GPSolo Law Student Welcome Kit
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Succeeding at the Interview

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The Art of Interviewing
In today’s competitive marketplace, people skills are crucial. Law firms are viewed more as businesses than professional associations. Lawyers must be able to attract and retain clients. Lawyers who do not develop a “portable practice” — clients who view the attorney, not the firm, as their lawyer and who would follow the attorney from firm to firm—will not remain employed very long, regardless of their legal abilities. Interviewing skills are the yardstick against which candidates are measured to determine their potential for developing a successful and profitable practice. Therefore, interviewing skills are among the most crucial people skills that a job seeker must master to obtain a legal job and build a clientele.

Types of Interviews
During your job search you will experience primarily three different types of interviews: screening, call back and informational interviews. Informational interviews were covered in the networking chapter. If you have skipped ahead to this section, go back and read that chapter. It contains vital information!

This chapter will focus on good interviewing techniques which can be used in both interview settings.

Screening Interviews
Generally, interviews with a legal employer are conducted in two stages. A screening interview is the first contact you will have with the employer during this process. Screening interviews are generally short—about 15 to 20 minutes. The purpose of this interview is for the employer to quickly determine whether you will fit into their organization. If the employer thinks you should be considered for employment, you will be invited back to their firm for a call back interview. Law school on-campus interviews are typically considered screening interviews.

Call Back Interviews
A call back interview is significantly longer. Some call back interviews last two hours, while others involve the entire day. During this interview you will meet with several attorneys in the office, and you will probably be invited to a meal with some members of the firm. These interviews give all of the recruitment committee members an opportunity to meet you and assess your personality and skills. This also gives you the opportunity to observe the work environment and obtain more detailed information about the firm so that you can decide whether you would like to work there.

Preparing for the Interview
Even before you receive an offer to interview, you should be preparing yourself for the experience. This means performing self-assessment, conducting informational interviews to become acquainted with your career options, deciding in which area of the country you would like to work and researching employers. One must do this preparation to be an effective interviewer. How can you ever sell yourself to an employer if you cannot articulate why you want to join that organization?

After you receive an invitation to interview, you should continue your preparation. Running into the Career Services Office ten minutes before your interview to scan the employer's Martindale-Hubble listing, NALP form or firm resume is not sufficient. Employers want to know whether you really want to work for them. This is a time-consuming process, but a necessary one. As you conduct your research consider your skills and weaknesses, why you want to work for that employer and whether there is additional information you would like to know about the office.

If you have some knowledge about the interviewer’s background, it will be easier to find some topic of
interest that you have in common with him or her. This may include the fact that you graduated from the same alma mater, were raised in the same hometown or share hobbies and interests. Finding a common point of interest can make the initial conversation more comfortable and even demonstrate to the interviewer that you had the insight to look into these matters. By identifying common interests or even discovering more about the interviewer’s specialty, you convey to the interviewer that you have a professional demeanor. Additionally, you should prepare answers to the questions you are most likely to be asked. Unless the interviewer is asking you bizarre questions, you can probably anticipate 80% of them. Preparing in advance by writing out your potential answers is very helpful, especially if you are shy or have an introverted personality. Caution: Remember not to give answers that seem “canned” or too rehearsed.

Employers agree that the best interviews are those that come off as conversations, and not simply question and answer sessions. Turning an interview into a conversation is an art form – but it can be learned with practice. This skill conveys that you are at ease, confident and have a command of the discussion topic. These are the skills that all legal employers find valuable.

Conducting Yourself in the Job Interview

Create a Positive First Impression

First impressions count. Research indicates that your interviewer will determine within the first five minutes whether or not you will be hired. If the interviewer forms a negative impression within the first five minutes of the interview, 90% of the time the candidate will not be hired. However, if the first impression is positive during the first five minutes, 75% of the time the candidate will be hired.

It is imperative that you create a positive first impression. Employers want to hire people who will fit into their organization and with whom their clients will feel comfortable doing business. Demonstrate through your initial interaction with the staff and interviewer that you have the people skills the employer is seeking.

Your initial impression begins the moment you are asked to interview. Therefore, if you need to make travel arrangements, get directions, clarify any information, confirm your interview time, submit additional application materials or make any other inquiry or contact with the employer, that becomes part of your first impression. Whether these contacts are via e-mail, phone or fax, and whether they are with support staff or the hiring attorney, you will be judged. Therefore it is important that your demeanor and content of message be professional, efficient and appropriate.

Arrive On Time for Your Interview

One of the first things an employer will notice about you is whether you are punctual. Needless to say, arriving late or not showing up for an interview will create a negative impression. This will also affect the employer’s perception of future Chapman students. If you are interviewing on-campus and need to withdraw from an interview, please inform the Career Services Office at least 48 hours in advance. (In case of illness or accident, contact the CSO as soon as possible.) Failing to show up for an interview without any advance notice will create a negative impression of Chapman students in the legal community, which will affect your ability to find a job. Additionally, you will lose the opportunity to participate in future on-campus interviews.

Career counselors advise you to arrive between five and fifteen minutes early. Arriving on time is actually the equivalent of arriving late. Some of the benefits of arriving early are that you have time to fill out any pre-interview forms and you are relaxed and not flustered or upset about traffic delays. You will also be able to make observations about the firm and to rehearse in your mind your interviewing strategy. Receptionists or other employees who have observed you waiting will be asked to give an opinion of you. Treat the receptionist as you would the interviewer. Be aware that anything you say to receptionists, secretaries and associates will be repeated to the hiring committee—there are no such things as “confidential” conversations. Thus, you are on-stage from the minute you first enter the office or building (remember, you never know who is on the elevator with you).
Appearance
As stated above, another key to creating a positive impression is appearing professional. Legal employers tend to be more conservative than business employers, so dress conservatively. You will, of course, want to ensure that your clothing is clean and pressed.

**Men:** A dark suit (navy blue, charcoal gray or black), a *professionally laundered*, white, long-sleeve shirt; a conservative tie; and polished dress shoes are appropriate.

**Women:** Business suits in neutral colors (navy blue, tan, gray, black) and a white silk blouse are always a good choice. Make sure that the cut of the suit is conservative, the skirt is not too short, and your blouse is not revealing. Although very stylish pant suits are being worn by professional women, they are still not a good choice for an interview. Keep jewelry simple and make-up toned down. Shoes, preferably conservative heel pumps, should coordinate with the outfit, and stockings should be free from runs.

Noticable or unnecessarily distracting fragrances on either men or women are discouraged. Additionally, you may want to perform your own self-assessment to determine whether any other aspect of your appearance may create a negative image (e.g., hair style or hair color, non-traditional piercing, fingernails, weight, etc.)

Your Mind Set as You Walk in the Door
First and foremost, you must realize that you are qualified for the job; otherwise, the employer would not spend time interviewing you. During the interview, employers are checking to see whether you will fit into their organization. Some questions running through their minds might be: Will I like working closely with this person? Will this person fit in with other office staff? How will this candidate interact with our clients? Does the candidate have the necessary skills to eventually attract new clients? Does this person seem to have an ambition and a desire for substantive projects? Is the candidate interested in us or is his/her job search unfocused?

Second, realize that **an interview is a selling situation and you are the product.** Interviewers want to see strong self-confidence which stops short of arrogance. In *Guerrilla Tactics for Getting the Legal Job of Your Dreams*, Kimm Walton suggests that you write a short “infomercial” about yourself. The purpose of doing so is not to stand up and give a monologue, but to be able to explain why the employer should hire you and to demonstrate your personality. Your “infomercial” consists of three to five job related strengths and one personal achievement. Job related strengths are transferable skills, such as the ability to organize events or the ability to successfully manage your time to handle multiple tasks at once.

To construct your “infomercial,” review the worksheets you completed as you began drafting your resume. Note your accomplishments from those sheets as well as any others which are not work or academically related. Did you climb Mount Everest? Do you speak a foreign language fluently? Were you able to graduate from college in four years while working full-time? Once you have listed all your accomplishments, select one personal achievement and three to five work related accomplishments which best personify you and would be of interest to an employer. Next, describe what transferable skills each accomplishment illustrates about yourself. Now using these building blocks, begin constructing your “infomercial.” Write a short statement answering the question “Why should we hire you?” Memorize your “infomercial,” so you can repeat it with confidence. Again you will not whip out flip charts and give the interviewer your best sales pitch, but you can insert information from your “infomercial” as appropriate.

Interview Questions
During the interview you will be asked several questions. You will also be expected to ask the interviewer several questions of your own. One of the biggest mistakes most students make is that they fail to turn the interview into a “conversation.” Most of us let the interview proceed in what we call an “interrogation” pattern. In other words, the interviewer asks you her questions first. Once she is done, you ask your questions. However, if you are able to break this pattern by occasionally asking the interviewer a question after your response, the interview will become more conversational in nature and
you will develop good rapport with the interviewer. Mock interview workshops will be offered during your school year to teach you this skill. Plan on participating in these, as good interviewing is a skill which can only be learned through practice.

### Handling Tough Interview Questions

The following questions are identified by Kimm Walton in *Guerrilla Tactics* as some of the most difficult questions you may be asked during an interview. Through your advance preparation, planning, and practice you will answer these questions confidently and outshine the competition.

**"Tell Me About Yourself"**

This question is usually asked because the interviewer either has not prepared for the interview or wants to separate those who are prepared from those who are unprepared. When an interviewer asks this question, she is really asking, “Why should I hire you?” The best response to this question is that they give their entire life history. The interviewer is not asking you about your personal history, so do not start with birth and recount everything you have done since then. However, some history is appropriate. For instance, if you had been raised in Washington, D.C., and are now seeking a job there, you would want to explain that you have ties to that area.

**"What are Your Weaknesses?"**

The interviewer wants to know whether you are credible, yet savvy enough not to torpedo your chances of receiving a job. The best answer to this question is a past weakness you have corrected. For instance, you may respond “I used to feel uncomfortable speaking in public. However, I forced myself to take a public speaking course and later joined the debate team. I think that with a lot of hard work, I have been able to overcome this problem.”

**"What are Your Strengths?"**

With this question, the interviewer is asking “What can you do for us, and how can you prove it?” If you have prepared for the interview by researching the firm and your own strengths and talents, this question is a lob pitch you should hit out of the park. Your response should synthesize your transferable skills and how they benefit the employer. The trick here is to pull out job related strengths and tailor them to your audience without sounding arrogant.

**"Why Should We Hire You?"**

This question is designed for the interviewer to justify why the hiring committee should extend you an offer. Related to “Tell me about yourself.” and “What is your greatest strength?”, this question asks “What can you do for us?” and “What will you do for us?” If you have already listed your strengths, then begin your answer by saying, “In addition to the strengths I have previously mentioned, . . . .” If you have not previously discussed your strengths, then begin by giving your “infomercial.” Some other characteristics that will make you shine include: strong work ethic, loyalty, enthusiasm, diligence, easy going nature, related work experience, and a desire to develop clients.

**"What Will You Be Doing 5 to 10 Years From Now?"**

When you hear this question, you may be thinking “How should I know? Life is filled with uncertainties.” Resist the urge to give this answer. There is a legitimate reason for asking this question. Firms are concerned about retaining associates. As a rule of thumb, a firm will spend more time and money training you for the first three years of practice than you will return. Employers want to know that they will receive a return on their investment. The best answer to this question is one that reflects commitment to the geographic area, working for an employer like the interviewer and career growth. This is a golden opportunity to follow up with a question of your own such as, “Of those who started out with you 5 to 10 years ago, what are they doing now?”

**"Why Aren’t Your Grades Better?"**

Be prepared to defend yourself and answer this question confidently. If there was a serious tragedy or a tangible reason for having lower grades you may want to briefly state that reason. Be careful how you craft this response. Employers do not want to know the details of your personal life. Additionally, you
may sound apologetic or as if you are creating excuses. Even if you believe it to be true, do not blame others (i.e. tough professors, other students) for your grades. If you blame others for your grades, than the employer can assume that you’ll blame opposing counsel or the judge for a denied motion. Finally, these are not the reasons behind most grades. Law school is filled with intelligent people whose grades are separated by tenths and hundredths of a percent. Do not be afraid to acknowledge that your grades are not what you wanted, but then go on to state that your GPA is not as indicative of your promise to success as are other skills. Point specifically to achievements that highlight your analytical abilities: a rising GPA, good grades in classes relevant to the employer, good grades in legal writing and research, good recommendations from employers, professors or externship experience.

**Caveat:** Be aware that law schools use a variety of grading systems. Even when two schools use the same grading system, their curves are usually set at different levels. Therefore, your grades from Chapman may not equate to grades from other law schools. You may need to remind interviewers and recruiting coordinators of this and remind them that your class rank will be most indicative of your academic performance.

"**Why Do You Want to Work for Us?**”
Again, if you have properly researched the employer this is another softball question. The purpose of the question is to determine whether the candidate really wants to work for that particular employer. Mention your research--the things that interested you about their firm resume and the advice you received from networking contacts.

"**Why Did You Go to Law School?**”
If you came straight out of an undergraduate program, emphasize the intellectual and analytical challenges of a legal education, and your desire to emulate Uncle Pete who is a great lawyer, or whatever the reason. If you are a second career person, characterize law as something which has always interested you and explain what triggered your desire to change careers.

"**Why Did You Choose This School?**”
The best way to answer this question, and all the variations on this theme, is to emphasize the positive points of the Law School. Fortunately, Chapman has much to boast about--an excellent faculty, individualized attention, a great library, the certificate programs. Answer the question succinctly and then ask the interviewer why she chose to attend her law school.

"**Why Do You Want to Work in This City?**”
Remember that employers want to know if you will remain with them long enough to recoup their investment. This question is directed at your motivation for locating to that city and remaining there. If you have ties to the locale, mention them. Otherwise, indicate the research you have performed on the area--the good school system, growing economy, etc.

"**Who Else Are You Interviewing With?**”
According to career services professionals, this question is geared toward discovering your interest in the employer’s geographic area. The employer is trying to determine whether you are truly committed to their locale or whether you are applying for jobs in a number of locations. To answer this question, only mention employers in the same city. If you have no other interviews but are trying to arrange them, indicate you are in the process of setting up interviews with other employers in the same city. Additionally the employer may be gauging your interest in the practice area. If the current firm practices primarily plaintiff personal injury and the other firms you are interviewing with practice criminal defense this may indicate your indifference to personal injury work. However, if you can show a common thread to these seemingly different practice areas (i.e. litigation or helping the "little guy") then your commitment may appear genuine.

"**What Kinds of Positions Are You Looking For?**”
To answer this question, you must first perform a self-assessment. Synthesize the features of the job for which you are interviewing with your skills and talents. For instance, if you are interviewing with a small firm, you may want to mention your desire to work for an employer who would give you immediate
Responsibility. After stating some preferences, make certain you express your flexibility and openness to learn new things.

Hypothetical Questions
There are not many employers who ask hypothetical questions. Typically hypothetical questions are used to determine a candidate's skill when interviewing with a government employer, such as the prosecuting attorney. These questions are not necessarily geared towards your substantive knowledge of the law, but are a test to determine whether you could withstand the rigors of the courtroom and whether you are able to think quickly on your feet. When answering these questions give yourself a moment to collect your thoughts – a few seconds of silence are very appropriate in this situation. Then launch into your reasoned, concise answer.

Resume Gaps and Resume Items
With regard to resume items, these types of questions should not be problematic as long as you are willing to discuss anything on your resume. In the case of gaps, (e.g., not listing your GPA, having a period of time not accounted for, etc.) be willing to explain items which would be of interest to an employer. Answer these questions frankly and unapologetically. If an employer asks about your GPA, just state the exact number and move on. Do not stumble around looking for a perfect phrase or excusing yourself.

"Why Didn't You Get an Offer From Your Last Employer?"
If the employer reorganized and no clerks were rehired, this is not a difficult question to answer. However, if you were not extended an offer for other reasons; i.e., some clerks received offers, there was a personality conflict, or you received a negative evaluation, you need to find out specifically from your employer what the problem was. Next, you need to take steps to correct the problem. If possible, get letters of recommendation or references from other attorneys at your former office. Then, answer this question by concisely stating the problem, explaining the steps you have taken to correct the problem, and offering the name of your reference.

"Why Didn't You Accept An Offer from Your Last Employer?"
Compared to the previous question, this one is easy. The key to answering this question is to say positive things about your former employer. No one wants to hire someone who talks negatively about former employers. Express your gratitude for being able to work for the previous employer and then explain why you are looking for a different environment, e.g., developed an interest in an area of the law not handled by the previous employer, looking for a new challenge, etc.

"What Kind of Salary Are You Looking For?"
If you have done research using the NALP Directory of Legal Employers, the NALP Salary Survey (both of these resources are located in the CSO) and on-line resources, this question will not be difficult to answer. The best response is to state a range corresponding to a similar firm in the same city. For example, you could respond, "My research indicated that other small firms in this city pay between $___ and $___ per hour."

"How Are You Enjoying Law School?"
Resist the urge to begin bashing your entire law school experience. If you love law school, let your enthusiasm show. However, if you are having a mixed experience, stress the parts of your education you enjoy the most, e.g., cocurriculars, certain classes, externship experiences, etc.

Illegal Questions
You will most likely be asked at least one illegal question. Many of them are meant to be innocuous. You are being interviewed by attorneys, not human resource professionals. The interviewer may have been so engaged in conversation that he did not realize he asked you an illegal question. Illegal questions include anything relating to your religion, marital status, ethnicity, family status (including pregnancy), age or disability. With regard to disability, it can often be difficult to determine whether a question is technically illegal, as an employer does need to know whether you can perform the job with or without accommodations – so asking whether a hearing-impaired person whether they can read lips or can hear.
with a hearing device may be an appropriate question for a litigation position.

In responding to illegal questions, there are primarily five different approaches you can consider.

1) Answer the question.
2) Respond with soft-tough love. Deflect the question by gently asking the interviewer if this information is relevant to be hired.
3) Humor. Make a humorous comment instead of answering the question directly.
4) Non-committal answer. In place of a response, you could make a statement such as, “that is an interesting question,” and then redirect the discussion.
5) Righteous indignation.

Realize that there are risks in all of these approaches. For instance, a humorous response will fall flat if you are not funny. If you respond with righteous indignation you will most likely not be offered a job by that particular employer. Your reputation may even precede you when you interview with other recruiters. However, if you just answer any and all illegal questions, the interviewer may wonder why you have failed to comprehend and exercise your rights. You will need to decide how you will respond to illegal questions. Since each interview is different, you may choose to employ more than one strategy.

Questions You Could Ask the Interviewer
You demonstrate your interest in the employer by asking questions. Additionally, employers pay attention to your questions to determine how much thought you have put into the job search and the extent of your creative problem-solving skills. Therefore, it is imperative that you ask thoughtful questions which are important to you even if you have thoroughly researched the employer and have answered most questions. Good questions:

- Are not generic.
- Could not be easily answered by reading the firm brochure.
- Are designed to have the interviewer discuss the personal aspects of the job.
- Show off your research.

**Example:** If you want to know how many hours transactional associates are expected to work, you could ask the interviewer about the types of transactions associates handle, the steps they take to complete the transaction, and the usual turnaround time. Based on the interviewer’s responses, you can deduce the approximate amount of time spent at the office.

Common Interviewing Mistakes
Inexperienced interviewers often make the following mistakes. Whether you are getting ready for your first legal interview or your fortieth, avoiding these pitfalls will set you apart from other candidates.

- Failing to participate in mock interviews.
- Not researching the employer.
- Being too humble. (You have to freely discuss your strengths.)
- Being arrogant.
- Volunteering your flaws.
- Assuming you cannot get the job.
- Being intimidated by the interviewer.
- Showing up late.
- Speaking rudely to the staff.
- Letting your guard down in front of associates.
- Not asking any questions.
- Waiting until the last five minutes of the interview to ask any questions.
- Asking questions which could have been easily answered by reading the firm brochure.
- Inquiring about salary and benefit issues during a screening interview.
Follow-Up
Once you have returned home from an interview, follow up by sending a thank you letter to the interviewer. This will be a short letter thanking the interviewer for taking time from her schedule to meet with you and mentioning one interesting item of discussion. Preserve your professional image by sending a formal business letter (not hand written) on bond paper. One student even sent a thank you letter to the recruiting coordinator for setting up his interviewing schedule. If you were interviewed by more than one attorney at the firm, do not send each interviewer the same letter. (It is better to send only one letter than to send the same letter.) If the firm is really interested in you, the interviewing attorneys may compare correspondence.

In Review
There are several steps that should be followed when preparing yourself for interviews. First, remember this is not a short, one-time process, so make sure you are committed for the entire process. This includes practicing your interviewing skills and preparing separately for every interview. Second, have a positive attitude about each interview. Maintain this attitude during the interview. Your confidence will show greatly to your interviewer so always have a smile on your face and be positive. Finally, follow up after your interview and perform self-assessment tests on your interviewing skills after each interview. This will help you improve your interviewing skills for the next interview.

###
What is a Writing Sample?

The standard application package for a clerkship or attorney position at a law firm consists of a cover letter and resume. However, some employers will ask you to submit additional items such as a transcript or writing sample. Several students have asked what type of writing sample they should submit and how long it should be. The answer varies from employer to employer. The following guidelines will help you choose an appropriate submission:

- **Use your best piece of legal writing.** Do not use an essay or thesis you wrote in undergraduate school. Legal employers are most interested in reviewing your analytical writing skills.
- The specific subject matter of your writing (i.e. criminal, negligence, tax, procedural) does not matter as much as the strength of your analysis and argument. However, if you have two similarly strong pieces and one is in the practice area you are applying, then do use the piece from that area.
- Unless an employer specifies the length and type of writing sample (i.e., a pleading), you can use something you produced for a class, a law journal, or in an employment setting. Although the general rule is 8-10 pages, some employers want to see the entire document. You have basically three options to choose from:
  1) Submit the entire document and let the employer choose how much they will read.
  2) Submit only the first ten pages of your writing sample. In your cover letter, state that the entire document is available upon request.
  3) If you are submitting a scholarly piece, annotate the section that describes the underlying facts. Submit your one page annotation along with the analytical portion of your article.
- Do not submit a writing sample which has been substantially edited by others.
- If submitting a piece from a class and the research was given to you by the professor (such as a closed memo or closed brief in legal writing), you should state this fact in your cover letter. Similarly, if your class writing is from a different state or fictitious place, that should also be explained.
- If you want to submit a document which you wrote for an employer, ask for permission before including it in your application packets. Do not submit a writing sample which contains privileged information; oftentimes you can redact sensitive information and party names with permission.
- Be SURE your writing is free of typographical and grammatical errors.

Remember, the employer is looking to assess your legal writing skills. So use the piece that is most indicative of your writing. When you are hired, the employer will expect that your future writing will be of the same, or higher, caliber of the piece you submitted.

If you are unsure which piece you should submit, you should consult Career Services or one of your professors.

###
Overview of Types of Summer Jobs

"I am a 1L and I need to get some experience this summer. Where do I start?"

Sound familiar? It’s as easy as 1-2-3. First, you should narrow your focus to positions that sound interesting and will afford you opportunities to expand your skills. If you can squeak by without making a full-time salary during the summer, there are many unpaid positions in which you can gain great legal experience. Make a list of all the jobs for which you intend to apply. Second, tailor your resume and cover letter to the type of position you seek. Run them by CSO to make sure they look professional. Third, apply in a timely manner and follow up. Here are some initial ideas:

Federal Government: Many federal agencies offer paid and unpaid summer internships, including the United States Department of Justice. See NALP binder on federal jobs pp. 70-71 for a chart listing all federal agencies and whether they accept summer interns.

You might also check with the U.S. Attorney’s Office. The office in Santa Ana occasionally accepts a 1L intern during the summer. This would be great experience, especially if you are considering a career in criminal law or government.

State or Municipal Government: If you are interested in government, you might check with your state Attorney General’s office, as well as various City Attorneys, to see if they accept summer interns. Check out the yellow books on State and Municipal jobs (in CSO, but a more current version is in the library).

If you are interested in criminal law, apply to District Attorney’s offices and/or Public Defenders. If you already know you would like to prosecute or defend, focus on getting a job in that area. While it may not keep you from getting a permanent job to have worked on the “other side,” you would hate to be barred from a case because of a conflict of interest from a case you worked on as a summer intern.

Judicial externship: Some federal and state judges accept summer externs (Judge Reinhardt in Los Angeles, for example). Check out the Judicial Externship/Clerkship red binder in CSO to read “reviews” of judicial externships from former students.

Private Law Firms: Some offer paid or unpaid positions. Check out the book on law firms in career services. If a firm does not indicate whether it accepts 1Ls for the summer, call its hiring partner or recruiting coordinator and ask.

Study Abroad: While 2Ls are expected to find a summer legal job, 1Ls can get away with more. Why not get ahead in credits and have an amazing experience by studying abroad? See binder of study abroad opportunities in the Office of the Registrar, as well as flyers in the student lounge.

Corporations: A few corporations offer summer internships in their legal departments. Call ahead to see if they accept applications from 1Ls.

Public Interest Organization: Most non-profit organizations take summer interns. They are looking for someone with a passion for public interest work/community service.

If you need help locating resources to aid your job search, visit us at www.americanbar.org/groups/gpsolo.

GOOD LUCK!

###
Chapter 4: Transforming Notes and Outlining

ASP LECTURE # 2

Let’s say that in these first four weeks of Law School you followed my advice in the first lecture: that you read every case carefully, and briefed it according to the format we have been teaching you; that you actively prepared for each class and actively engaged in each class; that you took notes actively—that you took the right notes at the right time; and that you volunteered and participated with great interest and vigor.

Transforming Notes
What next? Writing notes is not enough. Once you write your notes, which themselves are incomplete, in different places—some are on your case briefs, and some are made chronologically—those notes became passive. Even the best of notes contain odd and perhaps easily forgotten references, abbreviations that only make sense when written and for a short time thereafter, and bits and pieces of analysis and structure. A week later, they will be meaningless. Remember, about 80% of what was learned in a classroom will be forgotten within 24 hours, even material covered in notes if those notes are not transformed into something more useful. You need to almost immediately transform your notes into something useful for when you make an outline—information that is complete enough that you will not forget it, and its meaning, weeks later.

I am not yet talking about making outlines. You really can’t make course summaries or outlines for a few weeks into the semester, but you can transform your notes right away every day into material that includes categorized information, memory cues, specific inquiries, and basic material that you can convert into outlines.

Note transformation, then, is about sorting and categorizing the notes you have taken so that they are more complete, explanatory, and organized, and so the information contained in them won’t look like a bunch of meaningless scribbles or abbreviations weeks later.

The POINTSystem that we learned in our last lecture continues after class ends, so we will now talk about the three steps to take in transforming your notes—both those you write on note paper in class and those you make as adjustments to your case briefs—from something that was valuable in keeping you engaged in class to something that will be valuable to you for the rest of the semester or, for those year-long classes that test cumulatively, for the entire year.

Step 1—Complete the Notes
To complete the notes, fill in the “note holes.” Note holes are the blanks in your notes. Early on, make friends with another student who is also a good note-taker. Agree to get together before you leave the classroom to check each other’s note holes. If neither of you has it, check with others soon after class ends.

Step 2—Begin to Transform the Notes
As soon as possible after class ends, and right after class if you have a break, highlight and summarize your notes. At the end of class, you have a better perspective of what during class was really important, so highlight those points in your notes.

Then, in the left-hand margin, go through your notes and for each topic neatly—in printing—briefly describe that part of the notes with a topic phrase or description. Think about what your notebook now looks like. On the right side of the notebook is a page with writing—topic phrases on the left margin and
your notes on the right side of the page. On the left side of the notebook is a blank page—the reverse side of the previous page’s notes. Here, put three categories of information:

- **Summary of what you covered in class.** Succinctly state the principles, rules, and exceptions discussed in class—every term of art or legal word or phrase with a special definition.

- **Visuals.** If you can, describe the principles with diagrams, stick figures, or mini-flow charts.

- **Questions.** Shortly after class, develop three types of questions: (i) What remains unclear? Note that you are always asking questions to make sure you have really learned the information. (ii) How does this information relate to material in this course, in another course, or in personal experience? Thus, you are learning the context in which this information appears, so it is not isolated with nothing to connect it to other issues. (c) How might this appear on an exam? Usually, consider similar fact patterns to those that gave rise to the issue in the cases and hypothetical fact patterns you discussed in class.

Let’s consider these three questions in a little more detail, since only when you have answered them have you transformed your notes into something usable in constructing a course summary or outline.

**Summary of what you covered in class.** If you find that something you discussed in class is unclear, look it up in the casebook, hornbooks or other texts, or even a commercial outline. If you are still not able to clarify your understanding, ask your professor. Either make an appointment during office hours, or e-mail the question, or, if they have a TWEN site for their course, post a question on their TWEN site.

You can answer the questions about how the information relates to material in this course, in another course, or in personal experience by looking at your casebook table of contents or similar parts of the book, by turning the pages of the book in another course to which the information seems to relate, or by careful reflection.

In addition to considering how issues arose in various fact patterns in the cases, consider where the professor suggests are areas of tension in the law. Here, tension means the tug of opposite arguments, because different judges and writers have bipolar viewpoints and perspectives. You should therefore consider areas of tension, ambiguity, or uncertainty in the law, or the vulnerability of a doctrine discussed in class.

How long should this entire exercise of transforming notes take? Somewhere between 15 and 30 minutes. Why is it important? If you don’t do it right away, you will lose the familiarity with the notes because you will forget the meaning of your notes rather quickly. Then, you can never transform your notes into something usable later in the week when you use the notes in creating your course summary.

**Preparing Course Summaries**

During Orientation I gave you a handout that illustrates one way of creating a course summary or outline. Now, we are going to discuss the topic of constructing an outline in much more depth. Why now? Because you are now completing your fourth week of classes—the time when you have covered enough material in class to be able to isolate topics and outline them. You should spend this coming weekend in part constructing outlines in each of your substantive courses, and by the end of the weekend they should be up-to-date and current, incorporating all of your transformed notes to this point.

Production of a course summary or outline has one major goal: your total mastery of a subject. One of the points Dean Tonsing has expressed in his book, and that I have tried to emphasize here, is that a major challenge in Law School is to transform what you were used to—a passive educational process—into the active educational process requiring your labor and your effort to exercise your “mental muscle” and be successful. Creation of a course summary organizing every facet of the course is a crucial step in being ready to take exams successfully, just as creation of a trial notebook organizing every facet of the trial is crucial to being ready to go to trial.
Production of a course summary enables you to learn your subject deeply, accurately, strategically, schematically, and course-specifically. What do each of these adverbs mean to you?

**Deeply**
If you only learn a course superficially—you barely learn the rules, but do not think about how they work in conjunction with other rules, or with policy, or what facts trigger the importance of particular rules, you will be confused. You will not understand the course material well enough to navigate through Law School. Moreover, you will not be able to analyze issues on an exam very deeply, and your confusion on exams will be evident to the professor.

**Accurately**
This means that the legal rule, defense, or definition you use must be complete and accurate. Paraphrasing of a rule is simply not going to work, because above all else the law demands some precision of words and meanings. Often, students do not do well on exams because they begin by stating the legal rule that applies to a situation inaccurately. Therefore, their application of the rule is inaccurate, superficial, or disorganized. If one element of battery is “intent to cause an offensive or harmful contact or to cause an apprehension of imminent offensive or harmful contact,” it is inaccurate to describe the element as an, “intent to cause an offensive or harmful contact.” If you were then faced with facts where Johnny threw the rock at Billy just to scare Billy, but not to hit Billy, and Johnny had a bad aim and actually hit Billy, you would conclude that since Johnny didn’t intend to cause a contact, there was no battery. And you would be wrong in three ways: you would have been wrong in your description of the rule; you would have been wrong in applying the rule; and you would have been wrong in your conclusion, since an intent to make someone think they are about to be hit by a rock is all you need if the rock in fact hits the person. So, get the rule right—not as an approximation or a paraphrase, but the rule itself.

**Strategically**
As we will discuss in later weeks, you want to go into an exam with a plan for writing it—a stratagem. You can only have a plan if your course summary has woven together all the necessary elements of the course, including how various topics weave together with others.

**Schematically**
Similarly, you need to take all the different doctrines, theories, principles, rules, statutes, policies, and definitions and “schematize” them: form them into a series of relationships. In other words, you need to know how everything fits in the scheme of things. How does offer fit with acceptance? How does assault fit with battery? If you know these relationships, you will see “issue clusters:” if the facts suggest one issue, then you will know to cover all the related issues in the cluster, because certain issues just get analyzed together. For example, if the facts present an issue of whether there is consideration sufficient for a valid contract, your course summary might suggest to you that, if your answer is that there is not sufficient consideration, the other issue in the cluster is what is called “promissory estoppel,” and you will address this very major concept on the exam.

**Course-specifically**
The casebooks and the commercial outlines include tons of topics, but your professor cannot and will not cover all of them. Whether your professor is more interested in covering lots of rules with lots of elements, or likes to focus on just a few legal issues and the policy issues presented, she will express her preferences for what you should be addressing in your exam answers. A course-specific course summary highlights and identifies those preferences of the professor, who is also the exam grader.

As I stated in Orientation, only one person should create your course summary—you. There are two very good reasons for this. One is practical: the authors of the commercial outlines and even second or third year students didn’t sit through and experience your class: with its hypotheticals, the professor’s comments, specific student comments. No one can reproduce what happened in that classroom except the participants in that particular semester’s class.
The second reason goes back to the importance of active learning rather than passive learning. The practice of law is active. Every facet of it is active. Reading someone else’s outline is passive. You learn very little. But if you make your own course summary, you will learn even more as you create it. You will be actively learning.

Earlier, both Dean Tonsing and I referred to the similarity with developing a trial notebook. I once tried a case against the two-time California Trial Lawyer of the Year. I worked very hard to put together my own trial notebook, planning every point in the trial, considering and analyzing and describing every item of evidence, every document, every line of deposition testimony. My opponent relied on co-counsel to prepare the case, and literally just showed up to try the case. He was relying, not on active learning, but on passively using someone else’s work and his own formidable courtroom skills.

Unfortunately for him, his clients had lied repeatedly on a crucial point in their depositions, and in the first trial handled by a lawyer other than me, but no one had caught them. I found the documents to prove they were lying, but he never prepared his own case and had no idea. He unwittingly led his clients into the trap, and could only sit there as I introduced document after document in his clients’ own handwriting proving them to be liars. He paid for not actively preparing his own case by losing the case and seeing his clients ordered to pay my clients’ legal fees, and law students who forget they are actively practicing law as students in preparing their own course summaries will pay by receiving disappointing exam results.

A course summary is a lot more than an outline. A mere outline, that sets out, for example, the elements of battery, is at best a skeleton of what you will need to achieve fluency in the subject. For example, consider the outline of battery, set out generally on Handout 1.

This outline could come from any textbook, hornbook, or commercial outline. It would tell you absolutely nothing about your course or what your professor is looking for, unless she uses a definition of battery identical to this one. Even then, you would have no idea from this outline what all these words mean, or might mean, in the context of your class discussions, or hypothetical questions the professor might throw at you. Your course summary needs to be your book on the subject, as learned from your professor. It must be created by you from scratch, and it must be extremely course/professor specific.

By creating your personalized course outline from scratch, you will become fluent in the language of each course, as that course is presented by your professor.

Both Dean Tonsing and I have stressed that you should begin to create your course summary at the end of the fourth week of class. Only then will you have covered enough in most substantive subjects to organize, synthesize and supplement your notes into a summary of at least one topic. Once you begin your course summary, you must commit to continually revising it, supplementing it, adding to it with each new week of course notes, all while the new material is fresh in your memory. Transform your notes daily. Use the transformed notes to extend your course summary at least weekly. Your objective is to complete the bulk of each course summary by about the 12th week of the semester, allowing you time to plan approaches to each major issue you might encounter on an exam. Only with good course summaries can you see the interrelationships among the issues and accomplish this task. Thus, all that we have been talking about from day one here is part of a continuum: reading cases thoroughly to fully understand them; briefing cases well; combining adjustments to the written briefs with great notes taken in class, and transforming them into usable notes to build excellent course summaries; using course summaries to prepare exam approaches to issues; and taking practice exams applying those exam approaches and receiving feedback on your practice exams. All of these steps on the continuum are part of the practice of law as a law student, preparing you for success on exams, on the Bar Exam, and as a lawyer. Each step requires significant time and work and dedication, from which you cannot and should not shrink. Indeed, the more practice you get at each of these steps, the less time each will take as you become more skilled. But take the time now to develop these skills early. Do not rush now, and do not become impatient.
To write a course summary, follow these ten steps. Beginning with step 3, we will see how this differs from just the outline we created above in Handout 1.

**Step 1: Gather essential materials**

Start by making sure that your study environment is quiet and without disturbances and distractions. Then, assemble on your desk the following:

- Your casebook and any course supplements suggested by your professor;
- Your fully annotated and transformed class notes;
- Your written case briefs, including all adjustments and revisions;
- Your favorite commercial study aid (if any).

**Step 2: Generally organize subject matter**

Lawyers think in terms of categories, so this step involves categorizing the subject matter. For example, at some point this year, you will learn that the legal rights of people injured on someone else's property depends on categorizing the injured person as a social guest, a business guest, a trespasser, or a child. Whether someone can sue for battery might depend on whether they are categorized as a boxer or not. Whether someone can be prosecuted for shooting another person might depend on whether the shooter is categorized as a law enforcement person or not, and whether the person who is shot is categorized as a fleeing criminal or not.

Thus, you begin your course summary of each subject by categorizing. The first stage of categorizing is organization under topical headings.

You will find these topical headings in several places: the professor’s syllabus, for example, has either divided the semester into groups designated by specific topical references, or by casebook page references. If it is the former, those specific topical references are your first categorization. If it is by page references, look to the casebook's table of contents to see how the pages are arranged by topical headings. Either way, the major summary headings are supplied either by the syllabus or by the table of contents in the casebook.

The secondary levels for your course summary—the subcategories, subtopics, or subdivisions—come from the same place, particularly the table of contents which tends to divide a major topic into subtopics, and also from your class notes and, if necessary and only as a supplement, from commercial study aids. Do not overdepend on these commercial aids, and do not buy more than one for any one course. Use them only to supplement your work, because it still must be your course summary derived from your work, your course, and your professor.

**Step 3: Collect fundamental rules and divide the rules into elements**

The skeletal outline I handed you in Handout #1 contains the fundamental rules and elements, but it was not in the context of the larger picture of topics and subtopics. Still, you must gather all these rules together. Where do you find these rules? First, search your class notes. If the professor has articulated the rule, or it came out in discussions, use it—verbatim. Second, search your revised briefs. They should contain the legal rule, and if you got it wrong the first time, you should have corrected it based on class discussion. Be careful, though, that the case from which you derived the rule is an example of the generally accepted legal principle. Sometimes, casebooks contain cases that are anomalous in order to generate class discussion, and then they give you the majority rule in a textual sidebar or note. Third, search the commercial study aid, but make sure that the articulation of the rule is one that is consistent with what your professor has stressed. Some courses emphasize different things in coverage, credit and duration, so the articulation of a rule may vary slightly from class to class, and this may be reflected in almost an over inclusiveness in terms of the rule. A good example of this is battery. When I taught Torts, the only elements I included were a volitional act, intent to cause offensive or harmful contact or an apprehension of imminent contact, causation, and offensive or harmful contact to the person of another. Other study aids will include an additional element—lack of consent. But my students would make a mistake if they included lack of consent as an element of the rule for battery, because to me, consent is a defense. Lack of consent is assumed in the cause of action, and the existence of consent is more
properly asserted as a defense. So, it is important to make sure you get the correct, articulated, and precise rule emphasized in your class by your professor.

Complete step three by dividing each rule into its elemental parts. This is easy in Torts and Criminal Law, which are elemental by their nature. The rule in those courses will probably be broken into elements. But in many courses, the rule is stated in more of a sentence or paragraph. You still have to cull from this text the “elements.” For example, to have an enforceable contract, you need, among other things, an offer, acceptance, and consideration. An offer may be defined as a communication that creates a reasonable expectation in the mind of the offeree that the offeror is willing to enter into a contract on the basis of the terms offered. Further whether a communication creates a reasonable expectation depends on three factors: Was there an expression of a promise, undertaking or commitment to enter into an agreement? Were the essential terms certain and definite? Was there a communication to the offeree of both the expression of a promise, undertaking or commitment and of the terms?

In creating the course summary, you would first state the elemental rule: A contract requires: (1) Offer; (2) Acceptance; and (3) Consideration. Under “(1) Offer” you would write the definition (“A communication that creates a reasonable expectation in the mind of the offeree that the offeror is willing to enter into a contract on the basis of the terms offered”), and you would further subdivide under offer: (a) Promise, undertaking, or commitment; (b) Definite and certain terms; and (c) Communication.

You may then find it necessary to further subdivide each of these subdivisions. What you cannot do, however, is put these rules, and subrules, “in your own words.” If you do, you will get a lower grade, because your definition of rules will be inaccurate. When you explain whether the rules and facts support a particular conclusion, you can use your own words. But when identifying and describing the rule itself, use the precise words of the rule, not your words. If you were a math student, and you learned that, in a right triangle of sides a, b, and c, where c is the side opposite the right angle, \(a^2 + b^2 = c^2\), you wouldn’t try to rewrite the rule into your own words before solving a problem asking for the length of c where \(a = 9\) and \(b = 12\). So, you shouldn’t try to do it with the language of the rules—the formulas of the law.

**Step 4: Identify Minority and Alternative Rules**

Go through your class notes and casebook and other resources for principles and rules that may have been, or were, used to reach results other than those dictated by the primary rules. Alternative rules are rules employed where the facts or situations differ or deviate from the standard. Good students recognize where the facts are ambiguous, so whether the principle rule is followed, or an alternative rule is followed, depends on what fact is determined. For example, since the duty of a landowner to an injured person is different depending on whether the injured person is a business guest or a social guest, the facts may be unclear about the role of the injured guest. Thus, if the injured person is the homeowner’s niece who is visiting with her mother and is also selling girl scout cookies, it is not clear whether she is a business guest or a social guest, and you as the student should address both alternatives on the exam, and apply both rules to reach alternative conclusions. Minority rules are significant variations in the law that are employed by less than half the states. Most law school exams are set in fictional jurisdictions—the State of Confusion, for example—so you must address both the majority rule and any significant minority rule if your professor tells you that you need to know the minority rule. You would then point out the possible different results under each.

**Step 5: Illustrate each point.**

The problem with **Handout 1** is that it is a skeleton. It tells you nothing about the meaning of any of the words. To illustrate each rule, sub-rule, and other category or division, you must clarify the meaning by use of examples, comparisons or explanations. The best sources for these are the cases themselves, and your class notes, and particularly the hypothetical questions and answers you write down. Thus, in illustrating what is an offensive contact, you may include a brief description from a case of a rude shove, and you might include a hypothetical question involving an unwanted pat or caress. These illustrations go immediately beneath the particular sub-rule, element, or word or phrase from the rule that they are illustrating.
You can also illustrate by use of diagrams, pictures and drawings. Visual learners learn from seeing the pictures, and kinesthetic learners, who learn by doing, learn just from drawing the pictures. Some students benefit from color. You might color the rules one color, alternative rules a second color, minority rules a third color, and exceptions to the rule a fourth color.

**Step 6: Include policy rationale.**
You can’t really learn the rules, or any of the law, without learning the policy behind the law. If you do not understand why the law is what it is, you cannot understand whether to apply it to a particular situation, when to apply it to a particular situation, or how to apply it to a particular situation.

While mere application of the rules to the facts in a mechanical way certainly will get you passing grades, the truly great exams are written by students who also discuss the policy reasons why a particular result may be obtained. Thus, if A knocks a dish out of B’s hand, a student who explains that, because the policy behind the tort of battery is to protect people from the intentional invasion of their personal space and bodily integrity, knocking a possession out of B’s hand is just as much a part of that concern as striking B, and therefore this is contact with “the person of another,” will reap lots of points for that answer.

Moreover, lawyers make policy arguments to support their position. What if you are in a state with a majority rule that hurts your client, but the trend over the last five years in other states is to adopt what had been a minority rule? To have any chance to prevail, you might need to argue that the policy behind the new trend is better social or economic or legal or moral policy than the policy behind the majority rule. Just as a lawyer in the professional practice uses policy to make her point, you must also use policy in the student practice to make your point in class or on an exam.

**Step 7: If you haven’t already done so in Step 5, add cases as examples of how the rules apply to specific factual scenarios.**
In Step 5, I mentioned the importance of illustrating the rules through hypotheticals and cases. The cases supply the most important factual scenarios for the application of particular rules. It is the facts, not the case names (except in Constitutional Law, parts of Civil Procedure, and parts of Criminal Procedure) that matter most on exams. Usually, in most courses, professors will only expect you to know a very few case names (and those they will tell you). But, in using cases to illustrate the rules, don’t use your entire case brief—only a brief description of the facts that exemplify the rule. Similarly, don’t list every case, so that your course summary becomes nothing but a list of cases. List only necessary brief factual references (and perhaps the case name) to illustrate a rule—not every case you ever read that illustrates the rule. Your objective in briefing cases was to thoroughly understand the case in preparation for class discussion, but your objective in including case information in a course summary is different—it is to illustrate a legal principle or rule you have, as the result of study and class discussion, already learned. For example, if you learn from a case that one form of an offensive contact is when a surgeon operates, even successfully, but hasn’t obtained her patient’s informed consent to the particular procedure, then under the part of the rule called “offensive contact,” you might include, “Failure to obtain informed consent before performing medical procedure (Kennedy v. Parrott).”

**Step 8: Make sure your organization is in a hierarchical format.**
This means you place your format in an organization that makes sense. For example, Torts is divided into three major categories: Intentional Torts; Negligence; and Strict and Products Liability. Within each of those categories, there are further subdivisions: each individual tort, for example, as well as remedies. Each individual tort can then be analyzed in terms of its elements. Thus, **Handout #1**, while only a skeleton, would illustrate the hierarchical format we are talking about. Use the format that works for you. If you like organizing by the traditional I.A.1.a.i format, do so. If you like to organize using bullet points and indentations, that would be ok. If you organize using color schemes, that would be fine. Just make sure you use a format that preserves a hierarchy—how are each of the topics related to each other within the course. This comes from having done a good job generally organizing into categories, as you do in Step 2 by using the table of contents or a course syllabus. Whatever visually effective method you use, keep it consistent throughout each of your course summaries.
Step 9: Revise as necessary.
Throughout your first year, you will come to a new understanding or deeper understanding of the material. As a result, you will want to revise your course summary to reflect this understanding. You may only need to change a few words, or to change an entire section. Whatever it takes, do it, because you want your course summary to reflect your work and your self-learning. Make your summary deep, and sharpen its analytical focus. Ultimately, the course summary is directing you toward analytical paths to sophisticated exam writing, so no amount of revision is too much.

Step 10: Verify the summary’s completeness and usefulness.
The only way to test the completeness and usefulness of a course summary is to test it by using it to take practice examinations in writing. This can vary from using one section to take a one-issue practice hypothetical like you may get in ASP, to using the entire course summary to take practice exams, and old exams on reserve, all of which contain several major issues and numerous minor issues and sub-issues.

What, then, should a course summary look like when you have completed these steps? Handout #2 (see Chapter 7) is a more fully developed analysis of Handout #1 (see Chapter 6), where each rule is explained both in words and in illustrations of each point in the outline.

Dean Tonsing suggests that, as you use the course summary to help you answer practice hypothetical questions and exam questions, the summary will begin to speak to you. It will tell you what you need to memorize, what gaps you need to fill, and where your analytical strengths and weaknesses lie. You need to compose material that speaks to you, because you wrote it. It will become an active document, unlike the passive documents written by others. This will allow you to then develop exam approaches or flowcharts, so that you can pre-write much of an exam answer and be prepared for any exam situation.

Preparing Flowcharts
Flowcharts or approaches are essential to good exam writing, and to good trial practice. Remember Dean Tonsing’s story about the trial lawyer who created a wall chart with note cards and colored string running from note cards to other note cards. This is one form of a visual representation of how his case flowed. Similarly, a course must flow. Certain issues, when presented on an exam, trigger other issues in what I like to call issue clusters, and all of them need to be discussed. Only with an approach or flow chart, in which you set up the progress of a discussion from one issue to the next logical issue, can you successfully master this process.

Powerful learning occurs when you assimilate new information into your existing cognitive structure. You want to extract information from the course summary and put it into a pre-existing design, to give you both a roadmap to the entire course and an approach to exam answers. You use information on an exam—but to use information you must first remember it. To remember information, you must understand it. To understand information, you must first structurally organize it into a larger framework, so you are constantly integrating new information with the known information and the structure that contains it.

To illustrate this point, why do schools require you to take Algebra I before Geometry? Because Geometry uses algebraic principles. A simple example is if a transverse line is drawn through a horizontal straight line, forming four angles, how do you prove that the opposite angles are equal? You need to use the substitution theory of algebra (if a+50=b+50, then a=b). Similarly, to understand more complex legal concepts, you must first understand the simpler ones, and then integrate them into a structure. In drawing flowcharts, then, you will learn even more because you are also constructing your knowledge.

Once your course summary is developed enough, perhaps by the sixth week or so, begin preparing your flowcharts or approaches, improving on them each week. There are four steps to preparing these flowcharts. The exact format of your flowchart may vary according to your taste and comfort level.

Step 1: Extract the issue-resolving questions from your course summary
Your starting place is always your course summary. It will identify for you the critical issues that you have considered throughout the course. Issues resolve questions, so you construct your flowchart as a series of questions that are then resolved by answers in the form of the rules and policies you have considered.

What are these questions? Although they will depend specifically in an exam on the fact pattern, your course only covers certain topics, so you can pretty much predict the questions. For example, in Contracts, you might expect to get a question on Contract Formation. That is, the issue is whether an enforceable contract between the parties was formed. There are a number of questions posed by this issue:

- Was the communication an offer or a solicitation of an offer?
- Was there consideration?
- Was the response an acceptance?
- Did one party make a promise that the other party relied on?
- Did either party suffer a detriment?

The problem is that these questions are out of order, so the second step involves determining the right order in which to ask the questions.

**Step 2: Arrange the questions in a systematic, hierarchical structure**

Lawyerly analysis requires systematic inquiry. Thus, your flowchart must be systematic. There is a logical flow to questions—they proceed in a particular order. The order is based on the categorization you have already done in making your course summary: if this, then what follows? If the other, then what goes next? You are trying to draw a link from one question to the next, depending on how the previous question was answered, with a goal in mind. Whether something is an acceptance is irrelevant unless you are trying to determine if a contract has been formed and it is an acceptance of something—an offer—so it is logical to first ask if something is an offer before asking if something else is an acceptance. You therefore need to think about the systematic order of questions—what comes first, second, third, etc. in the analysis and where is it all going.

The questions must also be hierarchical, meaning they are in a ranked order. In thinking about battery, for example, you wouldn’t first ask about whether an act was done with intent, without first asking if the conduct amounted to a volitional act—as opposed to an involuntary occurrence.

The concept here is that logically, and based on your analysis of the law in your course summary, one question logically precedes another. Thus, rearrange the questions like this:

- What was the nature of the communication?
- Was the communication an offer or a solicitation of an offer?
  - If the communication was an offer, what were its terms? If it wasn’t an offer, was any successive communication an offer?
- Was the response an acceptance?
  - If it wasn’t an acceptance, was it a rejection?
  - If it wasn’t an acceptance or a rejection, was it a counteroffer?
- If it was a counteroffer, was the counteroffer accepted?
- If it was an acceptance, was there consideration?
  - If there was consideration, then there was a contract.
  - If there wasn’t consideration, so that the contract is unenforceable, was there promissory estoppel that can be supplied in the place of consideration?
- Did one party make a promise that the other party relied on?
  - If so, did the promising party reasonably expect that the promise would rely on the promise to her detriment?
  - Did the relying party suffer a detriment?

Now you have constructed a flow chart that asks a series of questions, depending on which way certain answers go. By the way, when you answer a question on an exam, you do not merely say, “Yes, there was consideration.” Rather, you explain, using the facts, why there was consideration: “Yes, there was
consideration, because there was a detriment to the promisee, who agreed to refrain from smoking and dating until at least the age of 25.”

**Step 3: Use the flow chart to answer single issue hypothetical questions**
Test each part of the flow chart by seeing if it helps you answer a single-issue hypothetical, like some of the ones you will get in ASP. With your flow chart in front of you, walk through an answer to the question—orally, or mentally, since you are testing the flowchart’s ability to get you through an answer, not your own ability to write an answer. If the flowchart is missing something in answering the question, you will know it quickly and you can add whatever questions are missing to the flowchart, or you can restructure the question order if necessary.

**Step 4: Modify the flow chart as needed and extend it weekly**
Just as you are always modifying and improving your course summary, and adding to it weekly, you should do the same with your flowchart. The flowcharts you create for individual issues need to be integrated into your schematic for the whole course. If you don’t, you will have flowcharts out of context. It doesn’t matter if there was an acceptance if you haven’t decided there was an offer first.
In integrating these issues, you will discover fundamental questions to be asked that lead you down one issue approach or another. For example, in Contracts, one fundamental “fork in the road” question is what law applies—common law or the Uniform Commercial Code (which applies to commercial transactions like the sale of goods). If you determine that the alleged contract is for services, like painting a house, you would follow the path of the flowchart involving common law formation of a contract. If you determine that the alleged contract is for the sale of goods, you would follow the UCC path in the flowchart.

Similarly, in Torts, you would first ask, “Is what defendant did intentional or negligent?” This would determine what path you would then follow—intentional torts or negligence.

As you continue to add to and integrate your flow chart, and test its usefulness, you will continue to patch holes in it, and as you become more sophisticated in your analysis, you will find places to adjust and strengthen your flowcharts. Eventually, your flowchart will cover every segment of the course as taught by your professor, but augmented by your own effort and input.

###
Transforming Notes and Outlining – Bad Outline

Handout #1 Referenced Above

I. Battery—volitional act by the defendant done with the intent to cause either a harmful or offensive contact or the apprehension of an imminent harmful or offensive contact, which directly or indirectly causes a harmful or offensive contact with the person of another.

A. Volitional Act—an act done with a conscious purpose and not through hypnotism, or unconscious behavior.

B. Intent to Cause

1. Subjective intent
2. Objective intent

C. Causation

1. Direct Causation
2. Indirect Causation

D. Contact

1. Harmful; or
2. Offensive

E. To Person of Another
Transforming Notes and Outlining – Good Outline

Handout #2 Referenced Above

I. Battery—defined as a volitional act by the defendant done with the intent to cause either a harmful or offensive contact or the apprehension of an imminent harmful or offensive contact, which directly or indirectly causes a harmful or offensive contact with the person of another.

A. Volitional Act—an act done with a conscious purpose and not through hypnotism, or unconscious behavior.

Hypo: Defendant is knocked out, and falls onto plaintiff. This is not a volitional act by Defendant.

Hypo: Defendant causes a contact while intoxicated. The act itself is still done with a conscious purpose.

B. Intent to Cause

Either subjective or objective intent

Subjective intent—defendant had a purposeful desire to cause contact
Case: one schoolboy deliberately kicks another schoolboy in the classroom—this is subjective intent to cause contact, and there is no requirement that Defendant intended to cause the particular harm of disintegrating bone (Vosburg v. Putney)

Objective intent—defendant knew to a substantial certainty that the contact would occur, even if Defendant did not intend for it to occur

Case: 5-year old boy pulls chair out from under elderly woman who was sitting down knew to a substantial certainty (because of gravity) that woman would then fall to the ground, making contact with the ground (Garratt v. Dailey)

Hypo: Defendant sets up a bucket of rocks to fall onto an intruder’s head if they break into the shed. This is knowledge to a substantial certainty that the rocks will strike the intruder (based on Katko v. Briney)

1. Harmful contact or

2. Offensive Contact; or

3. Apprehension of Imminent Harmful or Offensive Contact

Hypo: A shoots a water cannon above B’s head, and B ducks and falls. Because B ducked, B apprehended imminent contact.

C. Causation

1. Direct Causation

Defendant’s act directly resulted in contact.

Hypo: Defendant hit plaintiff in the head.
2. Indirect Causation

Defendant’s act resulted in an event that ended in plaintiff making contact.

Case: 5-year old boy pulls chair out from under elderly woman who was sitting down. He didn’t make contact, but he indirectly caused her contact with the ground (Garratt v. Dailey).

Hypo: Defendant threw a rock that hit plaintiff in the head.

D. Contact

1. Harmful; or

Contact that causes any kind of impairment of the condition of the body, or physical pain or illness.

Hypo: A slaps B and raises a small welt below the eye. Even though it is slight, it is a harmful contact.

2. Offensive

Contact that would offend a reasonable sense of personal dignity—the ordinary person and not one unduly sensitive as to personal dignity—unwarranted by the social usages prevalent at the time and place where the contact is inflicted

Hypo: Plaintiff is unusually afraid of infection by germs and doesn't want to be touched by anyone. If Defendant doesn't know of plaintiff’s fear, under current standards, unreasonable to consider handshake or pat on the back offensive.

Hypo: An unwanted kiss is probably offensive.

Case: Giving a vaccination over plaintiff’s objection is offensive (O’Brien v. Cunard Steamship Lines)

Case: Removal of body parts during surgery where no emergency existed and without informing patient of such a plan and without obtaining plaintiff’s consent is an offensive contact, even if the surgery was helpful to plaintiff (Bang v. Charles T. Miller Hospital)

E. To Person of Another

Can be either the body or something closely connected to the body.

Case: Grabbing a plate out of someone’s hand is contact to the person of another (Fisher v. Carrousel Motor Hotel)

Case: Untying a boat with passengers aboard from a dock during a violent storm, causing the boat to sink and the passengers to fall into the stormy water, is causing contact to the person of another (contact with the water) (Ploof v. Putnam)

###
Chapter 7: How to Brief a Case

[OR–WHY DIDN'T I CHOOSE TO GO TO MEDICAL SCHOOL]

By Dana L. Blatt, Esq.

You are just about to start law school. You buy all of your required casebooks [they are about two feet thick–only “slightly” intimidating], and you receive your first assignment. You are simply told, “read the first 100 pages in each book and BRIEF all of the cases!”

O.K., you know how to read [hopefully], but what does it mean to “brief” a case? You have heard of “briefcases,” but that is something that you carry around. The last time you sang at a karaoke bar someone may have asked you to be “brief,” but instinctively you know that that is not the kind of brief that is being discussed here. And you may even be wearing “briefs.”

But, what is a brief of a case? For that matter, what is a case?

The purpose of this article is to teach exactly what briefs are, why they are important, and how to draft them. You will learn most of the various ways to brief a case, the basic elements of each brief, and how briefs are used in various contexts. Additionally, you will read sample cases and briefs of those cases in every format. By the time you finish reading this, you will be so sick of briefs, that you will wish this writing were much briefer! So, now let’s get down to business.

What is a case? A “case” starts out as a lawsuit between two or more people. The parties to the lawsuit have a trial and one party wins while the other loses (or possibly there is no trial but one of the parties wins because of a decision based on legal procedure). Next, the party who lost the case gets angry and bitter. So, he or she decides to file an appeal. An appeal is a request that a “higher court” examine what was done in the trial court to make sure that no legal errors were committed. (The “higher court” is usually referred to as an appellate court. The “highest” appellate court is the Supreme Court.) Generally, there are no trials in appellate courts. Rather, an appeal is strictly a review by a panel of judges of what transpired in the trial court. The appeals courts usually make their decisions in writing. The written decision is called an opinion. It is called an opinion because it reflects the opinion of the justices as to what the law is for that particular factual situation. Since the decision is in writing, it is saved. [Not only is it saved, but it is cataloged and indexed ad nauseam.] Since the opinion has been saved, it can be located in the future whenever it is needed. Opinions have been saved and catalogued for hundreds of years. It is the fundamental theory of our entire legal system that once a case is decided, if there should ever be another case in the future that is the same as the decided case, that future case should be decided exactly the same way as the first case was decided. This is called stare decisis. In other words, the opinion effectively establishes a rule that is to be followed in the future for all similar cases. Moreover, since all of the opinions over the past hundreds of years have been saved, they can always be located and used as a basis to resolve a current legal dispute. The Common Law is the result of the collection of hundreds of years of written decisions by appellate courts in England before the United States was formed. The United States adopted the Common Law and it is the basis of our legal system. Thus, [to answer the question] a case, for purposes of this definition, is a written appellate court opinion which reviews the decision of a lower court and is, accordingly, now the “Law of the Land” according to the doctrine of stare decisis. In law school, what you will study is the aforementioned collection of appellate court opinions because they are “the law.”

What is a brief? A brief is nothing more than a summary of an appellate court opinion. That’s it–nothing more! [Now that you know, there is no reason to read the rest of this article.] A brief is a written synopsis or digest. It is just a concise rendering or explanation of the opinion. Your primary job as a law student (even your job as a lawyer) is to brief (i.e., summarize) cases.
**Why bother summarizing cases?** Suppose that you asked a friend if she had seen that old classic movie, “Green Aliens of Reptar?” Your friend frankly concedes that she doesn’t remember that movie and asks, “What was it about?” You could insist that she go see the movie. Better yet, you could “briefly” explain what the film was about (that would surely refresh her memory), and then the two of you could discuss the importance of the flick to your conversation. In law school, you will be asked to read hundreds of cases. Most of the cases are NOT particularly memorable. In class, when it comes time to discuss a particular case, it is “best” if all students are thinking about and discussing the same case at the same time. The professor will select a student (usually at random) to “brief” the case for the entire class. If you are called upon, then [after you catch your breath], you must summarize the case at issue, on the spot, before the entire class. In this manner, the entire class can be reminded of what the case is about before it is discussed. If you are called upon and cannot brief the case, you will be told to stand in the corner. You will be graded by how well you brief a case and by how prepared you are to discuss the ramifications of the case in class. Accordingly, it is essential and fundamental that you read every case and brief every case. You absolutely must be prepared, in every class that you attend, to thoroughly discuss every case; that means that you must be able to recite a brief of every case in every class, every time! With so many unmemorable cases to remember, the only way that one can be prepared to brief every case every time, is to write out a summary of every case in advance of class. To put it another way, it is the job of every law student to read all of the cases and to summarize every case. It is extremely time-consuming to write briefs. Thus, study time must be budgeted accordingly. Here we will explain the long, hard, tried and true methods of briefing a case. Later we will show you some short cuts.

**Are there other kinds of legal briefs?** Yes. [You can skip this section if you only want the “beef”!] Throughout your career as a lawyer you will be required to prepare various kinds of writings, all of which are referred to as “briefs.” A trial brief or appellate brief is simply a summary of your legal argument or a collection of “briefs of cases” organized in such a manner and interspersed with legal contentions in such a way as to persuade a trial or appellate court that a particular legal position that is being advocated is correct. The trial or appellate brief is usually “brief” (i.e., only as long as necessary) and rarely, if ever, contains the full text of any case. Rather, such a brief refers the court to the full text of a case by summarizing the important points of the case and providing the citation [a book volume and page number where the case can be found]. If the court needs more information from a case than what is provided by the excerpt, the judge can read the entire opinion by reference to the citation. In one form or another, briefs of cases are used in every kind of legal activity that exists whether it be a trial brief, writing a law review article, drafting an inter-office memo in a law firm, studying for a law school examination, conducting legal research, or making an argument to the United States Supreme Court. In other words, briefing is WHAT YOU DO in law school and a major part of WHAT YOU WILL do as a lawyer. Thus, learning how to brief a case is an essential skill that must be mastered and will be used throughout every person’s legal career. [By now you ought to be really scared!] Briefs can be many pages long or they can be as short as a single sentence. The length of the brief depends on the purpose for which it is going to be used. In this discussion we will focus on briefs for use in the law school classroom. However, we will also provide examples of other types of briefs. Rest assured, however, if one can brief a case for classroom purposes, all other types of briefs will fall naturally into place.

**Are there different kinds of briefs intended for classroom purposes?** Yes; and we will learn about all types in this article. The types are: (1) Standard Classroom Format, (2) Bullet Point Briefs (3) Book Briefs, (4) Professional Briefs, and (6) “Jockey.”

**How to Brief A Case.** [Finally, at last, thought we would never get there!]

There are certain elements which are found in every brief. They are found in every brief because they are the fundamental elements of every case. They are:

**CASE NAME**
FACTS

ISSUE

DECISION

Briefly, the Facts are the circumstances which occurred between the parties that resulted in a lawsuit. The Issue is the legal question to be answered by the court. And, the Decision is what was decided by the court.

Many commentators advocate the use of a system called “IRAC” for the taking of law school examinations. “IRAC” stands for Issue, Rule, Application, Conclusion. The IRAC elements can also be found in every brief. They represent a basic method of analyzing any legal problem. Actually, “IRAC” is a sub-part of the above basic brief elements. The only reason that the word “facts” does not appear in “IRAC” (i.e., FIRAC) is that the facts are always supplied in a law school examination and “IRAC” is usually thought of as a test-taking tool. We will incorporate “IRAC” into our brief format as follows:

CASE NAME

FACTS

ISSUE ISSUE

DECISION RULE

APPLICATION

CONCLUSION

For purposes of understanding a case, we will add one more element, the rational. Thus, our basic approach to a brief is as follows:

(1) CASE NAME
(2) FACTS
(3) ISSUE ISSUE
(4) DECISION (4a) RULE

(4b) APPLICATION RATIONALE
(4c) CONCLUSION

Each of the foregoing elements will now be explained in detail [this is referred to as “spoon feeding”].

The very first thing you must do before you brief a case is read it [Duh!]. However, don’t just read it, study it. Read it twice if you have time. Obviously, you cannot do a good job of summarizing something that you do not understand.

Legal opinions are full of words that you have never seen before including legal words, Latin expressions, trade terms and rarely used English vocabulary. Look up every word that you do not thoroughly understand. In the first few months of law school, the foregoing task could interrupt your reading many, many times per case, but it will be worth it for improved general understanding.

So, let’s get on with it:
(1) **CASE NAME.** Every case has a title. For example, *Smith v. Jones.* This title contains the names of the parties that are suing each other. Always reproduce the title above each brief.

Under the title, include the name of the court rendering the opinion. For example, “United States Supreme Court.”

Under the court, indicate the year that the decision was rendered (e.g., 1998).

The foregoing information is always reproduced at the top of every opinion. If you have difficulty locating the name, we are in trouble!

There is one point that may assist you in understanding the case name. Even if the case is entitled “*Smith v. Jones,*” this does not necessarily mean that “Smith” is the plaintiff and “Jones” is the defendant. It may be that “Smith” was, in fact, the plaintiff in the trial court. Or, maybe “Smith” was the defendant. However, most appellate courts list the name of the party that filed the appeal first, regardless of their status as plaintiff or defendant in the trial court. Thus, if “Smith” was the defendant in the trial court, but lost the case at trial, “Smith” is listed first in the title of the case because he filed the appeal. Moreover, now “Smith is called the Appellant or Petitioner and “Jones” is called either the Appellee or Respondent.

(2) **FACTS.** After you have thoroughly read and understood the opinion, you should be ready to write the facts. But, you may be asking yourself, what are the facts and how many of the facts should be included in a brief?

The facts are nothing more than the story of what happened to the parties. Clearly, at a minimum, your facts must include what transpired between the parties that resulted in a lawsuit.

You should attempt to determine the basic operative facts that drive the case. In selecting facts, always keep in mind the ultimate point made by the court. If you understand why the court reached the conclusion that it did reach, you will understand which facts are most important.

Only the essential facts should be include in your brief. Remember, you are charged with writing a summary [i.e., just the facts, ma'am!]. A summary necessarily implies that you will leave out some of the details. In order to determine which facts to use in your summary, you must understand which facts are important.

If you are unclear as to exactly which of the various points being made by the court is the most important, simply look at the section of your casebook where the case has been reproduced. Be sure you are clear as to the topic being discussed in the chapter under review. The most important part of the case relates to that topic. Next, look at the reasons why the court reached its decision. The facts which support the reasoning of the court are the most important.

Don’t be afraid of the facts. There is nothing magical, mystical or mysterious about them. Generally, facts are relatively straight-forward and can be understood by a layperson. This is so because the facts merely relay a short story.

You may ask, how long should the facts be? There must be at least enough facts so that one can understand the problem being resolved by the court. The next section of the brief will be the issue. There should be enough facts (enough of the story) that the issue is raised or becomes apparent from a reading of the story.

Sometimes, the facts can be clarified and the issue can be raised merely by summarizing the contentions (or arguments) of the parties. Sometimes it helps to state how the trial court ruled. But, when you have completed writing the facts, there should be no surprise as to what the problem is that is being solved by the court.
Usually, rules of law are not discussed in the facts. However, sometimes a statute is the subject of a controversy, or a line of decisions are at issue. Under such circumstances, it is acceptable to include rules in the facts. Otherwise, you can probably exclude the legalese from any discussion of the facts. You will decide whether to include legal matters in the facts as you become more experienced.

The goal is to write a clear statement of only the essential facts, sufficient to raise the issue, yet long enough to understand the basis for the court’s decision.

The best way to understand what is being explained in this article is to examine some sample briefs. Later, we will present a sample case and multiple sample briefs of that case. Moreover, this entire booklet contains over a hundred sample briefs from all of the first year law school courses. According, you should be able to learn a great deal by studying examples.

(3) ISSUE. The facts must be long enough to tell the story. The issue, on the other hand, is simply one single sentence. As short as the issue is, in the beginning it will be very difficult to draft.

The issue is always in the form of a question. And, the question can usually be answered with a simple “yes” or “no.”

If the parties to the lawsuit could not settle their case in the trial court, that means that they must still be arguing over some point. Maybe they are arguing about whether the sky is blue or grey. If the foregoing is the question, the issue is, “Is the sky blue?” or conversely, “Is the sky grey?” [The answer, of course, may depend on the weather.] But, note that the question is capable of a yes or no answer.

Usually, the question is not confined to the facts of the case as in the above example (i.e., the question of the color of the sky should have been resolved by a factual finding in the trial court). Instead, the issue should be phrased as a legal question. The question describes the legal problem that the court must solve. Stated otherwise, assuming the scenario described in the facts, and considering the various contentions of the parties, what must the court decide (what question must the court answer)?

For example, do you remember the case of Roe v. Wade? The question in that case was NOT, “Should abortion be legalized?” (The foregoing is not the issue because it is too confined to the facts and does not state a legal principle.) [Even if you didn't remember Roe v. Wade from the name, you now know the primary principle for which it is most often cited. Moreover, you should also have learned something about how a question can set up a problem to be solved—even if it is the wrong question.] A more correct and legalistic description of the issue in Roe v. Wade is as follows [of course, you would have no means of knowing this issue unless you read the case], “Is there an implied right of privacy in the United States Constitution which limits the power of states to regulate abortion in the first trimester of pregnancy?” Note that there are no facts stated in the issue (although you can certainly glean a great deal about the facts from reading the issue alone). Note also that after the question asked by the issue is answered (i.e., yes or no), we are left with a rule of law: “There is an implied right of privacy in the United States Constitution which limits the power of states to regulate abortion in the first trimester of pregnancy.” The foregoing observation should also help you to formulate an issue. That is, once you have determined what the rule of law is, you can convert that rule into a question and you will have the ISSUE!

There is usually only one main issue per case. Your challenge, [should you decide to accept it], is to select the single most important question presented by the opinion. If you feel that there is more than one issue, write out each version of the issue that you feel is appropriate. Then, attempt to combine all of your versions into a single question.

Sometimes the issue is easy because it is specifically articulated by the court in the opinion. But, be careful. Even if the court has expressed an issue, it may not be the most important issue. As suggested earlier, to get help in determining the most important issue, refer to the subject being discussed in the casebook chapter. For example, if the course is Torts, the subject being studied is negligence, and the topic under discussion is the element of “duty,” the issue should be one involving “duty” and not, for
example, “breach of duty.” This is so even if the subject of “breach of duty” is discussed in the case.

There are some statements of the issue, however, which are NEVER correct. The reason they are never correct is that they generally apply to most or many cases, and teach us nothing about the legal problem to be solved. Examples of incorrect issues are as follows:

“Is the defendant liable?”

“Should the trial court judgment be affirmed on appeal?”

“Should the evidence be excluded?”

“When one person drives her vehicle into the rear end of another person’s automobile, is the driver of the car in the rear liable for negligence?” [This issue is incorrect because it is too confined to the facts of the case and does not articulate a legal principle.]

Instinctively you will always know and understand the issue after you have finished reading the facts. You will not need to be told what the issue is. The only difficult part will be to find a way to articulate the issue in a single short sentence. This will come with experience. In the meantime, use the aforementioned guidelines and instructions to draft an issue.

The issue should lead naturally and comfortably to a discussion of the basis for the court’s decision.

(3) **DECISION.** This is the section of the brief where one must summarize what the court said about the rules of law, how the rules apply to the facts of the case, and what conclusion the court reached. Although we think of the decision section as only one part of the brief, it is actually a conglomerate of various parts. We will be breaking down the decision section into the elements which derive from the “IRAC” method referred to above.

Respond to the issue. The first part is simple. Answer the question asked by the issue. If the issue was properly framed, the answer will be “yes” or “no.” So, write “yes” or “no.”

State the rule. Next, state the rule of law established by the case. The rule should be simple after formulating the issue. It is simple because you already did all of the hard work when you drafted the issue. In other words, now take the question which is your issue, turn it around, make a statement out of it, and state it as a rule.

For example:

**Issue:** "Is an offer to enter into a contract deemed accepted from the moment a written acceptance letter is placed in the mail?"

**Decision:** Yes. An offer to enter into a contract is deemed accepted from the moment a written acceptance letter is placed into the mail.

The purpose of this article is to teach a new law student the basics of drafting briefs. The foregoing method of stating the rule of the case is used solely because it is an easy approach to drafting the rule for first timers. But, in reality, it is a very ridged and redundant approach. Accordingly, as you read more cases and become more familiar with different legal principles, feel free to state the rule of the case in any manner that you deem appropriate.

The next portion of the decision section of the brief requires that the student summarize the rationale of the court and summarize how the facts of the case were applied to the rule of the case so as to justify the conclusion reached by the court.

(4a) **Application/rationale.** As you read a court opinion, you will see that the judges do not simply spout out rules. To the contrary, the justices consider what the applicable rule ought to be. In deciding
what the law ought to be, the court devotes most of its time to explaining the reasons for its opinion. This is called the rationale. Understanding why the court decided to rule as it did, which factors were important and which factors were unimportant, what the court believed to be fair, and what precedents (previously decided cases) the court felt were applicable, are all part of the rationale. Understanding the reasons for the court’s decision is fundamental to understanding the law. [Surprise, surprise! You thought that law school was memorizing a bunch of rules. Wrong!] The rules are only a small part of what you must learn. Understanding the reasons for the rules is the most important thing that you will learn in law school.

Since we now know that what is most important is the REASON for the rule, it should be clear that in summarizing a case, you must summarize the REASONS the court reached its conclusion. Stated otherwise, one must summarize the rationale of the court.

In part, the rationale includes a critical look at how each of the facts of the case interrelate with each of the other facts (i.e., what is the importance of each fact as compared with the other facts.) Next, it is important to summarize how the court applied the facts of the case to the rules of law.

For any opinion to have any meaning at all, the court must demonstrate how it applied the facts to the rules. Often, this portion of a case demonstrates which facts the court found to be most important. As a lawyer, it will be essential that you understand which facts are important so that you will know how to be persuasive. Accordingly, if it is important for the court to explain how the facts apply to the rules, it is equally important that you summarize that information in your brief. Here is an example of how to apply facts to a rule:

Very Hypothetical Rule: “If the glove does not fit, you must acquit!”

One argument (application of the facts to the rule): It is a given that the glove was worn by the murderer. If the hand of “the man” on trial does not fit into the glove, he must not be the murderer. In this case, the glove does not fit the man on trial. He attempted to put his hand into the glove but the glove was much smaller than his hand. He couldn’t even pull the glove all the way onto his hand. The glove would have to have been much larger in order for it to fit the hand of this defendant. The murderer had a much smaller hand. Since the glove was too small, since it didn’t fit, it follows that it would be impossible for this man to be the murderer.

The other argument (application of the facts to the rule): The fact that the glove did not easily go onto the hand of the defendant is an illusion. First, the defendant was wearing rubber gloves at the time he tried on the gloves at issue. It is always difficult to put one pair of gloves on over another pair. Second, the gloves were soaked with blood at the time of the murder. Over time, as the blood dried, the gloves shrunk. Originally the gloves did fit the defendant, but the gloves changed size by virtue of the blood shrinking them and only did not fit at the time of trial for that reason. Moreover, “the man” was spreading his fingers out so as to make it appear that the gloves did not fit (not to mention his acting skill).

The foregoing illustrates all of the essential elements of the decision section of the brief. Thus, in writing this portion, be sure to (1) state the holding (that is the “yes” or “no” answer to the issue), (2) state the rule of law, (3) articulate the reasons for the decision, and (4) summarize the connection between the facts and the rule. Eventually each of these elements will merge together. Ultimately, you will observe that there is no conscious effort by the courts to be certain that the foregoing elements appear in each opinion. Rather, each of the sections simply flow together by virtue of the nature of an opinion. Similarly, your brief should combine the aforementioned elements so that they flow naturally.

(4b) Conclusion. This is the easiest part of the whole brief. All that this section requires is that you state the ultimate outcome of the case. What was the final resolution of the case? Was the lower court affirmed (higher court agreed with the lower court decision), was the decision reversed (the decision of the lower court was wrong) or something else? This section is only one or two words long. For example, “Reversed.” Moreover, the word you are looking for will likely be the last word in the opinion.
Thus, this is an easy section with a one-word answer.

At this point, we have discussed all of the sub-parts of the decision section of the brief. Hopefully, now that the elements have been explained to you, you no longer find the task scary. For the decision section, merely answer the question posed by the issue, state the rule of law, summarize the reasons for the courts decision, apply the facts to the rule, and indicate the ultimate conclusion reached by the court. DO NOT feel compelled to follow the foregoing brief format rigidly. Although virtually every case lends itself to the foregoing format, in truth and reality, the ultimate goal is to draft a clear, yet concise, simple rendition of what occurred in the case so that you will be prepared to summarize the salient points for the class and so that a cogent classroom discussion can follow.

**The Good News.** Fortunately, it is NOT necessary that your briefs be well-written. That’s true! In fact, they need not be written at all (this is called bullet point briefing and book briefing which will be explained later). [Hurray, hallelujah, fantastic!] NOT SO FAST! The primary reason that you will be writing briefs at all is so that you can remember all of the details of a case when you are called upon in class to give a summary. Thus, the real reason for writing out your brief is (1) to make sure you understand the case and (2) for use as a memory refresher. (You will be reading so many cases that your brain will become “mush!” Accordingly, unless you have a “Kodak” memory, it is virtually impossible to remember all of the essential details of each case.) Even if you are called upon in class, it is unlikely that you will actually ever read your brief to the class (although you may do so). Rather, you are more likely to use your brief as a guide and dictate a more detailed summary of the case to the class from your memory banks. Accordingly, it is NOT necessary that you devote extraordinary amounts of time to proofreading and polishing your work. In fact, with so many cases to read and briefs to draft, you will only have five or ten minutes per case to draft a brief. Accordingly, just write it well enough so that you can use it to recite a quality summary in class.

**More brief elements.** Oops. We forgot to tell you that there are actually more elements to a brief than are described above. Sorry about that. [You can’t fire me, I quit!]

**Procedural Basis.** The primary missing element is referred to as the “Procedural Basis,” “Nature of Case,” “Legal Procedure” or some other equally meaningless expression. This section of the brief usually appears at the very beginning of the brief, before the facts. However, we have left this section for the last because it can be complicated and is likely to divert your attention from truly important portions of a brief that are described above. The procedural basis is intended to be a very short statement (no longer than one sentence) of how and why the case is before the court from a procedural point of view. As someone new to the law, you cannot possibly be expected to understand legal procedure. In fact, Procedure is an entire course of study in law school. Nonetheless, you are expected to include this element in your brief whenever the information is available.

Actually, the Procedural Basis can be broken down into four parts, each of which is one or two words long. Then, all four parts combined result in no more than one single sentence.

The Procedural Basis is very complicated, very legal-oriented, [and generally of very little importance]. Nonetheless, you will need to recite it if called upon in class and you must always know what it is.

The four elements of Procedural Basis are (A) Type of ACTION, (B) Type of RELIEF, (C) Type of PROCEDURE, and (D) Type of APPEAL. They are explained below (and are usually found near the beginning of each opinion):

A. Type of action. Lawsuits are of various kinds. Some people sue because they are injured. Others sue because someone breached a contract. Sometimes people are in court because they have committed a crime. This sub-part of Procedural Basis requires that you state why the parties are in court in the first place. For example, “Action for breach of contract,” or “Prosecution for violation of curfew law,” or “Administrative hearing regarding revocation of parade permit,” etc.
B. Type of relief. When a person files a lawsuit, he or she is always asking the court to do something to the opposing party(ies). This sub-part describes what it is that the court is being asked to do (or maybe, what it actually did). Does the person seek money (i.e., damages), is he asking the court to issue an injunction to prohibit certain kinds of conduct, is he merely asking the court to declare what the rights of the parties are (Declaratory Relief), or is some other kind of relief being sought? When provided in the opinion, the type of relief sought in the trial court should be stated. For example, “Action for damages for breach of contract.” (Note that both the type of ACTION and the type of RELIEF are included in the foregoing sentence.)

C. Type of Procedure. There are many ways in which a case might end up before a panel of appellate justices. There are “moves” that a lawyer can make in the trial court to shorten litigation. There are things that must be done in a particular order for a court to properly move forward. There are challenges to legal action at every level of litigation. These things are generally referred to as “procedure” (as contrasted with rules of law). The brief must describe what procedure was employed in the trial court that resulted in the matter going up on appeal. A couple of examples will illustrate this point.

Example 1. The plaintiff files a complaint (lawsuit). The defendant files a demurrer to the complaint. A demurrer is a legal procedure whereby the defendant effectively argues that assuming, for the sake of argument, that all of the facts in the complaint filed by the defendant were proved to be true, the complaint does not state a claim that is recognized by the law. If the judge in the trial court agrees and sustains the demurrer, the plaintiff loses the case without any further trial or other proceedings. If the foregoing occurred, the procedural basis would state: “Appeal from sustaining of defendant’s demurrer.” To build on the hypo in the previous section, “Appeal from sustaining of demurrer to complaint for damages for breach of contract.”

Example 2. Assume that there is a full trial before a jury. The jury returns a verdict in favor of the defendant. The Procedural Basis might state, “Appeal from judgment for the defendant after jury trial in action for damages for breach of contract.”

In the beginning, you may not understand what the procedure IS, but you should nonetheless report what it was (as stated by the court).

D. Type of Appeal. There are many different ways in which to appeal a case. Sometimes a litigant has an absolute right to have his/her case heard in an appellate court. This would be called an appeal. Other times, an “appeal” is only possible if the court grants permission for the case to be heard. Other times a lawsuit is being filed against the trial judge in an appellate court to force the trial judge to do something. The latter is usually referred to as a “Writ” rather than an appeal. There are also different kinds of writs (e.g., certiori, mandamus, etc.). [Clearly, we cannot conduct a class in procedure in this article.] In any event, one must state in the brief which of the various methods of “appeal” were employed to get the matter before the court hearing the case. For example: “Writ of Certiori to the United States Supreme Court after judgment for defendant in action for damages for breach of contract.”

As hard as this section of the brief is to understand and draft, if the Procedural Basis is of any significant importance, it is usually stated in the opinion and can be copied. Later in law school you will understand the meaning of the words used in the Procedure section. When you do, it will shed new light on the true meaning of a case.

There should not be any facts stated in the procedural basis section. However, it is O.K. to include some of the procedural aspects of a case in the “Facts” section of the brief.

Still More Elements. Believe it or not, there are three more sections that might be part of your brief.

Concurrences and Dissents. [That’s two.] Sometimes an opinion in your casebook contains one or more concurrences or dissents. Remember, an appellate court is made up of a panel of judges. Sometimes, all of the judges do not agree on how to decide a case. But, the rule is that whatever the majority of judges
decide, will become the law of the case. So, what happens with that insolent disgruntled judge who had
the audacity to disagree with the majority of the justices? Well, he or she gets to state, in writing, how
misguided the majority is. A “dissent” is a written opinion by a justice wherein he or she expresses his or
her disagreement with the majority and the reasons for the disagreement. A “concurrence” is a written
opinion by one of the justices who agrees with the outcome as decided by the majority but disagrees
with the rationale of the majority’s opinion. In both cases, the alternate points of view are expressed.

Only the majority point of view becomes the law which can be used as precedent pursuant to stare
decisis. However, in law school, the concurrences and dissents are almost as important as the majority
opinion. This is so because, as stated earlier, learning the law is not just the memorization of a bunch of
rules; rather, it is understanding the reasons and rationalizations for why the law is what it is. In order
to fully appreciate the meaning, significance, and correctness (or incorrectness) of the majority opinion,
it is usually necessary that one understand and appreciate other points of view.

Thus, if the case in the casebook contains a concurrence or dissent, you must always summarize that
point of view as well. Fortunately, summarization of a concurrence or dissent is relatively easy. All other
parts of the case will have been briefed utilizing the basic format set forth above. The only thing to
summarize in a concurrence or dissent is the RATIONALE of the justice. (As set forth above, sometimes
the rationale includes an application of the facts to the rule.) So, write a short summary of the reasons
the concurring or dissenting judge disagreed with the majority and you will have done all that is
necessary.

**Analysis.** The very last element of a brief is analyzing the case. Actually, this is not an element at all, it
is just EVERYTHING.

Throughout the briefing process it is helpful to consider the importance of the case to the course.
Always consider the reason why the casebook author included the case in the casebook. The reason is
RARELY for the rule of law established by the case. A rule can usually be stated in a single sentence.
So, why would one read 20 pages just to learn a single sentence? One wouldn’t! Consider the
background and history of the area of law when considering the opinion. Consider the accuracy and/or
correctness of the judges’ opinions. Think critically about the case. Utilize the notes which follow the
case in the casebook to determine what is most important about the case. Consider the implications of
the rule on society. Synthesize all of the various rules that you have read and try to make sense out of
them. The foregoing are only a few of the literally unlimited number of things to think about. Each case
has many ramifications.

The classroom discussion will start with a brief of the case. Thereafter, the professor will raise problem
after problem posed by the case. You must be prepared to respond to the professor’s inquires.
Anticipate what questions the professor might ask. Then, make some notes about your observations.
Those notes will come in handy during class discussion. This is referred to as case analysis.

Believe it or not, you have now read everything that you are ever going to read about how to brief a
case. You now know more than you need to know. However, you probably do not understand anything.
The best way to learn briefing is by example. Accordingly, what follows is a sample case and many
different types of briefs of that case. As alluded to earlier, you may utilize the other briefs in this booklet
to see if the first few cases in each of your casebooks were properly briefed by you.

**SAMPLE BRIEFS**

As stated, the best way to learn how to brief a case is by example. Once a number of cases have been
briefed, the process will be very clear. The details of the foregoing discussion will soon become part of
your subconscious [or forgotten entirely]. In fact, the sooner you forget the details the better. All of
this reading has been designed to do just one thing: teach you what a brief is. Now, forget the details
and just remember it is nothing but a summary of the case intended to refresh your memory in class.

As referenced earlier, there are many types of briefs. The discussion so far has related to a Standard
Classroom Format for a brief. What follows is a sample case entitled *Henningsen v. Bloomfield Motors*. After the case we will present a sample brief of *Henningsen* in a Standard Classroom Format. Then, we will show you a “Bullet Point Brief.” This will be followed by a “mini brief” of the same case. Following the mini brief will be a “one line brief.” Lastly, we will reproduce the opinion for a second time, in full. However, the opinion will be marked up with all kinds of lines and comments to demonstrate how to “book brief” a case.

For your convenience, at the end of the sample briefs we have presented a professionally written brief of the same case prepared by High Court® Case Summaries. This brief is presented on a double spread page with references to the various features that can be found in our format. Don’t be confused, there are many features in a High Court® Brief that you are not expected to include in your own brief.

Oddly enough, although a brief is intended to be a memory aid, a High Court® brief contains numerous memory aids. Thus, we have memory aids to help us remember the memory aids. [That’s because, after three years of law school, most students end up with dementia.]

Students use High Court™ briefs for many reasons [even when their mommy tells them not to]: Because (A) It is a good product (as your fellow students will tell you), (B) there isn’t always enough time to brief every case, (C) there isn’t always enough time to read every case—our briefs are so thorough that you can learn the essential parts of a case without even reading the opinion, (D) our briefs are a good way to check to see if you understand the most important parts of a case, and (E) there is no place where you can obtain as much quality detailed analysis of a case as you can from a High Court™ brief. [There are lots of other reasons too; but, we don’t want to “toot our horn” too much.] [End of commercial.]

**LEGAL SHORTHAND**

As should be apparent, law students are required to do a great deal of writing. They write briefs, they take notes, they write exams, they write law review articles, [my fingers are cramped just thinking about it.] Therefore, we thought it would be helpful to teach you a common shortcut. One helpful measure is to memorize some basic abbreviations for legal words [its not much, but it is better than nothing].

The following is a list of common legal abbreviations and symbols:

<table>
<thead>
<tr>
<th>WORD</th>
<th>SYMBOL/ABBREVIATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appeal</td>
<td>Ap</td>
</tr>
<tr>
<td>Appellant</td>
<td>Apl</td>
</tr>
<tr>
<td>Attorney</td>
<td>atty</td>
</tr>
<tr>
<td>Cause of action</td>
<td>c/a</td>
</tr>
<tr>
<td>Complaint</td>
<td>C</td>
</tr>
<tr>
<td>Contract</td>
<td>K</td>
</tr>
<tr>
<td>Cross</td>
<td>x</td>
</tr>
<tr>
<td>Cross-complaint</td>
<td>x/c</td>
</tr>
<tr>
<td>Defendant</td>
<td>Δ</td>
</tr>
<tr>
<td>For example</td>
<td>e.g.</td>
</tr>
<tr>
<td>Husband</td>
<td>H</td>
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<tr>
<td>Judgment</td>
<td>Jdg</td>
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<tr>
<td>Plaintiff</td>
<td>Π</td>
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<tr>
<td>Prejudice</td>
<td>Pj</td>
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<tr>
<td>Respondent</td>
<td>R</td>
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<tr>
<td>Section</td>
<td>§</td>
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<tr>
<td>Wife</td>
<td>W</td>
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<td>with</td>
<td>w/</td>
</tr>
<tr>
<td>without</td>
<td>w/o</td>
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<tr>
<td>with prejudice</td>
<td>w/p</td>
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</tbody>
</table>
O.K., we are now going to set you free to read the attached examples. High Court™ Case Summaries wishes you great success in law school and in your legal career.
Plaintiff Clause H. Henningsen purchased a Plymouth automobile, manufactured by defendant Chrysler Corporation, from defendant Bloomfield Motors, Inc. His wife, plaintiff Helen Henningsen, was injured while driving it and instituted suit against both defendants to recover damages on account of her injuries. Her husband joined in the action seeking compensation for his consequential losses. The complaint was predicated upon breach of express and implied warranties and upon negligence. At the trial the negligence counts were dismissed by the court and the cause was submitted to the jury for determination solely on the issues of implied warranty of merchantability. Verdicts were returned against both defendants and in favor of the plaintiffs. Defendants appealed and plaintiffs cross-appealed from the dismissal of their negligence claim. The matter was certified by this court prior to consideration in the Appellate Division.

The facts are not complicated, but a general outline of them is necessary to an understanding of the case.

On May 7, 1955 Mr. and Mrs. Henningsen visited the place of business of Bloomfield Motors, Inc., an authorized De Soto and Plymouth dealer, to look at a Plymouth. They wanted to buy a car and were considering a Ford or a Chevrolet as well as a Plymouth. They were shown a Plymouth which appealed to them and the purchase followed. The record indicates that Mr. Henningsen intended the car as a Mother's Day gift to his wife. He said the intention was communicated to the dealer. When the purchase order or contract was prepared and presented, the husband executed it alone. His wife did not join as a party.

The purchase order was a printed form of one page. On the front it contained blanks to be filled in with a description of the automobile to be sold, the various accessories to be included, and the details of the financing. The particular car selected was described as a 1955 Plymouth, Plaza '6', Club Sedan. The type used in the printed parts of the form became smaller in size, different in style, and less readable toward the bottom where the line for the purchaser’s signature was placed. The smallest type on the page appears in the two paragraphs, one of two and one-quarter lines and the second of one and one-half lines, on which great stress is laid by the defense in the case. These two paragraphs are the least legible and the most difficult to read in the instrument, but they are most important in the evaluation of the rights of the contesting parties. They do not attract attention and there is nothing about the format which would draw the reader’s eye to them. De-emphasis seems the motive rather than emphasis. More particularly, most of the printing in the body of the order appears to be 12 point block type, and easy to read. In the short paragraphs under discussion, however, the type appears to be six point script and the print is solid, that is, the lines are very close together.

The two paragraphs are:

“The front and back of this Order comprise the entire agreement affecting this purchase and no other agreement or understanding of any nature concerning same has been made or entered into, or will be recognized. I hereby certify that no credit has been extended to me for the purchase of this motor vehicle except as appears in writing on the face of the agreement. I have read the matter printed on the back hereof and agree to it as a part of this order the same as if it were printed above my signature. I certify that I am 21 years of age, or older, and hereby acknowledge receipt of a copy of this order.’

On the right side of the form, immediately below these clauses and immediately above the signature line, and in 12 point block type, the following appears:

‘CASH OR CERTIFIED CHECK ONLY ON DELIVERY.’

On the left side, just opposite and in the same style type as the two quoted clauses, but in eight point size, this statement is set out:
“This agreement shall not become binding upon the Dealer until approved by an officer of the company.’ The two latter statements are in the interest of the dealer and obviously an effort is made to draw attention to them.

The testimony of Claus Henningsen justifies the conclusion that he did not read the two fine print paragraphs referring to the back of the purchase contract. And it is uncontradicted that no one made any reference to them, or called them to his attention. With respect to the matter appearing on the back, it is likewise uncontradicted that he did not read it and that no one called it to his attention.

The reverse side of the contract contains 8½ inches of fine print. It is not as small, however, as the two critical paragraphs described above. The page is headed ‘Conditions’ and contains ten separate paragraphs consisting of 65 lines in all. The paragraphs do not have headnotes or margin notes denoting their particular subject, as in the case of the ‘Owner Service Certificate’ to be referred to later. In the seventh paragraph, about two-thirds of the way down the page, the warranty, which is the focal point of the case, is set forth. It is as follows:

‘7. It is expressly agreed that there are no warranties, express or implied, made by either the dealer or the manufacturer on the motor vehicle, chassis, or parts furnished heretofore except as follows.

“The manufacturer warrants each new motor vehicle (including original equipment placed thereon by the manufacturer except tires), chassis or parts manufactured by it to be free from defects in material or workmanship under normal use and service. Its obligation under this warranty being limited to making good at its factory any part or parts thereof which shall, within ninety (90) days after delivery of such vehicle to the original purchaser or before such vehicle has been driven 4,000 miles, which ever event shall first occur, be returned to it with transportation charges prepaid and which its examination shall disclose to its satisfaction to have been thus defective; This warranty being expressly in lieu of all other warranties expressed or implied, and all other obligations or liabilities on its part, and it neither assumes nor authorizes any other person to assume for it any other liability in connection with the sale of its vehicles. * * *.” (Emphasis ours.)

After the contract had been executed, plaintiffs were told the car had to be serviced and that it would be ready in two days. According to the dealer’s president, a number of cars were on hand at the time; they had come in from the factory about three or four weeks earlier and at least some of them, including the one selected by the Henningsens, were kept in the back of the shop for display purposes. When sold, plaintiffs’ vehicle was not ‘a serviced car, ready to go.’ The testimony shows that Chrysler Corporation sends from the factory to the dealer a ‘New Car Preparation Service Guide’ with each new automobile. The guide contains detailed instructions as to what has to be done to prepare the car for delivery. The dealer is told to ‘Use this form as a guide to inspect and prepare this new Plymouth for delivery.’ It specifies 66 separate items to be checked, tested, tightened or adjusted in the course of the servicing, but dismantling the vehicle or checking all of its internal parts is not prescribed. The guide also calls for delivery of the Owner Service Certificate with the car.

This certificate, which at least by inference is authorized by Chrysler, was in the car when released to Claus Henningsen on May 9, 1955. It was not made part of the purchase contract, nor was it shown to him prior to the consummation of that agreement. The only reference to it therein is that the dealer ‘agrees to promptly perform and fulfill the terms and conditions of the owner service policy.’ The Certificate contains a warranty entitled ‘Automobile Manufacturers Association Uniform Warranty.’ The provisions thereof are the same as those set forth on the reverse side of the purchase order, except that an additional paragraph is added by which the dealer extends that warranty to the purchaser in the same manner as if the word ‘Dealer’ appeared instead of the word ‘Manufacturer.’

The new Plymouth was turned over to the Henningsens on May 9, 1955. No proof was adduced by the dealer to show precisely what was done in the way of mechanical or road testing beyond testimony that the manufacturer’s instructions were probably followed. Mr. Henningsen drove it from the dealer’s place of business in Bloomfield to their home in Keansburg. On the trip nothing unusual appeared in the way in which it operated. Thereafter, it was used for short trips on paved streets about the town. It had no servicing and no mishaps of any kind before the event of May 19. That day, Mrs. Henningsen drove to Asbury Park. On the way down and in returning the car performed in normal fashion until the accident
occurred. She was proceeding north on Route 36 in Highlands, New Jersey, at 20-22 miles per hour. The highway was paved and smooth, and contained two lanes for northbound travel. She was riding in the right-hand lane. Suddenly she heard a loud noise 'from the bottom, by the hood.' It 'felt as if something cracked.' The steering wheel spun in her hands; the car veered sharply to the right and crashed into a highway sign and a brick wall. No other vehicle was in any way involved. A bus operator driving in the left-hand lane testified that he observed plaintiffs’ car approaching in normal fashion in the opposite direction; ‘all of a sudden (it) veered at 90 degrees * * * and right into this wall.’ As a result of the impact, the front of the car was so badly damaged that it was impossible to determine if any of the parts of the steering wheel mechanism or workmanship or assembly were defective or improper prior to the accident. The condition was such that the collision insurance carrier, after inspection, declared the vehicle a total loss. It had 468 miles on the speedometer at the time.

The insurance carrier’s inspector and appraiser of damaged cars, with 11 years of experience, advanced the opinion, based on the history and his examination, that something definitely went ‘wrong from the steering wheel down to the front wheels’ and that the untoward happening must have been due to mechanical defect or failure; ‘something down there had to drop off or break loose to cause the car’ to act in the manner described.

As had been indicated, the trial court felt that the proof was not sufficient to make out a prima facie case as to the negligence of either the manufacturer or the dealer. The case was given to the jury, therefore, solely on the warranty theory, with results favorable to the plaintiffs against both defendants.

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Francis, J. . . . In assessing [the disclaimer’s] significance we must keep in mind the general principle that, in the absence of fraud, one who does not choose to read a contract before signing it, cannot later relieve himself of his burdens. . . . And in applying that principle, the basic tenet of freedom of competent parties to contract is a factor of importance. But in the framework of modern commercial life and business practices, such rules cannot be applied on a strict, doctrinal basis. . . . The traditional contract is the result of free bargaining of parties who are brought together by the play of the market, and who meet each other on a footing of approximate economic equality. In such a society there is no danger that freedom of contract will be a threat to the social order as a whole. But in present-day commercial life the standardized mass contract has appeared. It is used primarily by enterprises with strong bargaining power and position. "The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood in a vague way, if at all." Kessler, "Contracts of Adhesion—Some Thoughts About Freedom of Contract.” 43 Colum.L.Rev. 629, 632 (1943); Ehrenzweig, “Adhesion Contracts in the Conflict of Laws,” 53 Colum.L.Rev. 1072, 1075, 1089 (1953). Such standardized contracts have been described as those in which one predominant party will dictate its law to an undetermined multiple rather than to an individual. They are said to resemble a law rather than a meeting of the minds. Siegelman v. Cunard White Star, 221 F.2d 189, 206 (2 Cir.1955). . . .

The warranty before us is a standardized form designated for mass use. It is imposed upon the automobile consumer. He takes it or leaves it, and he must take it to buy an automobile. No bargaining is engaged in with respect to it. In fact, the dealer through whom it comes to the buyer is without authority to alter it; his function is ministerial—simply to deliver it. The form warranty is not only standard with Chrysler but, as mentioned above, it is the uniform warranty of the Automobile Manufacturers Association. Members of the Association are: General Motors, Inc., Ford, Chrysler, Studebaker-Packard, American Motors (Rambler), Willys Motors, Checker Motors Corp., and International Harvester Company. Automobile Facts and Figures (1958 Ed., Automobile Manufacturers Association) 69. Of these companies, the “Big Three” (General Motors, Ford, and Chrysler) represented 93.5% of the passenger-car production for 1958 and the independents 6.5%. Standard & Poor (Industrial Surveys, Autos, Basis Analysis, June 25, 1959) 4109. And for the same year the “Big Three” had 86.72% of the total passenger vehicle registrations. Automotive News, 1959 Almanac (Slocum Publishing Co., Inc.) P. 25.
The gross inequality of bargaining position occupied by the consumer in the automobile industry is thus apparent. There is no competition among the car makers in the area of the express warranty. Where can the buyer go to negotiate for better protection? Such control and limitation of his remedies are inimical to the public welfare and, at the very least, call for great care by the courts to avoid injustice through application of strict common-law principles of freedom of contract. Because there is no competition among the motor vehicle manufacturers with respect to the scope of protection guaranteed to the buyer, there is no incentive on their part to stipulate good will in that field of public relations. Thus, there is lacking a factor existing in more competitive fields, one which tends to guarantee the safe construction of the article sold. Since all competitors operate in the same way the urge to be careful is not so pressing. See “Warranties of Kind and Quality,” 57 Yale L.J. 1389, 1400 (1948).

Although the courts, with few exceptions, have been most sensitive to problems presented by contracts resulting from gross disparity in the buyer-seller bargaining positions, they have not articulated a general principle condemning, as opposed to public policy, the imposition on the buyer of a skeleton warranty as a means of limiting the responsibility of the manufacturer. They have endeavored thus far to avoid a drastic departure from age-old tenets of freedom of contract by adopting doctrines of strict construction, and notice and knowledgeable assent by the buyer to the attempted exculpation of the seller. 1 Corbin, supra, 337; 2 Harper & James [Law of Torts], 1590; Prosser, “Warranty of Merchantable Quality,” 27 Minn.L.Rev. 117, 159 (1932). Accordingly to be found in the cases are statements that disclaimers and the consequent limitation of liability will not be given effect if "unfairly procured," . . . International Harvester Co. of America v. Bean, 159 Ky. 842, 169 S.W. 549 (Ct.App.1914); if not brought to the buyer’s attention and he was not made understandingly aware of it . . . or if not clear and explicit. . . .

The rigid scrutiny which the courts give to attempted limitations of warranties and of the liability that would normally flow from a transaction is not limited to the field of sales of goods. Clauses on baggage checks restricting the liability of common carriers for loss or damage in transit are not enforceable unless the limitation is fairly and honestly negotiated and understandingly entered into. If not called specifically to the patron’s attention, it is not binding. It is not enough merely to show the form of a contract; it must appear also that the agreement was understandingly made. . . . The same holds true in cases of such limitations on parcel check room tickets . . . and on storage warehouse receipts . . .; on automobile parking lot or garage tickets or claim checks . . .; as to exculpatory clauses in leases releasing a landlord of apartments in a multiple dwelling house from all liability for negligence where inequality of bargaining exists, see Annotation, 175 A.L.R. 8 (1948). And the validity of release clauses in orders signed by a depositor directing a bank to stop payment of his check, exonerating the bank from liability for negligent payment, has been seriously questioned on public policy grounds in this State. . . . Elsewhere they have been declared void as opposed to public policy. . . .

It is true that the rule governing the limitation of liability cases last referred to is generally applied in situations said to involve services of a public or semi-public nature. Typical, of course, are the public carrier or storage or parking lot cases. Kuzmiak v. Brookchester, 33 N.J. Super 575, 111 A.2d 425 (App.Div.1954); Annotation, supra, 175 A.L.R. at pp. 14-17. But in recent times the books have not been barren of instances of its application in private contract controversies . . .

Basically, the reason a contracting party offering services of a public or quasi-public nature has been held to the requirements of fair dealing, and, when it attempts to limit its liability, of securing the understanding consent of the patron or consumer, is because members of the public generally have no other means of fulfilling the specific need represented by the contract. Having in mind the situation in the automobile industry as detailed above, and particularly the fact that the limited warranty extended by the manufacturers is a uniform one, there would appear to be no just reason why the principles of all of the cases set forth should not chart the course to be taken here.

It is undisputed that the president of the dealer with whom Henningsen dealt did not specifically call attention to the warranty on the back of the purchase order. The form and the arrangement on its face, as described above, certainly would cause the minds of reasonable men to differ as to whether notice of a yielding of basic rights stemming from the relationship with the manufacturer was adequately given. The words “warranty” or “limited warranty” did not even appear in the fine print above the place for
signature, and a jury might well find that the type of print itself was such as to promote lack of attention rather than sharp scrutiny. The inference from the facts is that Chrysler placed the method of communicating its warranty to the purchaser in the hands of the dealer. If either one or both of them wished to make certain that Henningsen became aware of that agreement and its purported implications, neither the form of the document nor the method of expressing the precise nature of the obligation intended to be assumed would have presented any difficulty.

But there is more than this. Assuming that a jury might find that the fine print referred to reasonably served the objective of directing a buyer’s attention to the warranty on the reverse side, and, therefore, that he should be charged with awareness of its language, can it be said that an ordinary layman would realize what he was relinquishing in return for what he was being granted? Under the law, breach of warranty against defective parts or workmanship which caused personal injuries would entitle a buyer to damages even if due care were used in the manufacturing process. Because of the great potential for harm if the vehicle was defective, that right is the most important and fundamental one arising from the relationship. Difficulties so frequently encountered in establishing negligence in manufacture in the ordinary case make this manifest. 2 Harper & James, supra, §§ 28.14, 28.15; Prosser, supra, 506. Any ordinary layman of reasonable intelligence, looking at the phraseology, might well conclude that Chrysler was agreeing to replace defective parts and perhaps replace anything that went wrong because of defective workmanship during the first 90 days or 4,000 miles of operation, but that he would not be entitled to a new car. It is not unreasonable to believe that the entire scheme being conveyed was a proposed remedy for physical deficiencies in the car. In the context of this warranty, only the abandonment of all sense of justice would permit us to hold that, as a matter of law, the phrase “its obligation under this warranty being limited to making good at its factory any part or parts thereof” signifies to an ordinary reasonable person that he is relinquishing any personal injury claim that might flow from the use of a defective automobile. Such claims are nowhere mentioned. The draftsmanship is reflective of the care and skill of the Automobile Manufacturers Association in undertaking to avoid warranty obligations without drawing too much attention to its effort in that regard. No one can doubt that if the will to do so were present, the ability to inform the buying public of the intention to disclaim liability for injury claims arising from breach of warranty would present no problem. . . .

The task of the judiciary is to administer the spirit as well as the letter of the law. On issues such as the present one, part of that burden is to protect the ordinary man against the loss of important rights through what, in effect, is the unilateral act of the manufacturer. The status of the automobile industry is unique. Manufacturers are few in number and strong in bargaining position. In the matter of warranties on the sale of their products, the Automobile Manufacturers Association has enabled them to present a united front. From the standpoint of the purchaser, there can be no arms length negotiating on the subject. Because his capacity for bargaining is so grossly unequal, the inexorable conclusion which follows is that he is not permitted to bargain at all. He must take or leave the automobile on the warranty terms dictated by the maker. He cannot turn to a competitor for better security.

Public policy is a term not easily defined. Its significance varies as the habits and needs of a people may vary. It is not static and the field of application is an ever increasing one. A contract, or a particular provision therein, valid in one era may be wholly opposed to the public policy of another. . . . Courts keep in mind the principle that the best interests of society demand that persons should not be unnecessarily restricted in their freedom to contract. But they do not hesitate to declare void as against public policy contractual provisions which clearly tend to the injury of the public in some way. . . .

[Affirmed.]
BRIEF IN STANDARD CLASSROOM FORMAT

Henningsen v. Bloomfield Motors
Supreme Court of New Jersey
(1960)

Procedural Basis: Certification to New Jersey Supreme Court after jury verdict awarding damages to plaintiff in action for breach of implied warranty of merchantability.

Facts: On May 7, 1955, Plaintiff, Clause Henningsen, purchased a Plymouth automobile from defendant Bloomfield Motors, Inc. The purchase order, which was a printed form, contained 8 ½" of fine print on the back in 6 point type. (The motive of the dealer appears to be de-emphasis of the provisions on the back.) Plaintiff was obligated to sign said document in order to purchase the vehicle. He didn’t read it before he signed it. One of the paragraphs on the back provided, “It is expressly agreed that there are no warranties, express or implied, made by either the dealer or the manufacturer on the motor vehicle, chassis, or parts furnished hereunder except...” for a 90 day/4000 mile warranty that the vehicle is free of defects. The warranty was limited to making good any defective parts. And, it provided, “This warranty being expressly in lieu of all other warranties expressed or implied, and all other obligations or liabilities on its [the dealer’s and manufacturer’s] part...” Virtually every automobile dealer in the country utilized the same contract. Mr. Henningsen gave the vehicle to his wife, Helen Henninsen as a gift (Mrs. Henningsen was also a plaintiff in the law suit but not a party to the purchase transaction). Mr. Henningsen was also a plaintiff in the law suit but not a party to the purchase transaction). On May 19, 1955, while Helen Henningsen was driving down a smooth paved road at about 20 miles per hour, the steering wheel suddenly spun in her hands and the car veered sharply to the right, crashing into a brick wall. The plaintiffs sued both the vehicle manufacturer and the dealer on a theory of breach of implied warranty. On appeal, the defendants asserted the language in the documents as a defense.

Issue: When there is a great disparity in the bargaining power of parties, is it against public policy to enforce provisions in a contract which would limit liability for breach of implied warranty?

Decision: Yes. When there is great disparity in the bargaining power of parties, it is against public policy to enforce provisions in a contract which would limit liability for breach of implied warranty.

The court cannot ignore the general principle that one who does not read a contract cannot later relieve himself of its burdens. But, in the framework of modern commercial life, such rules cannot be applied strictly. The traditional contract is the result of free bargaining between parties of approximate economic equality. The warranty in this case, however, is imposed upon the automobile consumer. He takes it or leaves it. Courts are sensitive to issues where there is a disparity in bargaining power.

Courts also rigidly scrutinize any attempted limitation of warranties. This is especially true when the contracting party is offering services of a public or quasi public nature. In such cases, the stronger contracting party will be held to the requirements of fair dealing and of securing the understanding consent of the consumer.

A jury might well find that the type of print used in this contract was itself such as to promote lack of attention rather than sharp scrutiny. But, even if the plaintiff is charged with the obligation to read the back of the contract, can it be said that an ordinary layman would realize what he was relinquishing in return for what he was being granted? In the context of this warranty, only the abandonment of all sense of justice would permit us to hold that the language at issue signifies to an ordinary reasonable person that he is relinquishing any personal injury claim.

The task of the judiciary is to administer the spirit as well as the letter of the law. Part of that burden is to protect the ordinary man against the loss of important rights. Courts do not hesitate to declare void as against public policy contractual provisions which clearly lead to injury to the public in some way.

Affirmed.
A Bullet Point Brief is an advanced form of briefing. It should only be used when the student has become proficient at drafting briefs in the Standard Classroom Format.

Every single element of the Standard Classroom Format brief can be found in the Bullet Point Brief.1

In the Standard Classroom Format, each element of the brief is written out in prose. If a student is called upon in class to recite a case, the easiest thing to do is to merely read the brief. This is especially so if you are trembling! But, with time, you may become more comfortable with discussion of a case out loud, while the rest of your classmates look on hoping you will make a mistake.

You may become so confident that you do not even need to write out the brief in full. Instead, you may simply be able to write down the most important points and use your list of points as a guide to present an ad lib summary of the case.2

The foregoing is all there is to know about Bullet Point Briefs. When, and IF, you feel ready, simply recite your brief to the class from your list of important points.
Facts:

- Husband purchased car from dealership
- Printed contract had provisions on back in small type
- Effect of provisions was to limit liability for defective parts to replacement
- Every dealer used same contract
- Wife injured when steering wheel spun in her hands and car swerved sharply crashing into wall.
- Suit based on breach of implied warranty

Issue:

- When there is a great disparity in the bargaining power of parties, is it against public policy to enforce provisions in a contract which would limit liability for the breach of implied warranty?
- Yes
- Contracts should be the result of free bargaining
- Here, great difference in bargaining power
- Automobile dealers impose this contract on consumers
- Limitations on warranties are scrutinized
- Stronger party must demonstrate fair dealing and securing of understanding of consumer
- Against public policy to allow limitation of liability
- Affirmed
When you get really, really cocky, you can stop writing out briefs altogether. [For that matter, you can stop going to class.]

Book briefing is nothing more than highlighting the important points in an opinion as you read it. You do not write out a separate brief. Almost certainly you will use a highlighter to emphasize important points as you read, regardless of the briefing method employed. Book briefing simply takes highlighting one step further.

After reading and marking all of the important points in an opinion, the book briefer goes back over the case and locates the basic elements normally used in the standard brief. For example, he or she may first look for the facts. Then, one highlights (usually with a different color of highlighter) sufficient facts to refresh one’s memory concerning all of the facts. Finally, students using this method usually mark the margins of the book to indicate which element of the brief appears in that portion of the opinion. For example, an “F” is placed in the margin to indicate that “Facts” appear in the opinion at that point.

The markings used in the margins are usually as follows:

<table>
<thead>
<tr>
<th>Marking</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>“P”</td>
<td>Procedural Basis</td>
</tr>
<tr>
<td>“F”</td>
<td>Facts</td>
</tr>
<tr>
<td>“I”</td>
<td>Issue</td>
</tr>
<tr>
<td>“R”</td>
<td>Rule</td>
</tr>
<tr>
<td>“D”</td>
<td>Decision/Rationale</td>
</tr>
</tbody>
</table>

If one uses the foregoing method of briefing, he or she must be prepared to recite a summary of the case merely by glancing over his or her notes in the casebook. If you are called upon in class to recite the rule of the case, you must quickly flip through the pages to find the “R” and then state the rule. This requires special skills and it is not for everybody. In fact, book briefing is not generally recommended. It is explained here only in the interest of being thorough [and because we know that you will do it even if we say not to].

There are a many problems with using a book brief. If you attempt this method of study, you will have to learn those problems for yourself. It would be virtually impossible to articulate all such difficulties. For example, the opinion may not state all of the elements that should be in the brief. In *Henningsen v. Bloomfield Motors* the court does not state the issue. Accordingly, one cannot highlight the issue in the opinion. Thus, the book briefer will either not have an issue available or he will have to write it out in longhand. When you review our sample book-briefed case, you will note that elements of the brief are missing. Similarly, the way the court phrases a statement may be different than the way you would want to state it in class. If you do this kind of briefing, you must be prepared for such handicaps.

Everybody briefs a case differently. Do not be upset if you would have chosen different words or concepts to discuss. Also, do not be concerned if you would have highlighted different portions of the opinion. It’s all within your discretion.
CONCLUSION

ABOUT HIGH COURT™ CASE SUMMARIES

Without a doubt, you have your work cut out for you over the next three years.

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1. **Each brief includes an extensive analysis of the case.** There is no other single source to obtain as much specific information about a specific case as is available in a High Court™ Brief. This will help you immensely in appreciating and understanding the relevance and importance of each case to the course and in preparing you for classroom discussion.

2. **Each brief contains numerous memory aids.** You won’t find what we provide in our product in any other legal study aid. We give you pictures, mini briefs and lots of helpful tools to remember what the case is about. Our briefs help you focus on the precise rule of the case (through the use of the “Black Letter Rule” section). And, we highlight the importance of the case to the course in our headnote.

3. **Each brief contains relevant vocabulary words.** Virtually every case you read will contain words that you will need to look up. But, why bother? Most of the difficult legal, Latin and English words that are found in each case are defined right on the brief page for immediate access.

4. **The briefs are written with YOU in mind.** In our briefs, we try to be entertaining (something like we attempted with this article). They are available to you in computer format. We introduce you to difficult legal topics in the beginning of each chapter with our perspective section. We provide you with an organizational outline which demonstrates the relationship of each of the major cases to the course. Generally, we try to make the study of law as easy and stressless as possible. Try one, you’ll like it!

Now, we set you free to encounter and enjoy the world of our legal system. Few experiences in life will be as challenging as law school. We hope that this article has assisted you with your first challenge, “How To Brief A Case.”

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The GPSolo Guide to Opening a Law Office

By Jocelyn Frazer, Nerino J. Petro Jr.

Jocelyn Frazer is the equity ombudsperson and practice advisor for the Law Society of Alberta. Nerino J. Petro Jr. is the practice management advisor for the State Bar of Wisconsin.

So you are thinking of opening your own office? Before you take this bold step, you need to ask yourself: Are you prepared? Do you understand the challenges that you face? Do you understand yourself? Being a sole practitioner entails more than just being good at the law and understanding how to file a complaint or argue before a judge. You also have to understand how to start and run a business. To succeed, you must be a savvy business person, negotiator, and bookkeeper all while being a good lawyer.

Realistically Evaluate Your Situation
First, you need to understand yourself. Are you an entrepreneur? Are you willing to take a risk? Have you considered what it will take to run your own office by thinking about your budget, equipment, marketing, and keeping your doors open while you build your practice? Can you balance a checkbook and deal with demands on your available funds? Do you see yourself as a self-starter, comfortable with managing competing demands, multiple deadlines, and doing it all yourself? Or are you more of a social animal, feeding off the energy of others and most effective where you have a team approach to various tasks? Your personal attributes will help direct you into the right type of practice and setting. Think about the type of environment that will make you most effective. Will you function best as a true solo with no support staff, or would you benefit from a less solitary office with someone to assist you from the first day?

You must be realistic and honest with yourself. Critically evaluate your strengths and weaknesses. It isn’t enough simply to know the law and have the desire to share your knowledge. To run a successful law practice, you must have, or at least be willing to learn, strong business skills. You will need to possess the ability to take the appropriate actions, on a day-to-day basis, to initiate and sustain the progress of your business. You need to be prepared to forgo regular paychecks, work harder than you ever have before, and not only be a lawyer but also be a person. You need to recognize that solo or small firm practice is not for everyone.

Develop a Plan and Get Some Advice

If you are still undeterred and are satisfied that you have the necessary business acumen, you will need a clear vision of what you want your practice to be and an idea of how you are going to get there. Is this a temporary solution to a current situation? Are you hoping to grow your firm to include multiple support staff persons and, perhaps, other attorneys over time? Or possibly start a series of satellite offices? Do you eventually hope to join another existing practice? Do you intend to run a general practice or specialize in only a specific area? Are you an innovator, dreaming of revolutionizing the practice of law?

Next, think about the types of clients you want to attract. Who are your ideal clients? What are the attributes they possess that make them likely prospects for your assistance? Think of identifying your ideal prospect as being able to spot a zebra in a herd of horses: When you know what you are looking for in prospective clients, they will stand out from others.

If you believe that solo practice is the right choice, then you need to decide what this practice will look like and develop a plan to build it. The plan doesn’t have to be 30 pages with subsections and appendices; it can be as simple as a single piece of paper at this point. If you take the time to write down your vision—where you want to be in six months, one year, and five years—it will help you focus your ideas. Knowing where you want to end up makes reaching your destination easier.
Now you need to develop a solid business plan that will drive many of the other decisions that you make in starting up. Having an idea of the area of law you intend to practice, the nature of the work that will entail, and who are your target clients will help complete other sections of the plan as you write it. Identifying your ideal client will also help you develop a marketing strategy to attract that business and form the basis of your financial plan. Things you will need to consider when drafting your business plan include:

1. What type of entity will you use for your practice? Today, you have a number of choices when it comes to how you structure your law firm. The two primary considerations when determining an operating structure are (1) what is the best structure to shield yourself from personal liability (not including malpractice) and (2) which structure best addresses the foreseeable tax consequences of your practice? Think through the liability and business implications of the various entity types that are suitable for your practice, whether a sole proprietorship, partnership (if you are going into practice with another attorney), PC, SC, Law Corp., P.A., LLC, or some other recognized form of limited liability incorporated entity.

Take the time to get some accounting advice to help you determine the operating structure to select. Talking to an accountant before you select the entity type can save you money as your practice becomes successful.

Determine whether there are any restrictions on the type of structure that you choose. For example, there may be statutory restrictions in your governing rules that prevent you from partnering with non-lawyers or using an LLC or other form of limited liability entity as a way to avoid personal liability.

2. What will you need for an office? Most start-up businesses are faced with financial choices to make when getting off the ground. One of the major decisions is whether or not you can practice initially out of your home or if you will need dedicated office space. While having dedicated office space is nice if you meet regularly with clients, being able to forgo this expense when you start can make a huge difference to your bottom line and the start-up capital you will require. Working from your home is a good way to keep your overhead low in the start-up phase. This also allows you to focus your budget on critical items such as a marketing plan and acquiring the necessary technology to make you effective and efficient.

Consider whether you want to work from home, at least initially, or develop more of a “virtual” office. (For more, see “Launching a Virtual Law Firm.”) You may want to lease space from an executive office suite provider such as Regus (regus.com), Premier Business Centers (pbccenters.com), or Instant (instantoffices.com); establish a more traditional office in a commercial building; or share an office with another attorney or firm. Ask yourself whether you need a dedicated office in the traditional sense or whether other options may work while you build your client base. Obviously, it is less expensive to work from home, but security or professional isolation may be a concern for you. Some lawyers arrange to meet clients at the courthouse, at the client’s home or business, or at a local coffee shop (confidentiality is obviously a concern with this approach). Others make arrangements with attorneys or other businesses to rent conference rooms from these established offices on an as-needed basis. The reality is that there are many creative solutions to this and no single right answer.

If you do decide that you need a physical office, how much space do you need? Where do you want to be located? Different areas of practice may also impact where you want to be. With a litigation practice, you may want to be close to the courthouse or near public transit to make access easier for you or your clients. If you are focusing on transactional legal work, perhaps you want to be located in the suburbs or other areas so as to be more accessible to where your clients work or live.

Determining how much space you need is not an exact science. If you are working from your home, your space needs are different than if you are renting space elsewhere, and where you will be meeting with clients will influence this decision as well. If practicing from your home, you need dedicated “work” space as differentiated from your “living” space—not only to preserve your mental health but also to meet the ethical requirements of safeguarding client information. The differentiation is also important for tax.
purposes. To claim a home office deduction, the Internal Revenue Service (IRS) requires that you must regularly and exclusively use a part of your home as your principal place of business. (For more, see 1.usa.gov/1duAA6i.)

If you determine that your practice needs distinct office space outside your home, you need to determine if there will be a meeting room available, kitchen or break room, storage space, and room for an assistant if you need one. Think in terms of square feet when considering office space. If you will meet with clients in your office, it should be larger than if you will meet with clients in a conference room or other location. If you plan to have an assistant, how many square feet should be reserved for this person? You also need to remember that your costs will generally be based on the amount of space you use, so the larger the space, the higher your rent will be. (About.com has a number of useful articles to help you plan for your office space needs: abt.cm/1duBcZJ and abt.cm/1duBkbw. A helpful worksheet created by Guidance Corporate Realty Advisors can be found at bit.ly/1duBnUP. Another useful resource can be found on the How Stuff Works website: bit.ly/1duBz6i.)

Check your code of professional conduct to understand your obligations with respect to protecting client confidentiality and space-sharing arrangements.

3. What will you need for technology? Think about what you really want to accomplish and what your comfort level is with technology. The possibilities in terms of equipment and applications are virtually endless. As with everything else, know your objectives and your limitations. Unless you are very tech savvy, you should get some advice from an expert. Think about how much you want to do yourself and how much you are capable of maintaining. At the very least, you need a telephone, Internet access, computer, something to back it up, and probably a printer. Key programs for word processing, timekeeping, billing and accounting, e-mail, contact, and calendar management would also form a simple foundation. Beyond that, your decisions will again be influenced by your practice objectives and your budget. Consider whether you want to develop a paperless (or less paper) system—start-up is an excellent time to consider entrenching a digital backup system for all files and documents that come into your possession. (For more, see “Start-Up Tech for Any Budget” and “How to Start and Run a Paperless Office.”)

Creating Your Financial Plan and Your Budget

Next you need to develop a cash flow plan and budget. You will use your cash flow plan and budget to help adjust your operations as you grow your practice. They will serve as your road map for getting to a successful practice and provide benchmarks to monitor your progress. It is critically important to understand your cash flow requirements, your regular monthly expenses, your potential sources of revenue, and what will you live on until you begin to generate a reliable income. Do you have an existing client base that will generate immediate income for you, or will you need to draw on funds from other sources?

Many lawyers hear the words “financial plan” or “business plan” and envision lengthy documents with pages and pages of details. This often results in paralysis as they feel overwhelmed trying to create the plan. A key thing to remember is that a business plan doesn’t need to be complex and cover everything in extreme detail. This is an instance where following the KISS principle (“keep it simple, stupid”) is a benefit. Generally, a business plan will consist of a number of parts such as:

- Executive summary
- Firm description
- Scope of services
- Market analysis
- Marketing plan
- Financial projections
- Operating plan

One recommendation is to break the different segments of your business plan into a number of mini-plans (e.g., your marketing plan will be a mini-plan that can stand on its own). Fortunately, you do not
have to recreate the wheel to draft a business plan: There are numerous resources online and in print that can make this process easier. The U.S. Small Business Administration (SBA) has a number of articles and resources, including a step-by-step tool to write a business plan (tinyurl.com/9x83dkk). Inc. magazine has posted an online “Business Plan Checklist” (tinyurl.com/knw4z6t), and you can find sample law office business plans on sites such as bit.ly/1a7hxaO, bit.ly/1a7hID3, and bit.ly/1a7hKL4.

Whether your initial capital investment comes from your own personal savings, loans from family and friends, credit cards, or a line of credit, you will need to establish a budget for your initial start-up. Obviously, the size of your budget will dictate the complexity of your initial set-up. Capital expenditures such as furniture, equipment (computer, software, scanner, copier, printer, telephone, fax, filing cabinets, postage scale and meter), and potentially tenant improvements will depend on your practice setting. (See “Start-Up Tech for Any Budget” for more.) Consider to what extent your smartphone or tablet can substitute for a landline, laptop, copier, or scanner—at least for a while. Consider whether you will purchase, lease, or rent your office equipment (this is probably something to discuss with your accountant). Other operating expenses associated with start-up will continue on a regular, recurring schedule: office supplies, license, membership and insurance dues, utility expenses for heating, cooling, water, garbage disposal, insurance, taxes, etc. They need to be included in your budgeting process.

The information in Table 1 (Sample Expense Calculation) is needed to help you determine what you are going to charge for an hourly rate, if that’s how you will bill.

When you've established your hourly rate, you need to divide your monthly fixed expenses by this hourly rate to determine the minimum number of hours you will need to bill simply to cover your fixed expenses. Using Table 1’s monthly total of $1,200 and dividing it by an hourly rate of $150 per hour would result in the calculation shown in Table 2 (Number of Billable Hours to Cover Fixed Expenses).

Therefore, you would need to bill a minimum of eight hours each month just to cover your fixed expenses. If you're not sure what an expense will be, you can often discover approximate amounts easily by talking to fellow attorneys, getting price quotes from service providers, and making an educated guess in some circumstances. This number is not meant to be exact but to give you an idea of what you'll need to make just to cover your fixed expenses. You will have expenses above these for such things as office supplies, mailing, and copy expenses, and no amount was included for equipment or other purchases. These will also have to be taken into consideration. Generally, for such things as office equipment and technology purchases, you will create a budget and spread it over two to five years.

With a view to the image that you want to create, decide how you want to convey that image to your target audience. You also will want to spend some time developing a website—this doesn’t have to be extensive at first, but it is a very important element in your marketing plan and requires time to design.

There are a number of resources to assist you in creating a marketing plan for your firm. Your initial plan can be as simple as a single page with the marketing efforts you will make daily, weekly, monthly, and annually. If you are starting a new practice and do not have an existing base of clients, marketing your firm will be critical to early success. You may want to include hiring a legal marketing provider in your budget. Firms such as AttorneySync (bit.ly/1a7iik9) provide manuals for creating a marketing plan. You can also see a number of sample marketing plans for lawyers at bit.ly/1a7ipwe. Stephanie Francis Ward's helpful ABA Journal article "50 Simple Ways You Can Market Your Practice” (July 1, 2013, bit.ly/1a7iAYa) provides some great tips for marketing your practice.

**Regulatory Requirements**

There are a number of resources to assist you in creating a marketing plan for your firm. Your initial plan can be as simple as a single page with the marketing efforts you will make daily, weekly, monthly, and annually. If you are starting a new practice and do not have an existing base of clients, marketing your firm will be critical to early success. You may want to include hiring a legal marketing provider in your budget. Firms such as AttorneySync (bit.ly/1a7iik9) provide manuals for creating a marketing plan. You can also see a number of sample marketing plans for lawyers at bit.ly/1a7ipwe. Stephanie Francis Ward's helpful ABA Journal article “50 Simple Ways You Can Market Your Practice” (July 1, 2013, bit.ly/1a7iAYa)
provides some great tips for marketing your practice.

Regulatory Requirements

Check with your local bar association to determine the licensing requirements that have to be met.

Depending on your location, you may or may not be required to belong to your state bar association or legal society. However, all jurisdictions require that you maintain your license with the regulatory arm of the U.S. Supreme Court. States such as Wisconsin, Oregon, and others make membership in the state bar association a mandatory requirement to practice law there. This is also true for Canada and their law societies (their equivalent of our state bar associations). You need to ensure that you comply with the regulatory requirements for the jurisdiction(s) where you will practice. If you are going to use a limited liability entity such as an LLC, you may also need to register the entity as well as yourself. It is these same regulations that will determine whether or not you must maintain errors and omissions (E&O) insurance. In the United States, we commonly refer to this as malpractice insurance.

The majority of states in the United States do not require mandatory malpractice insurance, but a growing number do require that lawyers disclose whether or not they have malpractice insurance. In many states, to limit malpractice liability between lawyers in a firm operating as a limited liability entity, the firm must maintain malpractice in the amounts set forth in the rules of the jurisdiction. For example, Wisconsin Supreme Court Rule 20:5.7 (bit.ly/18WeKVJ) requires a firm of one to three lawyers to maintain a combined indemnity and defense cost coverage of $100,000 per claim and $300,000 aggregate combined indemnity and defense cost coverage per policy period. So make sure to check with your local rules to ensure that you are in compliance. (For more, see "Attorney Malpractice Insurance: Who’s Got Your Back?")

It is also important to understand the qualifications you have to meet if you want to operate a trust account. If you are going to accept funds for advanced fees or costs or funds that belong to someone else other than yourself, you will need to establish a trust account. This is often referred to as an IOLTA (Interest on Lawyers Trust Account) account. You will find the requirements in your rules and may have a state organization that operates these accounts, such as the Wisconsin Trust Account Foundation, Inc. (wistaf.org), or the Florida Bar Foundation (flabarfndn.org/iota).

Determine whether your municipality requires you to obtain a separate business license.

You will also need to consider whether there are any rules that restrict you in terms of business/mailing address requirements or obligations with respect to how you name your firm and whether you need to register a trade name. Review your code of professional conduct in terms of advertising guidelines. (For more, see "Ethics Perils of Opening a Law Office.")

In addition to professional liability coverage, there are many other types of insurance that can protect you and your practice in various circumstances. Depending on your personal situation, consider the applicability of the following:

- Public liability and/or tenants liability coverage
- Property insurance (all perils)
- Auto and home (business use)
- Business interruption, valuable papers
- Life and short- and long-term disability insurance
- Fraud coverage

You will also need to obtain your Employer Identification Number (EIN), sometimes referred to as a Taxpayer Identification Number (TIN), whether you operate as a sole proprietorship or a PC, LLC, or other limited liability entity. In the United States, you can apply for your EIN online on the IRS website at 1.usa.gov/18WhpPa.
Solo, but Not Alone
Starting up a new business is an exciting and also somewhat daunting process—like everything else in life, being your own boss has its rewards and its headaches. It is important to develop a network of other professionals to whom you can turn for support. And probably most important of all, find a friend, a mentor, or a sounding board that you can rely on for objective feedback—or just a shoulder to cry on. There is also a great wealth of information available through the ABA and your state bar association or law society. Be sure to leverage the resources available to you at your local law practice management program or practice advisors.

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