

Legal Analysis *and* Writing

Third Edition

William H. Putman



CHAPTER 2

Introduction to Legal Analysis

Outline

- I. Introduction
- II. Legal Analysis Defined
- III. Legal Analysis Process
- IV. General Considerations
- V. Key Points Checklist: *Conducting Analysis*
- VI. Application

Learning Objectives

After completing this chapter, you should understand

- The definition of legal analysis
- The elements of legal analysis
- How the elements of legal analysis apply in specific situations
- The importance of focus and intellectual honesty



Marian has worked as Robert Walker's paralegal for the past two years. She conducts initial client interviews, manages the case files, and performs basic research. Robert, a solo practitioner, always determines the merits of a case and performs the substantive research.

Robert called Marian into his office one morning. "Marian," he said, "I'm going to hire another paralegal to do your assignments." Marian wondered, "What have I done wrong?" Robert continued, "I want you to take over some of the more substantive legal work. I want you to start performing the legal analysis of some of the new cases and determine what, if any, possible causes of action exist. Your new responsibilities will be to study the cases and provide me with memoranda of law identifying the legal issues and analyzing how the law applies to

the issues. This will free me to concentrate more on trial work. Start with Mr. Lietel's case."

Marian remembered the initial interview with Mr. Lietel. Jerry Lietel has a hot temper. When he got into an argument with his neighbor, Tom Spear, his temper got the best of him. He punched Tom, and a fight ensued. Steve Spear, the father of Tom and a retired deputy sheriff, came out of his house and announced that he was placing Mr. Lietel under citizen's arrest.

A short struggle ensued during which Mr. Lietel was subdued and handcuffed. After Mr. Lietel was handcuffed and had ceased resisting, Steve Spear kicked him about six times, cracking one of his ribs. Mr. Lietel incurred medical bills and lost two days of work. Since the incident, Mr. Lietel has a lot of trouble sleeping and is taking sleeping pills on his

doctor's advice. He is fearful of Steve Spear whenever he sees him.

Jerry admits that he punched Tom without provocation and that the citizen's arrest was probably justified, but he wants to sue for his medical bills and the loss of work.

Marian realizes that as this is her first analysis assignment, whether she continues to be assigned this type of

substantive legal work will depend on the quality of her product. She asks herself, "What's the best way to approach a legal problem? What is a systematic way to analyze a client's problem that will produce the best result in the least amount of time?" The analysis of Mr. Lietel's case and the answers to Marian's questions are presented in the Application section of this chapter.

I. INTRODUCTION

As discussed in the preface, the focus of this text is the process of analyzing the legal questions raised by the facts of a client's case, the process of communicating that analysis in written form, and legal writing in general. This chapter presents an overview of the process of legal analysis and some of the concepts and considerations involved.

Most cases begin like the Lietel case. A client relates a set of factual events that the client perceives entitle the client to legal relief. The client seeks a solution to what the client believes is a legal problem. The problem may be as simple as the need for a power of attorney or as complex as a question involving multiple parties and several legal issues. The problem may be one for which there is no legal remedy, or it may not be a legal problem at all.

For Example An individual is fired in retaliation for disclosing a defect in the employer's product. The state where this occurs does not have a statute prohibiting retaliatory discharge, nor have the state courts adopted a cause of action in tort for retaliatory discharge. Therefore, it may be that no legal remedy for this type of discharge is available under state law. It is possible that the client's only recourse is political; that is, the client may be required to attempt to get legislation passed prohibiting retaliatory discharge or to exert social pressure through the media.

The object of legal analysis and legal research is to analyze the factual event presented by the client and determine:

1. what legal issue (question) or issues are raised by the factual event
2. what law governs the legal issue
3. how the law that governs the legal issue applies to the factual event, including what, if any, legal remedy is available

Once this analysis is completed, the client can be advised of the various rights, duties, and options available.

II. LEGAL ANALYSIS DEFINED

Before addressing the steps involved in the legal analysis process, it is necessary to understand what is meant by *legal analysis*. The term has different meanings, depending on the context—that is, the type of legal analysis being performed.

For Example The term *legal analysis* can refer to statutory analysis (discussed in Chapter 3), case law analysis (Chapter 8), or counteranalysis (Chapter 9), among other types of analysis.

In this chapter, **legal analysis** is used in a broad sense to refer to the process of identifying the issue or issues presented by a client's facts and determining what law applies and how it applies. Simply put, legal analysis is the process of applying the law to the facts of the client's case. It is an exploration of how and why a specific law does or does not apply.

III. LEGAL ANALYSIS PROCESS

The commonly used approach to legal analysis involves a four-step process:

Step 1 Issue. The identification of the issue (legal question) or issues raised by the facts of the client's case

Step 2 Rule. The identification of the law that governs the issue

Step 3 Application. A determination of how the rule of law applies to the issue (sometimes referred to as the analysis step)

Step 4 Conclusion. A summary of the results of the legal analysis

An acronym commonly used in reference to the analytical process is **IRAC**. It is composed of the first letters of the descriptive terms for the four steps of the legal analysis process. The acronym is an easy way to remember the four-step legal analysis process—**I**ssue, **R**ule, **A**nalysis/**A**pplication, and **C**onclusion.

Each of these steps is addressed in detail in subsequent sections of this chapter.

But before the legal analysis of a case can properly begin, some preliminary preparation must take place:

1. All the facts and information relevant to the case should be gathered.
2. Preliminary legal research should be conducted to gain a basic familiarity with the area of law involved in the case.

A. Facts

It is important to keep in mind the crucial role the **facts** play in the analytical process. The four steps of the analysis process involve the facts of the client's case, and the facts play a major role in each step:

1. **Issue.** Included in the issue are the key facts. The issue is the precise question raised by the *specific facts* of the client's case. A properly stated issue requires inclusion of the key facts.

legal analysis

The process of identifying the issue or issues presented by a client's facts and determining what law applies and how it applies. The process of applying the law to the facts of a case. It is an exploration of how and why a specific law does or does not apply.

IRAC

An acronym commonly used in reference to the legal analysis process. It is composed of the first letters of the descriptive terms for the four steps of the process—**I**ssue, **R**ule, **A**nalysis/**A**pplication, **C**onclusion. The standard legal analysis process is the identification of the issue, followed by the presentation of the governing rule of law, the analysis/application of the rule of law, and the conclusion.

facts

Information concerning some thing, action, event, or circumstance.

For Example Under the provisions of the state battery law is a battery committed by an individual, *present at the scene of a battery, who encourages others to commit the battery but does not actively participate in the actual battering of the victim?*

The key facts of this issue are italicized.

2. **Rule.** The determination of which law governs the issue is based on the applicability of the law to the facts of the client's case.

For Example If the issue involves oppressive acts by a majority shareholder against the interests of minority shareholders in a closely held corporation, the facts govern the determination of which corporation statutes apply. Only those statutes that address acts by majority shareholders can apply. In most states, this is limited to a few statutes.

3. **Analysis/Application.** The analysis/application step is the process of *applying the rule of law to the facts*. It obviously cannot take place without the facts. Without the facts, the law stands in a vacuum.

For Example Assume a very simple problem where the client was ticketed for driving 65 mph in a 55-mph zone. The client believes that the speed limit was actually 65 mph and that the officer made a mistake. A determination of whether the client violated the law requires the application of the rule of law to the facts of the client's case. Was the speed limit where the ticket was given 65 mph or 55 mph? *The facts are essential to the process*. Without the facts, a determination of how the law applies cannot be made.

4. **Conclusion.** The conclusion is a summation of how the law applies to the facts, a recap of the first three steps. It requires the facts.

In every case, the analytical process involves a determination of how the law applies to the facts. In court opinions, courts determine how the law applies to the facts presented to the court. Often, students pay too little attention to the facts, focusing on what the law is and what it requires. They ignore the important role the facts play.

In a sense, cases are fact driven—the facts determine the outcome of the case. Often, if a single fact is changed, the outcome is different. The application of the law results in a different conclusion.

For Example In a murder case, the degree of the offense can depend upon a single fact. First-degree murder requires specific intent. It requires not only that the defendant intended to shoot the victim, say, but also that the defendant intended the shooting to kill the victim. If the facts of the case show that the defendant intended to shoot but not kill the victim, the offense is not first-degree murder. The defendant's intent is a fact, and changing this single fact changes the outcome of the case. The application of the law results in a different conclusion. The offense is not first-degree murder but a lesser offense.

With this in mind, the analysis process should begin with a consideration of the facts of the client's case. Identify and review the facts at the outset.

This preliminary step should include the following:

1. Be sure you have all the facts. Ask yourself whether you have all the interviews, files, statements, and other information that have been gathered concerning the case. Are the files complete? Are facts or information missing? As discussed in the murder case example, a single fact can determine the outcome of a case. If key facts are missing, your analysis may result in an erroneous legal conclusion.
2. Study the available facts to see whether additional information should be gathered before legal analysis can properly begin.
3. Organize the facts. Group all related facts. Place the facts in a logical order, such as chronological order.
4. Weigh the facts. The value of some factual information, such as hearsay, may be questionable.
5. Identify the key facts. Determine which facts appear to be critical to the outcome of the case. Chapter 5 discusses the importance of key facts and the process for identifying key facts.

B. Preliminary Research

Before the analysis process can begin, it may be necessary to conduct some basic research in the area(s) of law that govern the **issue** or issues in the case. You may be unfamiliar with the area of law in general or with the specific aspect of the area that applies in the client's case. It is easier to analyze a problem if, at the outset, you have a basic familiarity with the area of law involved. You may obtain a general overview of the law by reference to a legal encyclopedia or a single-volume treatise. If the specific question or area is known at the outset, an *American Law Report* (ALR) reference or a multivolume treatise may be appropriate.

issue

The precise legal question raised by the specific facts of a dispute.

C. IRAC Analysis

Once the facts have been gathered and reviewed, follow the four steps of the IRAC legal analysis process (see Exhibit 2–1). The following considerations are important to keep in mind when performing these steps.

STEP 1	<i>Issue.</i> Identify the issue (legal question) or issues raised by the facts of the client's case
STEP 2	<i>Rule.</i> Identify the law that governs the issue
STEP 3	<i>Application.</i> Determine how the rule of law applies to the issue
STEP 4	<i>Conclusion.</i> Summarize the results of the legal analysis

Exhibit 2–1

Steps in the IRAC Legal Analysis Process

1. Step 1: Issue

Identify the issue(s) (legal question) raised by the facts of the client's case. The issue is the precise legal question raised by the facts of the dispute. The first and probably most important step in the analytical process is to identify the issue. You must identify the problem before you can solve it. The issue is the starting point. If it is misidentified, each subsequent step in the process is a step in the wrong direction. Time is wasted, and malpractice may result.

For Example A client complains that the individual who sold and installed the tile in his bathroom installed it in a defective manner. After a few months, the tile began to fall off the wall. The person who installed the tile gave no oral or written warranty covering the quality of the installation or the quality of the tile.

The paralegal assumes, without conducting research, that the entire transaction is a sale of goods covered by state statutes governing the sale of goods. The paralegal makes this assumption because the transaction involved the sale of goods, the tiles.

Under the sale of goods statutes, there is a section that creates an implied warranty that goods are merchantable when sold, which in this case means the tiles will not fall apart.

The statute as interpreted by the state courts, however, does not apply to the service portion of such transactions, which, in the client's case, is the installation of the tile. Based on an incorrect assumption, the paralegal identifies the issue as a question of whether the implied warranty of merchantability was breached. The identification of the issue is incorrect because of the erroneous assumption. The question is not about the quality of the tile but about the quality of the installation. Research on the existence of an implied warranty of merchantability is misdirected.

The case may be lost because the issue is incorrectly identified. The laws governing the sale of a service are different from those governing the sale of goods. A lawsuit claiming breach of an implied warranty of merchantability will probably not prevail, because the implied warranty of merchantability statute does not apply.

A client does not pay to have the wrong question answered. The subjects of issue identification and presentation are of such importance that Chapters 6 and 7 are devoted to them. Some important considerations involving issues are discussed briefly here.

1. *Multiple Issues.* The client's fact situation may raise multiple legal issues and involve many avenues of relief. The implied warranty example presented above involves one issue, but there may be several issues in a case.

For Example Mr. Elvan rear-ended the client's car at a stoplight. After the impact, Mr. Elvan exited his car, approached the client's car, and started yelling at the client, threatening to hit the client. He grabbed the client's arm but never struck him. As a result of the incident, the client's car is damaged. The client suffered whiplash from the collision and a bruise on his arm from being grabbed, and since the wreck he has been upset and has had trouble sleeping.

The client may have several causes of action against Mr. Elvan: a claim of negligence arising from the rear-end collision, civil assault for his conduct of approaching the client in a threatening manner, battery for grabbing the client, and intentional infliction of emotional distress for his conduct after the collision. Each of these potential causes of action may raise legal issues or questions that must be addressed. This example is referred to in this chapter as the rear-end collision example.

You should be aware—and keep in mind—that one set of facts may raise multiple issues and include multiple causes of action.

2. *Separate the Issues. Analyze and research* each issue separately and thoroughly. If you are trying to research and analyze several issues at once, it is easy to get confused and frustrated. If you find information relevant to another issue, make a reference note and place it in a separate research file.

3. *Focus on the Issues of the Case.* Keep your focus on the issues raised by the facts of the client’s case or on those issues that you have been assigned to research.

For Example In the rear-end collision example, assume that there was a passenger in the vehicle with the client and that the passenger is represented by another law firm. Although there may be many interesting issues involving potential legal claims available to the passenger, the passenger is not the client. The focus should be on the issues in the client’s case. The issues involving the passenger are outside the scope of the problem and should not be allowed to become a distraction.

In the rear-end collision example, you are assigned to research the assault issue. Do not research the other issues or clutter your analysis with issues you were not assigned to address. Stick to the assignment. If you come across useful information that is relevant to another issue, note it and give it to the person assigned to address that issue.

Avoid getting sidetracked and wasting time on interesting aspects or issues of a case you were not assigned to address.

2. Step 2: Rule

Identify the law that governs the issue. The next step in the IRAC analytical process is to identify the **rule of law** that governs the issue. This is the legal research component of legal analysis. Ask yourself what rule of law applies to the question raised by the facts of the case. This may be enacted law or case law.

1. **Enacted Law.** The legal issue may be governed by enacted law. As defined in Chapter 1, enacted law encompasses constitutions, statutes, ordinances, and regulations.

For Example Most of the criminal law is governed by enacted law—laws passed by legislative bodies. In the rear-end collision example, the driver of the car who rear-ended the car at the light may be cited for following too closely and careless driving. These may be criminal offenses established by the state legislature when it passed the state’s motor vehicle code. Chapter 3 addresses the analysis of issues governed by enacted law.

2. **Case Law.** The issue may be governed by rules or principles established by the courts.

For Example In the rear-end collision example, the possible civil causes of action for negligence, battery, assault, and intentional infliction of emotional distress are tort claims. Most tort claims are based on case law, which is composed of rules and principles developed over a period of time by the courts.

Case law and case briefing are discussed in detail in Chapters 4 and 8.

3. **Combination of Enacted Law and Case Law.** In many instances, the rule of law governing a situation requires both enacted law and case law.

For Example Although freedom of speech is guaranteed by the First Amendment of the United States Constitution, you may have to refer to court decisions to determine which types of speech are protected under the amendment. The provisions of the First Amendment do not indicate whether symbolic acts, such as burning the American flag, are protected as free speech. The decisions of the United States Supreme Court have addressed this question, and the law governing the question of flag-burning includes both the First Amendment and the rules and principles adopted by the courts interpreting the amendment.

This step includes identifying all additional case law that may be required to interpret the terms of the statute or act, including the case law that may assist or act as guidance in determining how the law applies to the issue being addressed. Be sure your research is complete. Always conduct thorough research, and be sure to search for other court decisions that address the rule of law that governs the question.

3. Step 3: Analysis/Application

Determine how the rule of law applies to the issue. Once the rule of law is located, you analyze the law to determine how it applies to the facts of the client's case. In other words, apply the law to the legal issue. This is a three-part process (see Exhibit 2–2).

Part I	Identify the component parts (elements) of the rule of law
Part II	Apply the elements of the law to the facts of the client's case
Part III	Consider the possible counterarguments to the analysis of the issue; that is, conduct a counteranalysis of the analysis

Exhibit 2–2

Three parts of Step 3: Analysis/Application

An in-depth discussion of this step in regard to statutory law and case law is presented in Chapters 3 and 8, respectively. Chapter 5 addresses the role of the key facts. Chapter 9 discusses counteranalysis. Therefore, only a brief summary of this step is included here.

Part I Identify the component parts (elements) of the rule of law. To determine how a rule of law applies to a fact situation, certain conditions established by the rule must be met. These conditions or component parts are called the elements. You must identify the requirements of the rule of law before the rule can be applied to the issue raised by the facts of the client's case.

For Example Section 93-85A of the state statute governing the execution of a will provides: "The execution of a will must be by the signature of the testator and of at least two witnesses as follows:

1. The testator, in the presence of two or more witnesses:
 - a. signifies to the witnesses that the instrument is the testator's will, and
 - b. signs the will or has someone else sign the testator's name at the testator's specific direction.
2. The attesting witnesses must sign in the presence of the testator and each other."

To determine how the statute applies to a client's facts, first identify the elements of the statute. The elements of the statute are that

1. the testator must indicate to two or more witnesses that the instrument is the testator's will.
2. the testator must sign the will or have someone sign it at the testator's specific direction.
3. the witnesses must sign.
4. steps 1 through 3 must be done in the presence of the witnesses and the testator.

This example is referred to in this chapter as the wills example.

Part 2 Apply the elements of the law to facts of the client's case. Once you have identified the elements of the rule of law, match or apply the facts of the client's case to the elements and determine how the rule applies.

For Example

If the client's case involved a question of whether a will was validly executed in accordance with the statute presented in the wills example, match the facts of the client's case with the elements of the statute to determine whether the execution was valid. Assume the will was signed by someone other than the testator and not at his specific direction. The testator never specifically directed the person to sign the will but was aware of what was happening and did not object. When this fact is matched to the element of the statute requiring that a will be signed by the testator or someone at his *specific* direction, the requirement of the element may not be met.

Once facts of the client's case have been matched to the elements of the rule of law, you may determine how the rule applies in the client's case.

For Example

In the preceding example, a conclusion could be reached that the element allowing a signature by "someone else" at the testator's specific direction was not met. Although the testator was present, he did not specifically direct the other person to sign the will. It could also be concluded that additional research is necessary to determine how the courts have interpreted "specific direction" as used in the statute.

In some cases, the manner in which the rule applies is clear from the face of the rule, and there is no question how the rule applies. All that is required is the application of the elements of the rule of law to the facts to determine how the law applies in the case.

For Example An eighteen-year-old client wants to know whether she is eligible to run for the position of probate judge. Section 34-214 of the election code provides that the minimum age for candidates for the position of probate judge is twenty-one years. It is clear from section 34-214 that the client is not eligible to run.

In many cases, it is not clear from the rule of law how an element applies in a specific fact situation. In such instances, it may be necessary to refer to court opinion where the court, in a similar fact situation, interpreted how the law applies.

For Example The rule of law defines slander as the “publication of a false statement of fact concerning the plaintiff that causes damages.” In the client’s case, the client’s neighbor orally communicated to another neighbor a false statement of fact concerning the client. While visiting her neighbor’s house, she falsely stated that the client was a thief. The statement damaged the client.

The answer to the question of whether an oral communication to one person constitutes “publication” within the meaning of the statute is not clear from a mere reading of the statute. You must refer to case law to determine how the courts have interpreted the term *publication*. You must then apply the courts’ interpretation of the term to the client’s case. If the courts have defined *publication* as communication to any third person, the communication to the neighbor is slander.

This example is referred to in this chapter as the slander example.

Part 3 Consider the possible counterarguments to the analysis of the issue; that is, conduct a counteranalysis of the analysis. Once you complete the analysis and application of the rule of law, consider any potential counterarguments to the analysis or application. This involves the anticipation and consideration of any argument an opponent is likely to raise in response to the analysis.

For Example Refer to the wills example, where the testator did not specifically direct a third party to sign the will but was aware of the signing and did not object. It can be concluded that the element of the statute allowing a third party to sign the will at the testator’s specific direction was not met. Although the testator was present, he did not specifically direct the other person to sign the will.

The counterargument is that this element of the statute is met because the equivalent of “specific direction” took place. The testator was aware that the third person was signing on his behalf and did not object. The failure to object is evidence that the signing took place at his specific direction.

Undertake research to determine whether this counterargument has support in the case law. The counterargument should be considered and addressed in this step of the analysis process.

Chapter 9 addresses counteranalysis.

4. Step 4: Conclusion

Summarize the results of the legal analysis. The final step in the analytical process is the **conclusion**, the result of the analysis. As discussed in step 3, part of the analysis/application process is a determination of how the rule of law applies to the client’s

facts. This determination is, in effect, a conclusion. Therefore, the conclusion step in the analytical process is a summing up and commentary that may include:

1. a recap of the determination reached in the analysis/application step

For Example Referring to the wills example, a summary of the analysis could read: “Section 93-85A(1)(b) of the state statute allows a third party to sign the will for the testator if the testator specifically directs the third party to sign on the testator’s behalf. In our case, the testator was aware the third party was signing the will but did not specifically direct the third party to sign. Therefore, it appears that the requirements of the statute were not met, and the will was not validly executed.”

2. a consideration or weighing, based on the analysis, of what action a court may take or how a court may rule on the issue

For Example Referring to the slander example, “Inasmuch as the slander statute requires publication, and the courts have defined publication to include any communication, oral or written, to a third party, the court will most likely rule that publication took place in our client’s case. The neighbor orally communicated false statements concerning the client to another neighbor. Oral communication to a third party took place.”

3. the identification of additional facts or other information that may be necessary because of questions raised in the analysis of the problem

For Example Referring to the wills example, “It is advisable to interview all those present at the time the third party signed the testator’s will to determine whether the testator in some way directed the third party to sign the will.”

4. the identification of further research that may be necessary in regard to the issue. Further research may be required because the necessary research sources are not readily available, because the analysis is preliminary owing to time constraints, or because the factual investigation of the case has not been completed

For Example Referring to the wills example, if, owing to time constraints, thorough research was not completed on the question of how the courts interpret the term *specific direction*, this should be noted. Possibly only state case law was researched, and it might be advisable to consider researching out-of-state case law on the subject.

5. the identification of related issues or concerns that became apparent as a result of the research and analysis

For Example Referring to the rear-end collision example, the preliminary analysis of the case may have identified assault, battery, and negligence as possible causes of action. The analysis of those possible causes of action may reveal the possibility of an additional cause of action for intentional infliction of emotional distress. This should be noted in the conclusion.

IV. GENERAL CONSIDERATIONS

The process of analyzing a legal problem can at times be difficult, especially for a beginner. In addition to the steps outlined in the previous section, the following general considerations and guidelines will prove helpful when analyzing a legal issue.

A. Focus

Focus is critical when performing the steps of the analytical process. Focus has several meanings, depending on which part of the process is being performed.

At the broadest level, it means to stay focused on the specific task assigned. Analyze only the issue or issues assigned.

For Example Referring to the rear-end collision example, if the assignment is to analyze whether a cause of action is present for civil assault, stay focused on that issue. Answer only that question. If you come across information relevant to another issue, note it, but do not pursue it. When you have a break or at the end of the day, give your notes to the person assigned to analyze that issue. Valuable time may be lost in researching and analyzing the other issue or in interrupting your work to discuss the information with the other person.

When identifying the issue, focus on the facts of the client's case. Ask yourself what must be decided about which of the facts of the client's case.

When identifying the rule of law, focus on the facts of the case and the elements of the rule of law. This will help you quickly eliminate rules of law that may not apply.

For Example The fact situation involves a credit purchase by the client. There may be several rules of law that govern the transaction, such as the state's usury laws, the state sale of goods statutes, and the federal truth-in-lending laws.

The interest charged in the transaction in question was one percent, and the usury statute provides that interest rates in excess of twenty percent are void. If this fact is kept in mind when locating the possible laws that apply to the transaction, the usury statute can be immediately eliminated from consideration. The interest charged does not violate the usury statute, and the statute clearly does not apply. It does not have to be considered when analyzing the problem in step 3.

When analyzing and applying the rule of law in step 3, focus on the client's facts and the issue or question being analyzed. It is easy to get sidetracked, especially when reading case law. There may be interesting issues addressed in a court opinion that are close but not directly related to the issues in the client's case. Stay focused. Ask yourself, "Is the issue being addressed in this opinion really related to the issue in my case? Is it on point?" The guidelines and principles addressed in Chapter 8 are helpful in this regard.

If you do not stay focused, after you have completed your research you may have several cases in front of you that are only marginally related to the specific issue you are analyzing. A lot of time can be wasted reading cases that are not really on point.

Focus on the work. Avoidance and procrastination are deadly. When you are stuck or having a difficult time analyzing or researching an issue, it is sometimes easy to procrastinate, to avoid working on the problem. You may find excuses for not working on the problem, such as working on an easier project. The way to overcome this is to *start*. Do not put it off. If you are at the research stage, *start researching*. If you are at the writing stage, *start writing*. Do not be discouraged if the results seem poor at first. Focus on the problem and begin. Often the barrier is beginning.

B. Ethics: Intellectual Honesty

Rule 1.1 of the American Bar Association’s Model Rules of Professional Conduct requires that a client be represented competently. This means that it is your ethical duty to possess and exercise that degree of knowledge and skill ordinarily possessed by others in the profession. In the context of legal analysis, **intellectual honesty** requires researching and analyzing a problem objectively. Do not let emotions, preconceived notions, personal views, or stubbornness interfere with an objective analysis of the client’s case. Do not assume you know the law. Check your resources. Even if you “feel” a certain outcome should occur, do not let that feeling prevent you from objectively researching and analyzing the issue.

For Example

The paralegal has a personal history of domestic violence. When he was a child, there was domestic violence in the home. He has a strong aversion to domestic violence and harbors a prejudice against perpetrators of domestic violence. The paralegal interviews a client who complains that, the night before the interview, her husband hit her in the face with his fist. She states that he has beaten her frequently and savagely throughout their ten-year marriage. The client appears to have been severely beaten. She has two black eyes, and her face is swollen around the eyes.

The paralegal is outraged and upset by what happened to the client. As a result of his outrage, he fails to conduct a thorough and objective interview. He does not ask questions to elicit the details of the events of the previous night. He assumes the battery was unprovoked and does not ask questions concerning the reasons the client’s husband hit her. His emotions and personal feelings cause him to focus on punishing the husband.

The paralegal knows that in addition to the remedies available under the criminal law, there is a civil cause of action for domestic battery available under the state’s recently passed domestic violence statute. He recommends that the supervising attorney file a civil complaint for domestic battery under the domestic violence statute. Relying on the paralegal’s record for thoroughness, the supervising attorney directs that a complaint be drafted and filed.

A few weeks later, the husband’s counsel, a friend of the supervising attorney, calls concerning the case. “Why did you file this complaint?” she asks. “My client was acting in self-defense. He hit his wife after she stabbed him.” As it turns out, the client decided to kill her husband rather than face a future of beatings. She took a kitchen knife and stabbed him in the chest. In self-defense, he hit her once, and the blow caught her between the eyes, causing the two black eyes and facial swelling.

Had the paralegal not lost his objectivity, he would have conducted a thorough interview. Probing questions concerning the events of the night in question would have revealed the true facts, and the lawsuit might not have been filed.

intellectual honesty

In the context of legal analysis, intellectual honesty implies researching and analyzing a problem objectively. This includes analyzing all aspects of a problem free of preconceived notions, personal views, and emotions.

This is an extreme example, but it occurs in varying degrees. Personal prejudices, personal beliefs, and sympathy for the client can combine to affect objectivity, which may lead to a failure to conduct an objective, critical analysis of the case, to vigorously pursue potential opposing arguments, or to discount opposing authority.

Remember, the client may not be telling the whole truth. This may not be intentional. It may be the result of forgetfulness or a personal tendency to discount or downplay the importance of adverse facts. In this example, the client may have been so focused on the years of abuse, and the desire to escape from further abuse, that she truly considered the stabbing insignificant when weighed against what she had gone through.

Pursue the analysis of all legal issues with intellectual honesty. Identify all the facts affecting the case. All legal authority concerning the issues should be pursued, including any authority that may negatively affect the client's position. Ignoring adverse authority will not make it go away. It must be addressed.

V. Key Points Checklist: *Conducting Analysis*

- Always pay attention to the facts. Keep them in mind when performing each step of the analytical process. The analysis process involves determining how the law applies to the *facts*. Make sure you have all the facts at the outset.
- Before beginning the IRAC process, perform preliminary research to obtain a familiarity with the area of law involved in the case.
- Remember IRAC. An easy way to remember the legal analysis process and what to look for when reading a court opinion is to remember the acronym IRAC.
- When conducting legal analysis, address one issue at a time. If there are several issues involved in the assignment, consider each issue separately. Complete the analysis of one issue before proceeding to the next issue. In doing so, you will be more efficient and avoid confusion.
- Remember counteranalysis. Always look for authority or arguments counter to your position.
- Keep focused. Focus on the specific issue you are assigned to analyze and the facts of the client's case, and keep asking yourself, "What must be decided about the facts of this case?"
- Maintain intellectual honesty. Do not lose your objectivity. Do not let personal beliefs or feelings interfere with a thorough legal analysis.

VI. Application

The steps of the analytical process are illustrated here through their application to the hypothetical presented at the beginning of the chapter.

Marian's new assignment requires her to analyze the Lietel case, identify the issues, and determine whether Mr. Lietel has any cause of action against Steve Spear. Marian realizes that she must first familiarize herself with all the information concerning the facts of the case. She reviews the case file and all interviews that have been conducted. Next, she reviews the notes from the legal research and analysis course she took when she was studying for her degree. She notes a four-step approach for analyzing a case:

Step 1 Issue. Identify the issue (legal question) or issues raised by the facts of the client's case.

Step 2 Rule. Identify the law that governs the issue.

Step 3 Analysis/Application. Determine how the rule of law applies to the facts.

Step 4 Conclusion. Summarize the results of the legal analysis.

A. Battery Issue

Step 1 Identify the Issue(s). Assume for the purposes of this problem that there is no question concerning the lawfulness of the citizen's arrest by Steve Spear. He had authority to make a citizen's arrest.

On the basis of her education and experience as a paralegal, Marian quickly identifies two possible civil causes of action that Mr. Lietel may have against Mr. Spear:

1. battery
2. intentional infliction of emotional distress

From her training, Marian knows that the best approach to legal analysis is to address and completely analyze one issue before proceeding to the next one. She decides to begin with the battery issue.

Marian knows that the issue is the legal question raised by the facts of the client's case, and therefore the statement of the issue must include reference to the law and the facts. The steps of the process Marian follows when identifying and stating the issue are presented in detail in Chapters 6 and 7. She identifies the issue as follows.

Under the state's tort law, does a civil battery occur when an individual encounters resistance while making a lawful arrest, uses force to overcome the resistance, and kicks the person being arrested several times after the resistance ceases?

Step 2 Identify the Rule of Law. The next step is to identify the rule of law governing battery. Marian first looks for any state statute that defines civil battery. Based on her familiarity with tort law, she is fairly certain that civil battery is defined in the case law and there is no applicable statutory law. She researches the statutes, however, to be sure that the state legislature has not enacted any legislation concerning civil battery. Her research reveals that there is no statute. She finds that the case law definition of battery adopted by the state's highest court is: "A civil battery is the unprivileged, intentional, and harmful or offensive contact with the person of another."

Step 3 Analysis/Application. The third step is a determination of how the rule of law applies to the facts of the client's case. This is a three-part process:

- Part 1 identify the component parts (elements) of the rule of law
- Part 2 apply the elements to the facts of the client's case
- Part 3 consider the possible counterarguments to the analysis of an issue; that is, conduct a counteranalysis of the analysis

Part 1 Identify the components (elements) of the rule of law. After reviewing the definition of battery, Marian identifies the following elements that are required for a battery to occur:

1. unprivileged
2. intentional
3. harmful or offensive
4. contact

Part 2 Apply the elements to the facts of the client's case. If the elements of the case law are met or established by the facts of the case, a cause of action exists. Elements 2, 3, and 4 appear to be clearly established by the facts of the case. Mr. Spear's actions of kicking Mr. Lietel were clearly intentional and harmful and did contact Mr. Lietel's body. Admittedly, Mr. Spear was making a lawful citizen's arrest, and he did encounter resistance. But did the continued use of force after resistance ceased constitute a battery? Was the continued use of force unprivileged?

The case law definition of battery does not provide sufficient guidance for a determination of whether the conduct was unprivileged. Marian must, therefore, refer to additional case law to determine what constitutes "unprivileged" contact. She looks for a court opinion that is on point—that is, an opinion with facts similar to the client's facts where the court addressed the question of the use of force in making a lawful arrest.

Assume she finds the case of *Art v. Kelly*. In this case, an off-duty police officer, while making a citizen's arrest, continued to use force after the arrest had been made and resistance had ceased. The court held that whenever a lawful arrest is made, either by a citizen or by a law enforcement officer, the privilege to use force in conducting the arrest ceases when resistance ceases. Any continued use of force is a civil battery.

Applying the rule from *Art v. Kelly* to the facts of the case, Marian concludes that the requirements of the first element are met. Although Mr. Spear may have been privileged to use force to overcome resistance when making the citizen's arrest, the continued use of force after resistance ceased constituted a battery under the rule announced in *Art v. Kelly*. Marian concludes that a cause of action exists for civil battery. Mr. Spear's actions of kicking Mr. Lietel after Mr. Lietel had ceased resisting constituted unprivileged, intentional, harmful contact with Mr. Lietel.

Part 3 Conduct counteranalysis. Before proceeding, Marian should conduct a counteranalysis. She should identify and address any counterarguments to the analysis.

For Example

Suppose Marian found a court decision involving an arrest by law enforcement officers that held that some continued use of force after resistance ceases is permissible if the situation is extremely heated. The court reasoned that law enforcement officers are not perfect, and that if the situation is extremely heated, the brief continued use of force is privileged. In Marian's analysis, she would have to include the case in her memorandum and discuss how it does or does not apply to the facts of the client's case.

Step 4 Conclusion. The final step in the analysis of the battery issue is a conclusion.

When she applied the rule of law to the facts of the case in step 3, Marian reached a conclusion that there is a cause of action for civil battery in Mr. Lietel's case. Law firms vary in regard to what should be included in the conclusion. Marian's conclusion could include, among other things, any or all of the following:

- a summary of the analysis

For Example “The case law defines battery as the nonprivileged, intentional, harmful, or offensive contact with the person of another. In the court opinion of *Art v. Kelly*, the court stated that when a lawful arrest is being made, the continued use of force after resistance ceases is unprivileged. Mr. Spear’s actions of kicking Mr. Lietel after Mr. Lietel had ceased resisting constituted unprivileged, intentional, harmful contact with Mr. Lietel. Therefore, a cause of action for civil battery is available in this case.”

- a weighing or consideration, based on the analysis, of the merits of the cause of action

For Example “There is strong support for a battery claim in this case. The testimony of the witnesses supports Mr. Lietel’s statements that Mr. Spear kicked him after he was subdued. All the elements of the cause of action are established by the facts of the case. Under the rule of *Art v. Kelly*, Mr. Spear’s continued use of force was clearly unprivileged.”

- an identification of additional facts or information that may be necessary

In this case, the statements of additional witnesses or other information may be required.

- the identification of further research that may be required. Further research may be necessary because part of the research could not be performed owing to time constraints (the memo was due) or the research sources were not readily available
- the identification of other issues or causes of action that became apparent during the analysis of the case, which is not necessary in this case, since Marian’s assignment is to identify all possible causes of action and issues. Suppose Marian’s supervisory attorney believed that only a battery claim was present in this case and Marian’s assignment was to address that issue. If her analysis of the battery issue revealed other possible causes of action, she should mention those possibilities in her conclusion

B. Intentional Infliction of Emotional Distress Issue

When she performed step 1, Marian identified intentional infliction of emotional distress as a possible cause of action. After concluding her analysis of the battery claim, she follows the same steps in analyzing the possibility of an intentional infliction of emotional distress claim.

Step 1 Identify the Issue. Just as with the battery issue, Marian knows that the issue is the legal question raised by the facts of the client’s case, and, therefore, the statement of the issue must include reference to the law and the facts. She identifies the issue as follows.

Under the state’s tort law, does intentional infliction of emotional distress occur when an individual who encounters resistance while making a lawful arrest kicks the party being arrested six times after the resistance has ceased, causing the party to have trouble sleeping and be fearful whenever he sees the individual?

Step 2 Rule of Law. Marian's research reveals that there is no statutory cause of action for intentional infliction of emotional distress. The state case law does establish a cause of action for intentional infliction of emotional distress. There is no cause of action for negligent infliction of emotional distress. Intentional infliction of emotional distress is defined in the case law as intentionally causing severe emotional distress by an act of extreme or outrageous conduct.

Step 3 Analysis/Application.

Part 1 Identify the components (elements) of the rule of law. Marian's review of the case law reveals four elements:

1. There is extreme or outrageous conduct.
2. There is intent to cause severe emotional distress.
3. Severe emotional distress is suffered.
4. The conduct causes the distress.

Part 2 Apply the elements to the facts of the client's case. Marian's application of the facts of Mr. Lietel's case to the elements raises several questions about whether the requirements of intentional infliction of emotional distress are met in this case:

1. Was Mr. Spear's conduct "extreme or outrageous"?
2. Mr. Spear obviously intended to kick Mr. Lietel, but did he intend to cause severe emotional distress?
3. Was the harm suffered by Mr. Lietel "severe emotional distress"?

The answers to these questions are not apparent from a reading of the definition of intentional infliction of emotional distress. Marian turns to additional case law for guidance and locates the case of *Addik v. Garay*, which appears to answer her questions. In the case, Mr. Garay and Mr. Addik got into a fight at a party. Mr. Garay knocked Mr. Addik down and, while Mr. Addik was down, kicked him multiple times, yelling, "I'm not gonna kill you, but you'll remember me in your dreams. You'll never forget this." Mr. Addik was so affected by the incident that he had a nervous breakdown and was out of work for two months.

The court, addressing Mr. Addik's claim for intentional infliction of emotional distress, ruled that public humiliation, such as that suffered by Mr. Addik, constitutes "extreme and outrageous conduct." Ruling that the requisite intent was present, the court held that there must be some *specific conduct* indicating an intent to cause emotional distress. The mere intentional act of kicking was not sufficient to evidence an intent to cause emotional distress, but Mr. Garay's statements while kicking Mr. Addik were specific conduct indicating an intent to cause emotional distress. The court went on to rule that the emotional distress suffered must be severe: the mere loss of sleep is not sufficient. Instead, severe harm, such as loss of work or medical expenses, must result.

Applying the guidelines presented in *Addik v. Garay*, Marian concludes that there is probably not a cause of action for intentional infliction of emotional distress in Mr. Lietel's case. Mr. Spear's conduct of kicking Mr. Lietel in public is sufficiently extreme and outrageous, but it is questionable whether the requirements of elements 2 and 3, intent and severe emotional distress, are met by the facts of the case. There was no conduct by Mr. Spear evidencing a specific intent to cause emotional distress. The act of kicking alone was not sufficient evidence of intent according to *Addik v. Garay*. If Mr. Lietel's loss of work and medical expenses resulted from the battery and were not related to the emotional distress, there is no evidence that Mr. Lietel

suffered severe harm as required by *Addik v. Garay*. Fearfulness and loss of sleep are probably not sufficiently severe to meet the *Garay* standards.

Part 3 Counteranalysis. In this part, Marian would identify and address any authority or counterarguments to her analysis. We will assume that she did not identify any counterargument to her analysis of the emotional distress issue.

Step 4 Conclusion. Just as with the battery issue, Marian begins her conclusion with a summary of the analysis.

For Example The case law definition of intentional infliction of emotional distress is the intentional causing of severe emotional distress by an act of extreme or outrageous conduct. In the case of *Addik v. Garay*, the court ruled that:

1. Public humiliation by kicking constitutes outrageous conduct.
2. The act of kicking alone is not sufficient evidence of intent—there must be additional conduct evidencing an intent to cause severe emotional distress.
3. Severe harm must result from the severe emotional distress.

In Mr. Lietel’s case, there is no evidence of the required intent, and it is questionable whether there was severe harm. Therefore, a cause of action for intentional infliction of emotional distress does not appear to be present.

Marian may include some other items in her conclusion similar to those presented in the conclusion to the battery issue.

For Example She may identify additional information that is needed. She may note that the client and witnesses need to be reinterviewed to determine whether Mr. Spear said anything while he was kicking Mr. Lietel.

Quick References

analysis/application	000	intellectual honesty	000
conclusion	000	IRAC	000
ethics	000	issue	000
facts	000	legal analysis	000
focus	000	rule of law	000

Summary

Most clients enter the law office with a problem that must be analyzed and solved. Legal analysis of the problem involves the identification of the legal issues in the client’s case and a determination of what law applies and how it applies. The commonly used legal analysis format involves four steps:

1. identification of the legal issue or issues
2. identification of the rule of law that governs the issue

3. analysis and application of the rule of law to the facts of the case. This step is composed of three parts:
 - a. a determination of the elements or requirements of the rule of law
 - b. a matching of the facts of the client's case to the elements and a determination of how the rule of law applies to the facts
 - c. a counteranalysis that addresses any counterarguments to the analysis
4. a conclusion that summarizes the previous steps. The conclusion may also include a weighing of the merits of the case and an identification of other information or avenues of research that should be pursued

The four steps of the analysis process can be easily referred to and remembered by the acronym IRAC. It is composed of the first letters of the descriptive terms for the four steps: **I**ssue, **R**ule, **A**nalysis/**A**pplication, and **C**onclusion.

It is important to keep two general considerations in mind when engaging in legal analysis:

1. focus
2. intellectual honesty

Keep focused on the task. Expend energy in the direction of addressing the issues assigned. Focus on the facts of the client's case, and analyze only the issue or issues raised by those facts. Avoid being distracted by interesting or related issues that do not need to be addressed.

Perform analysis with intellectual honesty. Always look for the correct answer, even though that answer may not be in the client's favor or in accordance with your beliefs. Do not let preferences, prejudices, or politics interfere with your duty to analyze the legal question objectively and honestly. Base the conclusion on an objective analysis of all the facts and law and include both the supporting and opposing positions.

Internet Resources

The following sites may provide useful support information to paralegals engaged in legal analysis.

<http://www.nala.org>

This is the site for the National Association for Legal Assistants (NALA). The association site provides information ranging from articles on the profession to education and certification programs for paralegals. Includes information on court decisions affecting paralegals and links to other related sites.

<http://www.paralegals.org>

This is the Web page for the National Federation of Paralegal Associations (NFPA), another national paralegal organization. Provides links to a wide range of sites of interest to paralegals—research sources, publications, products, and so on.

<http://www.legalassistanttoday.org>

Legal Assistant Today is a magazine geared toward the needs of paralegals. Often includes helpful articles on legal analysis and writing.

Using <http://www.google.com> as a search engine and “IRAC legal analysis” as a search term can identify several hundred Web sites (too many to list here) related to the topic of legal analysis and the IRAC process.

Exercises

Additional assignments are located on the Online Companion and the Student CD-ROM accompanying the text.

ASSIGNMENT 1

Describe in detail the steps of the IRAC legal analysis process.

ASSIGNMENT 2

Facts: Client found a check written out to cash in the amount of \$750.00. The check was completely made out when he found it. He took it to the bank, signed it on the back as instructed by the teller, and cashed it. He was subsequently arrested and charged with forgery.

Rule of Law: Section 30-236 of the state penal code defines forgery as “falsely making or altering any signature to, or any part of, any writing purporting to have any legal efficacy with intent to injure or defraud.” Section 45-3-109d of the state commercial code provides that when a negotiable instrument is made out to cash it is a “bearer instrument.” The section goes on to provide that “[a] bearer instrument refers to an instrument that is payable to anyone possessing the instrument and is negotiable by transfer alone, it is the same as cash.”

Note: A check is a negotiable instrument.

Assignment: Based on the information presented in the problem, prepare a complete and detailed analysis of whether there is sufficient evidence to support a charge of forgery.

ASSIGNMENT 3

Facts: Client is charged with burglary. He broke a window, entered his neighbor’s garage, and took three cases of beer. The garage is a separate building located about six feet from the neighbor’s house.

Rule of Law: Section 2397 of the state penal code defines burglary as the breaking and entering of the dwelling house of another with the intent to commit a crime.

Case Law: In the case of *State v. Nelson* the court ruled that “a dwelling includes out-buildings close to but not physically connected with a dwelling house, if such build-

ings are capable of being fenced in.”

Assignment: Based on information presented in the problem, prepare a complete and detailed analysis of whether there is sufficient evidence to support a charge of burglary.

ASSIGNMENT 4

Facts: The client is the president of an extremist group that believes that the followers of Islam should be deported to Islamic countries. The organization at its ceremonies burns a large replica of the Koran while singing anti-Islamic songs. The organization’s letterhead and literature are embossed with a picture of a burning Koran being stepped on by a spiked boot. The local library has books by members of the American Nazi Party, the American Communist Party, and the Ku Klux Klan. The library refuses to include the organization’s literature among its materials. The client claims this violates the organization’s constitutional rights.

The law firm handles cases involving the violation of constitutional rights. **Assignment:** Identify and analyze the possible causes of action that the client may have against the city library.

- A. Discuss and describe in detail the steps you should follow when conducting the legal analysis.
- B. Assume there are possible causes of action based on freedom of speech under the First Amendment and equal protection under the Fourteenth Amendment. For each issue, describe in detail each step of the analytical process.
- C. Discuss possible factors that may affect your objectivity and how those factors could affect the legal analysis of the problem.

ASSIGNMENT 5

Facts: The client was cited for passing in a no-passing zone. Frustrated by a slow-moving vehicle on a two-lane highway, the client admits that he passed the vehicle entirely in a no-passing zone—that he

began and ended the passing maneuver in an area where the center of the road was marked with two solid stripes. There was no oncoming traffic, and the maneuver was safely made.

Rule of Law: The state's motor vehicle code, section 293-301, provides that it is a violation of state law to pass a vehicle in a no-passing zone. In the statute, a no-passing zone is defined as that portion of the road marked by two solid lines painted in the center of the road. Passing zones are indicated by single, eight-foot stripes down the center of the road.

Case Law: The only relevant case on the subject is *State v. Roth*. In the case, Mr. Roth was cited for improper passing. He began the passing maneuver in the last thirty feet of a no-passing zone and completed it in a passing zone. There were no oncoming vehicles. Evidence presented to the trial court established that the last thirty feet of the no-passing zone should have been marked as part of the passing zone. Mr. Roth appealed his conviction in the trial court. On appeal, the state's highest court held that the purpose of the state motor vehicle code is to ensure safety on the public highways.

The court ruled that Mr. Roth's passing maneuver was clearly made safely, and in light of the evidence that the no-passing zone was improperly marked, a strict reading of the statute was not appropriate. Mr. Roth's conviction was set aside.

ASSIGNMENT:

- A. Based on the information presented in the problem, conduct an analysis of the client's case and prepare a complete and detailed analysis of the problem.
- B. Repeat Assignment A, assuming the following facts: The client began the passing maneuver approximately twenty feet from the end of the no-passing zone and completed it in a passing zone. There was no oncoming traffic, and the maneuver was safely completed.
- C. Repeat Assignment A, assuming the following facts: The client began the passing maneuver in a passing zone, but completed it in a no-passing zone.
- D. What additional information, if any, may be necessary for a complete analysis of the preceding problems?



For additional resources, visit our Web site at www.paralegal.delmar.cengage.com



Additional assignments are located on the Student CD-ROM accompanying the text.

PART II

THE SPECIFICS OF LEGAL ANALYSIS

Overview

Part II covers matters essential to the analysis of a legal problem. It begins with three chapters on two of the principal components of a legal question (legal issue):

1. Rule of Law—The law governing the legal question, addressed by the chapters on statutory and case law
2. Key facts—Facts critical to the outcome of the case

Next are chapters on identifying and writing legal issues, which discuss how to identify the legal issue presented by a fact situation and how to state the issue.

Part II concludes with two chapters on topics fundamental to legal analysis:

1. Case Law Application—The analytical process used to determine whether a court opinion applies to a legal question
2. Counteranalysis—The process of discovering and considering the counterargument to a legal position or argument.

This page intentionally left blank