

Legal Analysis *and* Writing

Third Edition

William H. Putman



Counteranalysis

Outline

- | | |
|---------------------------------|---|
| I. Introduction | VI. Counteranalysis Techniques: Comments |
| II. Counteranalysis: Definition | VII. Counteranalysis: Where |
| III. Counteranalysis: Why? | VIII. Key Points Checklist: <i>Conducting Counteranalysis</i> |
| IV. Counteranalysis: When | IX. Application |
| V. Counteranalysis: Techniques | |

Learning Objectives

After completing this chapter, you should understand:

- What counteranalysis is
- Why counteranalysis is important
- The techniques of counteranalysis
- Where counteranalysis is placed in an interoffice research memorandum or a court brief



On a frigid Saturday in December, Mr. Henry “Hot Dog” Thomas, an inexperienced skier, was skiing an expert run at a local resort. As he came over a hill, he encountered a patch of ice, lost control, crashed into a tree, and was severely injured. The ski resort did not post a warning sign indicating the presence of the ice patch. Mr. Thomas consulted with Ms. Booth, a local attorney, and retained her to represent him. Shortly thereafter Ms. Booth filed a negligence suit against the resort. She sent her paralegal a memo indicating that the resort’s attorney had filed a rule 12(b)(6) motion to dismiss for failure to state a claim. The memo directed the paralegal to prepare a legal research memorandum assessing the likelihood of the motion being granted.

The Ski Safety Act, which governs the rights and liabilities of skiers and ski resorts, provides that

- the resort has a duty to warn of hazardous conditions.
- the skier has the duty to be aware of and the responsibility for snow and ice conditions.

The act also provides that skiers have a duty to refrain from skiing beyond the range of their ability. One of the questions to be addressed by the paralegal is which of the duties apply in the client’s case.

The memo prepared by the paralegal focused on the resort’s duty to warn and the skier’s duty in regard to snow and ice conditions. Based on this focus and the relevant case law, the paralegal concluded that the resort had the duty to warn of the

ice patch that the client encountered. Therefore, the 12(b)(6) motion would probably not be granted.

At the motion hearing, the resort's counsel did not focus on the issue of the resort's duty to warn but rather argued the issue in the context of probable cause. The resort's counsel contended that the cause of the accident was the skier's admitted violation of his statutory duty to refrain from skiing beyond

the range of his ability. As an admitted inexperienced skier, his skiing an expert run violated the statute and, therefore, the cause of the accident as a matter of law. The skier's attorney, relying on the paralegal's memo, which did not address the proximate cause issue, was unprepared to counter this argument. Consequently, the motion was granted and the case dismissed.

I. INTRODUCTION

What went wrong in the preceding hypothetical? Of course, the supervising attorney should have more carefully reviewed the paralegal's memo, noticed that the assistant had not addressed the proximate cause issue, and engaged in additional research. But often an attorney is too busy and, based on past excellent and reliable performance by a paralegal, may rely fully on the paralegal's work product and not sufficiently review what has been submitted.

What went wrong with the paralegal's research? The paralegal failed to anticipate the legal argument the opposing side was likely to make. He failed to analyze the position from the other side's point of view. In other words, he failed to provide a complete counteranalysis in the memo. A paralegal's role in conducting legal research, or in any situation where legal analysis is required, includes determining the potential weaknesses of a legal argument and the counterarguments the other side may present.

The purpose of legal research is not only to discover how the law applies to the client's case but also to determine the strength of that case. To accomplish this, the strength of the opponent's case must be analyzed as well. The case must be looked at in its entirety to determine its strengths and weaknesses.

The focus of this chapter is the process of identifying the strengths and weaknesses of a client's case through an analysis of the case from the perspective of the opposition. That is, the focus is on counteranalysis. Thorough research must be conducted and all applicable law identified prior to the beginning of the process.

II. COUNTERANALYSIS: DEFINITION

If analysis is the application of the law to the facts of a case, what is **counteranalysis**? At one level, it is an exploration of how and why a specific law does or does not apply to the facts of a case. In essence, it is the process of discovering and considering the **counterargument** to a legal position or argument. It is the process of anticipating the argument the opponent is likely to raise in response to your analysis of an issue. It involves an identification and objective evaluation of the strengths and weaknesses of each legal argument you intend to raise.

counteranalysis

The process of discovering and considering the counterargument to a legal position or argument; the process of anticipating the argument the opponent is likely to raise in response to the analysis of an issue. It is the identification and objective evaluation of the strengths and weaknesses of a legal argument.

counterargument

The argument in opposition to a legal argument or position. The argument the opponent is likely to raise in response to the analysis of an issue.

III. COUNTERANALYSIS: WHY?

The role of the attorney and paralegal is to represent the client to the best of their ability and to pursue a course of action that is in the best interest of the client. This is accomplished by engaging in research and analysis that thoroughly examines all the aspects of the case. One of those aspects, counteranalysis, is important for several reasons.

1. **(Ethics.)** Under Rule 3.3(a)(3) of the American Bar Association’s Model Rules of Professional Conduct, an attorney has an ethical duty to disclose legal authority adverse to the position of the client that is not disclosed by the opposing counsel.

The goal of the adversary system is that justice be served. The ends of justice require the discovery and presentation of all relevant authority in order that a just resolution of the issues may be achieved. Therefore, a paralegal, to inform the attorney properly, must locate and provide the attorney with all relevant authority, including that which is adverse to the client.

2. **(Ethics.)** Both the attorney and paralegal have an ethical duty to do a complete and competent job. See Model Rule 1.1. Research and analysis are not complete unless all sides of an issue and all legal arguments have been considered. Failure to analyze a problem completely can constitute malpractice. To represent the client competently, you must be prepared to respond to any legal argument raised by the other side. The identification of opposing arguments allows you to consider what the other side’s position is likely to be. It allows you to answer the following questions:

- “What will they do?”
- “How can we counter their arguments?”
- “What preparation is necessary to respond?”

In essence, counteranalysis allows you to anticipate opposing arguments and prepare to counter them. The last thing a paralegal wants is to be responsible for the supervisory attorney being unprepared to respond to an argument.

3. Counteranalysis aids in the proper evaluation of the merits of a case and can assist in the selection of the appropriate course of action to follow.

For Example Counteranalysis may reveal a weakness in the client’s case that leads to the conclusion that settlement should be pursued. Without conducting a thorough counteranalysis, an improper course of action could be followed, such as taking the matter to trial rather than pursuing settlement options.

4. It is important to locate and disclose adverse authority to maintain credibility with your supervisor. You may not be considered reliable and the credibility of your research may be questioned if you ignore or fail to identify and disclose adverse authority. The opposition or the court, if the issue comes before the court, most likely will discover the opposing authority. Your failure to do so indicates lack of ability, sloppiness, or intentional concealment. Your credibility and trustworthiness will be enhanced if you candidly reveal unfavorable authority and meet it head on.

5. When a legal brief is submitted to a court, if you identify and address adverse authority in the brief, you have an opportunity to soften its impact by discrediting or distinguishing it. You have an opportunity to provide reasons why the adverse authority does not apply, and your credibility is enhanced. This allows the reader to consider the adverse authority in the context of your response to it. This opportunity is missed if you fail to include the adverse authority.

Weaknesses in your position or analysis will not go away if you ignore them. No matter how strongly you feel you are right, you can count on the other side raising some counterargument, and if you have not considered and prepared for the counterarguments, you may very well lose in court.

IV. COUNTERANALYSIS: WHEN?

Employ counteranalysis whenever legal research is conducted or the strengths and weaknesses of a case are considered, in other words, *always*. When addressing a legal problem, look for all potential counterarguments to any position taken. Counteranalysis is required when preparing an interoffice legal memorandum or conducting any research on an issue in a case. It is certainly necessary when you are assisting in the preparation of a response to a brief filed by the opposing party. Also, you should engage in the process even when you are just thinking about the legal issues in the client's case. Even in the initial stages of a case, counteranalysis may be required.

For Example Some paralegals conduct the initial interview with a client and provide the supervisory attorney with a summary of the interview and the applicable statutory and case law. The summary of the applicable law should include a counteranalysis section that introduces any apparent weaknesses in the client's case.

V. COUNTERANALYSIS: TECHNIQUES

A. In General

Before counteranalysis can begin, researching and analyzing the issue or legal position thoroughly is a prerequisite. You must know the law before you can respond to it. Thorough research should reveal the weaknesses of a legal position and the counterarguments to it.

For Example Mary Kay, a door-to-door sales representative for Ace Brush, sold Ella Smith a set of brushes at Ms. Smith's residence. Ms. Smith signed a contract to purchase the brushes. The contract provided for three monthly payments. Ms. Smith called two days later and canceled the contract. When Ace Brush attempted to deliver the goods, Ms. Smith refused to accept the delivery. Ace Brush sued Ms. Smith for breach of contract.

Tom, a paralegal with the firm representing Ace Brush, was assigned the task of determining whether Ms. Smith could legally cancel the contract after it

was signed. He determined that article II of the state Commercial Code governed the transaction. His research indicated that the code had no provision allowing a cooling-off period for door-to-door sales, and therefore, he concluded that Ms. Smith's rejection of the goods was a breach of the contract.

Tom, however, committed a major error. He failed to research the question thoroughly. The state had another statute, called the Consumer Sales Act, which provided that in the event of a credit transaction involving a home solicitation sale, the buyer had a right to cancel the sale within three days of the transaction.

Had Tom's research been thorough, he would have located the weakness in his legal position, which was based on the Commercial Code and identified the counterargument to the conclusion that the contract was breached.

When embarking on counteranalysis, always assume that there is a counterargument to the position you have taken. Put yourself in the opponent's place and ask yourself:

- "How do I respond to this argument?"
- "What is the argument in response to this position?" Remember, counteranalysis consists of identifying any possible counterargument the opponent may use to challenge your legal position or argument.

To determine what the counterarguments to an argument or position are likely to be, it is necessary to consider the ways a legal argument may be attacked. Once you are familiar with the techniques used to challenge an argument, use those techniques to seek out the weaknesses in your argument and to anticipate the likely counterarguments.

A legal argument or legal position is usually based on **enacted law** or case law or both. The various approaches that you may use to attack or challenge an argument based on **enacted** or case law are explored separately in the following two sections.

B. Enacted Law

Ways to challenge or attack a legal position or argument based on an enacted law are discussed here. *Enacted law*, as defined in Chapter 1, includes any law passed or adopted by the people through a representative body, such as Congress or a state legislature, city council, and so on. Throughout this section and the remainder of the chapter, the term *statute* is used when discussing legal arguments or positions based on enacted law.

There are several approaches to consider when attacking a legal position based on a statute. Some of these approaches are listed in Exhibit 9-1. Consider all of them when analyzing an argument based on a statute to ensure that all possible weaknesses and counterarguments are identified.

1. Elements of the Statute Are Not Met

Every statute is composed of elements that must be met before the statute can apply. When a client's case is based on a statute, facts must be present in the case that establish or satisfy each of the elements of the statute.

enacted law

The body of law adopted by the people or legislative bodies, including constitutions, statutes, ordinances, and administrative rules and regulations.

Challenges to a position or argument based on enacted law.

1. The elements of the statute are not met.
2. The statute is sufficiently broad to permit a construction or application different from that urged by the opposition.
3. The statute has been misconstrued or does not apply.
4. The statute relied upon as a guide to interpret another statute does not apply and, therefore, cannot be used as a guide in interpreting the other statute.
5. The statute relied on has not been adopted in your jurisdiction.
6. The interpretation of the statute urged by the opposition is unconstitutional or violates another legislative act.
7. The statute relied on is unconstitutional.

Exhibit 9–1

Counteranalysis Approaches to a Legal Position Based on a Statute

For Example Criminal Code § 1000 defines burglary as the breaking and entering of the residence of another with the intent to commit a crime. The elements are

1. breaking and entering
2. the residence
3. of another
4. with the intent to commit a crime.

Facts must be present that establish *each* of these elements before an individual can be convicted of burglary.

One way to attack a legal position based on a statute is to argue that the elements of the statute have not been met—that is, there are not facts present in the case to establish each element(s) of the statute.

For Example Mary is charged under Criminal Code § 1000 with burglary of Steve’s house. Steve is a friend of Mary, and Mary often stays at Steve’s house. On the date of the alleged burglary, Steve’s house was unlocked. Mary came over to see Steve, entered the house, saw money on the kitchen table, took it, and left.

The counterargument to the prosecution’s reliance on the statute is that there are no facts present in the case to establish two elements of the law.

1. Mary did not break into the house, as it was unlocked.
2. Mary did not enter with the intent to commit a crime. She entered with the intent to visit Steve. The intent to commit a crime did not occur until after entry had taken place.

When conducting counteranalysis of an argument based on a statute, closely examine the facts relied on to establish *each* of the required elements. Ask yourself: “*Have the elements of the statute been met?*” Look for any argument that can be raised that the facts do not establish or satisfy an element or elements.

2. Statute Is Sufficiently Broad: Different Construction

In many situations, a statute may be sufficiently broad to allow an interpretation or application different from that relied on by the opposing side.

For Example Section 54-9-91 of the state domestic relations statute provides that custody shall be determined in the best interest of the children. Gerald contends that he should be granted custody of the children because he lives in a small town, and his former spouse lives in a large city. He argues that a small town is a better environment because it is safer and free from the pressures of gang violence and drug use.

A counterargument can be made that the benefits of the city, such as greater access to the arts, museums, and universities, offset the alleged disadvantages of a large city. The term *best interest of the children* can be interpreted in a manner different from that urged by the opposing side.

Where the language relied on in a statute is broadly crafted, such as in this example, look for the counterargument that a different interpretation is permissible because of the broadness of the language. Ask the question: “*Is the statute sufficiently broad to permit a construction or application different from that urged by the opposition?*”

3. Statute Misconstrued or Does Not Apply

Explore the possibility of a counterargument that the statute is being misconstrued or misapplied.

For Example Section 9(A) of the Deceptive Trade Practices Act provides a remedy in tort for “deceptive practices in negotiation or performance” of a contract for the sale of goods. Tom and Larry have a contract for the delivery of goods. Under the contract, Tom is to deliver the goods on the fifth of each month. Every month Tom comes up with some excuse for not delivering the goods on the fifth, and the goods are always delivered between the seventh and fifteenth of the month. Finally, Larry gets fed up and sues Tom for violation of the Deceptive Trade Practices Act, claiming that Tom is engaging in deceptive practices in violation of Section(9)A of the act.

A review of the legislative history and case law clearly indicates that the Deceptive Trade Practices Act is not designed to apply to simple breach of contract cases. The Sale of Goods provisions of the Commercial Code statutes govern breach of contract situations. The courts have consistently held that when there is an adequate remedy in contract law, the tort remedy available under the act does not apply. Therefore, a counterargument can be raised that the statute has been misconstrued and does not apply in a simple breach of contract case such as that of Tom and Larry.

When a legal position or argument is based on a statute, engage in counter-analysis to ensure that the statute is not being misconstrued or applied in a situation to which it clearly does not apply. *Always* consult case law to determine whether the

courts have interpreted or applied the statute in a manner different from that relied on. Ask the following questions: “*Has the statute been misconstrued or does it not apply? Does another statute apply?*”

4. Statute Relied on as a Guide Does Not Apply

In some situations, the statute that governs does not have a provision that addresses a specific question raised by the facts of a client’s case. In such instances, there may be an argument that a different statute, which has a section that governs a similar fact situation, may be used as guidance in interpreting the applicable statute. It is usually argued that the different statute can be used as guidance because the language and functions of the statutes are similar.

When this occurs, you can make the counterargument that the statute relied on to interpret another statute is not intended to govern or apply to the type of situation presented by the client’s case and, therefore, cannot be used as a guide. The argument usually is that the statute governs or applies to only those limited fact situations covered by the language of the statute and cannot be used as a guide for the interpretation of another statute.

For Example The jurisdiction has adopted the following statutes:

- Section 59-1 provides that an individual must be a resident of the county to be eligible to run for the position of animal control officer.
- Section 200-1 provides that an individual must be a resident of the county for three months to run for a position on the county school board.

Aaron, a resident of the city for three months, wants to run for the position of animal control officer. She argues that since Section 59-1 is silent on the length of residency necessary to be eligible to run for the position of animal control officer, the three-month residency requirement established in Section 200-1 should be used as a guide to determine the length of residency required under Section 59-1. She reasons that because both statutes are similar in language (both use the word *resident*) and because both involve county elective offices, they are sufficiently similar for the residency requirement of Section 200-1 to be used as the standard for Section 59-1.

Because the statutes are different, however, a counterargument can be made that the duties of animal control officer are much different from those of a school board member. The duties of the animal control officer require a degree of familiarity with the geography of the county that cannot be acquired in three months. Therefore, the differences in the requirements of the positions represent a factual difference that renders Section 200-1 inappropriate for use as a guide to interpret Section 59-1.

In every situation where it is argued that a provision of one statute may apply or be used to interpret a provision of a different statute, a counterargument can *always* be made that no matter how similar they may be in language and function, the statutes differ functionally in some way. Therefore, the provisions of one statute cannot be relied on or applied to interpret or govern the other statute.

When your legal position or argument is based on the use of one statute as a guide to interpret another statute, consider the counterargument that focuses on the differences in the statutes. Keep in mind the question: “*Is it possible that the statute relied on as a guide is so functionally different that it cannot be used as a guide to interpret the statute being analyzed?*”

5. Statute Relied on Has Not Been Adopted in Jurisdiction

The jurisdiction has no law or statute governing a fact situation, and your legal position is based on an argument that advocates the adoption of the language of, or principles embodied in, a statute from another jurisdiction. In such situations, you are attempting to persuade the court to adopt the law, or the principles embodied in the law, of another jurisdiction.

A counterargument can always be made that a statute, or principles that apply to facts in another jurisdiction, should not be adopted to apply to similar facts in your jurisdiction. It is usually possible to point out some difference between the jurisdictions or difference in the public policy of the jurisdictions and argue that the difference precludes the adoption of the language or principles of the statute.

For Example

Ida, a resident of state *A*, borrows her next-door neighbor’s lawn mower. As the result of a defect in the mower, Ida is injured. Ida sues the manufacturer, a local company, for breach of warranty. The manufacturer moves for dismissal, claiming that the warranty does not extend to nonpurchasers. The commercial code adopted in state *A* does not address the question, nor is there any case law on point. Ida argues that the court should adopt the language of the law of state *B*, a neighboring state. Section 2-389 of state *B*’s commercial code provides that warranties extend to the buyer and any person who may be reasonably expected to use the goods, which includes a neighbor.

The manufacturer’s counterargument could be that the law of state *B* should not be looked to because of policy differences between the states. State *A*, to encourage and protect the growth of local industry, has traditionally adopted a policy that narrowly limits manufacturer liability. State *B*’s position represents an expansive view that broadly extends manufacturer liability, a position contrary to state *A*’s traditional view.

When conducting counteranalysis, look for the argument that the statute relied on has not been adopted and should not apply. Ask the question: “*Where a legal position is based upon an argument that advocates the adoption of the language or principles embodied in a statute of another jurisdiction, are there differences in the jurisdictions that preclude the adoption of the language or principles of the statute?*” Note that there is always the additional counterargument that such matters are of legislative concern and should be addressed by the legislature, not the courts.

6. Interpretation of Statute Is Unconstitutional or Violates Another Legislative Act

Be alert for an argument that the *application* or *interpretation* of the statute advocated is unconstitutional or violates another statute.

For Example Section 22 of the state’s Secured Transaction Code allows a creditor to repossess collateral after providing the debtor with notice of default and allowing the debtor sixty days to cure the default. A car dealer, after providing notice of default and waiting more than sixty days for the customer to cure the default, repossessed the customer’s car from the customer’s residence while the customer was at work. The car dealer interpreted the statute as not requiring prior court approval and, therefore, did not seek a court order authorizing the repossession.

The customer sued the car dealer, claiming the dealer illegally seized the car because the due process clause of the state constitution requires a court order before property can be seized. The dealer claimed that the seizure was legal because he complied with the statute—that is, he provided notice of default and waited sixty days.

The counterargument is that the interpretation of the statute urged by the dealer is unconstitutional because it allows for prejudgment seizure—that is, it allows the seizure of property without prior court approval.

Counteranalyze a legal position or argument based on an *interpretation* of a law for the possibility that the interpretation violates a constitutional or statutory provision. Ask yourself: “*Is the interpretation of the statute urged by the opposition unconstitutional or does it violate another legislative act?*”

7. Statute Relied on Is Unconstitutional

Although statutes are not usually unconstitutional and, therefore, are not likely to be vulnerable to constitutional attack, you should consider the constitutionality of the statute on which a legal position is based. Has the constitutionality of the statute been questioned in scholarly journals, law reviews, and so on?

For Example Ellen is prosecuted under a local ordinance that prohibits the sale of any material that “shows genitalia or excites a prurient interest.” Such a statute may be subject to challenge as being unconstitutional because the term *prurient interest* is too vague.

When working with statutes, consider a counterargument based on a challenge to the constitutionality of the statute. Always consider the question: “*Is the statute unconstitutional?*”

Caveat: When a legal position or argument is based on a statute, be sure to conduct thorough research to ensure that some other law, provision, or court decision does not apply that affects your reliance on the statute.

C. Case Law

To understand how to counteranalyze a legal position or argument based on reliance on case law, it is necessary to understand the process involved in determining whether a court opinion is on point. Therefore, it is helpful to review Chapter 8 before beginning this section. When used in this section, the terms *rule of law* and *legal*

principle include any constitutional, legislative, or case law provision, act, doctrine, principle, or test relied on by the court in reaching its decision.

There are several approaches for challenging a legal position based on case law, some of which are listed in Exhibit 9–2. Consider each of them when conducting counteranalysis.

Challenges to a position or argument based on case law.

1. Reliance on the court opinion is misplaced because the key facts in the opinion and the key facts of the client's case are different to such a nature or degree that they render the court opinion unusable as precedent.
2. Reliance on the court opinion is misplaced because the rule of law or legal principle applied in the court opinion does not apply.
3. The court opinion is subject to an interpretation different from that relied on in support of a legal position.
4. The rule or principle adopted in the opinion relied on is not universally followed.
5. The opinion relied on presents several possible solutions to the problem, and the one urged by the opposition is not mandatory and is not the best choice.
6. The position relied on no longer represents sound public policy and should not be followed.
7. There are other equally relevant cases that do not support the position adopted in the case relied on.

Exhibit 9–2

*Counteranalysis
Approaches to a Legal
Position Based on
Case Law*

1. Reliance on Court Opinion Is Misplaced: Key Fact Difference

Apply the test from the Determining Whether a Case Is on Point section of Chapter 8: “Substitute the client’s key facts for those of the court opinion. If the substitution of the key facts would result in changing the outcome of the case, the court opinion cannot be used as precedent.”

For Example

The plaintiff requests that a psychologist’s records be admitted into evidence. Plaintiff bases his argument on the holding in the case of *Smith v. Jones*, which allowed the admission of a psychologist’s records into evidence. In that case, the evidence was admitted because no claim was raised that the evidence was privileged. The decision turned on the key fact that privilege was not claimed.

In the plaintiff’s case, privilege is vigorously claimed. Therefore, *Jones* cannot be relied on as precedent to support the argument for the admission of the records because it is not on point. There is such a significant difference in the key facts that the case cannot be relied on as precedent. In *Jones*, privilege was not claimed, but in the plaintiff’s case, it is claimed.

Be cautious when your legal argument relies on a court opinion that has key facts that are different from your case. Conduct counteranalysis to identify a possible counterargument that the court opinion relied on does not apply because of

differences in the key facts. Ask the question: “*Is the opinion relied on not on point because of key fact differences?*”

2. Reliance on Court Opinion Is Misplaced: Rule of Law or Legal Principle Does Not Apply

When conducting counteranalysis, look for the counterargument that the legal principle applied in the court opinion does not apply in the case at hand.

For Example In the case of *Davis v. Davis*, Ms. Davis had sole custody of her two daughters. Ms. Davis’s boyfriend occasionally stayed overnight at her home, and the daughters were aware of the overnight visits. Mr. Davis, her former husband, filed a motion with the court asking for a change of custody. He based his claim solely on his wife’s alleged “immoral conduct.” He presented no evidence indicating how the overnight visits impacted the children.

The trial court granted a change of custody. In overturning the trial court, the court of appeals ruled that “mere allegations of immoral conduct are not sufficient grounds to award a change of custody.” The court stated that there must be evidence presented showing that the alleged immoral conduct harmed the children.

In the client’s case, the facts are the same as those in *Davis v. Davis* except that instead of occasional overnight visits, the custodial spouse is cohabiting with another person. Also assume there is a statute in the jurisdiction that provides that cohabitation is per se harmful to the children—that is, in cohabitation cases, evidence of harm to the children need not be presented because cohabitation is presumed to be harmful to them.

If the custodial spouse relies on *Davis* for the proposition that the noncustodial spouse’s request for change of custody must be denied because he has failed to present evidence of harm to the children, the reliance is misplaced. The reliance is misplaced because the cohabitation statute does not require the presentation of evidence of harm to the children. Therefore, the rule of law presented in *Davis* is not applicable in the client’s case, and the case is not on point.

When a court opinion is used to support a legal position, ask the question: “*Is reliance on the opinion misplaced because the principle applied does not apply to the case at hand?*”

3. Court Opinion Is Subject to a Different Interpretation

The court may have interpreted a term in a manner that is subject to an interpretation different from that relied on in support of a legal position.

For Example Mr. Johns is charged with violating Municipal Code Section 982, which prohibits nude dancing. Mr. Johns was dancing in see-through bikini briefs. In prosecuting Mr. Johns, the city relied on the court opinion of *City v. Dew*. In that case, the court, in interpreting the term *nude dancing*, ruled that a dancer is nude when the breast or genitalia are exposed. In *Dew*, the dancer was completely nude.

In Mr. Johns's case, the city contends that Mr. Johns was nude dancing because his genitalia were exposed when he wore see-through bikini briefs. A counterargument could be made that the term *exposed*, as used in the opinion, should be interpreted to mean uncovered. Therefore, a dancer is not nude under the definition adopted in *Dew* when he is covered by any fabric, no matter how sheer. The counterargument is that the language of the opinion is subject to an interpretation different from that relied on by the opposition.

Closely scrutinize the language of the court opinion to determine whether it is subject to another interpretation. Be aware that the interpretation you adopt may not be the only possible interpretation. Ask the question: "*Is the court opinion subject to a different interpretation from that relied upon?*"

4. Rule or Principle Adopted in Opinion Relied on Is Not Universally Followed

This should be a consideration when the opinion relied on is not mandatory precedent—that is, when there is no court opinion directly on point, and a party is urging the court to follow a rule or principle adopted by another court ruling in a similar case in either the same or a different jurisdiction.

For Example The counterargument could be "Although the plaintiff relies on and urges the adoption of the principle presented in *Smith v. Jones*, and that opinion is followed by the Ninth, Fifth, and Seventh circuits, several other circuits have chosen not to follow it. The better position, presented in the case of *Grape v. Vine*, is followed by the Fourth, Sixth, and Eleventh circuits. The principle adopted in *Vine* more accurately reflects the policies of this jurisdiction."

Identify the other rules or legal principles that may apply by reading the opinions of courts that have adopted other positions in similar cases. Keep in mind the question: "*Is the rule or principle of the case relied on universally followed?*"

5. Opinion Presents Several Possible Solutions; One Urged by Opposition Is Not Mandatory and Is Not Best Choice

Check the court opinion relied on in support of a legal position to determine whether the opinion includes other solutions in addition to the one relied on. Also, check other court opinions to identify different solutions that may have been adopted in other cases. If it is not mandatory to follow a single solution or position, conduct counteranalysis to identify the other possible solutions and anticipate counterarguments that may be based on one of the other solutions. Ask yourself: "*If the opinion relied on is not mandatory precedent, does the opinion or another court opinion allow for other possible positions?*"

For Example A counterargument could be "In the case of *Smith v. Harris*, the court stated that the plaintiff could pursue several avenues of relief, including injunction and damages. The defendant argues that *Harris* mandates the pursuit of injunctive relief when, in fact, the court allowed the pursuit of several avenues of relief in addition to injunction."

6. Position Relied on No Longer Represents Sound Public Policy and Should Not Be Followed

If the court opinion is mandatory precedent and, therefore, must be followed, explore the possibility that it no longer represents sound public policy and should be overruled. This approach is available only if the court considering the question has the authority to overrule the precedent. A trial court does not have the power to overrule a higher court decision. If an intermediary court of appeal set the precedent, that court has the power to overturn it. If the highest court in the jurisdiction set the precedent, only that court has the power to overturn it.

This approach is always risky because a court will not lightly choose to ignore precedent. A court usually requires a strong argument to support a decision to abandon or not follow precedent. When a position, however, is based on a court opinion, consider the possibility that the rule or principle adopted in the opinion should no longer be followed because of some policy or other change. In such situations, it can be argued that fairness demands that the court reexamine the law.

For Example Mr. Clark wishes to move into an apartment complex that has restrictions based on parental status. The restrictions provide that no individual or couple may rent an apartment if they have children. The restrictions also provide that if tenants have children after they rent an apartment, they must vacate the premises within three months of the birth of a child. The only case on point is the 1935 case of *Edwards v. Frank*. In that case, the court ruled that restrictions based on parental status did not violate the Constitution and, therefore, were enforceable.

A counterargument is that current public policy strongly favors families with children, that current policy dictates that rental restrictions based on parental status are no longer acceptable or desirable, and that, therefore, *Frank* should no longer be followed.

Consider the question: “Does the court opinion relied on no longer represent sound public policy and, therefore, should it not be followed?”

7. Other Equally Relevant Cases Do Not Support Position Adopted in Case Relied On

In some instances, a matter has not been clearly settled by the highest court in the jurisdiction or the opinions of the highest court appear to conflict. Look for other opinions that may take a position different from the one taken in the court opinion relied on to support a legal position or argument. Ask yourself: “Are there equally relevant cases that do not support the position adopted in the case relied on?”

For Example The client is seeking punitive damages in a negligence case. There are three court opinions from the highest court in the jurisdiction. In the case of *Yaws v. Allen*, the court held that punitive damages may be recovered in a negligence case when there is a showing of gross negligence on the part of the tortfeasor. In the case of *X-ray v. Carrie*, the court ruled that before punitive damages can be awarded in a negligence case, there must be

some demonstration that the tortfeasor had a culpable state of mind. In the case of *Casey v. Cox*, the court held that the establishment of gross negligence by itself does not indicate the existence of a culpable state of mind; it is also necessary to demonstrate willful and wanton misconduct by the tortfeasor.

Reliance on *Yaws v. Allen*, in support of a legal position that the establishment of gross negligence on the part of the tortfeasor is sufficient to obtain punitive damages, is subject to challenge. A counterargument is that the *Carrie* and *Cox* cases, also from the highest court in the jurisdiction, require more than gross negligence.

Caveat: When a legal position or argument is based on a court opinion, be sure that thorough research is conducted to find any other law, provision, or court decision that may affect your reliance on the opinion. The research should identify all court opinions that present possible solutions and approaches to the problem being analyzed.

VI. COUNTERANALYSIS TECHNIQUES: COMMENTS

When engaging in legal research or analysis, review all the approaches presented in the preceding sections and determine whether the legal position or argument may be challenged through any of them. Be aware, however, that the techniques and considerations presented here are not inclusive of all the available ways to attack or challenge a legal position or argument based on a legislative act or court opinion. In addition to using the techniques listed, use any other approach that comes to mind. Also, you may use combinations of methods. The particular circumstances of the case will determine which, if any, of the suggested approaches are applicable. It is important to remember that when your position or argument is based on a legislative act or court opinion, you must engage in thorough counteranalysis to locate any weaknesses, anticipate any counterarguments, and prepare a response.

VII. COUNTERANALYSIS: WHERE?

Where does counteranalysis fit in an interoffice research memorandum or court brief? Because counteranalysis involves analysis, it obviously fits in the analysis section. But where in the analysis section does it belong? There are no established guidelines or formal rules for the placement of counteranalysis. The following are recommendations and considerations.

A. Court Brief

In a **court brief**, inasmuch as counteranalysis involves discussing potential counterarguments to or weaknesses in your analysis, it is recommended that counteranalysis be presented in the middle of the analysis, that is, immediately after the analysis but before the conclusion. Present your argument and analysis first, then present the other side's position, followed by the conclusion.

Presenting counteranalysis in the middle of the analysis keeps the focus on your position rather than on your opponent's position. A reader tends to remember the beginning and end of a presentation more than the middle. Because you believe your analysis or legal argument is correct and should prevail, you want the memory

of your analysis to be foremost in the reader's mind. Therefore, you do not want to place the counterargument in a location where it is more likely to be remembered or emphasized, such as at the beginning or end—hence, its placement after the analysis and prior to the conclusion.

For Example “It is appropriate for the court to allow the admission of DNA test results from the IMAK test. In this state, in the case of *State v. Diago*, the supreme court ruled that the results of scientific tests are admissible when the test's reliability and scientific basis are recognized by competent authorities. The IMAK test, developed in 1992, is universally accepted by all competent authorities as scientifically valid.

“Defendant's reliance on the state case of *Arc v. Arc* is misplaced. In that case, the court's refusal to allow the admission of DNA evidence was based on the disagreement among experts about the reliability of the test being administered at the time, the ITAK test. The ITAK test was not universally accepted and was not as accurate as the current IMAK test. Indeed, IMAK test results have been admitted into evidence in all cases where they have been submitted. For the reasons of universal scientific acceptance, reliability, and court acceptance, the results of IMAK DNA testing should be admitted in this case.”

B. Interoffice Research Memorandum

In an interoffice research memorandum, or **office legal memorandum**, it is recommended that counteranalysis be placed after the analysis of each issue. It logically follows the analysis, and this placement ensures that it will be reviewed by the supervisory attorney before he or she proceeds to the next issue(s). To make certain that it is not overlooked, it may be useful to include a separate counteranalysis subsection for each issue addressed in the memo. One possible outline of the analysis portion of a legal research memorandum is as follows:

Analysis Section: The legal analysis of the issue(s) Issue I

- A. *Introductory sentence.*
- B. *Rule of law.* State the rule of law that governs the issue. This may be a constitutional provision, statutory provision, court doctrine, principle, and so on.
- C. *Case(s).* Present the case or cases that are on point and illustrate the application of the rule of law to the facts.
- D. **Counteranalysis**
- E. *Conclusion*

Assume the information included in the previous example is presented in an interoffice memorandum. A portion of the analysis and counteranalysis section of the memo may appear as follows:

Analysis

It is likely the court will allow the admission of DNA test results from the IMAK test. The state supreme court, in the case of *State v. Diago*, ruled that the results of scientific tests are admissible when the test's reliability and scientific basis are recognized by competent authorities. The IMAK test, developed in 1992, is universally accepted by all competent authorities as scientifically valid.

Although the courts of this state have not addressed the question of the admission of DNA evidence from the IMAK test, the United States Court of

office legal memorandum

A legal memorandum prepared for office use. It presents an objective legal analysis of the issue(s) raised by the facts of the client's case and usually includes the arguments in favor of and in opposition to the client's position. It is often referred to by other names, such as interoffice legal research memorandum, office research memorandum, and interoffice memorandum of law.

Appeals for the Fifth Circuit has considered the matter. In *Eric v. Eric*, the court of appeals stated, “The time has arrived to admit the results of DNA testing into evidence. The IMAK test meets the requirements established by this court for the admission of scientific evidence.” IMAK test results have been admitted into evidence in all cases where they have been submitted. For the reasons of universal scientific acceptance, reliability, and court acceptance, the results of IMAK DNA testing should be admitted in this case.

Counteranalysis

Defendant may rely on the state case of *Arc v. Arc* and argue that the results of the test should not be admitted. In *Arc*, the court refused to allow the admission of DNA test results from the ITAK test. The court’s refusal was based on the disagreement among experts about the reliability of the test. The ITAK test was not universally accepted and was not as accurate as the current IMAK test. Because the *Arc* opinion involved a different test that was neither as universally accepted nor as accurate as the IMAK test, the opinion is not on point and cannot be relied on as precedent in this case.

For an in-depth discussion of the analysis section of an interoffice legal research memorandum, see Chapter 13.

VIII. Key Points Checklist: *Conducting Counteranalysis*

- A weakness in an argument will not go away if you ignore it. You can count on either the other side or the court bringing it to light. It is much better for you to raise the counterargument and defuse it.
- For every issue presented in a legal research memorandum, consider how the other side is likely to respond.
- Put yourself in your opponent’s position. Assume you are the opponent and consider all possible counterarguments, no matter how ridiculous—be ruthless.
- The more strongly you believe in the correctness of your analysis, the greater the likelihood that you will miss or overlook the counteranalysis to that analysis. Beware: When you feel extremely confident or sure, take extra precautions. Overconfidence can seriously mislead you.
- Do not let your emotions, preconceived notions, or stubbornness interfere with an objective counteranalysis of your position.
- When analyzing court opinions, a counteranalysis of the majority opinion may be found in the dissenting opinion or other opinions that criticize or distinguish the majority opinion.
- When conducting counteranalysis, always consider *each* of the approaches listed in this chapter. Remember, more than one approach may apply, and approaches other than those listed may be available.
- Even if you find a case on point, always research thoroughly. Look for other laws or court opinions that may apply.

IX. Application

This section explores the application of the principles discussed in this chapter. Three situations are explored in the following examples.

A. Chapter Hypothetical

Review the example presented at the beginning of the chapter. In the hypothetical, the paralegal failed to conduct a thorough counteranalysis. The assignment was to assess the likelihood that a rule 12(b)(6) motion to dismiss for failure to state a claim would be granted. In a 12(b)(6) motion, the movant is basically claiming that under the facts of the case, the plaintiff cannot state a claim. To state a claim in a negligence case, there must be facts present that establish or satisfy each of the elements of negligence: duty, breach of duty, proximate cause, and damages. In the example, the paralegal's attention was focused on duty, that is, on which duty applied. In light of the provisions of the applicable statute, the Ski Safety Act, and the facts of the case, there appeared to be a conflict of duties. The paralegal focused on which duty applied

- the resort's duty to warn of hazards, or
- the skier's duty to know of and be responsible for snow and ice conditions.

The paralegal's mistake was the failure to conduct a complete counteranalysis. A proper counteranalysis would have led the paralegal to consider the opponent's possible challenge involving the other areas of negligence—breach of duty, proximate cause, and damages. Had this been done, the paralegal would have recognized that the opposing side could raise a proximate cause argument: the cause of the accident was the skier's breach of duty by skiing beyond the range of his ability, not the resort's failure to warn. Had the paralegal considered this argument, a response could have been prepared, and the motion may not have been granted.

This example illustrates one of the most important considerations in counteranalysis: *When analyzing a legal position, always conduct thorough and complete research that considers every possible attack, no matter how remote.*

B. Counteranalysis: Reliance on Legislative Act

Section 35-6-6A of the Construction Industries Licensing Act provides that contractors must be licensed. The section requires all licensed general contractors to take reasonable steps to ensure that the subcontractors they hire are licensed. The section also provides that licensed general contractors who hire unlicensed subcontractors are vicariously liable in breach of contract suits filed against the unlicensed subcontractors.

In the client's case, the client (Plaintiff) is acting as his own general contractor; the subcontractor (SC) is unlicensed. Tom's, Inc. (TI), a licensed general contractor, has used SC on projects in the past and has acted as an agent for SC, often helping SC obtain jobs with other general contractors. Plaintiff, a private individual building his own home, contacted TI seeking assistance in locating a subcontractor. TI arranged the contract between SC and Plaintiff. TI recommended that SC be hired and fully disclosed to Plaintiff that TI was merely an agent for SC. TI was not party to the contract. SC breached its contract with Plaintiff, and Plaintiff sued both SC and TI.

In the lawsuit, Plaintiff argues that Section 35-6-6A allows a cause of action for breach of contract against a general contractor who *is not* a party to the contract. This cause of action exists when the general contractor is acting as an agent for an unlicensed contractor who *is* a party to the contract. Plaintiff also contends that Section 35-6-6A imposes an implied duty on licensed general contractors to protect third parties against all unlicensed contractors, not just unlicensed subcontractors. Plaintiff reasons that the implied duty arises because the intent of the statute is to place a duty on licensed general contractors to assist in the elimination of use of unlicensed contractors on construction projects.

The counterargument is that the statute is being too broadly interpreted. The statute, by its language, applies only to subcontractors hired by general contractors. In the case at hand, TI was merely a disclosed agent. TI did not hire SC, SC was not a subcontractor of TI, and TI was not a party to the contract. Therefore, the statute does not apply.

Further counteranalysis may reveal an additional counterargument: the law of agency governs the case rather than the contractor statute. Agency law provides that disclosed agents who are not parties to a contract are not liable for breach of contract. In this case, TI fully disclosed that it was acting only as an agent for SC and, therefore, under the law of agency, is not liable.

This example illustrates the application of two counteranalysis approaches.

- The legal position is based on a misinterpretation of the legislative act.
- Another legal principle governs rather than the act relied on.

C. Counteranalysis: Reliance on Case Law

Customer is suing Bank, claiming that Bank's debt collection calls to his place of employment constitute intentional infliction of emotional distress. The calls were placed daily for a two-week period between 11:00 a.m. and noon. The issue is whether Bank's conduct is "outrageous conduct"—an essential element of intentional infliction of emotional distress.

There are no cases in the jurisdiction addressing the question of whether contact with a debtor at the debtor's place of employment constitutes outrageous conduct. The case of *Tyron v. Bell*, however, involved a case where a bill collector made daily telephone calls for three weeks to a debtor's residence. In that case, the highest court in the jurisdiction ruled that daily calls to a debtor's residence do not constitute outrageous conduct as long as only one telephone call per day is made and the call is placed at a reasonable time—between 8:00 a.m. and 7:00 p.m.

Bank argues that *Bell* is analogous and on point because both cases involve daily telephone calls to a debtor, made at a reasonable time. Relying on this reasoning, Bank contends that its conduct, like the conduct in *Bell*, cannot be considered outrageous.

The counterargument is that the court opinion is clearly distinguishable and, therefore, cannot apply as precedent. Telephone calls to an individual's place of employment are much more threatening than telephone calls to the individual's residence. Telephone calls to the place of employment disrupt the individual's work, interfere with job performance, and disrupt the work of others who have to answer the calls. Such persistent work interruptions can cause the employer to fire the employee. Calls to the workplace are outrageous because they pose a threat to the individual's livelihood. No such threat exists when the calls are to a residence. Therefore, calls to the workplace are clearly distinguishable, and the court opinion is not analogous, is not on point, and does not apply as precedent.

In this example, the counteranalysis challenges reliance on a court opinion by focusing on differences in the key facts of the opinion and the case. The counterargument is based on a commonsense comparison of the facts of *Bell* and the facts of the client's case. This comparison leads to the conclusion that the key facts are so different that *Bell* cannot apply as precedent. Whenever your legal position or argument is based on a court opinion, be sure to conduct a counteranalysis of the position using all the approaches presented in this chapter as well as any other approach that comes to mind.

Quick References

case law	000	court brief	000
counteranalysis	000	enacted law ethics	000
counterargument	000	office legal memorandum	000

Summary

Counteranalysis is the process of discovering and presenting the counterarguments to a legal position or argument. It is important because to be able to address a legal problem adequately, all aspects of the problem must be considered. This includes identifying all the potential weaknesses in a legal position and being prepared to respond to all challenges to the position.

Employ counteranalysis whenever you are researching a legal issue or addressing a legal problem. Always be alert and look for counterarguments.

A prerequisite to engaging in counteranalysis is thorough research of the question or legal argument. This may help you identify some counterarguments and give credence to or dismiss those already identified. Once the research is complete, there are many approaches that may be employed to assist you in counteranalysis.

Because most legal arguments are based on either enacted or case law, this chapter focuses on various counterarguments that may be raised when attacking reliance on an enacted or case law. The list of approaches presented in this chapter is by no means inclusive of all the available ways to challenge a legal argument or position. It is important to make sure that you engage in counteranalysis using *all* the avenues listed (and any other approach) when looking for potential weaknesses in or counterarguments to a legal position. You can count on the opposing side to discover weaknesses in your position and use them against you. Remember, whenever you are reviewing your client's case, you are negligent if you fail to engage in counteranalysis.

Internet Resources

As of the date of the publication of this text, there are no Web sites dedicated specifically to counteranalysis. However, entering “law counteranalysis” as a topic in a search engine such as Google may locate a limited number of sites that address some aspect of law and counteranalysis. Some sites discuss counteranalysis in specific areas of the law such as military law, while others discuss the topic in relation to taking law school exams. Some sites mention briefly the role of counteranalysis in the analysis process; none addresses the topic in depth.

When “law counterargument” is used as a search topic, a much larger range of sites may be found. Most of these sites involve counterarguments in specific cases but do not discuss the role of counterargument in the legal analysis process.

Exercises

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

ASSIGNMENT 1

What is counteranalysis? When should counteranalysis be conducted?

ASSIGNMENT 2

Why is counteranalysis important?

ASSIGNMENT 3

Legislative Acts: Section 359-23A of the state statutes provides that to be eligible to run for the state senate an individual must be a resident of the state for three years. Local ordinance section 2231 provides that an individual must be a resident of the municipality to run for a position on the city council. The ordinance does not define residency.

Facts: Jerrie wishes to run for the city council. She has been a resident of the state for two years and nine months. The city clerk informs her that she is not eligible to run for city council because she has not been a resident of the state for three years. The clerk states that the city relies on the residency requirement established in section 359-23A.

Assignment: What is the counterargument to the clerk's position?

ASSIGNMENT 4

Case Law: In the case of *Baldonado v. State*, the plaintiff sued the state for false arrest. In *Baldonado* a police officer received information from the dispatcher concerning a violent domestic dispute and specifically describing the plaintiff and his vehicle. The dispatcher reported that the plaintiff had been drinking and was leaving the residence with his two minor children. When he arrived at the residence, the officer saw the plaintiff and his two children in the described car. At the scene, the plaintiff's spouse and neighbor corroborated the dispatcher's information that a violent dispute had taken place. When the officer requested the plaintiff to shut off the engine and stay at the scene, the plaintiff

attempted to leave. The officer stopped the plaintiff from leaving. The court noted that detention by a police officer is allowable only when there is reasonable suspicion that a crime has been committed. The court concluded that there was reasonable suspicion that a crime had been committed and the officer's detention of the plaintiff was lawful.

Facts: Officer was dispatched to plaintiff's residence to investigate a domestic dispute. When he arrived, he saw a red vehicle driving away from the residence. A neighbor was standing on the sidewalk. He informed the officer that he thought a domestic dispute had taken place at his neighbor's house and plaintiff had just left in the red vehicle. The officer pursued plaintiff and required him to return to the residence. Plaintiff is suing the officer for illegally detaining him.

Assignment: The state argues that *Baldonado v. State* supports the position that the detention was proper. What is the counterargument?

ASSIGNMENT 5

List seven ways to challenge an argument based on an enacted law.

ASSIGNMENT 6

List seven ways to challenge an argument based on case law.

ASSIGNMENT 7

Counteranalysis: Legal Position or Argument Based on a Statute

Legislative Act: Section 40-3-6-9A of the state criminal code provides that a noncustodial parent can be convicted of custodial interference when the noncustodial parent "maliciously takes, detains, conceals, entices away, or fails to return the child, without good cause, for a protracted period of time."

Assume there is no case law on point in the jurisdiction relevant to the following fact situation.

Facts: Mary has primary custody of her son. The father, Tom, has legal custody for two months in the summer. Tom takes the

son for two months in the summer but fails to tell Mary where the son is and does not allow her to communicate with him. Before he leaves with the son, Tom tells Mary, “I’m going to punish you for the way you’ve treated me.”

Assignment: The following are arguments presented by Mary in support of her claim that Tom is in violation of the statute. What are the counterarguments to each argument?

Part A

Tom’s actions constitute concealment within the meaning of the statute.

Part B

Same facts as above, but when Tom is leaving, he says, “Because you wouldn’t allow me to communicate with him when you had custody, I’m going to do the same.” Mary argues that Tom’s actions constitute concealment.

Part C

Same facts except that Tom says nothing when he picks up the son.

Part D

Tom allows the son to communicate with Mary, but he returns the son one day late. Mary argues that this constitutes failing to return the child without good cause for a protracted period of time.

Part E

Same facts as in part D except that Tom returns the son two weeks late.

Part F

Same facts as in part E except that Tom explains that he was unable to return the son on time because his car engine blew up, and it took two weeks to fix it.

ASSIGNMENT 8

Counteranalysis: Legal Position or Argument Based on Case Law

In the following example, assume that the only court opinion that is on point is *United States v. Leon* (see Appendix A).

Facts: Officer Jones submits to Judge Bean a request for a search warrant for the search of Steve’s apartment. Officer Jones knows that there is not sufficient probable cause for the issuance of the warrant, but he also knows that Judge Bean is very

pro-law enforcement and will most likely issue the warrant anyway. Judge Bean issues the warrant. Officer Jones gives the warrant to other officers and instructs them to execute it. He does not tell them that he knows it is defective because of the lack of probable cause for its issuance. The other officers execute the warrant in the good faith belief that it is valid. Drugs are found, and Steve is charged with possession.

Steve moves for suppression of the evidence, claiming that the search was illegal and the evidence must be excluded under the exclusionary rule. What is the counterargument to the prosecution’s position in each of the following situations?

Part A

The prosecution argues that because the officers executing the warrant were acting in the good faith belief that the warrant was valid, *United States v. Leon* governs the case. The good faith exception to the exclusionary rule applies and, therefore, the evidence should not be suppressed.

Part B

Same facts as above except that officer Jones delivers the warrant to members of the Citizens Protection Association, a private group of citizens trained by the police to assist in the performance of minor police functions. The group volunteers its services and is not employed by the police. They execute the warrant and make a citizen’s arrest of Steve. The prosecution argues that *United States v. Leon* governs, and the case holds that the exclusionary rule is designed only to protect against police misconduct, not misconduct by private citizens.

ASSIGNMENT 9

Legislative Act: Section 41-1-6-9 of the state statutes defines defamation as the intentional publication of a false statement about a person. The statute defines publication as communication to a third person.

Case Law: *Ender v. Gault* is an opinion of the highest court in the state. In the case, Gault wrote a letter to Ender accusing Ender of defrauding his clients. Gault intended to hand-deliver the letter to Ender at a party at Ender’s house. Gault became intoxicated at the party and left the letter

on Ender's kitchen table. The letter was in an unsealed envelope with Ender's name on it. One of Ender's business competitors who attended the party opened and read the letter.

Ender sued Gault for defamation. In its ruling in favor of Ender, the court stated that "*intentional publication*" as used in the statute includes publication that occurs as a result of the gross negligence of the defendant." The court held that Gault's act of leaving the envelope unsealed on the kitchen table during a party constituted gross negligence.

Facts: Tom is a business associate of Allen. He believes Allen is stealing from their clients. Tom writes a letter to Allen stating that he knows Allen is stealing and that he intends to file criminal charges.

Tom, intending to hand-deliver the letter to Allen, goes to a restaurant where

Allen usually has lunch. After Tom has waited an hour for Allen, one of Allen's friends enters the restaurant. Tom folds the letter and seals it with scotch tape. He gives the letter to the friend and asks him to deliver it to Allen. He does not tell the friend not to open the letter. The friend peels back the tape, reads the letter, reseals it, and delivers it to Allen. Allen finds out that the friend read the letter and sues Tom for defamation under section 41-1-6-9.

Assignment: Take into consideration the statute, the court opinion, and the facts when doing the following.

Part A

Prepare an argument in support of the position that Tom defamed Allen.

Part B

Prepare a counterargument to the argument prepared in part A.



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 III

LEGAL WRITING

Overview

Part III focuses on legal writing and the legal writing process. It applies the principles presented in the previous chapters to the drafting of legal research memoranda, court briefs, and legal correspondence, with chapters on the following topics:

- The legal writing process in general
- Fundamentals of writing
- Office legal memoranda
- Court briefs
- Correspondence

This page intentionally left blank