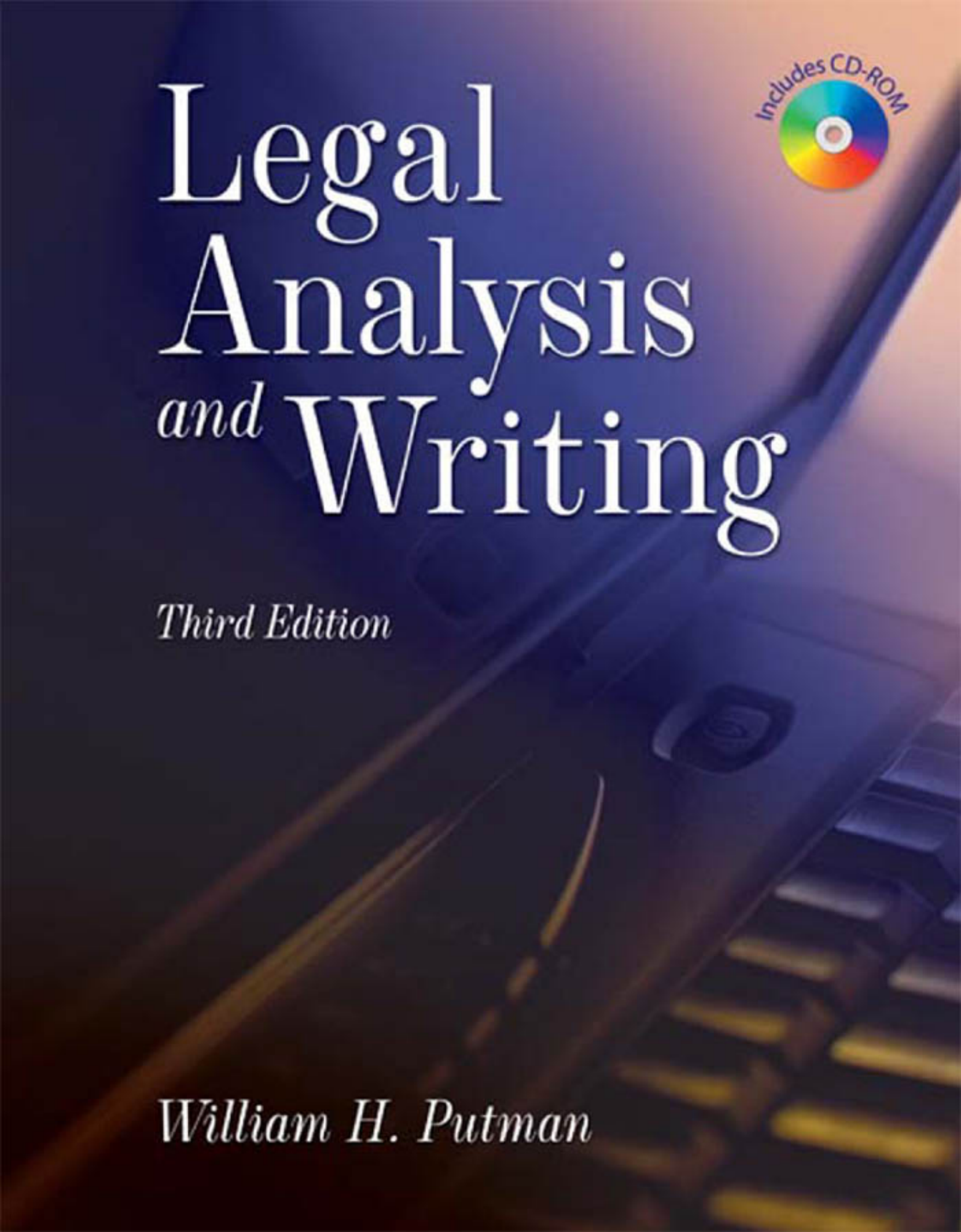

Legal Analysis and Writing

Third Edition

William H. Putman

CHAPTER 13

Office Legal Memorandum: Analysis to Conclusion

Outline

I. Introduction
II. Analysis Section
III. Conclusion
IV. Recommendations
V. General Considerations
VI. Key Points Checklist: *The Interoffice Memorandum: Analysis to Conclusion*
VII. Application

Learning Objectives

After completing this chapter, you should understand:

- The elements and format of the analysis, conclusion, and recommendations sections of an office legal research memorandum
- How to draft the analysis, conclusion, and recommendations sections of an office legal research memorandum
- General considerations to keep in mind when drafting a legal research memorandum

Ellen Taylor is a paralegal intern working in a district attorney's office in the hypothetical state of New Washington. Ms. Taylor recently received the following assignment.

To: Ellen Taylor, Intern
From: Carl Pine, Assistant District Attorney
Re: *State v. Kent.* Arrest during execution of search warrant and constructive possession
Case: Cr. 08-404

On January 7, police officers executed a search warrant authorizing the search of the apartment of David Kent for narcotics. Mr. Kent's apartment is located on the third floor of a four-story apartment complex. Upon entering the apartment, the officers found Mr. Kent lying on the bed in the bedroom. The officers secured the apartment and, after frisking Mr. Kent for weapons, handcuffed him and moved him into the kitchen for the stated purpose of "his and our safety." They did not read him his rights or officially place him under arrest at this time.

The search of the apartment did not reveal any narcotics. The police, however, discovered an "eight-inch hole" in the only window in the bedroom, and the window screen was pushed out. The police went downstairs and searched the area below the window. The bedroom window faces the rear of the apartment complex, and below the window is a parking lot. In the parking lot, three stories below Mr. Kent's bedroom window, the officers found a plastic bag containing one ounce of rock cocaine. The parking lot is a common area of the complex, accessible to the public and all apartment dwellers. No witnesses have been located who saw the defendant throw the cocaine out the window. There were no fingerprints

on the bag or other evidence linking Mr. Kent to the cocaine. After the bag was located, the defendant was read his rights and placed under arrest. He was charged with possession of a controlled substance.

Please prepare an office legal memorandum addressing the following questions:

1. Was the defendant under arrest when he was handcuffed and moved into the kitchen?
2. Is the connection between the defendant and the cocaine sufficient to support charges of possession of a controlled substance?

The office legal memorandum prepared by Ms. Taylor is presented in the Application section of this chapter.

I. INTRODUCTION

Chapter 12 focuses on the process involved in preparing the first half of an office legal memorandum: the heading, statement of assignment, issue, brief answer, and statement of facts sections. This chapter addresses the preparation of the second half of the office legal memorandum: the analysis, conclusion, and recommendations sections. In this chapter, as in Chapter 12, an office legal research memorandum is referred to as an office memo.

The discussion in Chapter 12 addressing the adoption of a writing process and the use of an expanded outline also applies to the preparation of the second half of an office memo. When preparing the analysis, conclusion, and recommendations sections of the office memo, use the guidelines presented in Chapter 12. The examples in this chapter refer to the enacted and case law of the hypothetical state of New Washington.

II. ANALYSIS SECTION

The purpose of an office memo is to provide a legal analysis of the issue(s) in a case. The **analysis section** is the part of the memo where the law is presented, analyzed, and applied to the issue(s). It connects the issue with the conclusion. It is the heart of an office memo assignment.

The analysis section is often referred to as the discussion section. The conventional analytical format, and the most efficient way to approach a legal question, is the IRAC format, that is, Issue, Rule, Analysis, Conclusion. Under the IRAC approach and the office memo format introduced in Chapter 12, the issue is presented at the beginning of the memo; the analysis section covers the rule of law, analysis, and application of the rule of law to the facts; and the conclusion summarizes the analysis. The reasons for following this approach are obvious.

- The reader must know the question in order to know the context in which the rule is analyzed.
- The rule that applies to the question must be identified before the rule can be analyzed and applied to the facts of the case.

- The application of the rule to the facts must take place before a conclusion can be reached.

Although IRAC is the basic format for addressing legal issues, it is only a broad outline of the format. It is necessary to have a more detailed outline of the analysis section to approach an office memo assignment effectively and prepare an office memo.

A. Analysis: Format

Exhibit 13–1 presents the recommended format of the analysis section.

The recommended format for the analysis section of an office legal memorandum

Part A. Rule of law
Part B. Case law (if necessary)—interpretation of rule of law
1. Name of case
2. Facts of case—sufficient to demonstrate case is on point
3. Rule or legal principle from case that applies to the client's case
Part C. Application of law to facts of case
Part D. Counteranalysis

Exhibit 13–1
Basic Four-Part Format: Analysis Section

In the prewriting stage of the writing process, assign each subsection of the analysis section at least one page in the expanded outline: a page for the rule of law, a page for each case, at least one page for the application of the law to the facts, and at least one page for the counteranalysis.

If the memo is a complex memo involving multiple issues, follow the same basic format for each issue (see Exhibit 13–2).

The recommended format for the analysis section of a complex office legal memorandum

Issue I: Analysis
Part A. Rule of law
Part B. Case law (if necessary)—interpretation of rule of law
1. Name of case
2. Facts of case—sufficient to demonstrate case is on point
3. Rule or legal principle from case that applies to the client's case
Part C. Application of law to facts of case
Part D. Counteranalysis

Issue II: Analysis
Part A. Rule of law
Part B. Case law (if necessary)—interpretation of rule of law
1. Name of case
2. Facts of case—sufficient to demonstrate case is on point
3. Rule or legal principle from case that applies to the client's case
Part C. Application of law to facts of case
Part D. Counteranalysis

Issue III: Analysis (same format as Issues I and II)

Exhibit 13–2
Complex Memo: Analysis Section Format

If more than one rule of law applies to a specific issue, include a reference to each rule in the outline.

For Example

Issue I: Analysis
- Part A. Rule of law
  1. Section 59-703 of the commercial code
  2. Section 45-211 of the usury statute

If more than one case is required to interpret the rule of law, such as when more than one element of the rule requires case law interpretation, include a reference to each case in the outline.

For Example

Issue I: Analysis
- Part A. Rule of law—section 59-703 of the commercial code
- Part B. Case law
  1. Case 1. *Smith v. Jones*—interpreting the term *sale* as used in section 59-703
     - A. Facts of case—sufficient to demonstrate case is on point
     - B. Rule or legal principle from case that applies to the client's case
- Part C. Application of the law to the facts of the client's case
- Part D. Counteranalysis
  2. Case 2. *Row v. Downs*—interpreting the term *merchant* as used in section 59-703
     - A. Facts of case—sufficient to demonstrate case is on point
     - B. Rule or legal principle from case that applies to the client's case
- Part C. Application of the law to the facts of the client's case
- Part D. Counteranalysis
- Part A. Rule of law—section 45-211 of the usury statute
- Part B. Case law
  1. *Doe v. Dean*—interpreting the term *loan* as used in section 45-211.
     - A. Facts of case—sufficient to demonstrate case is on point
     - B. Rule or legal principle from case that applies to the client's case
- Part C. Application of the law to the facts of the client's case
- Part D. Counteranalysis

The remainder of this section discusses the elements of the basic format for the analysis section of an office memo. Once you master the considerations involved in preparing the analysis of a single issue, you can approach complex memo assignments that address multiple issues or separate subissues by applying the basic process to the analysis of each issue or subissue.

B. Analysis: Part A: Rule of Law

Inasmuch as the analysis section of an office memo addresses how the law applies to the issue(s) and facts of the client's case, the starting point is a presentation of the rule of law or legal principle that applies. You must present the law before it can be applied. The governing law may be enacted law, such as a constitutional provision or a legislative act, or case law, such as a court-adopted rule of law.

Exhibit 13–3 list some considerations to keep in mind when preparing the rule of law portion of the analysis section.

Exhibit 13–3
Rule of Law: Considerations

Considerations to keep in mind when preparing the rule of law portion of the analysis section	
Introduction	Use introductory language to introduce the rule of law, for example: "The law governing the witnessing of wills is . . . ."
What to include	Paraphrase or quote only the relevant portions of the law.
Multiple rules of law	Use introductory language and present the relevant portion of each rule.
Citation	Provide the citation for the rule of law. If it is enacted law, cite the statute, ordinance, rule, etc.; if it is case law cite the court opinion.

1. Rule of Law: Introduction

The analysis section begins with the presentation of the rule of law. Do not start immediately with a presentation of the rule; use introductory language. The introductory language is italicized in the following examples.

For Example "*The rule of law governing the sale of securities* is section 59-903 of the New Washington Commercial Code. The section provides . . . ." "*In New Washington, the doctrine of strict liability was established in the case of Elton v. All Faiths Hospital,* 931 N. Wash. 395, 396 (1976), where the court stated . . ."

2. Rule of Law: What to Include

When presenting the rule of law, paraphrase or quote only the relevant portions of the law. In some instances, the rule of law is very lengthy, and only portions of the law apply to the issue being addressed. This is often true when the applicable law is statutory law and the statute is composed of many subsections and only one subsection applies. If this is the case, include only the relevant portion of the law.

For Example *Statutory Law:* "The rule of law governing oppressive conduct is § 50-14-5, which provides

A. the district courts may liquidate the assets and business of a corporation
1. in an action by a shareholder when it is established that: . . .
(b) the acts of the directors . . . are illegal, oppressive, or fraudulent . . . ."

Note: Subsection (a) is omitted because the provisions of subsection (a) do not apply to the issue being discussed.

For Example *Case Law:* "The rule of law governing a ski resort's duty to warn of snow and ice conditions was established in the case of *Jones v. Mountain Ski Resort,* 943 N. Wash. 857, 877 (1988), where the court stated, 'Resorts have a duty to warn of snow and ice conditions in the following situations: . . . when the snow or ice condition is a latent hazard . . . .'"

Note: Portions of the opinion are omitted because they do not apply to the issue being discussed.

3. Rule of Law: Multiple Rules

The analysis may require consideration of more than one rule of law. If this is the case, the format is similar to that discussed in the preceding text. Use introductory language, and present the relevant portions of each rule.

For Example "The New Washington Commercial Code section 50-101 establishes which contracts must be in writing. In our case, two subsections of that section apply: section 50-101B, which requires that 'An agreement that is not to be performed within one year from the making . . .' must be in writing, and section 50-101C, which provides that 'Contracts for the sale of goods in the amount of $500 or more . . .' must be in writing."

When the rule of law involves both general and specific sections of a statute, present the relevant general portion of the statute first, followed by the specific portion of the statute.

For Example "Section 50-501 creates an implied warranty of merchantability if the seller is a merchant with respect to goods of that kind. The term *merchant* is defined in section 50-401 as 'A person who deals in goods of that kind . . . .' "

4. Rule of Law: Citation

Whenever the reference is to a rule of law or legal principle, you must present the authority in support of your statement of the rule. If the source for the rule is enacted law, cite the enacted law; if it is case law, cite the case. Note that in the previous four examples, the reference includes the source for the rule of law—either statutory or case law. Without a reference to the authority, it is merely your word that the rule of law presented in the memo is actually what the law provides. The reader needs to know the source in order to check for accuracy and answer any questions concerning the law.

C. Analysis: Part B: Rule of Law Interpretation: Case Law

Exhibit 13–4 presents three considerations you should keep in mind when addressing the interpretation of the rule of law discussed in the memo.

Considerations to keep in mind when addressing interpretation of the rule of law	
Is interpretation required?	Does the rule of law require interpretation? Can the law be applied directly to the facts without interpretation?
What is the role of case law?	Is the rule of law so broadly stated that case law must be consulted to determine how it applies?
What is the process for presenting case law?	If case law is required, use a format like the one laid out in Exhibit 13–5 when presenting each case.

Exhibit 13–4
Rule of Law Interpretation: Considerations

1. Rule of Law Interpretation: No Interpretation Required

In some instances, the rule of law, whether it is statutory or case law, applies directly to the facts of the client's case. Further case law is not required to determine how the rule applies.

For Example The rule of law establishes a 15 mph speed limit in school zones, and the client was ticketed for driving 30 mph in a school zone. In this situation, case law is not needed to determine how the law applies. The law can be applied directly to the facts: driving 30 mph in the school zone is a violation of the law.

In such instances, proceed to the Analysis—Part C Application of Rule of Law to Client's Case section of this chapter for guidance. Note, however, you should *always* perform at least a cursory check of the case law. This is necessary to ensure that there is not some special interpretation of the rule or a term used in the rule that is not apparent from a plain reading of it.

2. Rule of Law Interpretation: Role of Case Law

Usually the rule of law that governs the issue being analyzed has some unexpected quirk or is so broadly stated that you must refer to case law to determine how it applies. Case law, in effect, provides the link between the rule of law and the issue raised by the facts of the client's case. Court opinions determine and explain how the law is interpreted and applied in specific fact situations.

For Example The First Amendment protects freedom of speech. The amendment does not define what constitutes speech. If the client's case involves the question of whether a symbolic act such as burning a state flag is protected under the First Amendment's freedom of speech provisions, case law must be consulted. The Supreme Court has interpreted how the First Amendment applies in this specific fact situation. Acts such as burning a state flag are considered symbolic speech and are protected under the First Amendment.

For Example A statute prohibits oppressive conduct by majority shareholders against minority shareholders, and *oppressive conduct* is not defined in the statute. Court decisions may define what constitutes oppressive conduct in specific fact situations, and reference to court decisions is necessary to determine how the law applies.

3. Rule of Law Interpretation: Process for Presenting Case Law

When presenting the case law that interprets how the law applies to a fact situation such as the client's, use the format presented in Exhibit 13–5.

The recommended format for presenting the case law that interprets how the rule of law applies	
Name and Citation of Court Opinion	First, provide the name and citation of the case.
Facts of the Case	Next, provide those facts from the case sufficient to demonstrate that the case is on point.
Rule of Law	Then identify the rule of law or legal principle adopted by the court that applies to the issue addressed in the memo.

Exhibit 13–5
Format for Presenting Case Law

Name and Citation of Court Opinion. When presenting the case, first identify the case name and citation. The reader should know the name of the case at the beginning of the discussion. This eliminates any possible confusion that may arise concerning which case is being discussed.

For Example "The case that defines the term *publication* as used in the statute is *Smith v. Jones,* 956 N. Wash. 441, 881 N.E.2d 897 (1995)."

Facts of the Case. The next step is to provide sufficient information concerning the facts and rule of law applied in the case to demonstrate that the case is on point. To accomplish this, you must include enough information about the court opinion to demonstrate that the similarity between the key facts and rule of law of the opinion and those of the client's case is sufficient for the court opinion to govern or provide guidance in deciding how the law applies.

For Example The client's case involves the question of whether a majority shareholder in a closely held corporation engaged in oppressive conduct when he refused to issue dividends while granting himself, as CEO of the corporation, semiannual bonuses in an amount triple his annual salary. Section 90-9-4 of the state corporation statutes prohibits oppressive conduct by majority shareholders against minority shareholders. The statute does not define *oppressive.* The case on point is *Cedrik v. Ely,* 956 N. Wash. 776, 881 N.E.2d 451 (1995).

The introduction of the case may read as follows: "The case that defines what constitutes 'oppressive' conduct in a fact situation such as that presented in our case is *Cedrik v. Ely,* 956 N. Wash. 776, 881 N.E.2d 451 (1995). In that case, just as in our case, a majority shareholder of a closely held corporation granted himself bonuses in excess of triple his salary. In *Cedrik,* the majority shareholder also refused to issue dividends. In defining what constitutes 'oppressive conduct' under § 90-9-4, the court stated .... *Id.* at 778."

Chapter 8 presents a comprehensive discussion of the steps and considerations involved in determining whether a case is on point. Refer to that chapter for assistance in deciding what must be included in the presentation of a case to demonstrate that the case is on point.

Note that the presentation of a case in a case brief is different from the presentation of a case in an office memo. When presenting a case in an office memo, it is not necessary to include all the information that you would include in a case brief. In an office memo, present only the facts sufficient to show the case is on point. A case brief should include more detail such as background facts and other information.

Rule of Law. The last step when discussing a case that is on point is to identify the rule of law or legal principle adopted by the court that applies to the issue being addressed in the office memo.

For Example The state collections statute provides that efforts to collect payment for a debt must be made in a "reasonable manner." *Reasonable manner* is not defined in the statute. In the client's case, the collector called the client three times a day, often after 9:00 p.m. The case on point is *Cerro v. Collectors,* Inc., 955 N. Wash. 641, 880 N.E.2d 401 (1994). The presentation of the *rule of law* applied by the court would read as follows: "In the *Cerro* case, the court stated that 'reasonable contact' as used in the collections statute means no more than one telephone call a day to the debtor's residence. The court went on to state that no calls should be placed before 6:00 a.m. or after 7:00 p.m. *Id.* at 645."

When presenting the rule of law from the case, keep the following considerations in mind:

1. Quote the language of the court whenever practical. Quotations are stronger than paraphrases. Sometimes the language does not lend itself to quotation, such as in situations where the rule is composed of several parts or steps that are presented in more than one paragraph of the opinion.

Do not use too many quotations. Use quotations to quote the law or legal principle presented by the court and key portions of the court's reasoning. They should not be used in place of your analysis. You have failed to analyze the case law properly if your analysis consists almost entirely of quotations of a court's presentation of the law and its reasoning.

2. When presenting the law, always cite the page of the court opinion where the rule is presented.

For Example "In defining what constitutes 'oppressive conduct' under § 90-9-4, the court stated, 'Oppressive conduct occurs when a majority shareholder engages in wrongful conduct that inures to the benefit of the majority and the detriment of the minority.' *Id.* at 778."

In summary, the sequence when presenting a case is as follows:

- Case name and case citation
- Relevant facts from the case that demonstrate the case is on point
- The rule of law or principle adopted by the court that applies to the issue in the client's case

This sequence is recommended because it is logical to discuss a case using this format for the following reasons:

- The presentation of case law is more readable if the reader knows first the name of the case; then what happened, the facts; then the rule of law applied by the court.
- It is logical to discuss the rule of law last because the next step in the memo is the application of the rule to the issue(s) and facts of the client's case. The memo flows more smoothly if the *application* of the rule immediately follows the *presentation* of the rule.

This is only a recommended sequence, however, not a hard-and-fast rule. In some instances, it may be better to address the rule of law from the opinion first, then present the name and facts from the case. Follow a sequence that works best for the memo you are drafting.

D. Analysis: Part C: Application of Rule of Law to Client's Case

The purpose of the office memo is to determine how the law applies. A critical element, therefore, of the analysis section is the application of the law to the issue(s) raised by the facts of the client's case. There are two situations you will encounter when applying the rule of the law to the facts of the case.

- The rule does not require interpretation through the use of case law.
- The rule requires interpretation through the use of case law.

1. Application of Rule That Does Not Require Case Law Interpretation

As discussed in the Analysis—Part B Rule of Law Interpretation—Case Law section, there are some instances where case law is not required to interpret how the rule of law applies to the issue being analyzed because it is clear from the face of the rule how it applies. In such instances, simply apply the rule directly to the issue being addressed in the office memo.

For Example "Municipal ordinance 91-1 establishes 25 mph as the maximum speed in residential areas of the municipality. The client was ticketed for driving 55 mph in a residential neighborhood. The application of the ordinance is clear. The client violated the ordinance."

2. Application of Rule That Requires Case Law Interpretation

In most instances, there is a question of how the rule of law applies to the issue(s) being analyzed. In such cases, it is necessary to refer to case law for guidance as to how

the law applies. Once the case on point is discussed, you must apply *the rule of law or legal principle adopted by the court to the facts of the client's case.* This is the next step of the analysis process. It immediately follows the presentation of the rule of law from the case on point.

For Example "In this case, the court defined *oppressive conduct* as 'wrongful conduct that inures to the benefit of the majority and the detriment of the minority.' *Id.* at 675. The court ruled that the majority shareholder's act of granting himself a bonus triple his annual salary while refusing to allow dividends was wrongful, inured to his benefit and the detriment of the minority shareholders, and was, therefore, 'oppressive conduct' within the meaning of the statute."

"In our case, just as in the *Cedrik* case, the defendant (the majority shareholder) gave himself bonuses in excess of triple his salary while refusing to allow the issuance of dividends. If the court follows the definition of 'oppressive conduct' established in the *Cedrik* case, the defendant engaged in oppressive conduct."

For Example "In the *Cerro* case, the court held that 'reasonable contact' as used in the collections statute means no more than one telephone call a day to the debtor's residence, and no call should be placed before 6:00 a.m. or after 7:00 p.m. *Id.* at 645."

"The collection agency contacted our client more than three times a day for seven straight days, and several of the calls were made after 9:00 p.m. If the trial court follows the rule adopted in *Cerro,* the outcome should be in our favor. The collections statute has clearly been violated."

Remember, you must include in the analysis a discussion of how the law applies to the issue(s) and facts of the client's case. It is useless to introduce the rule of law and discuss how the rule is interpreted through the presentation of a case on point, then fail to apply the law to the facts of the client's case. The purpose of the office memo is to demonstrate how the rule of law and the case law apply to guide or govern the determination of the issue(s) addressed in the memo.

E. Analysis: Part D: Counteranalysis

The next part of the analysis section is the counteranalysis. The analysis of a legal issue is not complete unless counterarguments to the analysis are explored. Refer Chapter 9 when conducting counteranalysis and drafting the counteranalysis portion of the analysis. Note the following when preparing the counteranalysis:

- In the analysis section, the counteranalysis should follow part C, the application of the law to the issue and facts of the client's case. The reader, therefore, is immediately apprised of any counterargument and can easily compare and contrast the arguments and counterarguments and evaluate the merits of each.
- If rebuttal is necessary, it should follow the counteranalysis. Rebuttal may be required if it is necessary to explain why the counterargument does not apply, or if you want to evaluate the merits of the counterargument.

For Example "The opposing side may argue that oppressive conduct did not occur, and the *Cedrik* case does not apply, because the majority shareholder in our case earned the triple bonuses by working long hours and weekends. In *Cedrik,* just as in our case, the majority shareholder worked long hours, and the court noted 'Even though the majority shareholder is entitled to receive extra compensation, he is not entitled to receive an amount of compensation that results in the total denial of benefits to the minority shareholders.' *Id.* at 778."

Exhibit 13–6 presents a checklist for the analysis section.

Checklist for use when preparing the analysis section

- Does the analysis section follow the proper format? The format is Rule of law + Case Interpreting the Rule of law (if necessary) + Application + Counteranalysis.
- If the application of the rule of law is not clear, is case law presented that is on point and interprets how the rule of law applies?
- Is the proper citation presented for each rule of law and authority included in the analysis?
- Is there a separate analysis section for each issue addressed in the memo?
- Is the rule of law, presented in the analysis, applied to the issue raised by the facts of the client's case?
- Is there a counteranalysis and rebuttal to the counteranalysis if necessary?

Exhibit 13–6
Checklist: Analysis Section

III. CONCLUSION

Part C of the analysis section, the application of the rule of law to the client's case, is a discussion of how the law applies to the issue. This application of the law to the issue is really a mini-conclusion: it concludes how the law applies. In effect, the analysis section includes a conclusion. Because the analysis section includes a brief conclusion, some law firms do not require a separate conclusion section. It is recommended, however, that you include a separate conclusion section composed of a general summary of the entire memo.

The **conclusion** section should not introduce new information or authorities, nor should it merely repeat the brief answer. It should summarize the conclusions reached in the analysis section. It is recommended that the conclusion be crafted to include a reference to and summary of all the law discussed in the analysis section, both the enacted and case law. In addition, it requires fewer introductory and transitional sentences. Ideally, the conclusion should briefly inform the reader of all the law that applies and how it applies. The reader should be able to obtain from the conclusion a general understanding of the law and its application without having to read the entire memo.

The advantage of this type of conclusion is that researchers working on similar cases can determine from the conclusion whether a memo from the office memo files applies to their case. They should be able to obtain all the essential information by merely reading the conclusion. The researcher saves time by not having to read the entire memo if all that is needed is a summary of the law and analysis.

For Example "Section 30-3-9 of the criminal code prohibits the possession of proscribed drugs. The case of *Smith v. Jones* provides that when an individual does not have actual possession, he may be in constructive possession if there is either direct or circumstantial evidence establishing that the defendant had both knowledge and control of the drugs. In our case, there is no evidence, either direct or circumstantial, that the client had either knowledge or control of the drugs he was charged with possessing. If *Smith v. Jones* is followed, there is not sufficient evidence to support charges of possession under § 30-3-9."

For Example "Article II, section 7, of the state constitution prohibits illegal searches and seizures. In the case of *State v. Idle,* the court held that an individual is seized within the meaning of the law when the actions of the law enforcement officers are such that a reasonable person would not believe that he was free to leave. In our case, the client was handcuffed and ordered to sit in the back seat of a police car. He was not placed under arrest. A reasonable person would not believe he was free to leave in this situation; therefore, if in our case the court follows the test adopted in *State v. Idle,* our client was under arrest."

Note that in these examples, *introductory sentences* are not used to introduce the law, and *transitional sentences* are not used to connect the statutory and case law.

When there are multiple issues, the conclusion is usually presented immediately after the analysis of each issue. When there are only two issues and the analysis is not complex, you may present one conclusion that summarizes the analysis of both issues at the end of the memo.

Exhibit 13–7 presents a checklist for the conclusion section.

Checklist for use when preparing the conclusion section

- Does the conclusion include a brief summary of the analysis of each issue?
- Is all the law discussed in the analysis section summarized in the conclusion, both enacted and case law?
- Is new information or authority excluded from the conclusion?

Exhibit 13–7
Checklist: Conclusion Section

IV. RECOMMENDATIONS

Not all law firms include a **recommendations** section as part of the basic format of an office memo. In some formats, recommendations are included in the conclusion section. Generally a separate section for any comments or recommendations should follow the conclusion section. Recommendations are not really part of the analysis or conclusion sections; they frequently address matters to be considered and steps to be taken as a result of conclusions reached in the analysis section. Include in the recommendations section any comments or recommendations you have concerning the client's case or matters discussed in the memo.

Some areas that you may address in the recommendations section are the following:

1. What the next step should be

For Example "Based on the analysis of the issues, it is apparent that the risk of liability is great. It may be advisable to seek a settlement in this case."

2. The identification of additional information that may be necessary as a result of questions raised in the analysis of the issue

For Example "It appears from the case file that the neighbors were not asked if they heard any strange noises. Inasmuch as the analysis of this issue reveals that this information is critical, it is recommended the neighbors be reinterviewed."

3. The identification of additional research that may be necessary

For Example Additional research may be required because the necessary research sources are not locally available, the analysis is preliminary because of time constraints, or the factual investigation of the case has not been completed.

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

For Example The memo addresses a negligence issue concerning an automobile accident. If the analysis of the negligence issue reveals other possible causes of action in the case, such as assault or negligent infliction of emotional distress, the attorney should be advised of the existence of these additional causes of action.

V. GENERAL CONSIDERATIONS

The following are some general considerations to keep in mind when preparing an office research memorandum. A separate section is devoted to these matters because they often apply to more than one section of a memo and you should keep them in mind when approaching a memo assignment.

A. Heading

Although an office memo is written in paragraph form, use a **heading** for each section. Headings provide the overall structure of the assignment, guide the reader, and apprise the reader of what is covered in each section. The reader may desire to read a specific section, such as the analysis; a heading allows the reader to locate that section quickly. Headings also serve as a guide for the preparation of the table of contents if a table is needed. Use the format presented in Chapter 12 as a guide for the appropriate headings. Refer to the Application sections of this chapter and Chapter 12 for examples.

B. Introductory Sentences

Use topic or **introductory sentences** to inform the reader of what is to follow. Avoid immediately jumping into the discussion of a topic, such as the presentation of the law.

For Example **No introduction:** "Section 59-3-2 of the criminal code provides that possession of cocaine is illegal. In *Smith v. Jones,* the defendant . . . ."

Provide an introduction when discussing a topic. The introductions are italicized in the example.

For Example **Includes an introduction:** *"The rule of law prohibiting the possession of cocaine* is criminal code § 59-3-2, which states that possession of cocaine is illegal.

The statute does not define possession; therefore, it is necessary to refer to case law. *The case that provides guidance as to what constitutes possession in a fact situation such as ours* is *Smith v. Jones.* In this case, . . ."

C. Transition Sentences

Use **transition sentences** to connect sections, subsections, and related topics. The following example lacks a transition.

For Example "The rule of law governing possession of drugs is § 59-3-2. Section 59-3-2c makes it illegal to possess cocaine. *Smith v. Jones* provides that possession occurs when . . . ."

Use a transition in this example to connect the statutory law with the case law. The reader should be informed why case law is being presented.

The following example uses a transition sentence. The transition sentence is italicized in the example.

For Example "The rule of law governing possession of drugs is § 59-3-2. Section 59-3-2c makes it illegal to possess cocaine. *The statute does not define what constitutes possession; therefore, it is necessary to refer to case law for guidance.*

"A case that defines what constitutes possession in a fact situation such as ours is *Smith v. Jones.* In this case, ..."

D. Paragraphs

paragraph
A group of sentences that address the same topic.

Paragraphs add coherence and make the memo more readable. Address each area or topic in a separate paragraph.

For Example In the analysis section of the memo, address in a separate paragraph or paragraphs the discussion of the rule of law, the case that serves as a guide to the interpretation of the rule of law, the application of the rule to the issue, the counteranalysis, and the rebuttal to the counteranalysis.

E. Persuasive Precedent

When presenting persuasive authority, indicate the reason you are relying on this type of authority and lay a proper foundation for its use.

For Example "Section 90-9-6 prohibits oppressive conduct by a majority shareholder. The statute does not define what constitutes oppressive conduct, and the courts of this state have not addressed the question.

"The state of New Washington, however, has a statute identical to our statute, and the New Washington courts have addressed the question of what constitutes oppressive conduct under the statute. In the case of *Darren v. Darren,* . . ."

In the preceding example, the reader is *informed why the out-of-state law (persuasive precedent) is referred to:* the statute does not define the term, and the state courts have not addressed the question. A *foundation for the presentation of the persuasive precedent is laid:* the statute of the state referred to is identical to our state statute, and the other state's courts have addressed the question. In the following example, a foundation is laid for the use of a court's interpretation of one statute to interpret another statute.

For Example "Our courts have not defined the term *oppressive conduct* as used in § 90-9-6. Section 45-5-6c of the Small Loan Act prohibits 'oppressive conduct' in small loan transactions. The state court of appeals, in the case of *Irons v. Fast Loans, Inc.,* has defined what constitutes oppressive conduct under the Small Loan Act, and we can look to that definition for guidance in interpreting § 90-9-6."

Refer to Chapters 2 and 8 when relying on persuasive precedent.

F. Conclusions

In many instances, after researching and analyzing a legal problem, you may not be able to provide a definite yes or no answer as to how it may be resolved.

For Example If there is no mandatory precedent and persuasive precedent or secondary authority is relied on, you may not be able to provide an answer as to how the court is likely to resolve the issue. If the case law that applies is very old and policies have changed, it may be questionable if the case law will be followed.

In such instances, present your conclusions and explain your reservations.

For Example "In conclusion, the courts of this state have not addressed this question. The majority of states that have addressed this issue follow the rule adopted by the New Washington supreme court in the of Tyler v. Tyler. As state in the analysis of this issue, the progressive approach of the New Washington court reflects the approach our supreme court has taken in resolving similar issues and will likely be adopted by the court."

G. Revisions/Redrafts

When preparing an office memo, it is essential to produce a professional product. This demands thorough research and analysis of all issues assigned and all aspects of each issue. It also requires assembly of the research and analysis into an organized, error-free final product. Be prepared to compose a number of redrafts.

H. Additional Authority

If there are several cases on point, it is not necessary to discuss each case thoroughly. Present and discuss thoroughly the most recent case on point, and refer to the other cases.

For Example "The case that defines what constitutes 'oppressive' conduct in a fact situation such as that presented in our case is *Cedrik v. Ely,* 956 N. Wash. 776, 881 N.E.2d 451 (1995). In this case, the majority shareholder gave himself three bonuses that were triple his salary. At the same time, he refused to allow dividends to be issued. In defining what constitutes 'oppressive conduct' under § 90-9-4, the court stated, 'Oppressive conduct occurs when a majority shareholder engages in wrongful conduct that inures to the benefit of the majority and the detriment of the minority.' *Id.* at 778. *See also Tyre v. Casey,* 953 N. Wash. 431, 878 N.E.2d 49 (1993) (oppressive conduct found when no dividends were issued and majority shareholder received several bonuses and was provided an extravagant expense account); *Ireland v. Ireland,* 952 N. Wash. 288, 873 N.E.2d 553 (1992) (oppressive conduct found when no dividends were issued and majority shareholder was given a house as a bonus)."

VI. Key Points Checklist: *The Interoffice Memorandum: Analysis to Conclusion*

- ❏ Follow the standard format for the analysis section of a memo: Rule + Case Law (interpretation of the rule) + Application of Rule + Counteranalysis. This format is based on the standard IRAC model.
- ❏ The presentation of a case in a case brief is different from the presentation of a case in an office memo. When introducing a case in the analysis section of a memo, it is not necessary to include all the information you would include in a case brief.
- ❏ In the analysis section, *always* discuss how the rule of law applies to the issue and facts of the client's case.
- ❏ *Always* conduct a counteranalysis. If there is no counterargument, mention the fact that there is no counterargument or different position supported by the case law.
- ❏ Provide enough information in the conclusion to inform the reader of all the applicable enacted and case law.
- ❏ Use introductory and transition sentences. Do not jump from one topic to another. Provide a smooth transition between subjects.

- ❏ Before presenting persuasive precedent or secondary authority, indicate why you are not relying on mandatory authority.
- ❏ Do not be disturbed if you do not reach a definite conclusion as to how the law applies. There are many gray areas and issues that have not been ruled upon. Your job is to inform the reader of the existing law and provide a well-reasoned analysis of its application. Predicting the legal outcome always involves some measure of uncertainty.
- ❏ Do not try to make the first draft the final draft. Just write the information in rough form. It is easier to polish a rough draft than to make the first draft the finished product.

VII. Application

The first example in this section illustrates the application of the principles to the analysis, conclusion, and recommendations sections of the office memo assignment introduced at the beginning of Chapter 12. Recall that the Application section of that chapter addressed only the first half of the memo assignment presented at the beginning of that chapter, that is, the heading, assignment, issue, brief answer, and fact sections of the memo. The second example in this section illustrates the application of the principles discussed in this chapter and the previous chapter to the office memo assignment presented at the beginning of this chapter.

Both Chapters 10 and 12 discuss the use of an expanded outline and present examples that illustrate the use of an expanded outline when drafting an office memo. Inasmuch as the use of an expanded outline is illustrated in those chapters, a detailed discussion of its use is not included in the two examples explored in this section. The examples in this section present the completed office memoranda.

A. Example 1

This example illustrates the completion of the memorandum assignment introduced at the beginning of Chapter 12. The heading through fact sections of the assignment are included in the Application section of that chapter. The remainder of the memorandum follows.

Analysis

The rule of law governing privileged communications between spouses is 735 ILCS 5/8-801, which provides, "In all actions, husband and wife may testify for or against each other, provided that neither may testify as to any communication or admission made by either of them to the other or as to any conversation between them during marriage .... The statute does not include any section that addresses waiver of the privilege. There is, however, Illinois case law that discusses the question of when the privilege is waived.

A state supreme court case that addresses the question of waiver of the privilege when children are present during the spousal communication is *People v. Sanders,* 99 Ill. 2d 262, 457 N.E.2d 1241 (1983). In this case, the trial court admitted into evidence conversations between the defendant and his spouse. The conversations took place in front of their children, ages eight through thirteen years old; the conversations implicated the defendant in a murder. When addressing the question of whether the communications were privileged, the supreme court stated that the rule followed in the state is that the presence of children of the spouses destroys confidentiality unless the children are too young to understand what is being said.

In our case, just as in *People v. Sanders,* the conversation between the spouses involved incriminating statements made in the presence of children. In our case, just as in *Sanders,* the children were old enough to understand the conversation. If the rule of law presented in *Sanders* is followed by the trial court, the conversation between Mr. Findo and Mrs. Findo is not a privileged communication under the statute and is admissible into evidence in the trial of Mr. Findo.

There is no case law in this jurisdiction that establishes an exception to the rule presented in *Sanders.* The only possible counterargument is that the children, although present, did not hear the conversation. The *Sanders* opinion does not directly state that the children must actually hear the conversation, but this is implied by the requirement that the children must be old enough to understand what is being said. See the Recommendations section in regard to taking steps to determine if the children heard and understood the conversation.

Conclusion

The rule of law governing privileged spousal communications is 735 ILCS 5/8-801, which provides that communications between spouses during the marriage are privileged. In *People v. Sanders,* the court held that the privilege is waived if it takes place in front of children old enough to understand what is being said. In our case, because the conversation took place in the presence of children old enough to understand, it appears that the privilege does not apply, and the conversation is admissible into evidence.

Recommendations

1. We should conduct further investigation to determine whether the children heard and understood the conversation.
2. Additional research should be conducted to determine whether there are any cases that address the question of whether, in addition to being present, the children must actually hear the conversation.

B. Example 2

This example illustrates the completion of the office memo assignment presented in the hypothetical at the beginning of this chapter. Assume that Ellen Taylor's expanded outline includes the following law from the state of New Washington that applies to the assignment.

- **Article II, section 4,** of the state constitution. "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated . . . ."
- **Section 95-21-14** of the state criminal code provides that, "It is unlawful for any person intentionally to possess a controlled substance . . . ." Cocaine is listed as a controlled substance under the act.
- ***State v. Ikard*, 945 N. Wash. 745, 853 N.E.2d 652 (1989).** In this case, law enforcement officers were looking for a suspect in an armed robbery. The officers recognized a friend of the suspect walking down a street. They stopped him, handcuffed him, and asked him where the suspect was. When he refused to answer the question, the officers searched him and found marijuana in his shirt pocket. The officers then arrested him for possession of narcotics.

In regard to the initial stop and handcuffing of the defendant, the court held that a person is seized (arrested) within the meaning of article II, section 4, of the state constitution when a reasonable person would believe he was not free to leave. The court held that a reasonable person in the defendant's position would not

believe he was free to leave; therefore, the defendant was under arrest when the officers stopped and handcuffed him.

- ***State v. Wilson*, 953 N. Wash. 111, 878 N.E.2d 431 (1993).** In this case, law enforcement officers were executing a search warrant. Upon entering the premises, an officer held the defendant by the arm and refused to allow him to leave. In addressing the question of whether the defendant was under arrest when the officer held him by the arm and refused to allow him to leave, the court held that "Not all detentions constitute a seizure within the meaning of [a]rticle II, [s]ection 4 of the constitution. A warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted. Such a detention does not constitute a seizure within the meaning of the constitution." *Id* at 121.
- ***State v. Bragg*, 955 N.Wash. 221, 880 N.E.2d 998 (1994).** In this case, the police searched an apartment where Bragg and several other people resided. Narcotics were found in a drawer in the kitchen. There was no evidence linking Bragg to the drugs. Only Bragg was charged with possession. The court noted that possession may be either actual or constructive.

  In overturning his conviction, the court ruled that in a situation where several individuals have access to the location where the drugs are found, and there is no evidence indicating that the defendant has actual possession of the drugs, a conviction can still take place if there is evidence that the defendant is in constructive possession of the drugs. The court stated that in order to convict the defendant of constructive possession, there must be either direct or circumstantial evidence presented that he had knowledge of the presence of the drugs and control over the drugs. In this case, there was no such evidence.

The following is the memorandum prepared by Ellen Taylor.

OFFICE RESEARCH MEMORANDUM

To: Carl Pine, Assistant District Attorney
From: Ellen Taylor, Intern
Re: *State v. Kent*
Case: Cr. 08-404
Re: Arrest during the execution of a search warrant and constructive possession of drugs

Statement of Assignment

You have asked me to prepare a memorandum addressing the following questions: Was Mr. Kent under arrest when he was handcuffed and held in the kitchen while his apartment was searched? Is there sufficient evidence to support charges of possession in this case?

Issues

Issue I: Under article II, section 4, of the state constitution, is an individual seized (under arrest) when police officers handcuff and detain him in the kitchen during the execution of a search warrant?

Issue II: Under § 95-21-14 of the criminal code, is there sufficient evidence to support charges of possession when the defendant is located in the bedroom of a third-story apartment and the drugs are located in a parking lot below a broken window of the bedroom?

Brief Answer

Issue I: No. The state supreme court has held that detentions during the execution of a search warrant do not constitute seizures within the meaning of article II, section 4, of the state constitution.

Issue II: No. When drugs are found in a common area accessible to multiple individuals and there is no evidence that the defendant has actual possession, the defendant may constructively possess the drugs. The state supreme court has ruled that constructive possession requires evidence that the defendant has knowledge and control of the drugs. In our case, there is no evidence that the defendant had knowledge and control of the drugs found in the parking lot.

Facts

On January 7, police officers executed a search warrant for the apartment of the defendant, David Kent. The apartment is located on the third floor of an apartment complex. When the police entered the apartment, Mr. Kent was lying on the bed in the bedroom. He was frisked for weapons, handcuffed, moved to the kitchen, and detained while the search was conducted. He was not placed under arrest or read his rights. The police found a broken window in the bedroom, and the window screen was pushed out. In the parking lot three stories below the bedroom window, the officers found a bag containing cocaine. There were no witnesses who saw the defendant throw anything out of the apartment window. There were no fingerprints found on the bag or any other evidence linking Mr. Kent to the cocaine. Mr. Kent has been charged with possession of a controlled substance.

Analysis

Issue I

The rule of law governing arrest in New Washington is article II, section 4, of the state constitution, which provides, in part, "The right of the people to be secure in their person … against unreasonable searches and seizures shall not be violated …." Neither the constitution nor the state statutes define the term *seizure.* There is, however, New Washington case law that defines the term.

The New Washington case that establishes the standard for what constitutes a seizure is *State v. Ikard,* 945 N. Wash. 745, 853 N.E.2d 652 (1989). In this case law enforcement officers were looking for a suspect in an armed robbery. The officers recognized a friend of the suspect walking down a street. They stopped him, handcuffed him, and asked him where the suspect was. When he refused to answer the question, the officers searched him and found marijuana in his shirt pocket. The officers then arrested him for possession of narcotics. In ruling that the defendant was under arrest when he was stopped and handcuffed, the court held that a person is seized (arrested) within the meaning of article II, section 4, of the state constitution when a reasonable person would believe he was not free to leave. *Id.* at 750.

The rule of law defining seizure adopted in *State v. Ikard* is so broadly stated that it can apply to a number of seizure situations, including the situation presented in our case. In our case, a reasonable person would not believe he was free to leave when handcuffed and moved to the kitchen during the execution of a warrant. It appears, therefore, that Mr. Kent was seized (under arrest) within the meaning of *Ikard.*

Not all detentions, however, constitute a seizure. There are exceptions. One exception is when the detention takes place while officers are executing a search warrant. This exception was announced by the supreme court in the case of *State v. Wilson,* 953 N. Wash. 111, 878 N.E.2d 431 (1993). In this case, after entering the premises during the execution of a search warrant, an officer held the defendant by the arm and refused to allow him to leave. In regard to whether the seizure constituted an arrest, the court held: "Not all detentions constitute a seizure within the meaning of article II, section 4 of the constitution. A warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to

detain the occupants of the premises while a proper search is conducted. Such a detention does not constitute a seizure within the meaning of the constitution." *Id.* at 121.

In our case, just as in *Wilson,* the police were executing a search warrant and the defendant was detained while the search was being conducted. None of our facts indicate the warrant was issued without probable cause. If it was based on probable cause, under *Wilson,* the police had the authority to detain the defendant, and the detention was not a seizure within the meaning of the constitution.

There is no case or statutory law in New Washington that contradicts or limits the *Wilson* ruling in regard to detention during the execution of a warrant. The only counterargument possible is that the warrant was issued without probable cause, and therefore, the police did not have authority to detain Mr. Kent. There is no evidence in the case file that indicates a problem in this regard. See the Recommendations section below.

Issue II

The rule of law governing the possession of cocaine is section 95-21-14 of the state criminal code, which provides that "It is unlawful for any person intentionally to possess a controlled substance …." Cocaine is listed as a controlled substance under the statute. The statute does not define what constitutes possession; therefore, it is necessary to refer to case law for guidance.

A case in which the supreme court has defined possession is *State v. Bragg,* 955 N. Wash. 221, 880 N.E.2d 998 (1994). In this case, the police searched an apartment where Bragg and several other individuals resided. Narcotics were found in a drawer in the kitchen. There was no evidence linking Bragg to the drugs. Only Bragg was charged with possession. The court noted that possession may be either actual or constructive. In overturning Bragg's conviction, the court ruled that in a situation where several individuals have access to the location where the drugs are found, and there is no evidence indicating that the defendant has actual possession of the drugs, a conviction can still take place if there is evidence that the defendant is in constructive possession of the drugs. The court stated that in order to convict for constructive possession, "there must be either direct or circumstantial evidence presented that the defendant had knowledge of the presence of the drugs and control over them." *Id.* at 225.

In our case, just as in *Bragg,* there is no evidence indicating that the defendant actually possessed the drugs. Also, there is no evidence, either direct or circumstantial, of constructive possession. There is no evidence that the defendant had knowledge of the presence of the drugs in the parking lot. Also, there is no evidence that he had control of the drugs. The drugs were found three stories below his apartment in a parking lot. There is no evidence linking the defendant to the drugs. If the rule of law presented in *Bragg* is followed, it appears that there is not sufficient evidence to support charges of possession.

There is no New Washington case law that contradicts *Bragg* or establishes a different definition of constructive possession. A possible counterargument is that the fact the drugs were found below the defendant's broken apartment window is sufficient to link him to the drugs. There is no case law to support this position. It may be necessary to look for additional evidence that links the defendant to the drugs. See the Recommendations section below.

Conclusion

Article II, section 4, of the state constitution prohibits the unreasonable seizure (arrest) of individuals. The case of *State v. Ikard* states that an arrest takes place if a reasonable person would not believe he was free to leave. The case of *State v. Wilson* provides that a detention that takes place during the execution of a search warrant does not constitute a seizure within the meaning of the constitution. In our case, the defendant was detained during the execution of a search warrant. Therefore, under the ruling in *Wilson,* it appears the detention of the defendant was not a seizure (arrest).

Section 95-21-14 of the state criminal code provides that it is illegal to possess cocaine. In *State v. Bragg,* the court held that to establish constructive possession, evidence must be presented that shows that the defendant had knowledge of the presence of the drugs and control over them. In our case, the defendant did not actually possess the drugs, and there is no

evidence that indicates he had knowledge or control of them. Therefore, it appears that there is not sufficient evidence to support charges of possession.

Recommendations

1. We should determine whether the issuance of the search warrant was supported by probable cause or if there is any other matter that affects the legality of the search. If the issuance of the warrant or the execution of the search was in some way defective, the detention exception established in *State v. Wilson* may not apply.
2. We need to conduct further investigation to determine whether there is any evidence that links the defendant to the drugs found in the parking lot. For example, was glass from the window embedded in the bag? Were there any individuals in the apartment complex who heard a window being broken?

C. Comments on Examples

Note that the analysis section of both memos follows the same analytical format: Rule of law + Case law interpreting the rule of law + Application of the law to the issue and facts of the client's case + Counteranalysis. There are transition sentences linking the presentation of the rule of law to the case law. No extra or superfluous material is presented; the reader is not required to wade through related but unnecessary case law or analysis. The applicable law is introduced, explained, and applied. The reader is clearly and concisely informed of the law and how it applies.

Note that, in both examples, there is one conclusion that includes a reference to the applicable law and summarizes the analysis of the issues. The conclusion summarizes all the applicable enacted and case law. If the reader desires a detailed analysis and discussion of the law, the analysis section is available for reference. When the memo is more complex and involves multiple issues, it may be appropriate to provide a conclusion section at the end of the analysis of each issue.

Quick References

analysis—application	000	introductory sentences	000
analysis—case law	000	paragraph	000
analysis—rule of law	000	persuasive precedent	000
analysis section conclusion	000	recommendations	000
heading	000	transition sentences	000

Summary

This chapter addresses considerations involved in preparing the second half of an office memo: the analysis, conclusion, and recommendations sections. The focus of the chapter is on the analysis section.

The heart of an office memo is the analysis section. The purpose of a memorandum is to inform the reader of the law that governs the issue and how the law applies in the client's case. This information is conveyed in the analysis section of the office memo. In this section, the reader is informed through the following means:

- A presentation of the law that governs the issue
- An explanation of how the law applies through reference to court opinions that applied the law in similar situations
- A discussion of how the law applies to the issue(s) in the client's case

Included in the analysis is a discussion of any counterargument the opposing side may raise.

The recommended basic format for the analysis section is as follows:

Part A. Rule of law
Part B. Case law (if necessary)—interpretation of rule of law
1. Name of case
2. Facts of case—sufficient to demonstrate case is on point
3. Rule or legal principle from case that applies to the client's case

Part C. Application of the law to the facts of the client's case
Part D. Counteranalysis

The conclusion follows the analysis section. Because the application of the law to the issue is discussed in the analysis section, the conclusion should contain a summary of the law and analysis already presented. It should inform the reader of all the applicable law and how it applies.

The recommendations section is the last section of the office memo. It includes any recommendations concerning the next steps to be taken or further research or investigation that should be conducted. In some law firms, the recommendations section is included in the conclusion or not required at all.

The format discussed in this chapter is a recommended format. There is no standard office memo format. Different law offices have different preferences. Use the format presented in this chapter if appropriate; modify it according to your needs.

Internet Resources

The Internet resources for this chapter are the same as those listed in Chapter 10. To limit the retrieval of irrelevant sites, search for a specific topic, such as "analysis, legal memorandum, public service contracts" or "application of law, legal memorandum, highway construction."

Exercises

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

ASSIGNMENT 1

Describe in detail the process for presenting a case in the analysis section of an office memo.

ASSIGNMENT 2

Describe in detail the format of the analysis section of an office memo.

ASSIGNMENT 3

Describe what should and should not be included in the conclusion section of an office memo.

ASSIGNMENT 4

Perform Assignments 5, 6, 7, 9, 10, or 11 using your state's statutory and case law.

In each of the following exercises, the assignment is to prepare an office memo. Each assignment contains the assignment memo from the supervisory attorney that includes all the available facts of the case. Complete the memo based on these facts. If additional facts need to be identified, note this in the recommendations section of the memo. When preparing the heading of each assignment, use your name for the "To" line, and put "Supervisory Attorney" after the "From."

Following each assignment is a reference to the applicable enacted and case law. In some assignments, the case citation includes a reference only to the regional reporter citation; the state reporter citation is not included. Use only the citation presented in the assignment. The cases are presented in Appendix A.

The first time you cite the opinion, use the citation format you are given for the opinion in the assignment.

For Example *Britton v. Britton* is cited in Assignment 5 as 100 N.M. 424, 671 P.2d 1135 (1983).

This is how you should cite this opinion the first time it is used in the memorandum. When you need to quote from an opinion in the memo, use a blank line to indicate the page number from which the quotation is taken.

For Example *Britton,* 100 N.M. at _____, 671 P.2d at _____, or *Id.* at _____, 671 P.2d at _____.

Do not conduct additional research. Complete the assignment using the facts, enacted law, and case law contained in each assignment.

ASSIGNMENT 5

To: (Your name)
From: Supervisory Attorney
Re: *Dixon v. Cary*
Probate of holographic will

We represent Holly Dixon, the widow of Thomas Dixon, in the case of *Dixon v. Cary.* She wishes to challenge the probate of the holographic will of Thomas Dixon. Mary Cary, the sister of Thomas Dixon and personal representative of his estate, has submitted for probate a holographic will prepared by Mr. Dixon.

The first half of the will is in the handwriting of Mr. Dixon. The second half is typewritten. It was typed by the next-door neighbor, Edgar Mae. Mr. Mae states that Mr. Dixon asked him to finish the will because Mr. Dixon was too weak to continue. The will is signed by Mr. Dixon. There are no subscribing witnesses to the will, but it includes a self-proving affidavit that meets the requirements of the statute.

Is the will admissible to probate under Texas law?

Statutory Law: Tex. Prob. Code. Ann. § 59, Requisites of a Will (Vernon 1980), provides: "Every last will and testament … shall be in writing …, and shall, if not wholly in the handwriting of the testator, be attested by two (2) or more credible witnesses …."

Tex. Prob. Code. Ann. § 60, Exception Pertaining to Holographic Wills (Vernon 1980), provides: "Where the will is written wholly in the handwriting of the testator, the attestation of the subscribing witnesses may be dispensed with. Such a will may be made self-proved at any time during the testator's lifetime by the attachment or annexation thereto of an affidavit by the testator to the effect that the instrument is his last will; that he was at least eighteen years of age when he executed it …; that he was of sound mind; and that he has not revoked such instrument."

Case Law: *Dean v. Dickey,* 225 S.W.2d 999 (Tex. Civ. App. 1949) (see Appendix A).

ASSIGNMENT 6

To: (Your name)
From: Supervisory Attorney
Re: Eldridge v. Eldridge
Modification of child support

We represent Gwen Eldridge in the case of *Eldridge v. Eldridge.* The Eldridges were divorced in 2005. Mrs. Eldridge was awarded custody of their two minor children. Mr. Eldridge was ordered to make child support payments in the amount of $700 per

month. He lost his job in January of 2006 and was unemployed from that date through October of 2006. He then obtained employment as an electrician.

Mr. Eldridge did not make child support payments for the months he was unemployed. In January of 2007, Mrs. Eldridge filed a motion with the court that entered the divorce decree, seeking an order forcing Mr. Eldridge to pay the child support payments due for the months he did not make payments; the amount totaled $7,000. Mr. Eldridge countered with a petition to modify his child support obligation. The petition requested that he be excused from having to pay the obligations that accrued during the ten months he was unemployed. The court ordered Mr. Eldridge to pay one-half of the amount due, $3,500, and excused him from paying the remaining $3,500. The court stated that Mr. Eldridge did not have to pay the full amount because he was unemployed during the months the child support accrued. The attorney who represented Mrs. Eldridge in the trial court told her that there is no basis for an appeal of the court order.

Please check the statutory and case law to determine whether the trial court acted properly when it excused Mr. Eldridge from paying $3,500 of the back child support.

Statutory Law: Ind. Code § 31-2-11-12, Modification of delinquent support payment, provides:

(a) Except as provided in subsection (b) …, a court may not retroactively modify an obligor's duty to pay a delinquent support payment.
(b) A court with jurisdiction over a support order may modify an obligor's duty to pay a support payment that becomes due:
  (1) After notice of a petition to modify the support order has been given … to the obligee … and
  (2) Before a final order concerning the petition for modification is entered.

Case Law: *Cardwell v. Gwaltney,* 556 N.E.2d 953 (Ind. Ct. App. 1990) (see Appendix A).

ASSIGNMENT 7

To: (Your name)
From: Supervisory Attorney
Re: *Commonwealth v. Jones*
Assault by means of a dangerous weapon—lightning

This is a bizarre case to say the least. We have been appointed by the court to represent Sedrick Jones in the case of *Commonwealth v. Jones.* Mr. Jones is charged with attempted murder, battery, false imprisonment, and assault with a dangerous weapon. Mr. Jones has had a stormy ten-year relationship with Elizabeth Steward. The relationship has been marked by multiple instances of domestic violence. They live in a cottage located on a bluff overlooking the Atlantic Ocean. On April 5 of this year, after an extended bout of drinking and arguing, Mr. Jones dragged Ms. Steward outside and tied her to the lightning rod attached to the cottage. This took place during a violent electrical storm. When he tied her to the pole, he said, "I'll fix you, you're gonna fry." Lightning did not strike the pole. This act is the basis of the assault by means of a dangerous weapon charge. The state claims that the dangerous weapon is lightning.

Please prepare a memo addressing the question of whether there is a sufficient basis to support the assault by means of a dangerous weapons charge.

Statutory Law: G.L. c. 265, § 15A, Assault and Battery with Dangerous Weapon (state of Massachusetts), provides: "(b) Whoever, by means of a dangerous weapon, commits assault and battery upon another shall be punished by imprisonment in the state

prison for not more than five years ...."

Case Law: *Commonwealth v. Shea,* 38 Mass. App. Ct. 7, 644 N.W.2d 244 (1995) (see Appendix A).

ASSIGNMENT 8

To: (Your name)
From: Supervisory Attorney
Re: *United States v. Canter*
Armed bank robbery with a dangerous weapon

We have been appointed to represent Eldon Canter in the case of *United States v. Canter.* Mr. Canter is charged with one count of armed bank robbery, in violation of 18 U.S.C. § 2113(a) and (d).

On January 5 of this year, Mr. Canter robbed the First State Bank. After he entered the bank, he approached a teller and pulled from his pocket a crudely carved wooden replica of a 9mm Beretta® handgun. He had carved the replica from a block of pine wood and stained it with dark walnut wood stain to make it look black. He drilled a hole in the barrel end in an attempt to make it look like a real Beretta.

The teller was so frightened that he only glanced at the wooden gun. He believed it was real. The teller at the next window looked at the replica and afterward stated that she was fairly certain at the time that it was fake. No one else noticed whether the wooden replica was real.

Please determine whether in light of the facts of this case there is sufficient evidence to support the charge that Mr. Canter committed bank robbery by use of a "dangerous weapon."

Statutory Law: 18 U.S.C. § 2113(a) & (d), Bank robbery and incidental crimes, provides

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another ... any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, a bank ....

Shall be fined under this title or imprisoned not more than twenty years, or both.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

Case Law: *United States v. Martinez-Jimenez,* 864 F.2d 664 (9th Cir. 1989) (see Appendix A).

ASSIGNMENT 9

To: (Your name)
From: Supervisory Attorney
Re: Mr. Arturo Garcia
Child support modification

After fifteen years of marriage, Arturo Garcia and Mary Chavez were granted a divorce in May 2000. There are three children from the marriage. Mr. Garcia was awarded primary custody of the children. Ms. Chavez, a brain surgeon at the time of the divorce, was ordered to pay monthly child support in the amount of $3,000 per month. The terms of the divorce order were undivided in that it did not specify a "per child" amount.

Ms. Chavez always resented the amount of child support she was ordered to pay; her frustration over this led her recently to quit her medical practice and enroll in the paralegal program at the community college. This career change resulted in a substantial reduction in her income. She told several individuals that she quit her practice because she "can't stand to pay that much money to my ex-husband."

Four months ago, the oldest child turned eighteen and moved out of Mr. Garcia's house. As soon as the oldest child moved out, Ms. Chavez reduced by one-third the amount of child support she was paying. She did not seek nor obtain a court order granting a modification of her support obligation. She told Mr. Garcia that she did not have to pay the full amount because the oldest child had turned eighteen. Two months ago, she unilaterally reduced her child support payments to $500 per month. She told Mr. Garcia, "That's all I can afford to pay now that I'm going to school."

Mr. Garcia has come to us seeking legal advice. With the preceding facts in mind, prepare a memo addressing the following questions:

1. Was it permissible for Ms. Chavez to reduce support unilaterally when the oldest child reached the age of majority?
2. What is the likelihood of the court granting a modification of child support as a result of Ms. Chavez's change of occupation?

Statutory Law: NMSA § 28-6-1 (Repl. Pamp. 1991) (state of New Mexico) provides that the age of majority is reached when an individual turns eighteen years old.

NMSA § 40-4-7 (Repl. Pamp. 1994)—Proceedings; spousal support; support of children; division of property—(state of New Mexico), section F, provides: "The court may modify and change any order in respect to … care, custody, maintenance … of the children whenever circumstances render such change proper. The district court shall have exclusive jurisdiction of all matters pertaining to the … care, custody, maintenance … of the children so long as the children remain minors."

NMSA § 40-4-11.4(A) (Repl. Pamp. 1994)—Modification of child support orders; exchange of financial information—the relevant portion of section A provides: "A court may modify a child support obligation upon a showing of material and substantial changes in circumstances subsequent to the adjudication of the pre-existing order."

Case Law: *Britton v. Britton,* 100 N.M. 424, 671 P.2d 1135 (1983) (see Appendix A).

Wolcott v. Wolcott, 105 N.M. 608, 735 P.2d 326 (Ct. App. 1987) (see Appendix A).

ASSIGNMENT 10

To: (Your name)
From: Supervisory Attorney
Re: *Kells v. Simns*
Implied warranty—fitness for a particular purpose

Our client, Mr. Merril Simns, is being sued by Tom Kells for breach on an implied warranty of fitness for a particular purpose in the case of *Kells v. Simns.* Mr. Simns placed an ad in the *Daily Post* offering to sell a Ryder 1000 riding lawn mower for $400. Mr. Kells responded to the ad and came to Mr. Simns' house to purchase the mower. Mr. Kells told Mr. Simns that he needed a good riding mower because he had two and one-half acres that had to be mowed once a week. Mr. Simns responded that, although he had never needed to mow more than an acre, the mower had always done a good job for him. After discussing the terms, Mr. Kells purchased the mower for $300.

One week later, Mr. Kells called Mr. Simns and informed him that the mower was too small and underpowered for his needs, and he wanted his money back. Mr. Simns refused, and Mr. Kells has filed suit in small claims court, claiming breach of an implied warranty of fitness for a particular purpose. Mr. Simns's only experience with riding mowers is based on his use of the Ryder 1000. He

does not have any special expertise concerning riding mowers.

Please assess the likelihood of Mr. Kells prevailing on an implied warranty of fitness for a particular purpose claim.

Statutory Law: ORS 72.3150, Implied warranty: fitness for particular purpose (state of Oregon), provides: "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under ORS 72.3610 an implied warranty that the goods shall be fit for such purpose."

Case Law: *Beam v. Cullett,* 48 Or. App. 47, 615 P.2d 1196 (1980) (see Appendix A).

ASSIGNMENT 11

To: (Your name)
From: Supervisory Attorney
Re: *Commonwealth v. Clavel*
Execution of search warrant—unannounced entry

We represent Darren Clavel in the case of *Commonwealth v. Clavel.* In this case, police officers executed a search warrant that authorized the search of the client's home for drugs. When the police arrived at Mr. Clavel's house, they knocked on the door, shouted "police, open up," waited fifteen seconds, kicked the door open, and searched the premises. Mr. Clavel, who is hard of hearing, heard some noise and was approaching the door to open it when it was kicked open. Upon searching the house, the police found a pound of marijuana in the bedroom closet. Mr. Clavel was charged with intent to distribute narcotics.

Please prepare a memo assessing the likelihood of having the evidence suppressed because of the manner in which the officers executed the warrant.

Statutory Law: The Fourth Amendment of the United States Constitution (U.S. Const. amend. IV).

Case Law: *Commonwealth v. DeMichel,* 442 Pa. 553, 277 A.2d 159 (1971) (see Appendix A).

ASSIGNMENT 12

To: (Your name)
From: Supervisory Attorney
Re: Mrs. Joyce Helger
Probate of copy of lost original will

We represent Mrs. Helger in the probate of her husband's estate. Mr. Helger died four weeks ago after a sudden heart attack. Mrs. Helger has been unable to locate the original of Mr. Helger's will. She knows that he had prepared a will, and she has a conformed copy of the will executed December 1, 2001. She also has a conformed copy of a codicil executed on May 6, 2006. She does not have the original of the codicil. Mrs. Helger thought the law firm who prepared the will kept the original, but she was informed that the firm could not locate the original. The senior partner at the firm told her that they do not keep the original of wills or codicils.

Please assess the likelihood of the probate court granting a petition for administration of the conformed copy of the will and codicil.

Rule of Law: The rule of law governing this question is case law rather than statutory law—*In the Estate of Parson,* 416 So. 2d 513, 515 (Fla. Dist. Ct. App. 1982): The court held that there is a "presumption that a will which was in the possession of the testator prior to death and which cannot be located subsequent to death was destroyed by the testator with the intention of revoking it."

Case Law: The court opinion that interprets the application of the rule stated in the above case is the following case: *In re Estate of Kuszmaul,* 491 So. 2d 287 (Fla. Dist. Ct. App. 1986) (see Appendix A).

ASSIGNMENT 13

To: (Your name)
From: Supervisory Attorney
Re: *Mad Dog Review v. Jonesville*
First Amendment—freedom of expression

We represent Mad Dog Review, a local rap band. As you know, this is a controversial group. The lyrics of one of their songs, "Mad Dog City Council," describes our city council in explicit terms using "dirty" words and language generally considered obscene. Based upon the language in their songs, and specifically that in "Mad Dog City Council," the city council of Jonesville (a neighboring municipality) has banned the group from performing in their community.

The Jonesville city council based their authority to enact the ban on Municipal Ordinance section 355-20. The ordinance provides: "The City Council, upon majority vote, may prohibit the public performance of any type of entertainment that does not comport with local standards of decency or acceptability." The ordinance does not define "local standards of decency or acceptability" or provide any standards or guidelines that the city council must follow.

Mad Dog Review wants to challenge the authority of the Jonesville city council to ban their performance. Please prepare an office memorandum addressing the question of whether the municipal ordinance violates the group's right to freedom of expression.

Rule of Law: First Amendment of the United States Constitution (U.S. Const. amend. I).

Case Law: Assume that the only case law governing this question is *Atlantic Beach Casino, Inc. v. Morenzoni,* 749 F.Supp. 38 (D. R.I. 1990). The relevant portions of the case are presented at the end of the chapter.

ASSIGNMENT 14

Note: Assignments 14 and 15 were prepared by Mary Kubichek, JD, director of Paralegal Studies at Casper College, Casper, Wyoming. The initial draft of the model answer to each assignment included in the Instructor's Manual was prepared by Ms. Kubichek's students.

To: (Your Name)
From: Supervising Attorney
Re: *Wright v. State*
Liability of State University for battery of student

We represent Joe and Ann Wright, parents of Bob Wright. Bob Wright was a freshman at State University of Generic. He was living 400 miles from home. He lived in Smith, a freshman dorm. Bob wanted to be involved in school activities. The University supported intramural sports activities where dorm students competed against other dorm students. Bob was not very athletic and his dorm lost games because of his lack of skill and he often got in the way of his team. After a 0–4 record, Bob's teammates threatened him and told him to quit. Bob notified a counselor at the University. Bob did not quit and after two more losing games, he was beaten by three teammates. Bob's arm was broken, and a fifth of alcohol was poured down his throat. Bob is a diabetic, and he required 40 stitches to his torso. Bob withdrew from the University. Bob's parents and Bob want to sue the college under the following sections of the state statute.

You are only to consider the following statutes. Do not bring in any outside facts or law.

Statutes:

(a) **Hazing** is defined as follows:
  (1) Any willful action taken or situation created, whether on or off any school, college, university, or other educational premises, that recklessly or intentionally endangers the mental or physical health of any student, or

(2) Any willful act on or off any school, college, university, or other educational premises by any person alone or acting with others in striking, beating, bruising, or maiming; or seriously offering, threatening, or attempting to strike, beat, bruise, or main, or to do or seriously offer, threaten, or attempt to do physical violence to any student of any such educational institution or any assault upon any such students made for the purpose of committing any of the acts, or producing any of the results to such student as defined in this section.

(3) The term hazing as defined in this section does not include customary athletic events or similar contests or competitions, and is limited to those actions taken and situations created in connection with initiation into or affiliation with any organization.

(4) The academic institution, college, university, etc. is liable for hazing if

(i) it occurred by members of a campus group;

(ii) it had notice.

Please draft an interoffice memorandum. Include the following:

To:
From:
Re:
Facts: (Remember to include parties and what the clients want)
Issue/s: (Remember that the issue/s must include jurisdiction, key facts, and be in question form)
Analysis:
Conclusion:

ASSIGNMENT 15

To: (Your Name)
From: Supervising Attorney
Re: *Martin v. City Airport*
42 U.S.C. § 2000e

We represent Jake Martin. Jake is a twenty-five (25) year-old American citizen. He is olive skinned, and six feet three inches tall; he weighs 220 pounds and has thick dark hair and a full beard. He applied for an airport security position. He stated that he has filled out all forms. He was informed that he will not be hired. Jake's mother lives on an Indian reservation within five miles of the airport security position. Jakes argues that he is being discriminated against under 42 U.S.C. 2000e -2(a)(1). Jake wants a job with airport security.

You are only to consider the following statutes. Do not bring in any outside facts or law.

Statutes: **42 U.S.C. § 2000e-2**

(a) Employer practices

It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge an individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national

security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter (regarding national security) shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

Please draft an interoffice memorandum. Include the following:

To:
From:
Re:
Facts: (Remember to include parties and what the clients want)
Issue/s: (Remember that the issue/s must include jurisdiction, key facts, and be in question form)
Analysis:
Conclusion:

ATLANTIC BEACH CASINO, INC.
d/b/a the Windjammer, et al., Plaintiffs,
v.
Edward T. MARENZONI, et al., Defendants.

Civ. A. No. 90-0471.

United States District Court, D. Rhode Island.

Sept. 28, 1990.

749 F. Supp. 38 (D. R.I. 1990)

OPINION AND ORDER

PETTINE, Senior District Judge.

In the last few years legislators and citizens have paid increasing attention to the lyrical content of popular music. The interest is not entirely new, for "rulers have long known [music's] capacity to appeal to the intellect and to the emotions and have censored musical compositions to serve the needs of the state." *Ward v. Rock Against Racism,* ___ U.S. ___, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661 (1989). The controversy some groups have ignited is not, in itself, any reason to take such speech outside the First Amendment. Indeed, expression may "best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. Chicago,* 337 U.S. 1, 4, 69 S.Ct. 894, 96, 893 L.Ed. 1131 (1949). The message and reputation of the rap music group 2 Live Crew evidently came to the attention of the Westerly Town Council, for they have taken steps toward possibly preventing the group from playing a scheduled concert. It is in this way that 2 Live Crew became the subject of, though not a party to, the present litigation.

On September 19, 1990, plaintiffs, who have contracted to present the 2 Live Crew concert, moved for a temporary restraining order prohibiting the defendants, members of the Westerly Town Council, from holding a show cause hearing on September 24, 1990, concerning the revocation of plaintiffs' entertainment license; from revoking the plaintiffs' entertainment license; from prohibiting the 2 Live Crew concert scheduled for October 6, 1990; and from imposing any special requirements on plaintiffs relative to the October 6 presentation. On September 21, 1990, the parties and this Court agreed that the matter would be considered as an application for a preliminary injunction and that the show cause hearing would be continued until October 1, 1990, subject to and dependent upon this Court's ruling. Based on

the September 21 conference and my review of the parties' briefs, this Court has determined that the central issue in this case is plaintiffs' facial challenge to the town of Westerly's licensing ordinances on First Amendment grounds. Because I find, for the reasons set out below, that the ordinances as written are unconstitutional under the First and Fourteenth Amendments, defendants are enjoined from conducting a show cause hearing and from revoking plaintiff's entertainment license. I also enjoin the defendants from prohibiting the concert for failing to allege sufficient harm to overcome plaintiffs' First Amendment rights.

* * * * * *

III. INJUNCTIVE RELIEF

In order for plaintiffs to prevail in their request for a preliminary injunction, they must meet the following standards: the plaintiff must demonstrate a likelihood of success on the merits, immediate and irreparable harm, that the injury outweighs any harm engendered by the grant of injunctive relief and that the public interest will not be adversely affected by such grant. *LeBeau v. Spirito,* 703 F.2d 639, 642 (1st Cir. 1983). I shall address each of these standards in turn.

A. Likelihood of Success on the Merits

Rather than allow 2 Live Crew to perform and then prosecute for any illegal activity that could occur, the Town Council wishes to review and decide in advance whether to allow the performance to go forward. This is a prior restraint. *See Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 554–55, 95 S.Ct. 1239, 1244–45, 43 L.Ed.2d 448 (1975). "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963). A licensing scheme involving such prior restraint survives constitutional scrutiny only when the law contains "narrow, objective and definite standards to guide the licensing authority." *Shuttlesworth v. Birmingham,* 394 U.S. 147, 150–51, 89 S.Ct. 935, 938–39, 22 L.Ed.2d 162 (1969), *see Lakewood,* 486 U.S. 760, *Southeastern Promotions,* 420 U.S. at 553, 95 S.Ct. at 1243–44, *Cox v. State of Louisiana,* 379 U.S. 536, 557–58, 85 S.Ct. 453, 465–66, 13 L.Ed.2d 471 (1965), *Irish Subcommittee v. R.I. Heritage Commission,* 646 F.Supp. 347, 359 (D.R.I.1986).

The Westerly Ordinance, see *supra* note 3, provides even less guidance than the law struck down in *Shuttlesworth. Id.* 394 U.S. at 149, 89 S.Ct. at 937–38 (permit could be denied if demanded by the "public welfare, peace, safety, health, decency, good order, morals, or convenience"). For example, Section 17-87 merely states, "Any license granted under Section 17-84 and 17-88 may be revoked by the Town Council after public hearing for cause shown." As in *Venuti,* the Westerly ordinance is utterly devoid of standards. See 521 F.Supp. at 1030–31 (striking down entertainment license ordinance). It leaves the issuance and revocation of licenses to the unbridled discretion of the Town Council. Our cases have long noted that "the danger of censorship and of abridgement of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use." *Toward a Gayer Bicentennial Committee v. Rhode Island Bicentennial Foundation,* 417 F.Supp. 632, 641 (D.R.I.1976) (quoting *Southeastern Promotions,* 420 U.S. at 553, 95 S.Ct. at 1242–44).

The defendants assert that they are guided by specific concerns for public safety, as outlined in their notice to plaintiffs, and not by the message of 2 Live Crew's lyrics. When dealing with the First Amendment, however, the law does not allow us to presume good intentions on the part of the reviewing body. *Lakewood,* 486 U.S. at 770, 108 S.Ct. at

1243–44. The standards must be explicitly set out in the ordinance itself, a judicial construction or a well-established practice. *Id.* Without standards there is a grave danger that a licensing scheme "will serve only as a mask behind which the government hides as it excludes speakers from the … forum solely because of what they intend to say." *Irish Subcommittee,* 646 F.Supp. at 357. Such exclusion is repugnant to the First Amendment.

This Court recognizes that the Westerly Town Council has a valid interest in regulating entertainment establishments. It is well established that time, place and manner restrictions on expressive activity are permissible, but even then the regulations must be "narrowly and precisely tailored to their legitimate objectives." *Toward a Gayer Bicentennial,* 427 F.Supp. at 638, *see Shuttlesworth,* 394 U.S. at 153, 89 S.Ct. at 940, *Cox,* 379 U.S. at 558, 85 S.Ct. at 466. The Westerly licensing ordinances do not even approach the necessary level of specificity constitutionally mandated.

Given the complete lack of standards in the ordinances and the long and clear line of precedent, plaintiffs' likelihood of success is overwhelming.

* * * * * *

ORDER

Because Westerly Code of Ordinances, Sections 17-84 and 17-87 are facially unconstitutional, because the plaintiffs have met the other requirements for a preliminary injunction, and because defendants have failed to allege sufficient harm. IT IS ORDERED that defendants are enjoined from conducting a show cause hearing, revoking plaintiffs' license pursuant to these ordinances or from otherwise prohibiting the scheduled concert.

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.