<tr>
<td>B. Are statements to a common law spouse admissible at trial?</td>
</tr>
</tbody>
</table>

**iii. The Third Level and Beyond: The Rule’s Structure**

Use your outline of the governing rule(s) to form the next levels of your discussion’s outline. For instance, in our example, the next levels under the roman numerals might produce the following outline:

<table>
<thead>
<tr>
<th>I. Do William Levitt’s actions constitute burglary?</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. breaking</td>
</tr>
<tr>
<td>B. entering</td>
</tr>
<tr>
<td>C. dwelling</td>
</tr>
<tr>
<td>D. of another</td>
</tr>
<tr>
<td>E. in the nighttime</td>
</tr>
<tr>
<td>F. intent to commit felony therein</td>
</tr>
<tr>
<td>II. Will Levitt’s statements to Delores Corbitt be admissible at trial?</td>
</tr>
<tr>
<td>A. Are Levitt and Corbitt married according to common law?</td>
</tr>
</tbody>
</table>

7. Statutes of limitation prescribe the time limits within which a claim can be brought.
1. intent of both parties to be married, and
2. actions holding themselves out to the community as husband and wife.

B. Are statements to a common law spouse admissible at trial?

[Statements made to a common law spouse are privileged and therefore not admissible unless the privilege is waived.]

C. Has Levitt waived the privilege?

Notice that your research on the admissibility of statements to a common law spouse has yielded a defeasible rule (a rule with an exception). The rule is a simple declarative statement with one exception: “The statements are inadmissible unless the defendant has waived the privilege.” Therefore, you have discovered another subissue: whether Levitt waived the privilege. You must return to your research to learn what kinds of acts would constitute a waiver.

Thus, the outlines of the relevant rules provide the organization for your working analysis of each issue. Using this outline, your analysis of the burglary question would discuss each element separately, completing the discussion of one element before proceeding to the next. Then you would proceed to the admissibility question and follow the same process there.

iv. Omitting Issues Not in Dispute

You might already know that some of the categories on your outline will not be issues in your assignment. For instance, in the burglary example, the “night-time” issue probably would not be disputed if the entry of the building occurred at 2:00 a.m. You can revise your outline now to delete the “nighttime” category, but you cannot forget the issue just yet. You will need to explain to your reader your reasons for not addressing that element. Section 3.C.3 will describe how and where to give your reader this information.

To be sure you do not forget the element, you can leave it in its place on your working draft outline and simply skip it when you start to write. After you have written out the other parts of your analysis, you will use your working draft to create the document designed for your reader. At that point, you will be doing some rearranging of the sections anyway, so revising the outline then would be convenient. For example, as Section 3.C.3 will explain, it probably will be appropriate to place the most dispositive element first in your discussion, and you might not know which element will be most dispositive until you have written out your analysis.

Leaving the category in its place temporarily can be a good idea for another reason. Legal conclusions often turn out to be less obvious than they first appeared. Only after you have researched both law and facts will you be ready to predict how the rule will apply to your client. Only then will you know for certain whether you can treat any parts of the rule as undisputed.
v. Uncertainty About Which Rule Your Jurisdiction Will Adopt

You might find that your jurisdiction has not yet adopted a rule governing your particular issue. Or perhaps your jurisdiction’s rule reflects an unwise approach to the issue, and your client’s interests would be served best by the adoption of a different rule. If you are writing an office memo, you will have to predict what rule the court probably would adopt. Then you can analyze the disposition of your client’s particular issue, assuming that your prediction is correct. You might also need to analyze the result if the decision-maker adopts the other rule. Your working draft outline might look like this:

| A. If the court adopts rule A, what will be the result? |
| B. If the court adopts rule B, what will be the result? |
| C. Which rule is the court most likely to adopt? |

In an office memo, you will need to compare the two rules to predict which rule the court is likely to adopt. In a persuasive brief to the court, you will be arguing which rule the court should adopt. In either case, you will need to address the relative strength of the authority supporting each rule.

vi. Annotating Your Outline

Your working outline now provides the structure for your discussion of the authorities. The next step is deciding which authorities you will discuss under each point in the outline and for what purpose. Chapter 3, page 52 described this process. If you have not yet read those pages, do so now. Remember that you should write a complete sentence expressing each relevant point you have learned about the rules of law. Do not select the authorities you will use until you have identified the points you will make. This way you will find yourself organizing according to the relevant substantive points and not simply listing and describing cases without using them to make a relevant point.

For each of the following exercises, draft an outline for a discussion of the legal issue. Assume that the “rules” set out below are the rules you have formulated from the applicable authorities.

C. Rule Explanation and Application

1. Small-Scale Organization: Explaining the Law

After you have a large-scale structure for your discussion, the next step is to write out the analysis, putting flesh on the bones of this structure. Section 3.C.3 will explain how to put the discussions of multiple issues together into one cohesive analysis.
You might say, “For the reasons I’ve explained before, that will not satisfy any of my client’s needs,” while using a tone of voice and perhaps a facial expression to suggest that the negotiation will fail unless the adversary becomes more responsive.

When are tone of voice and body language better than words? Sometimes, words will make one or both people uncomfortable (as with the charming and witty client). And sometimes, words that convey all you feel will make it hard for the other person to change behavior (as with the negotiating adversary who has not been listening to you). Tone of voice and body language can be used to imply where explicitly saying something would cause additional problems.

**h. Making Arguments**

A lawyer’s argument is not bickering. An argument is a group of ideas expressed logically to convince a listener to do a particular thing or to adopt a particular belief.

For good reasons, we list making arguments last among oral communication skills. One of the signs of ineffectiveness in a lawyer is a tendency to make arguments in situations where it would be more productive to do the things we’ve listed above: listen, empathize, ask questions, find or tell a story, paint a picture, give information, or imply through tone of voice or body language.

Nobody really knows why ineffective lawyers do this. It might be because argument is one of the first communication tools, oral or written, taught in law school, which might leave students with the impression that arguing is the essence of lawyering. Or it might be because the stereotype of lawyers as arguers attracts to the profession people who like to argue.

Certainly, every lawyer needs to know how to make good arguments. There are plenty of times when the only way, or the most effective way, to get what the client wants is through argument. But a threshold skill is knowing when to argue and when to do something else instead. In the negotiation chapters of this book, we help you develop that skill.

**D. Multi-cultural Lawyering**

1. **How Culture Matters in Lawyering**

A lawyer can be effective only if the lawyer understands cultural differences and knows how to recognize and deal with them. You will deal with people from widely varied cultures, regardless of the type of legal work you do. Different cultures are entitled to respect on their own terms and without stereotyping.

A culture is a body of values, customs, and ways of looking at the world shared by a group of people. A culture can be based on any of the following:

- ethnicity or race
- gender
- age
Obviously, many people have sensibilities shaped by more than one culture. If you ignore the differences among cultures—or if you think of people in cultural stereotypes—you will alienate clients, witnesses, other lawyers, and judges and juries. You will also cut yourself off from a great deal of information, simply because different cultures communicate in different ways.

Working with people of diverse backgrounds is a skill—actually a cluster of skills.

2. How Cultural Differences can Matter in Lawyering

Here are some ways in which cultures can differ and how that can affect how you do your job as a lawyer.

Are the events involved viewed differently by people from different cultural contexts? A police car is following another car. The police car’s siren and flashing lights go on, and both cars pull over to the side of the road. A police officer steps out and walks toward the other car. The officer plans to issue a traffic ticket and believes he is just doing his job. At least some of the police officer’s expectations might arise from the organizational culture prevailing in the police department. If the driver is from a culture that does not have a troubled history with the police, the driver expects merely the unpleasant experience of receiving a traffic ticket. But what is about to happen could be seen very differently by the driver if that person is from a culture in which contact with the police sometimes creates risks not shared by the majority U.S. culture. Either driver might be surprised by what happens when the police officer reaches the car and begins a conversation. But the cultural norms and expectations of all three of these people will affect what they say and do and how they remember the event afterward.

How is conflict viewed? In the majority U.S. culture, conflict is considered socially acceptable and even socially useful. That does not mean that every person in the majority culture enjoys conflict. Many people do not, and they will avoid conflict if they can. But conflict is not considered disgraceful in the United States. It’s honorable to complain when something goes wrong. And U.S. law resolves disagreements through procedures that might be more adversarial and contentious than in any other country. (Even lawyers in other common law countries are sometimes shocked by the way American lawyers behave in the courtroom.)

In some other countries, however, conflict is considered disgraceful. In some cultures, anyone involved in open and public conflict is thought to have done
something shameful. People in these cultures may often simply suffer a loss rather than complain officially about the person who caused the loss, especially if that person has a higher status or power of some kind. The world is not divided into conflict-tolerant cultures and conflict-intolerant cultures. Instead, cultures have a broad range of attitudes toward conflict, from those that honor conflict (such as the majority U.S. culture) to those that dishonor it, with many cultures somewhere in between. And in some cultures certain types of conflict are acceptable while others are not.

If you counsel a client whose cultural assumptions about conflict are different from yours, you might create a set of options that are entirely inappropriate for the client unless you take the cultural differences into account. And if you negotiate confrontationally against someone who views conflict as a disgrace, you might make agreement impossible.

**Is hierarchy valued?** Participatory relationships between professionals and their clients (see Section 4.A) reduce hierarchy (although they don’t eliminate it). Participatory relations do not always seem natural in cultures where authority figures are deferred to in ways that most Americans are no longer accustomed to. It might be difficult for a lawyer to create a participatory relationship with a client from a culture where hierarchy is valued. The client might view the lawyer as an authority figure who must be given respect and deference.

**Is formality valued?** The majority U.S. culture is, by world standards, unusually informal. In business situations, for example, we quickly get on a first-name basis. In some cultures, this can be taken as a show of disrespect for the person whose first name we have started using. In those cultures, informality can imply that you do not take seriously the person you’re talking to or the subject you’re talking about.

**How much do personal relationships matter?** In some cultures, two business people will do a deal just because each expects to make money from the transaction. Nothing else really matters. If, after “running the numbers,” each side is confident of making a profit, the deal is turned over to lawyers, who draft a long contract intended to govern the behavior of the parties in every detail. This is typical in the United States, where the contract is the entire transaction, and anything not provided for in the contract is probably not part of the deal.

In other cultures, business people will spend a great deal of time getting to know each other as human beings before either mentions even the possibility of doing a deal together. Each will want a great deal of confidence that the other can be trusted. If they do agree on a transaction, the contract might be two or three pages long, specifying little. After it is signed, it will be filed away and probably never looked at again. This is typical in Latin America and many parts of Asia, where the relationship is the core of the deal, and later problems and confusions will be resolved through the relationship, which would be damaged by referring to the contract.
This kind of cultural difference has obvious ramifications in international business transactions. But it also matters in the everyday practice of law. For several cultures inside the United States, personal relationships are much more important than they are to the majority U.S. culture. A person from a culture where personal relationships are highly valued can experience the majority U.S. culture as cold and impersonal, which can be important if that person is a client or a lawyer in a case you are working on.

**How acceptable is it to show emotion or to talk about emotion?** In some cultures, it is not acceptable to discuss emotions about personal matters except with family or long-time friends in the privacy of the home. And in many cultures, including several in the United States, people do not talk about their emotions as spontaneously as many Americans do. A client might be suffering emotionally even if the client, for cultural reasons, does not talk about it in an interview. And some clients might be made uncomfortable if their lawyer tries to express empathy too overtly. In some cultures, empathy is best expressed by subtle changes in tone of voice or facial expression rather than in words.

**How much is typically said in words, and how much is left to implication or context?** In the majority U.S. culture, a relatively high proportion of what one communicates is expressed in words. In some other cultures, this is considered unsubtle or rudely blunt. In some cultures, words are carefully chosen to imply messages that are not explicitly spoken. When a person from one of these cultures deals with a person from the majority U.S. culture, the potential for misunderstandings is large. For example, the person from the majority U.S. culture might not hear the other person’s implications and might become impatient, wrongly assuming that the other person is uncommunicative.

The difference is one of contexting. A low-context culture (such as the majority U.S. culture) communicates primarily through words, leaving little to be implied from the context in which the words are spoken. In a low-context culture, things that have not been spoken are probably not meant. A high-context culture communicates less in words and more by implying meaning from the context. In a high-context culture, what is *not* spoken may be as meaningful as—or more meaningful than—what is spoken.

For lawyers, there is a paradox here. In negotiation, you will have to communicate some things without saying them bluntly in words. If you say them bluntly in words, your adversary will use them against you. If you imply them, or let the context imply them, your adversary can get the message but not in a form that can be used against you. Thus, in one part of their work — negotiation — American lawyers, who otherwise may be among the wordiest and most blunt people on earth, communicate a great deal through implication and context. You will have to learn how to do that in negotiation.

**What does body language communicate?** There are many ways in which body language that seems natural in one culture may convey inappropriate messages in another culture. For example, one of the authors of this book grew up in a part of
the United States where two groups of minority cultures coexisted with the majority U.S. culture. In one of these groups, if you fail to look into another person’s eyes while talking to them, you show disrespect. For some but not all people in the other group of minority cultures, the opposite is true: to look into another person’s eyes is to show disrespect. In the majority U.S. culture, looking into another person’s eyes while talking is optional: you can do it or not do it, with no implication concerning respect.

Which is more important, the individual or the group? In the majority culture in the United States, individuals are expected to make their own decisions based on what’s best for them. In some other cultures, an individual might decide on the basis of what’s best for a group—the family or the community, for example. In still other cultures, a group reaches a consensus and decides for the individual, usually on the basis of the group’s needs. If you are counseling a client from a culture where group needs or group decision-making prevail over individual needs or individual decision-making, you can be helpful to the client only if you take that into account.

3. Why You Should Care about Multicultural Lawyering

For three reasons, you should care about multicultural lawyering:

First, it is the right thing to do. If we really do center on the client, then we also should be able to respect the cultural, racial, ethnic, and gender differences that exist between us and our clients. That means that we recognize the differences and adapt to them rather than assume that the client will adapt to us. For example, we learn to listen for meaning that, in the client’s culture, might be implied, even if in our own it would be expressed if intended at all. And we adapt to differences sincerely because insincerity is condescension.

Second, it’s in your own self-interest to care. It’s good business to respect the cultural and gender differences between yourself and your clients. A very large amount of a lawyer’s work comes through recommendations by satisfied clients, and clients whose differences have been respected sincerely are that much more likely to recommend.

Third, the world is a more interesting place when we become open to cultural differences and the ways in which people from other backgrounds live and perceive what happens around them.

4. The Risks of Stereotyping

Stereotyping occurs when cultural characteristics are oversimplified and exaggerated and then, in that oversimplified and exaggerated form, applied to everyone who shares something of that culture. The following is stereotyping: “White Anglo-Saxon Protestants dislike emotion.” The combined effect of the oversimplification, the exaggeration, and the false assumption that all persons who share the culture are alike is to trivialize, marginalize, patronize, and insult.
The opposite of stereotyping is showing respect for a culture by trying to understand it and all its complexities. Respect includes genuine curiosity and a willingness to accept the culture on its own terms rather than judging it. Respect also includes an understanding that people who share a culture might individually have a wide range of relationships to it. One person might feel immersed in the culture and its values and customs. Another person might have a much more detached relationship with the culture, adopting some aspects of it, rejecting others, and not caring or knowing about still others. Respect for another culture includes recognition of individual differences within that culture.

If you stereotype other cultures, people in those cultures can often quickly sense how you are thinking. The stereotyping will prevent you from having constructive working relationships with them. Genuine respect for a culture, on the other hand, can make it much easier for you to work with people in that culture.

5. Multicultural Skills

What skills do you need to work with people of diverse cultural backgrounds?

You cannot memorize—in advance—every detail about every culture you might deal with professionally. There are far too many cultures for that to be possible. Instead, develop an instinct for situations where another person’s cultural assumptions may be very different from yours. Learn to look for indications of cultural difference. And then try to figure out what would be the appropriate way for you to respond.

If you cannot memorize every detail about every culture, how can you be informed? First, learn about the other cultures that are most commonly found in the area where you will practice law. Learn not only some of their customs and values but also how people in those other cultures view your culture and the world in general. Second, when you foresee a situation in which you can do a better job if you take another person’s culture into account, think carefully about what behavior on your part would be appropriate. Think also about what behavior you should avoid either because it would be stereotyping or because it might accidentally give offense in other ways. Third, if you make a cross-cultural mistake—if you create a problem because you did not understand how your behavior would be seen by people in the other culture—apologize promptly. Often, the best apologies are short and simply note that you were unaware of the cultural difference.

The most important thing is to be curious and open-minded about how other people think and act and why they think and act that way. A generous frame of mind on your part and a genuine liking for other people—and their differences—go a long way in this respect. So do flexibility, empathy, patience, and a reluctance to see things in judgmental terms.

It helps, also, to understand how your own culture “shapes [your] attitudes, values, biases, and assumptions about lawyering” and about social interaction and life generally.59 How is your culture different from the other cultures you know?

This is not the same as asking how those cultures are different from yours. When you ask how other cultures are different from yours, you treat your culture as normal and look for abnormalities elsewhere. Turn it around. Take another culture as normal and ask how your culture differs from that norm. More concretely, how do people in that other culture view your culture? If they were meeting you for the first time, what would they anticipate finding culturally in you?

If you ask people from other cultures, the answers may surprise you. For example, when Americans visit an office and are offered a chair, they are easily willing to move that chair to “adjust the distance” between themselves and the person with whom they are speaking, for example, or to get closer to or farther from a table. This seems so natural to us that we assume anyone in the world would do it. But in some cultures, such as Germany, it creates discomfort and disturbs the settled order of things, and an American entering an office is considered rambunctious.60

After living for five years on their reservations in northeastern Arizona, Ned Hall realized that Navajos and Hopis “believed that whites were crazy, although they didn’t tell us that. We were always hurrying to get someplace [even though] that place would still be there whenever we arrived. Whites had a kind of devil inside who seemed to drive them unmercifully. The devil’s name was Time.”61

6. Do Men and Women Practice Law Differently?

Deborah Tannen, TALKING 9 TO 5

Mona Harrington writes of three women who left large law firms to start their own “alternative” firm specializing in commercial litigation. They determined to do things differently from the way things were done in the large firms where they had worked before — both in managing their relationships with each other and in doing work for their clients.

In terms of interoffice relations, in the women’s firm all partners make decisions together at meetings, have offices equal in size, and divide money earned equally among them, regardless of who brought in the client or who worked on the case. In terms of their working styles, the women told Harrington that they represent clients not by being as aggressive and confrontational as possible, but by listening, observing, and better “reading” opponents. One pointed out that in taking depositions, they get better results by adopting a “quiet, sympathetic approach,” charming witnesses into forgetting that the attorney deposing them is their adversary, than by grilling witnesses and attacking them.

Yet when interviewed by the press about their approach, these same women do not mention their different styles, not even to explain how well they work. Just the opposite, they stress that they are “tough” litigators and seasoned veterans of traditionally contentious legal settings. . . .

Mona Harrington, Women Lawyers: Rewriting the Rules
186–187 (1994)

[Describing the same law firm:]

. . . Many men as well as women employ a quiet style, my interviewees agree, and some women litigators are vigorously aggressive. But they agree that on a stylistic continuum from quiet subtlety to loud antagonism, there is a gender breakdown at the extremes—quiet women, loud men—with an overlap in the middle where you find the counterexamples in both sexes. Still, adds one [partner in the firm], “. . . We’ve been in situations where the two lawyers are women and the judge is a woman. Then the court works differently. There’s less dueling going on. People don’t have their swords out. . . . It’s not a pissing contest. It’s more getting to the heart of whatever it is they’re supposed to be doing. . . . ”

Says another, “We’ve had clients tell us that they thought [that before hiring us they had been] spending a lot of money on [their prior attorneys’] male ego, men showing off, wasting time. A lot of bluster and showmanship is not necessarily in the client’s best interest.”

So why don’t these women market themselves as different—subtle, psychologically astute, sensible, time-saving, wise? Why [do they talk to the media] about being tough? . . . Because, they tell me, there is no available language to describe the alternative qualities credibly within the necessarily adversarial tradition of litigation. The risk is too great that to describe themselves as different in this context is to convey that they are soft, weak, second-class, not to be trusted. One of the women says of the model of difference they’ve described, “I don’t think there’s ever been a language to talk about these things. You just have to be it, and develop a reputation” [based on getting results for clients].

Deborah Tannen, You Just Don’t Understand: Women and Men In Conversation
14–17, 49–50 (1990)

Some men hear any statement about women and men, coming from a woman, as an accusation—a fancy way of throwing up her hands, as if to say, “You men!” They feel they are being objectified, if not slandered, by being talked about at all.

But it is not only men who bridle at statements about women and men. Some women fear, with justification, that any observation of gender differences will be heard as implying that it is women who are different—different from the standard, which is whatever men are. The male is seen as normative, the female as departing from the norm. And it is only a short step—maybe an inevitable one—from “different” to “worse.” . . .

Generalizations, while capturing similarities, obscure differences. . . . In innumerable ways, every person is utterly unlike anyone else—including anyone else from the same categories. . . .
Pretending that women and men are the same hurts women, because the ways they are treated are based on the norms of men. It also hurts men who, with good intentions, speak to women as they would to men, and they are non-plussed when their words don’t work as they expected, or even spark resentment and anger.

The desire to affirm that women are equal has made some scholars reluctant to show they are different, because differences can be used to justify unequal treatment and opportunity. . . . [But t]here are gender differences in ways of speaking, and we need to identify and understand them. Without such understanding, we are doomed to blame others or ourselves—or the relationship—for the otherwise mystifying and damaging effects of our contrasting conversational styles. . . .

Eve had a lump removed from her breast. Shortly after the operation, talking to her sister, she said that she found it upsetting to have been cut into, and that looking at the stitches was distressing because they left a seam that had changed the contour of her breast. Her sister said, “I know. When I had my operation I felt the same way.” Eve made the same observation to her friend Karen, who said, “I know. It’s like your body has been violated.” But when she told her husband, Mark, how she felt, he said, “You can have plastic surgery to cover up the scar and restore the shape of your breast.”

Eve had been comforted by her sister and her friend, but she was not comforted by Mark’s comment. Quite the contrary, it upset her more. Not only didn’t she hear what she wanted, that he understood her feelings, but, far worse, she felt he was asking her to undergo more surgery just when she was telling him how much this operation had upset her. “I’m not having any more surgery!” she protested. “I’m sorry you don’t like the way it looks.” Mark was hurt and puzzled. “I don’t care,” he protested. “It doesn’t bother me at all.” She asked, “Then why are you telling me to have plastic surgery?” He answered, “Because you were saying you were upset about the way it looked.”

Eve felt like a heel: Mark had been wonderfully supportive and concerned throughout her surgery. . . . He thought he was reassuring her that she needn’t feel bad about her scar because there was something she could do about it. She heard his suggestion that she do something about the scar as evidence that he was bothered by it. Furthermore, whereas she wanted reassurance that it was normal to feel bad in her situation, his telling her that the problem could easily be fixed implied she had no right to feel bad about it.

Eve wanted the gift of understanding, but Mark gave her the gift of advice. . . .

Lawyers have to be able to give both. Clients hire lawyers for advice and for other forms of problem-solving, but many clients also expect understanding. And even if the client does not expect it, advice offered with understanding is easier to accept than advice offered without it.
This might involve speaking in two dialects almost simultaneously. Tannen points out that “because boys and girls grow up in what are essentially different cultures, . . . talk between women and men is cross-cultural communication.”


. . . Sensitivity training judges men by women’s standards, trying to get them to talk more like women. Assertiveness training judges women by men’s standards and tries to get them to talk more like men. No doubt, many people can be helped by learning to be more sensitive or more assertive. But few people are helped by being told they are doing everything all wrong. . . .

. . . The biggest mistake is believing there is one right way to listen, to talk, to have a conversation. . . . Nothing hurts more than being told your intentions are bad when you know they are good, or being told you are doing something wrong when you know you’re just doing it your way.

. . . Understanding style differences for what they are takes the sting out of them.

If you understand gender differences in . . . conversational style, you may not be able to prevent disagreements from arising, but you stand a better chance of preventing them from spiraling out of control.

E. Interviewing a Client

1. *Client Interviewing as Problem-Solving*

Lawyers conduct two kinds of interviews. Client interviewing is covered in this chapter. Witness interviewing is covered in Section 4.F.

Client interviewing is hard work for two reasons. The first is the intellectual challenge of beginning a diagnosis of the client’s problem while, at the same time, carefully discovering the client’s goals and the facts known to the client. The second is the emotional challenge of establishing a bond of trust and helping a person who may be under substantial stress.

If you’re a very rational person, you might ignore the emotionally charged atmosphere of the interview, much to the frustration of the client. If you are more astute about emotions than about ideas, you might give a client an emotionally satisfying interview while leaving big holes in your development of the facts. (Lawyers more often have the first problem rather than the second, and clients often complain about it; see Section 4.A.) If you are at one or the other of these extremes, you can improve your interviewing by becoming more rounded. Students at one of the extremes often gain a lot of insight about themselves from critiques of their first interviews.

This might involve speaking in two dialects almost simultaneously. Tannen points out that “because boys and girls grow up in what are essentially different cultures, . . . talk between women and men is cross-cultural communication.”

Deborah Tannen, You Just Don’t Understand: Women and Men In Conversation 297–298 (1990)

. . . Sensitivity training judges men by women’s standards, trying to get them to talk more like women. Assertiveness training judges women by men’s standards and tries to get them to talk more like men. No doubt, many people can be helped by learning to be more sensitive or more assertive. But few people are helped by being told they are doing everything all wrong. . . .

. . . The biggest mistake is believing there is one right way to listen, to talk, to have a conversation. . . . Nothing hurts more than being told your intentions are bad when you know they are good, or being told you are doing something wrong when you know you’re just doing it your way.

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An allied problem is the question of control. The professions in general are attractive careers in part because they offer opportunities to control one’s environment. Aggressiveness and competitiveness are useful in performing many of the tasks in a professional’s work life (such as trying cases in court). The urge and ability to control can help a lawyer keep an interview focused, but, if not carefully managed, they can also smother a client’s communicativeness. Many lawyers find that they must turn their control impulses on themselves, exercising more control over their own behavior than over that of the client. But even this can go too far. Spontaneous warmth and empathy are powerful professional tools.

a. Your Purposes in Interviewing Clients

Client representation usually starts with an interview. A person who wants legal advice or advocacy calls to make an appointment. The secretary finds a convenient time and, to help the lawyer prepare, asks what the subject of the interview will be. The person calling says, “I want a new will drawn” or “I’ve just been sued” or “I signed a contract to buy a house and now the owner won’t sell.” At the time of the appointment, that person and the lawyer sit down and talk. If the visitor likes the lawyer and is willing to pay for what the lawyer might do, the visitor becomes a client of the lawyer.

During that conversation, the lawyer learns what problem the client wants solved and the client’s goals in getting it solved; learns, factually, what the client knows about the problem; and tries to get to know the client as a human being and gives the client a reciprocal opportunity. Then or later, the lawyer and client also negotiate the retainer—the contract through which the client hires the lawyer—but here we focus on other aspects of the interview, especially fact-gathering.

These, then, are the lawyer’s purposes in interviewing a client:

1. **To form an attorney–client relationship.** That happens on three levels. One is personal, in that you and the client come to understand each other as people. To satisfy the client’s needs, you have to understand the client as a person and how the problem matters in the client’s way of thinking. If you and the client are to work together in the participatory relationship described in Section 4.A, you need to know each other fairly well. And the client cannot trust you without a solid feeling for the person you are. The second level is educational, in that you explain to the client (if the client does not already know) things like attorney-client confidentiality (see Section 4.A.6) and the role the client would or could play in solving the problem. The third is contractual, in that the client agrees to hire you and pay your fees and expenses in exchange for your doing the work you promise to do.

2. **To learn the client’s goals.** What does the client want or need to have done? Does the client have any feelings about the various methods of accomplishing those goals (“I don’t want to sue unless there is no other way of getting them to stop dumping raw sewage in the river”).

3. **To learn as much as the client knows about the facts.** This usually takes up most of the interview.
4. To reduce the client’s anxiety without being unrealistic. On a rational level, clients come to lawyers because they want problems solved. But on an emotional level, they come to get relief from anxiety. Even the client who is not in a dispute with anybody and wants something positive done, such as drafting a will, feels a reduction in anxiety when you are able to say — if you can honestly and prudently say it: — “I think we can structure your estate so that almost nothing would be taken in estate taxes and virtually everything would go to your heirs. It would take some work, but I think we can do it.” Most of the time, you cannot offer even this much assurance in an initial interview because there are too many variables and, at the time of the interview, too many unknowns. When first meeting a client, you are almost never in a position to say, “If we sue your former employer, I think we will win.” You need to do an exhaustive factual investigation before you can say something like that responsibly.

Most of the time, clients in initial interviews experience a significant degree of relief from anxiety simply from the knowledge that a capable, concerned, and likeable lawyer is committed to doing whatever is possible to solve the problem. When you help a client gain that feeling, you are reducing anxiety without being unrealistic.

b. Active Listening and Other Interviewing Dynamics

What is really going on in a client interview? Here are the otherwise hidden dynamics:

Inhibitors. What might inhibit a client from telling you everything the client thinks and remembers?

The interview itself might be traumatic for the client. It can be embarrassing to confess that a problem is out of control. And the details of the client’s problem are often very personal and may make the client look inadequate or reprehensible, even when the client might in the end be legally in the right.

The client might be afraid of telling you things that she thinks might undermine her case. You are part of the legal system, and most inexperienced clients do not realize that you can help only if you know the bad as well as the good.

Traditionally, lawyers are seen as authority figures. A client might feel some of the same inhibitions talking to a lawyer that a student feels when meeting privately with a teacher. And this can lead to etiquette barriers: deference to an authority figure may deter a client from challenging you when the client does not understand what you are saying or when the client believes that you are wrong.

The client might feel inhibited by cultural, social, age, or dialect barriers.

Facilitators. What might help a client tell you as much as possible?

You can build a relationship in which the client feels comfortable and trusts easily. And you can show empathy and respect rather than distance. (See Section 4.C.2.b.)
You can encourage communication with nonverbal communication and active listening, and you can set up your office in a way that clients find welcoming (see the next few paragraphs).

You can ask clear and well-organized questions (see Section 4.E.3.b).

**Nonverbal communication.** You are used to “reading” people based on their posture, facial expression, eye contact, and the like. Some of the messages you receive that way are inaccurate, but body language appears to tell us enough about another person’s feelings that we take it for granted. A person who looks us firmly in the eye while talking to us seems to be taking us seriously. Someone who leans back in a chair with arms crossed looks bored or impatient, while a person who sits up straight with arms uncrossed appears to want to hear what is being said. When someone nods vertically while we are speaking, we think that means agreement, or at least “I hear you and accept the importance of what you say.”

When does body language give us inaccurate messages? Sometimes, it is simple accident. A person might be very interested in what we have to say but lean back lazily because of fatigue. Sometimes, it is because body language means different things in different cultures. For example, in some cultures—including some that can be found in the United States—making eye contact is rude, and looking away from someone while talking to them shows respect.

Sometimes, a client’s body language tells you something about the client’s feelings. Sometimes, it does not. But you can use your own body language to show your interest in and respect for the client.

**Active listening.** The ability to listen well is as important in the practice of law as the ability to talk well (see Section 4.C). Some lawyers just want to get to the heart of the matter and quickly move on to other work, but they are in such a hurry that they leap onto the first important thing they hear, even if it is not in fact the heart of the matter. Instead, relax, let the client tell the story, and listen patiently and carefully.

Passive listening is just sitting there, hearing what is being said, and thinking about it. That is fine as long as the client does a good job of telling the story and is confident that you care.

Active listening, on the other hand, is a way of encouraging talk without asking questions. It also reassures a client that what the client is saying has an effect on you. In active listening, you participate in the conversation by reflecting back what you hear.

Compare these three examples:

1. **lawyer listens passively.**

   **Client:** I wanted to buy a very reliable car with a manual transmission and a sunroof. The car has to be reliable. I can’t spare the time to take it into the shop any more than necessary. You can’t get a sunroof and a manual transmission from Toyota. You can at Honda, but the dealer didn’t have any cars in stock. I had to
special order it. I gave them a $5000 deposit. Two months later, they called to tell me the car had arrived. But it had an automatic transmission and no sunroof. I told them that wasn’t the car I ordered. They refused to return the deposit and said I had to accept the car. I don’t want it. A sunroof helps cool off the car quickly, and in the winter it lets in light and makes the car feel roomier. And a manual transmission makes the car more fun to drive.

2. lawyer listens actively.

Client: I wanted to buy a very reliable car with a manual transmission and a sunroof. The car has to be reliable. I can’t spare the time to take it into the shop any more than necessary. You can’t get a sunroof and a manual transmission from Toyota. You can at Honda, but the dealer didn’t have any cars in stock. I had to special order it. I gave them a $5000 deposit. Two months later, they called to tell me the car had arrived. But it had an automatic transmission and no sunroof.

Lawyer: Really?

Client: I was astounded. I told them that wasn’t the car I ordered. They refused to return the deposit and said I had to accept the car!

Lawyer: You must have been pretty upset.

Client: Absolutely. I don’t want the car. A sunroof helps cool off the car quickly, and in the winter it lets in light and makes the car feel roomier.

Lawyer: They are nice.

Client: And a manual transmission makes the car more fun to drive.

3. lawyer listens with a tin ear.

Client: I wanted to buy a very reliable car with a manual transmission and a sunroof. The car has to be reliable. I can’t spare the time to take it into the shop any more than necessary. You can’t get a sunroof and a manual transmission from Toyota. You can at Honda, but the dealer didn’t have any cars in stock. I had to special order it. I gave them a $5000 deposit. Two months later, they called to tell me the car had arrived. But it had an automatic transmission and no sunroof. I told them that wasn’t the car I ordered.

Lawyer: Did you sign a contract with them that specified that the car had to have a sunroof and a manual transmission?

Client: I didn’t sign anything except the $5000 check. They refused to return the deposit and said I had to accept the car.

Lawyer: Is the car defective in some way, or is it just not the car you want?
Client: I don’t want it. It’s not what I ordered, and I shouldn’t have to accept it. I want a sunroof and a manual transmission. A sunroof helps cool off the car quickly, and in the winter it lets in light and makes the car feel roomier. A manual transmission makes the car more fun to drive.

In the first example, the client tells the story without any reaction from the lawyer. At some point, most clients would become uncomfortable in such a situation, and eventually the client would stop talking.

In the second example, the lawyer’s interjections show understanding and empathy and encourage the client to continue. But notice that the lawyer waits before saying anything. That is because clients “will reveal critical material as soon as they have the opportunity to speak,”63 and in the first few moments of a client’s narrative the lawyer should stay out of the way and let the client talk. Here, the first time the lawyer interjects is the first time that simple courtesy would demand an acknowledgement of the client’s predicament. Before that point, it is often better to confine active listening to nonverbal support, such as nods and eye contact.

In the third example, the lawyer asks relevant questions but seems not to have heard any of the emotional content in the client’s story, leaving the client with the feeling that the lawyer is unsympathetic. The lawyer asks the questions prematurely. They could have been asked later. When asked here, they get in the way of the client’s telling the story. To the client, the lawyer’s inability to hear all the client says suggests that the lawyer is not likely to be helpful.

It is the opposite of active listening to say “O.K.” in response to a client’s description of suffering:

Client: . . . And then the ambulance took me to the hospital. Or I’ve been told that happened. I wasn’t conscious at the time.

Lawyer: O.K. Who did the hospital get to sign the consent-to-treatment form?

From the client’s point of view, it is not O.K. O.K. can mean two different things. It can be a throwaway transition word, which is what the lawyer here intended. And it can mean “That’s good,” which is what many clients would hear. If you find yourself saying “O.K.” at times like this, you might be forgetting that the client is a real person who is actually living with the consequences of the facts being described.

An office arrangement comfortable for clients. Consider the furniture arrangement that would help you open up to a lawyer if you were a client. Some people are perfectly willing to talk over a desk to a lawyer. Other people would want

something less formal, perhaps two chairs with a small table to the side (all of which can be in the same room as the desk). We believe most clients are more at ease if you are not behind a big desk, which is both a physical barrier and a symbol of your authority. Sitting with the client — rather than across from the client — communicates in a subtle way that you are open to the kind of participatory relationship described in Section 4.A.

Your office should also communicate professionalism. An office that is a mess, with papers piled everywhere, suggests that the lawyer’s work is out of control. Some lawyers say that they “know where everything is.” Clients instinctively doubt that.

**Taking notes.** Clients are not bothered by your note-taking, although the client might appreciate it if you were to ask, “Do you mind if I take notes?” If you become too wrapped up in note-taking, however, it can be hard to listen (and certainly hard to maintain eye contact). The most effective practice is to take minimal notes while the client is telling the story, perhaps writing down only topics you want to go back to later, and then to take a complete set of notes while you are asking questions after the client has told you the story.

**The most important dynamic in the room.** “What clients want more than anything is to be understood, both for who they are and what they have suffered.”

### 2. Organizing the Interview

You can do a better interview if you prepare before the interview begins, as described below in Section 4.E.2.a. The interview itself can be broken down into five parts.

1. A brief opening part in which the lawyer and client become acquainted and get down to business (see Section 4.E.2.b).
2. An information-gathering part (see Section 4.E.2.c) — usually the longest part of the interview — in which you learn everything the client knows about the facts; if you are using cognitive interviewing techniques, this part of the interview is subdivided into the stages described in Section 4.F.4:
   a. an open-ended narration stage (the client tells the story);
   b. a probing stage (you ask detailed questions);
   c. a review stage (you describe the story as you understand it and the client makes corrections and additions).
3. A goal-identification part, in which you learn exactly what the client wants to accomplish in resolving the problem at hand (see Section 4.E.2.d).
4. A preliminary strategy part, in which you might discuss with the client — usually only tentatively — some possible strategies for handling the problem; in a

dispute situation, this usually includes some consideration of possible theories in support of the client’s position (see Section 4.E.2.e).

5. A closing phase in which you and the client agree on what will happen after the interview (see Section 4.E.2.f).

In practice, these parts usually overlap. For example, some theory-testing and strategizing (part 4) might happen during information-gathering (part 2). Or the client might volunteer clearly stated goals (part 3) in the first moments of the interview (part 1). Overlap is fine as long as it does not interfere with your own interviewing purposes (see Section 4.E.1.a).

a. Preparing
You might have spoken with the client briefly over the telephone when the client made the appointment. Otherwise, in a well-run office the secretary will have asked the client the nature of the problem the client is bringing to you. Some clients decline to say, but most of the time, you will have beforehand at least a vague sense of why the client wants to see you.

Unless you know well the field of law that seems to be involved, take a look at the most obviously relevant parts of the law before the client arrives. If the client says she was arrested for burglary, read the burglary statute and browse through the annotations. If the client wants you to negotiate a franchise agreement with McDonald’s, look through a practitioner’s book that explains how franchising works in the fast-food industry.

The interview is more productive if the client brings the papers that are relevant to the problem. Whoever in your office speaks to the client when making the appointment should ask the client to do that. But clients are not good at judging relevance. Try to be specific. If the client is threatened with mortgage foreclosure, the client should be asked to bring the documents that created the mortgage, all statements sent by the bank that holds the mortgage, records from the checking account used to make mortgage payments in the past, any official-looking notices sent by the bank or a sheriff or a lawyer, and anything else the client has that seems to be related to this mortgage.

b. Beginning the Interview
In some parts of the country, “visiting”—comfortable chat for a while on topics other than legal problems—typically precedes getting down to business. In other regions, no more than two or three sentences might be exchanged first, and they might be limited to questions like whether the client would like some coffee.

When it is time to turn to business, the lawyer says something like:

“How can I help?”
“Let’s talk about what brings you here today.”
“My secretary tells me the bank has threatened to foreclose on your mortgage. You’re probably worried. Where shall we begin?”
Soon afterward, the client will probably say something that means a great deal emotionally to her or him. Some examples:

“I’ve come into some money and would like to set up a trust for my granddaugh-ter, to help her pay for college and graduate school.”

“I’ve just been served with legal papers. The bank is foreclosing on our mortgage and taking our home away from us.”

Too often, when clients say these things lawyers just ask, “Tell me more,” and start taking notes. That may be a sign of the law-trained mind at work, ever quick to find the legally significant facts. But clients rightfully dislike it. If given a choice, most clients would rather not hire “a lawyer.” They would rather hire a genuine human being who is good at doing the work lawyers do. If you heard either of the statements above in a social setting, you would express pleasure at the first or dismay at the second because empathy and active listening are social skills that you already knew something about before you came to law school. Do the same for the client in the office — sincerely.

But do not leap in here with questions. Give the client a full opportunity to tell you whatever the client wants to talk about before you start structuring the interview. There are two reasons. First, many clients want to make sure from the beginning that you hear certain things about which the client feels deeply. If you obstruct this, you will seem remote, even bureaucratic, to the client. Second, many clients will pour out a torrent of information as soon as you ask them what has brought them into your office. If you listen to this torrent carefully, you may learn a lot of facts in a short period of time. You may also learn a lot about the client as a person and about how the client views the problem.

If the client is inexperienced at hiring lawyers, you will need to explain attorney-client confidentiality (see Section 4.A.6). But the best time to do so is probably not in the very beginning. It seems awkward and distancing there, and clients are eager to tell you the purpose of their visit anyway. A better time is in the information-gathering part of the interview, after the client has told you the story and before you start asking detailed questions discussed below in Section 4.E.2.c. Most clients will tell you the basic story at the beginning regardless of whether they understand confidentiality. It is when they begin to answer your questions later that confidentiality encourages clients to be more open with you.

Use the client’s name during the interview (“Good morning, Ms. Blount”). Saying the client’s name at appropriate points in the conversation shortens the psychological distance between you and the client because it implies that you recognize the client as a person rather than as an item of work. Which name you say — the client’s first or last name — depends on your personality, your guess about the client’s preference, and local customs. If you live in an area where immediate informality is expected, it may be acceptable to call the client by first name unless the client is so much older than you that, out of respect, you should use the client’s last name until the client invites you to switch to first names. But in most parts of the country, the safest practice for a young lawyer is to start on a
c. Information Gathering

After the client has explained why you are being consulted, the information-gathering part of the interview begins. If it is important for you to learn the details of past events, this is where you use the cognitive interviewing techniques described in Section 4.F.4.

Not all clients, however, need cognitive interviews. That is especially true in transactional work. When a client wants you to draft a will or negotiate a contract, you will need to learn many facts, but usually you do not need to worry about the client's memory of past events. Much of the information you need is about current conditions. To draft a will, for example, you need a list of the client's assets, a list of the client's potential heirs, and so on. In situations like this, start by asking the client to tell you everything the client thinks you will need to know. After the client has done that, start asking detailed questions to get the rest of the information you will need.

If, on the other hand, you are using cognitive interviewing techniques, the information-gathering part of the interview is subdivided into three stages:

- An open-ended narration stage in which the client is asked to describe everything the client remembers about the facts at issue.
- A probing stage in which you go back over the client’s story and ask questions to fill in gaps and clarify ambiguities.
- A review stage in which you reiterate the most important parts of the story as you understand them to give the client an opportunity to correct misunderstandings and to supply additional information.

Before inviting the client to narrate the story, recreate the context and ask the client to describe everything she remembers about the incidents at issue, regardless of relevancy (see Section 4.F.4). Say something like this:

**Lawyer:** I need to learn everything you can remember about what happened inside the store. Let’s go back to the point where you got out of your car in the parking lot. Take a few minutes and return in your own mind to that moment. Think about what you were seeing and hearing at the time, as you were walking through the parking lot toward the store. Don’t rush this. I can wait until you’re ready. And when you are ready, tell me everything you remember — even if it does not seem to be related to the store manager’s accusation about shoplifting.

If the client has trouble producing a complete and coherent story, you might ask her to recall the event in a sequence other than chronological, perhaps starting with the thing that impressed the client the most, or you might ask the client
to change perspectives and assess what others present might have seen or heard (see Section 4.F.4).

While listening to the story, take two kinds of notes. Write down what you are being told, and make a list of topics to go back to later for clarification or to fill in gaps. You can use two pads of paper to do this. Or you can use one pad, drawing a vertical line on each page to separate the two kinds of notes.

After the client has told the story, you can start asking questions. This is the second stage of the cognitive part of the interview. Get a clear chronological view of events from beginning to end, as well as a firm grip on the precise details of the story. For example, exactly when and where did each event happen? See Section 4.E.3.a for what to ask about and Section 4.E.3.b for how to formulate and organize questions.

You can introduce the review stage by saying something like this:

_**Lawyer:**_ I think I’ve got a clear picture now. Let me tell you my understanding of what happened. If I’ve got anything wrong, please correct me. And if you remember anything else as I go along, please interrupt me to point it out.

Then briefly summarize the relevant parts of the story.

Regardless of whether you are using cognitive interviewing techniques, the time to bring up attorney-client confidentiality is when you start asking questions. How should you explain confidentiality? It is not accurate to say, “Everything you tell me is confidential.” There are important exceptions to that statement (see Section 4.A.6). Most clients, however, do not want to hear a lecture on all the exceptions. A middle course is better:

_**Lawyer:**_ Before we go further, I should explain that the law requires me to keep confidential what you tell me. There are some exceptions, some situations where I may or must tell someone else something you tell me, but for the most part I am not allowed to tell anybody other than the people who work with me representing you.

You can explain the exceptions if the client asks about them or if one of them is obviously relevant.

Do not label the problem until you have heard all the facts. A client who starts by telling you about a dispute with a landlord might have defamation and assault claims instead of a violation of the lease or of the residential rental statutes.

d. **Ascertaining the Client’s Goals**

From the client’s point of view, what would be a successful outcome? If the client wants help in facilitating a transaction, the client will want the transaction to take a certain shape. For example, the client might want to buy a thousand t-shirts with pictures of Radiohead, but only if they can be delivered two days before next month’s concert and will cost no more than $6.50 wholesale.
each, preferably less. And the client will not want the lawyer to kill the deal by overlawyering.

If the client wants help in resolving a dispute, the desired outcome may vary. The client might want compensation for a loss (money damages, for example) or prevention of a loss (not paying the other side damages, not going to jail, not letting the other side do some threatened harm out of court) or vindication (such as a judgment declaring that the client was right and the other side wrong).

Depending on the situation, the client might want or need results very quickly. And most clients also want economy: they want to keep their own expenses (including your fees) to a minimum or at least within a specified budget.

Goals often conflict. A client who wants a large problem solved immediately on a small budget might have to decide which goals are most or least important. If the client has to compromise on something, will the client spend more, wait longer, or accept less than complete justice?

Whether the problem is transactional or a dispute, the client might want comfort and understanding. Some clients are not under stress or would prefer to keep their emotional distance from lawyers. But most stressed clients at least want empathy.

Most clients do not volunteer all of their goals in an interview. Some clients know what their goals are and assume that they should be obvious to the lawyer. The goals might seem obvious to the lawyer, but because assumptions are dangerous, it is best to get a clear statement from the client. And some clients have not thought through the situation enough to be sure what their goals are. They need help from the lawyer in figuring that out.

Helping the client identify goals requires patience and careful listening, often for messages that are not literally being expressed in the client’s words. “Find[ing] out what the customer wants [is something that] lawyers are famous for [doing badly]. They snap out the questions, scribble on a pad, and start telling you what you’re going to do.”65 Here is an example of what might happen when lawyers do not take the time to do this carefully:

Two law students under the supervision of a law professor represented M. Dujon Johnson on a misdemeanor charge. . . . The lawyers66 investigated the case thoroughly, interviewed their client, developed a theory of the case, and represented Mr. Johnson aggressively. When the case came to trial the prosecutor asked the judge to dismiss the case, a victory for the defense. The client was furious. . . .

Johnson . . . had been arrested by two state troopers when he pulled into a service station at night [and t]he troopers called out, “Hey, yo,” to Johnson, an African American undergraduate. They ordered him out of the car and asked him to submit to a pat-down search. When Johnson refused, claiming that such a search would violate his constitutional rights, the troopers arrested him for disorderly conduct, . . .

66. For conciseness, the author of the article from which this excerpt is taken uses the term “the lawyers” to refer to the team made up of the professor and the law students, who were practicing in a law school legal clinic. Because clinic students are not members of the bar, they may not hold themselves out as lawyers, however.
searched him, pressed his face on the hood of the car while handcuffing him, and took him to jail.

[When they first interviewed him,] the lawyers did not ask Johnson what his goals were. If they had, they would have learned that he wanted more than simply to be cleared of a misdemeanor charge. As he said later, “I would like to have my reputation restored, and my dignity.”

. . . If [the lawyers had inquired more thoroughly], they would have learned that he wanted a public trial. They would have learned that, at . . . arraignment, the prosecutor had offered to dismiss his case if he would pay court costs of fifty dollars, and he had refused. The trial itself was the relief Johnson sought. Without discussing it with their client, the lawyers filed a motion to suppress evidence that, if successful, would have drastically shortened the trial. . . .

. . . [A]fter his case had been dismissed, Johnson said the lawyers had been “patronizing” . . . [that] he was always the “secondary person[,]” and [that] they had treated him like a child.67

Here, the client understood what his goals were, but the professionals representing him did not. Another client might have only a vague sense of goals, and one of the lawyer’s tasks is to work with the client to clarify them.

For example, after being served with an eviction notice, a client might have come to the lawyer just because that seems like the right thing to do when confronted with confusing and intimidating legal papers. But the problem may be a deeper one. The client might have lost a job, and the client’s family might be disintegrating under financial pressures. There are two reasons why you should care. First, there may be legal issues inside the deeper problem (abusive discharge? child custody?). And second, even if there are no legal issues other than the eviction proceeding, the lawyer, as a disinterested observer, is still in a position to offer valuable advice that the client cannot easily find elsewhere (see Section 4.A.1).

Here are some questions that help clarify the client’s goals:

“*If you could imagine the best outcome we can reasonably hope for, what would that be?*” You want a list of the things the client wants to accomplish.

“*If we achieve that best outcome, how will it affect you?*” Or “*how will it affect your family?*” Or “*how will it affect your business?*” These tell you why the client has the goals listed in response to the first question. If the goals the client has initially cannot be accomplished, you and the client can try to develop other goals that have as nearly as possible the same effect.

“*What possible bad outcomes are you worried about?*” And “*Are there any other things that you want to make sure do not happen?*” You want to know what the client wants to prevent.

“*If any of those negative things were to happen, how would each of them affect you?*” (Or “*your family?*” Or “*your business?*”) These tell you why the bad outcomes must be prevented.

e. Considering a Strategy During the Interview

During an initial client interview, you will not know enough to start making clear plans for solving the problem. You will probably need to investigate the facts and read the law, and you will certainly need to think over the problem. But you and the client can do some brainstorming, starting the process of generating solutions (see Section 4.B.1.b). And you can learn something about the ones that are generated by asking the client for relevant information (including the client’s feelings). For example:

**Lawyer:** So the Santiagos do not seem to regret signing a contract to buy your house. In fact, they seem eager to move in. I get the sense that the only real problem from their point of view is that they can’t get a mortgage because the house has a zoning violation. Am I missing something?

**Client:** No. The only complaint I hear from them is about that.

**Lawyer:** One way of handling that is to ask the local zoning board to issue a variance. That could take at least two or three months. Do the Santiagos seem to want the house enough to wait that long?

**Client:** They like the house a lot. And I think they’re worried about having to sue to get their deposit back.

**Lawyer:** Do they have a strong need to move into a house — any house — as soon as possible?

**Client:** I don’t think so. They’re living in a rental now, and they haven’t given their landlord notice that they’re moving out.

**Lawyer:** I can’t predict at this point whether the zoning board would issue a variance. I’d have to look at exactly what this violation is and then see what your zoning board has done in similar cases in the past. But there is one thing I know right now: if any of your neighbors object, the board might not issue a variance. Do you think we’d have a problem there?

**Client:** We’re on good terms with our neighbors, and none of them has ever complained about our backyard deck, which seems to be what the violation is all about.

**Lawyer:** To get the Santiagos to agree to a delay, we might have to say that you will not return their deposit unless ordered to do so by a court. In other words, we’d be saying that if they won’t wait, they’ll have to sue to get their money back. Would you be comfortable taking that position?

**Client:** I don’t mind saying it. But if they actually do sue us, I think I’d rather give them the money and find another buyer. A court fight doesn’t seem like the fastest way to get our house sold.

**Lawyer:** That’s certainly a reasonable way to look at it.
This is a transactional situation on the verge of evolving into a dispute. In addition to some important details, the lawyer learns here that the client prefers to keep the situation transactional and will walk away from the deal to avoid litigation.

In a more typical dispute situation, where litigation is likely, strategizing includes finding the client’s persuasive story — finding a way of looking at the facts that will seem most persuasive to a fact-finder. Lawyers call such a way of looking at the facts a factual theory. In an initial client interview, you are not in a position to develop the theory fully. As with strategies generally, you need to do a factual investigation and read the law first. The most you can do in an initial client interview is to come up with some tentative theories and test them against what the client knows of the facts.

For now, however, it is enough to understand two things about effective theories. First, if you will have the burden of proof, your theory must satisfy the elements of the legal tests that make up your burden. If the other side will have the burden of proof, your theory must prevent the other side from satisfying at least some elements of the legal test the other side must prove. Second, a persuasive theory is based on solid evidence and the inferences people will typically draw from that evidence. In court, ambiguous evidence and debatable inferences are usually resolved in whatever way is most consistent with the evidence that cannot be questioned.

f. Closing

Assuming that the client wants to hire you and that you want to be hired, two agreements conclude the interview.

One is an agreement that the client is in fact hiring you to do the work discussed in the interview. If the client has not made clear that is happening, you can ask a simple question like this: “Now that we’ve talked about it, would you like me to defend you in this lawsuit?” Some clients will say yes or no on the spot. Others will want to think about it after the interview. If you are hired, that should be formalized through a written retainer (see Section 4.E.4.e).

The other agreement concerns what each party will do — and not do — next. Here is a typical example: the client will provide copy of the lease by the end of today; the lawyer will check the law on constructive eviction and call the client tomorrow; in the meantime, the client will not speak to the landlord and will tell anybody who makes demands to call the lawyer. In agreeing on what to do next, consider the following:

1. The client should not do anything to make the situation worse. Agree specifically on what the client will not do. This could involve restraints that might seem unnatural or abnormal to the client. Most clients do not realize that anything they say to an adverse party might escalate conflict, or that anything they say to anybody other than you might be later testified to by the other person, perhaps not accurately. In addition, it is part of a lawyer’s job to bear some of the pressure that would otherwise be brought to bear on the client. If
people have been demanding that the client do something that the client
does not want to do, the client should now start telling them to communicate
only through you.
2. You should make a realistic and clear commitment of what you will do in the
immediate future, together with a schedule for when you will do it. Clients
feel much better if you set a schedule for accomplishing certain tasks, keep to
the schedule, and report back to the client on what you have accomplished.
Otherwise, a client has no idea whether you are working diligently or are
ignoring the problem.
3. The client should commit to provide specific things that you need (informa-
tion, documents) to do your share of the work, and there should be a sched-
ule for this, too. (Paying your retainer is included; see Section 4.E.4.f.) Some
tasks— for example, writing a letter to the Internal Revenue Service request-
ing copies of prior tax returns—are things that you and the client are each
capable of doing. If the client does some or most of them, the client can avoid
paying what it would cost for you to do them.

The end of the interview should provide the client with a sense of closure—a
feeling that a problem has been handed over to a professional who will do what-
ever can be done to solve it. Some clients get closure from the mutual agreements
described above. Others may appreciate a comment from you that shows that you
understand what this problem means for the client and are concerned about it on
a human level.

Explain to the client how best to contact you. That is most easily done by giv-
ing the client your business card, which will include your phone number and
your e-mail address. Most clients will use the telephone. You might explain your
habits in returning phone calls. For example, if you are in court a lot and tend to
return most client phone calls late in the day, explain that to the client and add
that if the client needs a faster response she should tell whoever takes the message
in your office that the client is calling about something urgent.

What if you do not want to be hired to do this particular work? Make abso-
lutely clear that you are not in a position to take it on. If you think another lawyer
would do a good job and would want the work, you might make a referral.

If you are not hired — whether by your choice or the prospective client’s — it’s
wise to document that with a follow-up letter to the client in which you thank the
client for the interview and reiterate that you have not been hired. Lawyers call
this a “nonengagement letter.” Some clients do not hear a soft no when a lawyer
refuses their case. If such a client were not to seek another lawyer, and some bad
thing were to happen (such as the expiration of a statute of limitations), you want
it on record that you are not this person’s lawyer. A typical nonengagement letter
warns the would-be client of a statute of limitations or whatever other deadline
might compromise rights if ignored.
3. Questions

Remember that one of the marks of an effective professional is the ability to ask useful questions in a productive way (see Section 4.C.2). In a client interview, you need to know what to ask about and how to organize and formulate questions.

a. What to Ask About

During the information-gathering part of the interview (Section 4.E.2.c), be sure to explore the following:

*Ask for the raw facts and the client’s source of knowledge.* Do not ask whether the other driver’s car was exceeding the speed limit (a conclusion). Ask how fast it was going and how the client knows that. At trial, the client can testify only to the client’s estimate of the car’s speed in miles per hour. And that can happen only after the client has laid a foundation by testifying that he has a source of knowledge that the law of evidence recognizes as sufficient. If all you know is that the client thinks the car was speeding, you have no idea what the client will testify to at trial, or even whether the client will be allowed to testify on that point. If the client says he does not know the car’s actual speed, but that a friend told him the car had been traveling at about 60 miles per hour, the client will not be allowed to testify to that unless the friend’s statement fits within one of the exceptions to the hearsay rule. The friend’s name goes on your list of witnesses to interview.

*Ask for all the details.* If the client says, “Ling told me about that last week,” do not go on to the next topic. Ask when this conversation happened — not just the day, but also the time. Where did it happen? Who else was present? What else was discussed? How long did the conversation last? How did it start? How did it end? What words did Ling use, and what did the witness and anybody else present say? You are going to need these details to prepare your case. (Because in nonprofessional life vagueness and approximation are usually enough, young lawyers are too casual about these things. Experienced lawyers know that in representing clients only precision works.)

Ask about everything the client saw, heard, and said. You need to be able to see and hear in your own mind the scene in which the events described by the client occurred. Do not assume anything. If the events happened at the busiest intersection in town, do not assume that cars were whizzing past while the client was standing on the sidewalk. If the cars matter, ask. You might be surprised to learn that the street was torn up for construction and all the traffic routed elsewhere. Ask about any detail that might matter.

If a diagram would help you understand what happened, ask the client to draw one. That can be particularly important if the position of people and things in a scene is important.

Make sure you learn all the basic information as well: the client’s full name, age, address, all telephone numbers, occupation and job title, employer, job site, and work hours. Get similar information for the client’s spouse, as well as the ages
of and some details on any children. For each witness or other person with a role in the problem, get as much identifying information as the client can provide.

**Ask whatever questions are needed to prevent The Three Disasters.** The Three Disasters are (1) accepting a client who creates a conflict of interest, (2) missing a statute of limitations or other deadline that extinguishes or compromises the client’s rights, and (3) not taking emergency action to protect a client who is threatened with immediate harm. If you allow any of them to happen, you may commit malpractice and may also be punished for unethical conduct.

A lawyer or a law firm has a conflict of interest where the interests of one client conflict with those of another client, a former client, or the lawyer or law firm. A well-run law office will have a conflicts database so that, if you suspect a conflict, you can quickly find out whether the office represents or has represented a conflicting party. Once a new client has begun to reveal confidential information to you, the damage might be uncontainable, and you or the firm might have to withdraw from representing either client or both. (There are exceptions, which are complicated and explored in the course on Professional Responsibility or Legal Ethics.)

Suppose a client has suffered a wrong and seems to be entitled to a remedy in court. Suppose also that during the interview you don’t bother to pin down the date on which the statute of limitations would have begun to run, and after the interview you don’t bother to read the statute. And suppose the statutory period expires tomorrow. You have accepted a client and allowed the client’s rights to be extinguished. The client still has a remedy, but now it is against you in a malpractice lawsuit. Although the statute of limitations, because of its inflexibility, is the most dramatic example, other deadlines can have similar effects. For example, if the client has been sued by somebody else, when was the client served with the summons and complaint, and when does the time to answer the complaint expire?

Suppose the client has been served with a notice of eviction, and the notice says that the sheriff will evict the client tomorrow. Are there facts on the basis of which a court could grant an emergency order temporarily restraining the sheriff from putting all your client’s belongings on the sidewalk? The only way to find out is to ask pertinent questions during the interview so that, if there are grounds, you can start drafting a request for court relief immediately.

**Ask about pieces of paper.** Ask whether there are any pieces of paper, not already mentioned by the client, that might be related to the problem. (Remember to avoid using lawyer jargon. Do not ask about “documents.” Is a memo a document? You might say yes, but many clients would think no.) If relevant pieces of paper exist, ask where they are and who has possession of them. Ask whether the client has signed any pieces of paper connected to the problem. In a dispute situation, ask whether the client has received any pieces of paper from a

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68. See Rules 1.7, 1.8, 1.9, 1.10, and 1.11 of the Model Rules of Professional Conduct.
court, a lawyer, or a government agency. (Many clients will not understand if you ask whether they have been “served with papers.”)

In a dispute situation, ask all the questions needed to find the story in the facts. In the movie Amistad, Africans who have been brought to Connecticut against their will in 1839 sue to gain their freedom. Slave traders claim they own the Africans, who in turn claim they were kidnapped. At a critical point in the movie, one of the Africans’ supporters (played by Morgan Freeman) seeks the advice of a former President, John Quincy Adams (played by Anthony Hopkins). The case is going badly for the Africans, and the Morgan Freeman character wants to know how to handle it better. Adams says “Well, when I was an attorney a long time ago . . . , I realized after much trial and error that in a courtroom whoever tells the best story wins. In an unlawyer-like fashion, I give you that scrap of wisdom free of charge.”

That is the first of two great insights in the conversation between these two characters. Then, Adams explains how, although the Morgan Freeman character knows the facts about the Africans, he has not yet discovered their story. The second great insight is that you can know the facts but miss the story. Inside a mass of facts—hundreds of events and circumstances—is a story that touches your heart and makes an audience—the judge and jury—hope that one person gets better treatment in the future and another person gets worse. The story does not leap out of the facts. You have to find it. Ask questions that reveal the story you need to represent this client well.

For more on how to do this effectively, go back to Section 4.C.2.d and reread the material on finding and telling stories. We return to this skill in later chapters as well.

In a dispute situation, ask questions that would reveal what arguments the other side might make. There are two sides to every dispute, and you cannot prepare without knowing what the other side will claim. But you will learn little if you ask in a way that seems threatening to the client. For example, if your client has been charged with a crime, do not ask whether she is guilty. Ask what the police and the complaining witness will say about her. Before doing that, explain in detail why you can be a good advocate only if you know in advance what the other side will claim.

In a dispute situation, explore for other evidence. For example, ask who else saw or heard any of the things the client describes. Ask who else might know of aspects of the dispute that the client does not know about.

In a dispute situation, evaluate the client’s value as a witness in court. Is this client likely to tell the story in a way that can influence a fact-finder? Is the client credible and likely to earn the fact-finder’s respect? Are there any doubts about the client’s honesty or ability to observe and remember accurately?
In a dispute situation, ask whether the client has talked with anybody else about the subjects you are asking about. Those people might help corroborate what your client is telling you. Or they might end up testifying against your client at trial, saying that your client made statements that hurt the client’s case.

In a transactional situation, learn the posture of the deal so far. What is the present state of discussions between the client and the other party? What has already been agreed to? What issues have not yet been resolved? What obstacles does the client see to wrapping up the agreement? How much does the other party want or need this transaction? Is either party in a hurry?

In a transactional situation, learn the parties’ interests. What is the big picture? What about this transaction is most important to the client? To the other party? (In other words, what is each party trying to accomplish?) How will the deal operate financially? Where will the profit be made? How does the client envision, on a practical level, the transaction will operate once agreement is complete? How does the transaction fit into the client’s larger plans for the future? Is the transaction part of a long-term relationship—or a hoped-for long-term relationship—between the parties? In agreeing to this deal, is the client relying on factual assumptions about which the other party has or should have superior knowledge? (If so, the client can be protected by drafting the contract so that the other party represents and warrants the truthfulness of those facts.) Is there a risk that the transaction might violate the law? Can the transaction be structured to minimize the client’s tax? In drafting the agreement, what potential future difficulties should be provided for in advance? (The most obvious example would be breach: how should the agreement define breach, and what consequences would follow breach?) Are there any other ways that the agreement can be drafted to protect the client? What provisions does the client want in the drafted agreement? In addition, for each type of agreement, there’s a laundry list of issues that a prudent lawyer would typically resolve in drafting. (If you rent an apartment, look at your lease; it probably reflects the residential lease version of such a list from the landlord’s point of view.) What do you need to know in order to handle the laundry-list issues?

Ask whether the client has talked about this problem with another lawyer. If you are the seventh lawyer the client has consulted about this problem, there is a reason why the other six lawyers have not done what the client wanted. It might be a reason that should not influence you. But most of the time the other lawyers are not presently working for the client because the case is meritless or the client tends to sabotage a lawyer’s work.

b. Organizing and Formulating Questions

Organizing questions. When you start exploring various aspects of the problem in detail, try to take up each topic separately. Too much skipping around confuses you and the client.
On each topic, start with broad questions (“tell me what happened the night the reactor melted down”) and gradually work your way toward narrow ones (“just before you ran from the control panel, what number on that dial was the needle pointing to?”). Broad questions usually produce the largest amount of information, especially information that you have not anticipated. A versatile broad question is “What happened next?” Narrow questions produce details to fill in gaps left after the broad questions have been asked.

Move gradually from broad questions to narrow ones. If you jump too quickly to the narrow ones, you will miss a lot of information because it is the general questions that show you what to explore. Here’s an example of what can go wrong:

**Lawyer:** What happened next?  *[a broad question]*

**Client:** The store manager grabbed me and took me to a back room, where they opened my shopping bag and accused me of shoplifting. They were really abusive and embarrassed me in front of everybody in the store.

**Lawyer:** Did they touch you?  *[a narrow question, asked before the client has finished answering the broad one]*

**Client:** Yeah, the manager grabbed me by the arm and practically dragged me to that back room. And when I tried to leave, a big security guy stood in front of the door, took me by the shoulders and sat me back down.

**Lawyer:** How many people heard them call you a shoplifter?  *[another narrow question]*

**Client:** Maybe a dozen or so. They looked at me as though I was disgusting.

**Lawyer:** Do you know any of them by name?  *[yet another narrow question]*

**Client:** Oh, yeah. A couple of them belong to the PTA at my children’s school. Another is the receptionist in my doctor’s office.

Here, the lawyer is constructing a case against store personnel for assault, false imprisonment, and defamation. What the lawyer does not know is that the police came and arrested the client, who is scheduled for trial next week. The lawyer missed this by going too fast to narrow questions. If the lawyer had not done that, the following might have occurred:

**Client:** The store manager grabbed me and took me to a back room, where they opened my shopping bag and accused me of shoplifting. They were really abusive and embarrassed me in front of everybody in the store.

**Lawyer:** Oh, my. That must have been very upsetting. Let’s start from the point where the store manager first approached you. Please take a few minutes and remember everything that happened. Then, after you’ve finished running it through your mind, tell me everything you remember.

*[a period of silence]*
Client: O.K. I was standing at the dairy counter. The manager walked up from my left and grabbed me by the arm and said, ‘I saw you put something in your bag.’ I said, ‘What?’ or something like that. And he pulled me to that back room, closed the door, and told me to sit down. [As the client describes the scene in detail, we learn that the police arrived and arrested the client.]

Here, the lawyer asked the client to recreate the context, and then let the client tell the whole story before beginning to probe (see Section 4.F.4).

Ask broad questions until you are not getting useful information any more. Then go back and ask narrow questions about the facts the client did not cover. While the client is answering the broad questions, you can note on a pad the topics you will explore later by means of narrow questions.

Formulating questions. Phrase your questions carefully. Remember that how you say something has an enormous effect on how people respond. A good question does not confuse, does not provoke resistance, and does not help distort memory.

Ask one question at a time. If you ask two at a time, only one of them will be answered.

Lawyer: How much did Consolidated bid on this project? Were they the low bidder, or was somebody else?

Client: I think somebody else submitted the lowest bid, a company in Milwaukee that later had trouble posting a performance bond.

Did we learn how much Consolidated bid?

A leading question is one that suggests its own answer (“When the store manager took you into the back room, he locked the door, didn’t he?”). A leading question puts some pressure on the person answering it to give the answer the question suggests (“Yes, he locked the door”). The question implies one or both of two things. One is that the questioner expects that answer because the questioner already thinks or knows that it is true. The other is that the questioner wants that answer (for example, to help prove something, such as false imprisonment).

Because of the malleability of memory, leading questions have the potential to cause inaccurate answers. If a leading question — or any type of question — in an interview causes a client to “remember” things more favorably to the client’s case, and if the client is later to testify to that “memory” at trial, the leading question creates an ethical problem (see Section 4.E.4.a). (At trial, a lawyer is normally not allowed to ask a leading question of the lawyer’s own witness on direct examination. But leading questions are permitted when a lawyer cross-examines the other side’s witnesses, who can be expected to resist attempts to influence their memories.)

Leading questions, however, can be useful when the client might be fabricating (see Section 4.E.4.c) and for the review stage of cognitive interviewing (see Sections 4.F.4 and 4.E.2.c).
At times, you can probe for information without using questions at all. For example, active listening or body language indicating that you are particularly interested in what the client is saying can encourage the client to go into the facts in greater detail (see Section 4.E.2.b).

4. Special Problems in Client Interviewing

You may face problems of ethics (Section 4.E.4.a), information that the client considers private or too unpleasant to discuss (§ 8.4.2), a possibility that the client is not being honest with you (§ 8.4.3), pressure from the client to make a prediction before you have had an opportunity to research the law and investigate the facts (§ 8.4.4), or negotiating a fee agreement with the client (Section 4.E.4.e).

a. Ethics in Client Interviewing

First and foremost, you and those who work for you are obligated to keep confidential that which the client tells you, with the exceptions noted in Section 4.A.6.

In addition, you may not “falsify evidence [or] counsel or assist a witness to testify falsely.”69 If your client will become a party to litigation, your client will probably become a witness. Thus, you may not suggest that your client testify falsely or that your client falsify evidence. Nor may you help your client do either of those things. Falsifying evidence and suborning perjury are also crimes. And “many jurisdictions make\[\] it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen.”70 Even those that do not make it a crime may impose sanctions, including dismissal or claim preclusion on those who fail to preserve evidence crucial to an adversary’s case.

Perhaps the best known ethical dilemma in client interviewing is called the Anatomy of a Murder problem, after the novel71 and movie of the same name. There, a lawyer interviews his client, who is accused of murder. Before asking the client for the facts in detail, the lawyer gives the client a lecture explaining all the defenses to a murder charge. After listening to this, the client describes facts that would support a defense of temporary insanity. We are left with the impression that if the client had not heard the lecture, he would have told a different story—that the lawyer essentially told the client what the client would have to say in order to escape conviction.

Lawyers are not allowed to help create false testimony. But clients are entitled to know the law and to get that knowledge from their lawyers. How can you observe both of these principles while interviewing clients? The best approach is to interview for facts first and to explain the law afterward. The reasons are partly ethical and partly practical. In the novel and the film, the client invents a story and wins at trial. That is harder to do in the real world than it is in fiction. There

69. Rule 3.4(b) of the Model Rules of Professional Conduct.
70. Comment to Model Rule 3.4.
are always other witnesses and evidence and facts, some of them incontrovertible. Not many clients are clever and lucky enough to be able to invent stories that are either consistent with or more believable than everything else the fact-finder will be exposed to at trial. Much of the time, you can do a better job of advocacy if the client does not invent a story.

If the client is an organization, you have some special obligations. You do not represent the organization’s officers or employees, even though they are the people you normally deal with. This can be difficult in a situation where the people with whom the lawyer is dealing fear damage to their careers. Rule 1.13(f) of the Model Rules of Professional Conduct requires that, when dealing with officers or employees whose “interests are adverse” to those of a client organization, you make it clear that you represent the organization and not them. The Rule’s Comment adds that you “should advise . . . that [you] cannot represent such [a person,] that such person may wish to obtain independent representation[, and] that discussion between the lawyer for the organization and the individual may not be privileged.” The evidentiary attorney-client privilege and the ethical duty of confidentiality belong to the client (the organization) and not to the client’s officers or employees. In fact, the lawyer is obligated to tell responsible people elsewhere in the organization whatever the officers or employees tell the lawyer.

**b. Handling Private or Embarrassing Material**

If you suspect that the client will be reluctant to talk about some things because they seem embarrassing or especially private, you might wait until the end of the interview to explore them or even wait until a subsequent interview. Give the client time to appreciate that you are a person of discretion who can be entrusted with the kind of information that the client might not even be willing to tell friends about.

When you do raise the topic, begin by saying that you need to ask about something that the client might not find it easy to talk about; that you apologize for having to do so; and that you can do a good job for the client only if you ask these questions. Explain why you need to know, and remind the client of the rules on confidentiality. Then ask, respectfully but precisely.

Sometimes it helps to reverse the normal sequence of beginning with broad questions and moving toward narrow ones. Instead, start with carefully chosen narrow questions that take the client well into the subject. Then ask general questions, such as “Please tell me all about it.”

**c. When The Client is Distraught**

Sometimes clients bring an enormous amount of emotional pain with them into a lawyer’s office. The situation that has compelled them to seek legal assistance may be one of the most distressing things that has ever happened to them. You have just met this person. What can you do about the pain?

First, do not make superficial comments such as “Everything will be all right” or “I know how you feel.” Everything will not be all right. And unless you have suffered something very similar to what the client is suffering, you do not really know how the client feels.
Second, listen, patiently and attentively, to the client’s description of the most painful parts of the situation. Listen with care to anything the client says about the emotional aspect. You might be one of the few people to whom the client confides this. Try to understand, and let your tone and body language imply that you consider the emotional aspect important and are trying to understand. The fact that you are trying to understand may be a comfort to the client. Other people might not be trying to understand. You may not be able to understand fully, but your listening in a caring way may mean a great deal to the client.

Third, although you cannot honestly guarantee to solve the problem, your commitment to do the best you can may introduce hope.

d. Handling Possible Client Fabrication

When you suspect falsity, the cause might be unconscious reconstruction of memory, semiconscious fudging, or conscious lying. Most clients try to tell you the truth as they understand it, which means that when the client is wrong, there is a good chance that something other than lying is involved.

**Unconscious reconstruction of memory.** Section 4.F.4 explains what to do about it. We are all capable of unconsciously reconstructing memory. When a client does it, that does not mean the client is a bad person.

**Semiconscious fudging.** Some people tend to try to bolster their positions by putting a spin on objective facts. If something occurred three times, a person like this might say it happened “many” times (if more is better) or “barely at all” (if less is better). This can become so habitual that the person might not be fully conscious of individual exaggerations. But it is conscious in the sense that the person can stop doing it if she really wants to. When you find someone doing this, it means that even though the person might be wonderful in other ways, she is not always a reliable reporter of facts. The best thing to do is to press hard for precise answers.

*Client:* It happened many times.
*Lawyer:* How many times — exactly — did it happen?
*Client:* I don’t know — a lot.
*Lawyer:* Let’s list each time you can remember. On what date did the first one happen?
*Client:* Right after that blizzard we had last February. [*Client gives details.*]
*Lawyer:* When was the next time?

You have to ask these precise questions anyway with every person you interview. But with one who is fudging, you have to be firm and determined; do not give in to a fog of vague generalities spoken by the client.
Conscious lying. Here the client deliberately tells you something that is not true. Some clients do this because they are fundamentally manipulative. But others might be generally honest people who are in desperate or embarrassing situations, are lying reluctantly, and naively do not understand that it is in their own best interests to tell you nothing but the truth.

You probably don’t know for sure that the client is lying. If you become annoyed or accusatory, you may damage the attorney-client relationship irretrievably. But you do need to know the truth from the client. The best way to get that is to show the client that it is in the client’s own interest to tell you the truth and that other people—a judge and jury, for example—are not going to believe what the client is telling you. (If you say that you do not believe the client, you are accusing the client, and the client will fight back.)

Start by giving the client a motivation to tell you the truth. Explain how you can do a good job only if you know everything—including the unfavorable facts—from the beginning. (You might give one or two illustrations of how disaster can happen if you learn of an unfavorable fact for the first time in the courtroom when there is no longer time to prepare. Choose illustrations that are similar to the situation the client is in.) Say that your first loyalty is to the client, and summarize the rules on attorney-client confidentiality. Do all of this before you turn to the lie you suspect you are being told.

If the client is manipulative, you can use leading questions to box the client into a corner. Think this through very carefully. You do not want to humiliate the client, and you are not absolutely certain the client is lying.

You might explain how opposing counsel will cross-examine at trial and tell the client that you will give a demonstration of what that will be like. Start from what is undeniably true and conduct a determined but polite cross-examination, showing the client how a disinterested fact-finder is not likely to believe what the client is saying, given how inconsistent it is with what is undeniably true. Do this in such a way that the client can begin to tell you the truth without losing dignity.

Alternatively, you can ask questions—some of them leading—based on the assumption that the truth is something other than what the client has said. Do not point out the difference between your assumption and what the client said. If the client answers the questions consistently with your assumption, you have begun to establish the truth without a confrontation.

If the client seems to be a generally honest person who might be lying out of desperation or embarrassment combined with naivete about your role as an advocate, you might use some of the same techniques. But remember that this client does not really want to lie. You can probably be more gentle than you would with a manipulative client.

e. When the Client Wants a Prediction on the Spot

Clients often want the lawyer to predict immediately whether the client will win or lose. In nearly all instances, you cannot make that prediction. You might have to check the law or investigate the facts, or both. And you need to think about it. Predicting hastily raises the risk of error.
But clients want assurance. What can you give them? Usually, it’s enough to explain what work you will do, what issues you need to research, and what facts you need to investigate. You can add that you take the problem very seriously and want to do something about it (“I want to try to find a way to get you compensation for this injury”). Choosing a time by which you will have an answer also helps.

Some lawyers feel comfortable saying something noncommittal about what they are thinking. For example, “I’m hopeful, although I’m also worried about what the harbor master will say about the docking arrangements.” Or: “It might be difficult to win unless we can find witnesses who saw the other boat exceeding the speed limit; I want to work on that right away.” If these comments accurately summarize the lawyer’s reaction, it seems fair to share them with the client. They are explicitly tentative and point to what the lawyer sees are the variables. It would also be prudent to tell the client that the whole situation can change based on other facts that you do not know about yet.

f. Negotiating a Fee Agreement

There are four different ways for a client to pay for a lawyer’s services.

The client can pay an hourly rate. In a firm, the rate will differ according to the status and experience of the lawyer (senior partner, junior partner, senior associate, junior associate). If two or more lawyers are assigned to the case, the client will be billed at different rates depending on who did what. The advantage of an hourly rate is that the client pays for exactly the amount of effort the lawyer expends. The disadvantage to the client is that the total cost of the work can only be guessed at when the client hires the lawyer. The disadvantage to the lawyer is that she needs to fill out detailed time sheets and have office staff convert them to detailed bills.

Or the client can pay a flat fee for specified work, such as $850 for an uncomplicated will. The client knows from the beginning how much the job will cost, and the lawyer does not need to keep detailed time records. But flat fees are appropriate only for very routine work where the lawyer can predict in advance how much effort the task will take.

Or the client can pay a contingency fee. Typically, the lawyer would be paid a percentage, such as 33%, of any money recovered on behalf of the client. If the client recovers nothing, the lawyer gets nothing. A contingency fee makes justice theoretically available to a client who wants to sue for money damages but cannot afford an hourly fee. In nondamages cases, a contingency fee is impractical, and in criminal and domestic relations cases, it is illegal.72 Contingency fees are sometimes abused by lawyers, and in many states they are strictly regulated by statute or court rule.

Or the client can pay a percentage of the value of a transaction. To probate an estate, for example, a lawyer might in some situations charge a percentage of the value of the estate.

72. Model Rule 1.5(d).
Usually, the lawyer suggests the type of fee that makes most sense from the lawyer’s point of view, and the client either agrees or tries to persuade the lawyer to charge another kind of fee. Whatever the type, a fee is unethical unless “reasonable” according to the rules of ethics.\textsuperscript{73} In addition to the fee, the client usually pays certain expenses, such as photocopying, messenger services, court reporter fees, and the like.

The appropriate time to negotiate the fee is usually in the closing part of the interview (see Section 4.E.2.f). Earlier, you do not know enough about how much work will be involved, and the client is usually not yet ready to hire you formally. The fee agreement should explicitly define the services you will provide.

Lawyers cost more—often much more—than clients want to pay, and fees generate more conflict between lawyers and clients than almost any other issue. For that reason, in a well-run law office all fee agreements are reduced to writing, usually through an engagement letter, which the lawyer sends or gives to the client. When the client countersigns it, the engagement letter becomes the contract through which the client hires the lawyer and agrees to pay the fee. A thorough engagement letter will describe the work the lawyer is to do, specify the fee and how it will be billed and paid, and so forth.

If the client is ready to hire you on the spot and wants you to start work immediately, you can ask your secretary to word-process an engagement letter quickly so the client can sign it before leaving. Otherwise, the engagement letter can be mailed to the client.

Except when the client will pay a contingency fee, lawyers usually ask for a retainer, which is a payment in advance for the first part of the lawyer’s work. The retainer should be large enough to assure the lawyer that the client is serious about paying for the lawyer’s work. Retainers of $2,000, $5,000, or $10,000 are common for the typical work that an individual or a family might ask a lawyer to do. Business retainers might be larger.

A careful lawyer usually will not do any work until after the client has signed an engagement letter and paid a retainer.

Many—but not all—lawyers do not charge for the initial client interview.

\textbf{F. Interviewing Witnesses}

\textit{a. How Witness Interviewing is Different from Client Interviewing}

A witness will be one of three kinds. A friendly witness wants your client to win and is willing to help. A neutral witness does not care who wins; a neutral witness either does not want to get involved or is willing to testify at trial out of a sense of obligation to the system of justice. (What makes the witness neutral is not caring who wins. What the witness observed and remembers, however, usually does help one party and hurt the other.) A hostile witness wants your client to lose—or at least wants the other side to win—and is willing to say and do things that hurt you. As we shall see, each of these kinds of witnesses needs to be handled differently.

\textsuperscript{73} Criteria for “reasonableness” are set out in Model Rule 1.5(a).
In the later 1990s, University of California at Berkeley Professors Marjorie Shultz and Sheldon Zedeck began a comprehensive, multi-year study of what factors make lawyers effective. They interviewed lawyers, law faculty, law students, judges and clients. Their study identified 26 skills and abilities that demonstrate effective lawyering. Here is the list, organized under their eight umbrella categories:

List of 26 Effective Lawyering Factors with 8 Umbrella Categories

1. Intellectual & Cognitive
   - Analysis and Reasoning
   - Creativity/Innovation
   - Problem Solving
   - Practical Judgment
2. Research & Information Gathering
   - Researching the Law
   - Fact Finding
   - Questioning and Interviewing
3. Communications
   - Influencing and Advocating
   - Writing
   - Speaking
   - Listening
4. Planning and Organizing
   - Strategic Planning
   - Organizing and Managing One’s Own Work
   - Organizing and Managing Others (Staff/Colleagues)
5. Conflict Resolution
   - Negotiation Skills
   - Able to See the World Through the Eyes of Others
6. **Client & Business Relations - Entrepreneurship**
   - Networking and Business Development
   - Providing Advice & Counsel & Building Relationships with Clients

7. **Working with Others**
   - Developing Relationships within the Legal Profession
   - Evaluation, Development, and Mentoring

8. **Character**
   - Passion and Engagement
   - Diligence
   - Integrity/Honesty
   - Stress Management
   - Community Involvement and Service
   - Self-Development

**LSAC Report:**

*Identification, Development, and Validation of Predictors for Successful Lawyering*

Marjorie M. Shultz and Sheldon Zedeck, Principal Investigators, September 2008

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