

Contents

B. Examples: Common Law Crimes and the Tort of Negligence	26
C. Common Law in Constant Change	28
Exercise 3-1	29
 Chapter 4 Legislation	 33
I. Roles of Constitutional and Statutory Law	33
A. Example: Embezzlement	34
B. Example: Consumer-Protection Legislation	34
C. Increasing Significance of Legislation	35
II. Judicial Interpretation and Application of Statutes	35
A. Vagueness and Ambiguity	35
B. Interpretation Through Intrinsic and Extrinsic Evidence of Legislative Intent	36
C. Approaches to Statutory Interpretation	37
D. Originalism v. Living Statutes	38
E. Statutory Construction When Interpretation Fails	40
III. Case Studies in Statutory Interpretation	40
A. Illustration: Imprecision Leading to Ambiguity	40
1. The Problem	41
2. Intrinsic Evidence	41
3. Extrinsic Evidence	41
4. Second Thoughts in Some Federal Courts of Appeals	42
5. The Supreme Court Decides, with a Focus on Text	43
B. A Second Illustration: Generality Resulting in Vagueness	44
Exercise 4-1	46
IV. Legislative Enactment and Change	47
Exercise 4-2	48
V. Interplay between Legislation and Common Law	49
A. Relationship between Legislation and Common Law	49
1. Legislative Primacy	49
2. Legislation as Guidance for Common Law	50
3. Common Law as Background for Legislation	50
B. Judicial Power and Limitations Regarding Legislation	51
 PART III LEGAL METHOD AND ANALYSIS	 57
 Chapter 5 The Role of Precedent: The Court System and Stare Decisis	 59
I. Introduction to Stare Decisis	59
II. The Court System	60
A. Structure of State, Federal, and Tribal Courts	60
1. State Courts	60
2. Federal Courts	61
3. Tribal Courts	62
B. Court Structure and Stare Decisis	63

Contents

III.	Scope and Application of Stare Decisis	63
A.	Building a Wall of Case Law, Brick by Brick	63
B.	Analogizing and Distinguishing Precedent	64
1.	An Inexact Science with Ample Room for Argument	64
2.	Gaining Comfort with Legal Uncertainty	66
3.	Example: Warrantless Searches of Cars, Houses, and Mobile Homes	67
C.	Overruling Precedent	68
1.	Standards for Departing from Normal Application of Stare Decisis	68
2.	Changes in Social and Legal Context	69
3.	Abandonment of Erroneous or Unworkable Precedent	70
4.	Flexible Application of Stare Decisis to Constitutional Issues	70
	Exercise 5-1	72
	Exercise 5-2	74
Chapter 6	Deductive Reasoning and IRAC—Introduction to Legal Analysis	85
I.	Overview—Solving Legal Problems	85
II.	Overview of Deductive Reasoning and IRAC	86
A.	Deductive Reasoning in the Law—Uses and Limitations	86
1.	The Legal Syllogism	86
2.	Validity and Correctness of Legal Syllogisms	87
3.	Limitations of the Legal Syllogism	88
B.	IRAC—The Analytical Paradigm	89
III.	“ <i>I</i> ”—Identifying Issues for Analysis	91
A.	Defining Issues	91
1.	Issues and Subissues	91
2.	Continuing Development of Issues	92
3.	Materiality	93
	Exercise 6-1	93
B.	Scope of Analysis	94
1.	Exam Answers	95
2.	Office Memoranda	95
3.	Briefs	95
IV.	“ <i>R</i> ”—Formulating the Legal Rule	96
A.	Types of Rules: Elements, Factors, and Balancing Tests	96
B.	Sources of Authority	97
1.	Primary and Secondary Authority	97
2.	Jurisdiction in Which Primary Authority Controls	98
3.	Hierarchy of Constitutional, Legislative, and Common Law Authority	99
4.	Strength of Case Law as Precedent	99
a.	Level of Court	99
b.	Controlling, Analogous, and Distinguishable Authority	100

5. Summary	101
Exercise 6-2	101
C. Analysis of Legal Standards	103
1. Depth of Analysis	103
2. Hierarchy of Authority: Start with Constitutional or Statutory Text	104
3. Policy Analysis	105
Exercise 6-3	106
4. Recognizing Arguments for Both Sides	106
Exercise 6-4	107
5. Synthesis of Incremental Law	108
6. Reorganization of Notes: Synthesis as a Bridge to Outlining	110
7. Synthesis as a Step in Deductive Reasoning	110
Exercise 6-5	111
V. “A”—Application of Law to Facts	113
A. Basic Patterns	113
B. Developing Arguments for Both Sides	114
Exercise 6-6	116
VI. “C”—Reaching Conclusions	116
Exercise 6-7	117
PART IV PREDICTIVE WRITING—THE OFFICE MEMORANDUM OF LAW	123
Chapter 7 The Office Memorandum of Law	125
I. Overview	125
A. Oral Report, Email Memo, or Full Office Memorandum?	125
1. Oral Report	126
2. Traditional Office Memorandum of Law	127
3. Streamlined Email Memo	127
4. Pedagogic Focus on Traditional Office Memoranda	128
B. Traditional Office Memorandum: Audience, Purpose, and Perspective	129
1. Audience and Purpose	129
2. Perspective	129
C. Mastering the Assignment	130
D. Research Strategy	131
E. Reorganizing and Outlining Your Research Notes	133
II. Alternative Formats for a Traditional Office Memorandum	134
A. Choices	134
B. Format A: Effective for Multi-Issue Memoranda	135
1. Ordering the Elements to Aid Comprehension	135
2. Facts in Different Places to Perform Different Tasks	135
a. Example: Narration of All Essential Facts in Action for Breach of Contract	135

Contents

b.	Example: Analysis of Facts Relevant to Each Issue in the Discussion Section	136
3.	Conclusions in Different Places to Perform Different Tasks	136
4.	Overlapping Sections Are Like Actors Returning to Play Different but Complementary Roles	137
C.	Format B: For Especially Complex Cases	137
D.	Format C: A Slightly Streamlined Approach for a Full Memorandum	138
E.	Flexibility and Adaptation	138
III.	Elements of an Office Memorandum	139
A.	Issues—Identification and Expression	140
1.	Review	140
2.	Example: Identifying Issues in a Title VII Suit	140
3.	Expressing Issues with Particularity	141
B.	Brief Answer	142
C.	Facts	143
D.	Discussion	144
1.	Introducing Your Analysis	144
2.	Analyzing the Law and the Facts	146
a.	Example: Statutory Analysis	146
b.	Example: Established Common Law	149
c.	Rule Synthesis and Illustration	151
d.	Drawing Analogies in the Fact Analysis	153
E.	The Conclusion	154
	Sample Office Memoranda and E-memos	155
Chapter 8	Organization of Office Memoranda and Briefs	175
I.	Format	176
II.	Relationships among Multiple Issues and Subissues	176
A.	Proper Relationships among Topics	176
B.	Order of Topics	179
1.	Logical Organization in an Office Memorandum	179
2.	Strategic Organization in a Brief	179
3.	Discussing or Arguing the Full Range of Issues	180
C.	Technique	180
III.	Progression within Section or Subsection	180
A.	Hierarchy of Authority	181
B.	Progression from General to Specific	182
C.	Progression from Fundamental to Complex	184
D.	Separation or Consolidation of Analyses	185
1.	Overview—IRAC in Context	185
2.	Single Syllogism in Undivided Section	187
3.	Separation of Elements of Single Syllogism into Multiple Subsections	188

4.	Multiple Syllogisms within a Single, Undivided Section	189
a.	Separation of Multiple Syllogisms	189
b.	Consolidation of Multiple Syllogisms	190
c.	Discretion to Separate or Consolidate	191
5.	Summary	193
IV.	Paragraphs	194
A.	The Role of Paragraphs within a Section	194
B.	Paragraph Content and Development	194
C.	The Role of Sentences within a Paragraph	196
1.	Paragraph Length	196
2.	Beginning with a Thesis Sentence	197
3.	Logical Organization within a Paragraph	197
4.	Substantive Transition (“Dovetailing”) within a Paragraph	198
Chapter 9	Legal Writing Style in the Office Memorandum	201
I.	Clarity	202
A.	Simplicity and Plain English	202
Exercise 9-1		203
B.	Sentence Structure	204
1.	Structuring and Punctuating Long or Complex Sentences	204
a.	Closure through Punctuation	205
b.	Repetition of Prepositions or Other Linking Words or Phrases	207
c.	Complex Series	208
d.	Toward a Flexible, Policy-Oriented Approach to Punctuation	209
Exercise 9-2		213
2.	Concrete Verbs and Active Construction	214
a.	Concrete Verbs	214
b.	Active and Passive Construction	215
Exercise 9-3		218
3.	Effective Placement of Modifiers	218
Exercise 9-4		220
4.	Restrictive and Nonrestrictive Clauses	220
a.	The Role of the Comma	220
b.	The Choice between “That” and “Which”	223
c.	Procedural Labels	225
Exercise 9-5		226
C.	Precision	226
1.	Careful Expression of Analysis	226
2.	Beyond Dogma	228
II.	Concise Writing	229
A.	Content: Scope and Depth of Analysis	230
1.	Scope of Analysis	230
2.	Depth of Analysis	231

Contents

a.	Depth of Analysis of Legal Authority	231
b.	Incomplete Syllogisms	234
B.	Form: Efficient Organization, Sentence Structure, and Phrasing	234
1.	Organization and Repetition	234
2.	Sentence Structure and Phrasing	235
a.	Repetition	235
b.	Verb Structure	236
c.	Implicit Information	236
d.	Tension between Clarity and Concision	237
	Exercise 9-6	238
III.	Review and Revision	238
Chapter 10	Signaling, Presenting, and Quoting Authority	243
I.	Citation Signals	244
A.	No Signal	244
B.	“See”	244
C.	“Accord”	245
D.	“See generally”	246
E.	“Cf.” and “Compare ... with”	246
F.	“See also”	247
G.	“But” and “Contra”	249
H.	“E.g.”	249
	Exercise 10-1	250
II.	Presenting Your Authority Effectively	252
A.	Subordinating Your Citations	252
1.	Citation Clauses and Sentences	252
2.	In-Depth Case Analysis	254
B.	Synthesis of Case Law	255
1.	Lack of Synthesis Burdens the Reader	255
2.	The Benefits of Expressing Your Synthesis	256
3.	Parallels to Effective Study Techniques	258
4.	Consolidated Statement of Synthesis	259
C.	Citation within a Citation	260
III.	Quotations	260
A.	Using Quotations Selectively	260
B.	Presenting and Introducing Quotations	262
1.	Presenting Block Quotations	262
2.	Using Substantive Introductions While Subordinating Citations	262
	Exercise 10-2	264
Part V	INTRODUCTION TO ADVOCACY	267
Chapter 11	Advocacy: Overview and Ethics	269
I.	Overview—Procedure and General Format	269
A.	Procedure	269
B.	Basic Formats for Briefs	270

Contents

C. Advocacy in an Adversarial System	271
II. Good Faith, Reasonableness, and Full Disclosure	271
A. Assertion of Claims and Defenses	271
B. Disclosure of Adverse Authority	272
C. Misleading Legal Argument	273
Chapter 12 Developing Your Legal Arguments	277
I. Engaging the Reader with an Effective Theme	277
II. Organizing Your Arguments	280
A. Selecting Arguments	280
1. Include Only Arguments That Earn a Place in Your Brief	280
2. Consider Your Reader's Burdens	281
3. Presenting Alternative Arguments	281
B. Determining the Order of Your Arguments	283
1. Leading with Your Strongest Argument	283
2. Special Considerations for Responsive Briefs	284
a. Responding but Still Leading with Your Strongest Argument	284
b. Delayed Analysis of Adverse Authority in a Responsive Brief	284
C. Internal Organization: Deductive Arguments	286
III. Introducing Legal Arguments	286
A. Point Headings	286
B. Paragraphs	288
IV. Developing the Deductive Argument	289
A. Arguing the Law	289
1. Hierarchy of Authority	289
2. Strength of Case Law as Precedent	291
3. Depth of Analysis	294
4. Elements or Factors in Legal Rules	295
5. Presenting and Framing Your Authority	298
B. Analyzing the Facts	299
C. Conclusions	300
Chapter 13 Expressing Your Advocacy: Persuasive Writing Style and Oral Argument	303
I. Persuasive Writing Style	303
A. Persuasive Language	304
1. The Adversarial Approach	304
2. Clichés That Weaken or Offend	305
3. Personal Attacks	307
B. Persuasive Facts	307
C. Sentence Structure	308
D. Introducing Block Quotations	309
Exercise 13-1	311
II. Oral Argument to the Court	312
A. General Format	312

Contents

B.	Formality and Demeanor	313
C.	Content of the Argument	314
1.	Introducing Yourself and Your Argument	314
2.	Body of the Argument	315
a.	General Strategy	315
b.	Using the Facts	316
c.	Responding to Questions	316
3.	The Conclusion	317
D.	Nervousness and Verbal Stumbling	317
Part VI	PRETRIAL ADVOCACY—PLEADINGS AND MOTIONS	321
Chapter 14	Pleadings and Motions to Dismiss	323
I.	The Complaint	323
A.	Overview: Format and Content	324
B.	Jurisdictional Statement	324
C.	Claim for Relief	325
1.	Allegations of Fact and Citations to Law	326
2.	Substance of Allegations	327
3.	Specificity of Fact Allegations: General Notice Pleading and Plausibility	328
D.	Request for Relief	330
E.	Style and Organization	330
1.	Writing Style	330
2.	Organization	331
II.	The Answer	332
A.	Admissions and Denials	332
B.	Affirmative Defenses	333
C.	Counterclaims	334
III.	Motion to Dismiss	334
A.	Standards and Procedure	334
B.	Format	335
1.	The Motion	335
2.	The Supporting Brief	336
	Exercise 14-1	336
	Exercise 14-2	343
Chapter 15	Motion for Summary Judgment	349
I.	Procedural Context	349
II.	Standards for Summary Judgment	350
III.	Format for Summary Judgment Briefs—Overview	352
IV.	Statements of Facts	352
V.	Supporting Evidentiary Materials	355
VI.	The Motion	356
VII.	The Brief	358
A.	The Introduction	358
B.	The Argument	359

Contents

	C. The Conclusion	360
	Sample Motion for Summary Judgment	360
Chapter 16	Motion to Exclude Evidence Before Trial	377
	I. Pretrial Exclusion of Evidence	378
	II. Format	378
	III. The Motion	378
	IV. The Brief	379
	A. The Introduction	380
	B. The Argument	381
	1. Legal Rules	382
	2. Application of Rules to Facts	382
	C. The Conclusion	383
	Sample Motion in Limine	384
Part VII	APPELLATE BRIEF	389
Chapter 17	Standards of Appellate Review	391
	I. The Record on Appeal	391
	II. Standards of Review in the Federal Courts	392
	A. Overview	392
	B. Restricted Appellate Review of Findings of Fact	393
	1. Review of Jury Findings	393
	2. Review of a Judge’s Findings of Fact	394
	C. Conclusions of Law: Mixed Conclusions of Fact and Law in a Nonjury Trial	395
	1. Review of Discretionary Rulings	396
	2. Mixed Findings as Predominantly Fact or Law	396
	3. Constitutional Facts Doctrine	397
	Appellate Standards of Review	397
Chapter 18	The Brief—Effective Appellate Advocacy	401
	I. Overview of Appellate Briefs: Formats and Filing	401
	A. Components of the Opening Brief	401
	B. Components of Answering and Reply Briefs	404
	C. Formatting and Other Formal Requirements	404
	D. Filing the Brief in Hard Copy and Electronically	404
	II. Statement of Issues	404
	A. Issue Statements as Preliminary Advocacy	405
	B. Credibility of the Advocate	406
	III. Statement of Procedural History	407
	IV. Statement of Facts	408
	A. Telling a Compelling Story	408
	B. Constraints That Build Trust	409
	1. Advocacy with Credibility	409
	a. Organization of Facts	409
	b. Variation in Emphasis	410

Contents

2.	Premature Legal Argument	411
3.	Permissible Sources for the Facts	411
V.	The Argument	412
A.	Summary of Argument	413
B.	Standard of Review	413
C.	Arguing the Law—The Role of Policy Analysis	414
1.	When the Question Is One of First Impression	414
2.	The Enhanced Role of Policy Analysis on Appeal	414
3.	The Persuasive Value of Warning about Negative Consequences	418
D.	Arguing the Law and the Facts	419
1.	Strategic Choices	419
2.	Varieties of Fact Analysis	423
a.	Nature of Appellant’s Challenge	423
b.	Procedural Posture	424
VI.	The Conclusion	424
	Exercise 18-1	425
Part VIII	WRITING TO PARTIES: CONTRACTS AND CORRESPONDENCE	469
Chapter 19	Contracts	471
I.	Basic Approaches	472
II.	Fundamental Components	472
A.	General Format	472
B.	Introduction to the Contract	473
C.	Recitals	474
D.	Statement of Reciprocal Promises	474
1.	Introductory Clause; Recital of Consideration	475
2.	Precision in Drafting	476
a.	Simplicity; Terms of Art	476
b.	Deliberate Imprecision	478
c.	Plain English: Perfection and Pitfalls	478
3.	Merger Clauses and Parol Evidence	479
4.	Allocating the Risk of Unexpected Impediments to Performance	480
E.	Signature Line	481
	Exercise 19-1	481
Chapter 20	Advice Letters	487
I.	Advice Letters Distinguished from Opinion Letters	487
II.	Purpose, Audience, and Writing Style	488
III.	Format	489
IV.	Introduction and Statement of Issues	490
V.	Brief Answers	491
VI.	Facts	493
VII.	Legal Analysis	493

		Contents
VIII.	Conclusion; Strategic Recommendations	495
	Exercise 20-1 and Sample Advice Letters	496
Chapter 21	Demand Letters	505
	I. Purposes of a Demand Letter	505
	II. Audience, Tone, and Writing Style	506
	III. Format	507
	IV. Overview	507
	V. Factual and Legal Basis for the Demands	509
	A. Stating Your Legal Premises	509
	B. Audience	510
	C. Avoiding Concessions, Admissions, and Waiver	510
	VI. Demands and Threats	511
	Exercise 21-1 and Sample Demand Letters	514
APPENDICES		523
Appendix I	Introduction to the Case Method of Study: Additional Text and Problems for Chapter 2	525
Appendix II	Introduction to the Legal System: Problems for Part II of the Main Text	549
Appendix III	Legal Method and Analysis: Problems for Part III of the Main Text	553
Appendix IV	Office Memoranda: Assignments for Part IV	555
Appendix V	Legal Writing Style: Problems for Chapter 9 of the Main Text	565
Appendix VI	Pleadings and Pretrial Motions: Assignments for Parts V and VI	569
<i>Index</i>		581

TABLE OF CHARTS AND SAMPLE DOCUMENTS

CHARTS

Dispute and Litigation in <i>Hadley v. Baxendale</i>	16
Litigation Pyramid	18
Lawmaking Authority in U.S. Legal System	24
Legislative Reaction to “Bait and Switch”	34
Statutory Interpretation and Construction	39
California Court System	61
United States Court of Appeals for the Ninth Circuit	62
Navajo Nation Court System	62
Analogizing and Distinguishing Fourth Amendment Precedent	67
Synthesis of Cases with Differing Results	109
Research Strategy	132
Synthesis of Cases	538
Standards of Appellate Review	398

SAMPLE DOCUMENTS

Sample Case Briefs for Class Preparation	541
Sample Office Memoranda and E-Memos	155
Sample Complaints	337
Template for Motion to Dismiss	344
Sample Motion for Summary Judgment and Supporting Materials	361
Sample Motion in Limine to Exclude Evidence	384
Sample Appellate Briefs	435
Sample Advice Letters	497
Sample Demand Letters	514
Sample Contracts	482