Which of these two statements would you use as the holding in *Beta v. Adam?*

a. In *Beta v. Adam,* the defendant confined the plaintiff by duress even though he did not engage in threatening behavior.

or

b. In *Beta v. Adam,* the defendant confined the plaintiff by duress by implied threats that if she left the premises she would lose her property.

Case 3:

Your client drove her car into a gas station for gas. An employee of the station who thought she was wanted for bank robbery drained the water from her car's radiator and called the police. Your client had to wait fifteen minutes for a police officer to come and identify her as not being the felon.

Which of these two statements would you use as the holding in *Beta v. Adam?*

a. In *Beta v. Adam,* the owner of a restaurant confined the plaintiff when he took her pocketbook, told her not to leave the restaurant, and took twenty minutes to determine whether she paid her bill.

or

→ b. In *Beta v. Adam,* the defendant confined the plaintiff by duress when, although he did not threaten the plaintiff to remain, the plaintiff would have had to leave behind valuable property if she left the defendant's premises.

4. Reasoning

The court's reasoning in the precedent case must apply equally well to the facts in your problem case. This would certainly happen when the facts are quite similar, as they would be if you were applying *Last,* a case dealing with the domicile of an incompetent offspring for diversity purposes, to another case involving the same issue and similar facts. However, the court's reasoning may also apply in a different context. The *Last* court found the reasoning of *Juvelis* applicable to the issue of domicile to establish jurisdiction even though that case involved establishing domicile to receive federal benefits.

5. Policy

The court in the precedent may be basing its decision on an articulated (or unarticulated) policy. If the same policy would apply in your problem case, the result should be the same.

For example, suppose a state court has a well-established rule upholding releases in litigation involving race car drivers and bicycle racers. A release is a document in which the signing party (the participant in the race) agrees to release the operators of the activity from liability if their negligence injures the signing party. One policy behind that rule is the public interest in participating in and watching competitive racing. A rule invalidating the release would decrease the number of racing events because the operators would fear potential liability from injuries. Another reason for the rule is that the participants in the races are usually experienced racers who can calculate their risks.

This rule upholding releases for competitive racing is invoked by the operator of a cave exploration tour for tourists who requires participants to sign a release. The tour operator is sued by an inexperienced participant who was hurt in the cave because of the guide's negligence.

In this situation, a court may not enforce the release. Neither policy for upholding releases in competitive racing would apply: cave exploration is not a competitive spectator sport that involves the public, and the participants in these cave tours are not experienced spelunkers.

In general, then, under the principles of precedent and stare decisis, if your problem case is similar to the precedent, the result should be the same. When your problem case is different from the precedent in a significant way, the precedent should not be controlling. In making these comparisons, you will find a number of possibilities:

— Your problem case and a precedent dealing with the same issue and with similar facts—the result should be the same (the case is analogous);

- Your problem case and a precedent with the same issue but materially different facts—the result should be different (the case is distinguishable);
- Your problem case and a precedent dealing with a completely different issue—there should be no impact;
- Your problem case and a precedent with the same issue but based on a policy which is no longer persuasive or has not been accepted by another court—the result should be different.

Exercise 2–G

Consider whether a court would decide that the plaintiff in the following case could succeed in the described law suit. Use these five questions as a guide.

a. Is the issue the same or analogous to the issue in *Paugh?*
b. Are the relevant facts analogous or distinguishable?
c. Would the court's reasoning in *Paugh* lead to the same or a different result?
d. What impact, if any, would the policy behind the decision in *Paugh* have on this case?
e. In light of the answers to these questions, is it likely that the holding in *Paugh* will be followed?

From: Supervising Attorney, practicing in Tacoma, Washington
To: Law Associate
Date: October 10, 1998
Re: *Adam Dale Case*

I met last week with Susan and Robert Dale, Adam Dale's parents. They have retained this law firm to represent their son, Adam, in a lawsuit against the Tacoma Gardens Hotel. They will be bringing the case as guardians for their son who is six years old. I have attached a transcribed copy of my interview with them and notes of a phone conversation with the Hotel's lawyer. Please analyze whether Adam's lawsuit is likely to be successful.

Conversation with Susan and Robert Dale, October 5, 1998

Q. I just need to ask some very basic questions so please bear with me. Adam lives with you?

A. Yes, we all live in a house on 395 Thistle Drive in Tacoma. That's about a quarter of a mile away from the Tacoma Gardens Hotel.

Q. Now, as I understand it, Adam was injured when he tried to get inside the Hotel grounds.

A. Yes. He and some friends were playing outside the Hotel. They decided to scale the hedge and get inside the grounds.

Q. How is he doing? You said over the phone that his kneecap was seriously injured.

A. Adam was in a lot of pain, but he's feeling somewhat better now. But the doctors are saying that he will have a permanent disability.

Q. I'm very sorry to hear that. The poor kid. You must be very upset too.

A. We are, it's been awful.

Q. Could you tell me about the hedge?

A. Sure. The Hotel is surrounded by a very thick hedge, which is about six feet high. The hedge is very carefully trimmed. We were told that to facilitate the trimming and allow the hedge to grow straighter, the Hotel has installed thin poles of wood in the hedge at intervals of about one foot. The poles are colored so that they are virtually indistinguishable from the wood part of the actual hedge.

Q. You said that Adam was trying to get inside the Hotel grounds. Is that something that has happened before?

A. Not with Adam. But young children are constantly trying to get inside the Hotel grounds. Usually, the Hotel security force chases them away. The Hotel is very protective of the grounds because they are really beautiful and, we have heard, an important selling point to Hotel guests. We've seen the Hotel brochures and other advertising and the gardens inside are prominently featured.

Q. What happened on September 2, 1998?

A. Well, as we said, Adam was playing outside the Hotel grounds with some friends and they decided to try to scale the hedge. At first they thought that the Hotel security guards would chase them away, but nobody was there. The guards who were supposed to be on duty had

gone inside the Hotel. Adam's two friends lifted him up on their shoulders and Adam jumped onto the top of the hedge. However, when he landed, he fell through the hedge, banging his right knee severely on one of the wooden poles that was in the hedge.

Q. And you said his kneecap was severely injured.
A. Yes. Not only was he hurt, but he won't ever regain the full use of his right leg. He is particularly upset because over the summer he had become actively involved in a gymnastics class in his elementary school gymnasium.

Summary of Phone Conversation with Charles Kelly, representative of the Tacoma Gardens Hotel, October 5, 1998

I spoke with Mr. Kelly today. He said that for $20,000 the Hotel could have placed a fence around the hedge which would have prevented children from trying to climb it. However, the Hotel felt this would be too expensive and decided not to do it. He also said that his six-year old wouldn't be wandering around with a bunch of other six-year olds getting into trouble, and that if the parents had been doing their job, the injury would never have happened.

Exercise 2–H

1. Read *Smith v. Allen*. Then write an answer applying *Smith* to the problem in the *Peterson* case which follows *Smith*. How would a court decide the issue of David Peterson, Sr.'s liability? *Peterson* would be litigated in the same jurisdiction.

Smith v. Allen

Judith Smith alleges that James Allen owned a golf club which he left lying on the ground in the backyard of his home. On April 12, 1995, his son the co-defendant Jimmy Allen, age eleven years, was playing in the yard with the plaintiff, Judith Smith, age nine years. Jimmy picked up the golf club and proceeded to swing at a stone lying on the ground. In swinging the golf club, Jimmy caused the club to strike the plaintiff about the jaw and chin.

Smith alleges that Jimmy Allen was negligent since he failed to warn her of his intention to swing the club and he swung the club when he knew she was in a position of danger.

Smith also alleges that James Allen was negligent and that he is liable for his son's actions. She alleges that although Allen knew the golf club was on the ground in his backyard and that his child would play with it, and that although he knew or "should have known" that the negligent use of the golf club by children would cause injury to a child, he neglected to remove the golf club from the backyard or to caution Jimmy against the use of the golf club.

James Allen demurred, challenging the sufficiency of the complaint to state a cause of action or to support a judgment against him.

The demurrer is sustained. A person has a duty to protect others against unreasonable risks. A person who breaches this duty is negligent and liable for injuries resulting from his negligence. No person, however, can be expected to guard against harm from events which are not reasonably to be anticipated at all, or are so unlikely to occur that the risk, although recognizable, would commonly be disregarded. A golf club is not so obviously and intrinsically dangerous that it is negligence to leave it lying on the ground in the yard. Unlike a knife, for example, it is not commonly used as a weapon. Thus, the father cannot be held liable on the allegations of this complaint.[3]

Aarons v. Peterson

David Peterson stored a tool chest on the floor in the basement of his suburban home. In it he kept three screwdrivers, two wrenches, a hammer and several boxes of nails. Last Tuesday afternoon, his eleven-year-old son, David, Jr., and a nine-year-old neighbor, Phil Aarons, were playing knock hockey in the basement. Their exertions were so strenuous they knocked the side rail loose from the baseboard. Phil, who was losing, was glad. He was tired of playing knock hockey and wanted to play with David's trains. David, however, wanted to continue the match. Spotting his father's tool chest lying on the floor in the corner, he decided to fix the board. He took a hammer and a large nail out of the chest and, while Phil was playing with the train set, quietly set about repairing the damage. At first the work went well. He placed the nail at the joint and hit it firmly on the head. It pierced the wood and held firm. Then disaster struck. On the next hammer blow, the nail flew out

[3] This example is based on and uses language from *Lubitz v. Wells*, 113 A.2d 147 (Conn. Super. Ct. 1955).

from the wood and struck Phil in the face, chipping his two front teeth, bloodying his nose, and gashing his cheek.

In an action for negligence, is David's father liable for the injuries to Phil?

2. Read the following case summary of *Green v. Kermit.* This case was decided by a court in the same jurisdiction as *Smith v. Allen.* Does this decision change your analysis of *Smith* and *Aarons v. Peterson?*

Green v. Kermit

The plaintiff Lucy Green is suing for injuries she received on the Muni Golf course when she was struck in the knee by the defendant, John Kermit, who is eleven-years-old. Green was walking over a foot bridge about 150 yards from the eighth tee, when Kermit, who was playing in a foursome with his parents and sister, teed off the eighth tee without yelling "fore." The plaintiff was in clear view of the tee at the time Kermit teed off and hit her with the golf ball. The issue is the standard of care that the eleven-year-old defendant should be held to when he played golf.

A golfer should be required to use reasonable care. But whether John should be held to use the reasonable care of a reasonably prudent child or of a reasonably prudent adult depends on whether he used a dangerous instrument. Minors will be held to an adult standard of care if they used a dangerous instrument. A golf ball is a dangerous missile that can cause injury if it hits someone during its flight. Indeed, in some ways, hitting a golf ball is more dangerous than firing a gun or throwing a stone, because a person can have more control over the direction of a gunshot or a stone than over a golf ball.

Golf has become a very popular sport, and as golf courses have become more crowded, more accidents have occurred, especially accidents involving golf balls. Yet golf is an adult activity involving dangerous instruments. Since a child is, for practical purposes, on the course as an adult, he should be held to an adult standard. John could see the plaintiff, he did not yell fore, and he teed off with the plaintiff in sight. The judgment for the plaintiff is affirmed.

IV. Synthesizing Cases

YOU WILL RARELY WORK ON A PROBLEM for which there is only one case precedent. More likely, your research for a problem will turn up many cases relevant to the problem. In order to use the principles

that those cases offer to resolve your problem, you must relate the cases to each other, that is, synthesize them. In that way, you can understand the applicable area of law and then use the synthesis to analyze your problem.

The courts will frequently have done some synthesis for you. Often, when you read cases, you will see definitions of a claim for relief, like the definition of battery by a court or in the Restatement of Torts. In *Paugh,* for example, the five elements of the attractive nuisance rule had already been formulated. Usually these definitions or rules have evolved as courts over the years have put together the decisions of many related cases. The judges who have formulated those definitions have worked inductively, that is, from the specific to the general. They have analyzed the outcome of each case and then combined those separate cases into a coherent rule. The rule is expressed at a level of abstraction that encompasses the particular holdings of all of the individual cases.

When you analyze a legal problem, such as one of your class assignments, you will do further synthesis of your own. Synthesizing is the step between your research and your writing. You do research by reading one case at a time. If in your writing you merely report each case, one at a time, then you have compiled a list of case briefs, but you have not analyzed a topic.

To analyze and write about a topic, you will engage in one of three types of case synthesis, or in a combination of these three types:

1) Grouping cases according to the rule they follow;
2) Defining the elements of an evolving claim or defense;
3) Identifying the factors (the general categories of facts) that courts use to determine how a particular cause of action can be proven.

The first type, which is perhaps the least difficult, essentially requires you to group cases. For example, if you read several cases from different states on the issue of whether to adopt the attractive nuisance rule, you will find that several states have adopted the rule, but that some have not.

In writing about your research, you would group the cases applying the rule, rather than list the cases one by one. You would work deductively, starting with the general proposition that unites the cases.

> The majority of the states have adopted the traditional rule that a landowner is liable for injuries to trespassing children if the landowner maintains an attractive nuisance on the property. See [cases applying this rule]. The reasons for this rule are that [explanation of reasons].
>
> A number of states, however, have rejected the rule and instead apply the traditional rule of a landowner's duty to trespassers. *See* [cases rejecting the rule and explanation of these cases].

This writer has identified two lines of decisions and described the basic characteristic of each in clear topic sentences. The two categories in this example were based on a legal rule that was explicit in the cases themselves.

A second, more difficult, type of synthesis is required when courts have not yet clearly or fully articulated the elements of a cause of action. This type of synthesis involves putting together a general principle of law that is evolving in the case law.

Suppose you are analyzing some cases on the question of whether parents are immune from tort suits brought by their children. In this situation you know part of the rule, that parents may be immune from suit. Read the four case summaries to synthesize the rest of the rule. All suits are in the jurisdiction where the age of majority is 18. (Full citations are omitted.)

Case 1:

Jack Abbott sued his father Joseph for negligently pouring hot liquids in the Abbott kitchen so that he burned Jack in the process. Jack is twelve years old. Held: Mr. Abbott is immune from suit. *Abbott v. Abbott* (1985).

Case 2:

James White sued his father Walter for battery, an intentional tort. Walter knocked James's baseball cap off his head because James struck out in the last inning of a Little League game. James is ten years old. Held: Mr. White is not immune from suit. *White v. White* (1990).

Case 3:

Joan Brown sued her father Matt for assault, an intentional tort, for brandishing a tennis racket at her after she lost her serve in the

final set of the women's 25 and under local tennis tournament. Joan is twenty-four years old and lives at home. Held: Mr. Brown is not immune from suit. *Brown v. Brown* (1991).

Case 4:

George Black sued his father Paul for negligently burning him in Mr. Black's kitchen by handing him a large hot pot. George is a twenty-four-year-old business man and is married. Held: Paul Black is not immune from suit. *Black v. Black* (1992).

These cases involve two requirements of whether the parent is immune from suit. To analyze the topic, you should identify them and consider how they determine immunity. Look at the facts that evidently have led the courts to decide that the parent is immune, and at the facts that evidently have led the courts to decide that the parent is not immune.

In each case, the court mentions the child's age. In Case 1, the child was a minor and the parent was immune from suit. In Case 2, however, the child was a minor but the parent was not immune from suit. In seeking an explanation for this difference, you notice that a second requirement is involved, the type of tort, whether an intentional tort or negligence. In Case 4, the parent was negligent, but the child was not a minor and the parent was not immune from the suit. These two requirements now become part of the rule: 1) the child must be a minor, and 2) the child must sue for negligence.

You may find a chart helpful.

Number of Case	Type of Tort	Age of Child	Result
1	negligence	12	immunity
2	intentional	10	no immunity
3	intentional	24	no immunity
4	negligence	24	no immunity

When you can characterize these facts in a way that explains the results, that is, the full parental immunity rule, you are ready to begin writing. You would then start your written discussion of these cases with a topic sentence that identifies the parental immunity rule.

Notice the difference between the following two discussions of the immunity topic. Which is more effective and why?

1. Parents are immune from a tort suits brought by their children if the suit is for negligence and the child is a minor. First, parents are not immune from suits for intentional torts. The Kent Supreme Court has held that parents are not immune from their child's suit for assault, *Brown v. Brown,* and for battery, *White v. White.* But the court has held that parents are immune from a negligence suit brought by their child. *Abbott v. Abbott.* Second, in *Abbott,* the court held that a parent was immune from suit brought by a minor child for negligence. But in *Black v. Black* the parent was not immune from the negligence suit brought by his twenty-four-year-old son.

2. The Kent Supreme Court has decided four cases on parental immunity from tort suits by their children. In the first case in 1985, the court decided that a parent was immune from suit for negligence brought by his twelve-year-old son. *Abbott v. Abbott* (1985). However, in the next suit, in 1990, the court held that a parent was not immune from a suit for battery brought by a ten-year-old son. *White v. White* (1990). Only a year later in *Brown v. Brown* (1991), the court affirmed that a parent is not immune from suit for assault brought by a twenty-four-year-old daughter. The most recent case on this topic is *Black v. Black,* decided in 1992. In *Black,* the court decided another suit by a twenty-four-year-old against his parent, this time for negligence. The court still decided that the parent is not immune.

In the first discussion, the writer synthesizes the four cases and explains the two requirements for immunity. In thinking through the problem, the writer proceeded inductively by analyzing individual cases and then generalizing about these cases, i.e., by identifying two requirements that appear crucial on the issue of parental immunity. For the written product, however, the writer followed a deductive pattern. The writer put together a general rule to explain the law and started the discussion with that rule. Then she developed it, using the cases as authorities for her conclusion. However, the writer of the second discussion has not analyzed the problem. She has written no more than a historical narrative of the four cases. The paragraph's only organizing principle is one of chronological order. The writer has recreated her research process, but has left the job of making sense of the cases to the reader.

Exercise 2–I

Consider these cases along with the preceding cases about parental immunity.

Case 5:

Bob Peepe sued his father Larry for negligence for driving his car into Bob while Bob was riding his bicycle. Bob is nineteen and a senior in high school. He lives at home. Held: Mr. Peepe is immune from suit. *Peepe v. Peepe* (1989).

Case 6:

Marilyn Smith sued her father Richard for negligence for riding his bicycle into Marilyn while she was gardening. Marilyn is nineteen years old, unmarried, and a part-time college student who lives at home. She is not self-supporting. Held: Mr. Smith is immune from suit. *Smith v. Smith* (1994).

Case 7:

Gretel Andersen sued her father Hans Andersen for negligence for stumbling against Gretel and pushing her against the hot pottery she had just removed from her kiln. Gretel is seventeen, married and lives in another city. Held: Mr. Andersen is not immune from suit. *Andersen v. Andersen* (1995).

How might you synthesize these three cases and add them to the preceding four? What do these cases add to the rule?

The third type of synthesis is the kind you will be doing most often. It requires you to identify factors important to the application of a rule. Many of your assignments will involve claims for which courts have already synthesized a rule. To analyze the claim, you must apply the rule to your facts. Before you can do this, however, you must read the precedents you found, and identify the types of facts that courts consider significant in proving or disproving the elements of the rule. You then articulate a general category for each type of fact. These categories of facts are called factors.

For example, in cases dealing with the domicile of students, the courts determined the plaintiffs' domiciles by looking at a number of facts. One plaintiff had lived in the state for eighteen years, the

other plaintiff for twenty years. The factor involved here can be described as length of time living in the state of the alleged domicile. In addition, one plaintiff received tuition payments from the state; the other received tutoring help. This factor can be described as benefits received from the state of alleged domicile. And, if one plaintiff returned to visit his parents in the alleged domicile at least once a month and the other plaintiff had friends and family living in that state, we can describe this as the factor of retaining personal commitments to the state of alleged domicile.

Exercise 2–J

The question is whether at the time one defendant committed a murder, the other defendant was "in immediate flight" from a robbery they had both committed, and therefore was also chargeable with the murder under the state felony murder law.[4] The murder was of a third felon of their group. Synthesize the holdings in these five cases in order to formulate the relevant factors in determining whether a defendant was "in immediate flight."

Case 1:

The murder was committed by Alfred one day after Alfred and Bob robbed a store together. Bob was in another county 50 miles away. Held: Bob was not in immediate flight from the robbery.

Case 2:

The murder was committed by Delia as she and Gene were being chased by the police moments after they had robbed a store. Held: Gene was in immediate flight from the robbery.

Case 3:

The murder was committed by Adam one hour after he and Keith had robbed a store. Keith had gone to buy the two of them bus tickets to Atlantic City. They had agreed to divide the proceeds when Adam joined Keith at the bus terminal. Held: Keith was in immediate flight from the robbery.

[4] Under the criminal law, one whose conduct brought about an unintended death during the commission of a felony is guilty of murder.

Case 4:

The murder was committed by Barbara two hours after she and Dan had committed a robbery. One hour after the robbery, Dan had surrendered to the police and was in police custody. Held: Dan was not in immediate flight from the robbery.

Case 5:

The murder was committed by George at 10 p.m. At 5 p.m. George and Bert had divided the proceeds from the robbery that they had committed at 4 p.m. Held: Bert was not in immediate flight from the robbery.

Exercise 2–K

Read the following summaries of fourth amendment decisions. Under the case law interpreting the fourth amendment, the police need a search warrant if their activity invades a criminal suspect's reasonable expectation of privacy. You now want to know what types of situations involve a reasonable expectation of privacy. From the summaries, identify the factors that determine whether police violated the rule. (In these examples, the police acted without a warrant.)

1. Police broke down the door of the suspect's apartment and ransacked the suspect's bedroom. Police violated the fourth amendment.

2. Police knocked on the suspect's door, were admitted to his home, and strip-searched the suspect. Police violated the fourth amendment.

3. Police used binoculars to look through the windows of the suspect's home. No violation.

4. Police used dogs to sniff the suspect in an airport. No violation.

5. Police put a radar device into a package so it could be traced inside the suspect's home. Police violated the fourth amendment.

3

Analyzing Legal Authority: Statutes

I. Reading the Text of the Statute

JUST AS YOU SHOULD KNOW HOW TO READ and analyze a judicial opinion, you should also know how to read and analyze a statute. And just as there are layers of analysis involved in analyzing case law, from briefing a single opinion to synthesizing a group of related cases, there are layers of understanding involved in statutory analysis.

The first step in statutory analysis, as with analysis of any written material, is to read the text carefully. Your analysis of a statute begins with its exact text; you must know what the statute says. Among other things, you must read the statute to know to whom it is addressed, the exact conduct it prohibits, requires, or permits, and how the parts of the statute relate to each other. Your next step is to isolate the issue in your problem by determining what question is raised by the statutory language in terms of the facts of your case.

Often, your assignment involves only one section of a larger statute. Even so, you should look at that section within the context of the statute as a whole. Federal statutes, for example, often include explanatory preliminary sections, some of which can be helpful to you in interpreting the section at issue. Start by reading the title of the statute, which can help you understand its area of application. For this same reason, read any preamble or statement of policy or purpose which appears at the beginning of many statutes. This statement may tell you, for example, that the statute was written to codify the existing common law. If so, then the case law decided prior to the enactment of the statute should still be authoritative. If the statute was written to change the common law, then that case law should no longer be controlling. Frequently overlooked, but important to know, is the date that the statute took effect. This information will

be in the statute and it may be crucial; for example, the statute may not have been in effect at the time of the conduct at issue in your problem. Also, read through the other sections of the statute to see if any of them affect your problem. Look especially for a definition section, and determine whether any of the terms in the sections that apply to your case are defined there.

For example, a state statute, § 10 of the Probate Code, permits a person to revoke a will "by a subsequent will which revokes the prior will." Your client's mother left a will and a separate signed paper dated after the date of the will that said only, "I revoke my will." Your client wants to know if the revocation is valid. If you had read only § 10, you would have told your client that the revocation was not valid because the statute requires a person to revoke by means of a later will and the second paper is not a will. In order to advise your client correctly, however, you should also have read the Definitions section of the entire Probate Code. There you would have seen that the word "will" in § 10 is defined to include "any instrument that revokes another will." The second instrument is, thus, a valid revocation.

When you read the text of the sections with which you are concerned, look at the overall structure to see how one part of the text relates to the rest. If, for example, some language of the statute is in the alternative, that is, connected by the disjunctive "or," then only one of those parts needs to be proven. If, on the other hand, parts of a statute are connected by the conjunctive "and," then both parts must be proven. Consider this statute:

Burglary in the Third Degree

§ 1. A person is guilty of burglary in the third degree if he knowingly and unlawfully either enters or remains in a building, and
§ 2. Does so with the intent to commit a crime.

Under the language of § 1, the person charged needs either to have entered a building or to have remained there. He or she need not have both entered and remained in order to be guilty. And, according to the modifiers, the person must have both knowingly and unlawfully entered or remained. Thus if a person entered a building while it was open to the public, but knowingly remained unlawfully

after the building had closed, the prosecutor will be able to prove § 1 of the definition of burglary.

Both § 1 and § 2 of the statute must be proven, however, because they are connected by the conjunction "and". The prosecutor must prove that the person charged with burglary in the third degree either entered or remained in a building knowingly and unlawfully, and also that the person did either of those with the intent to commit a crime. These statutory requirements are known as elements. Each element must be proven in order to determine whether someone has violated the statute.

Statutory requirements will not always be delineated the way they are in the burglary statute above. Sometimes, as in the Animal Control Act that follows, the statutory elements are drafted in paragraph form. In this statute, the plaintiff must prove all the elements, although the drafters did not use explicit conjunctive connectors.

Exercise 3–A

Animal Control Act

If a dog or other animal, without provocation, damages another's property or injures any person who is peaceably conducting himself in any place where the person may lawfully be, the owner of the dog or other animal is liable for the damages or injury caused.

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1. What are the alternatives within the Animal Control Act?
2. What are the required elements?

II. Finding the Statutory Issues

WHEN YOU READ A STATUTE in light of the facts of your problem case, you determine first if the statute applies to your case at all. For example, one of the parties to litigation may rely on Article 2 of the state's Commercial Code, which applies to sales of goods. If the case concerns the leasing, rather than the sale, of goods then one issue is whether the requirements of Article 2 apply to a contract for the lease of goods.

Exercise 3–B

Do the following statutes apply to the sets of facts that follow them?

1. Statute: Deceptive Collection Practices Act

A collection agency or any employee of a collection agency commits a deceptive collection practice when, while attempting to collect an alleged debt, he or she adds to the debt any service charge, interest, or penalty, which he or she is not entitled to by law.

Facts 1:

John Brown, an interior decorator, loaned $3000 to his employee. When the employee had made no efforts to return the loan, Brown began harassing him for repayment and also claimed a usurious interest rate. The employee threatens to sue Brown under the Deceptive Collection Practices Act.

Facts 2:

Oscar Green, a secretary for Acme Collection Agency, plays poker with five friends every Tuesday evening after work. One night his friend Felix ran up a $500 debt that he couldn't pay, and Oscar loaned him the $500. Two weeks later, when he asked Felix to repay him, Oscar added a $25 charge.

What information about the statute's coverage might you want to know besides the section above?

2. Statute: The Animal Control Act on page 57 includes the following paragraph from the definitions section:

Owner means any person who has a right of property in an animal, keeps or harbors an animal, has an animal in his or her care, or acts as custodian of an animal.

Facts:

John Anderson, a home care provider, was injured when he walked his employer's dogs. One of the dogs nipped Anderson's leg, without provocation. Anderson wants to sue his employer.

Once you have determined that a statute applies to your case, then identify the elements of the statute that were violated. What con-

duct does the statute permit or not permit? Does your client's or the other party's conduct come within the statutory description?

Exercise 3–C

Identify the statutory issues in these problems.

1. Statute: Wills

In order for a will to be valid, the will must be signed by the testator (the person who executes a will) in the presence of two witnesses.

Facts:

Mr. Beal signed his will while one witness, Ms. Smith, stood next to him, and the other witness, Ms. Byrd, was in the adjoining room getting her pen. Ms. Byrd was facing Mr. Beal and saw him bend over the paper at the time he signed.

2. Statute: Solid Wastes

No garbage dump shall hereafter be established within the corporate limits of any city or town, nor shall any garbage dump be established within 250 yards of any residence without the consent of the owner of the residence.

Facts:

The People's Garbage Dump was opened by the city in 1950. Three years later, Tom Smith built a house on a lot near the dump. The city acquired a tract adjoining the dump and within 200 yards of Smith's residence. The city plans to enlarge the dump with the new tract of land. Smith opposes the enlargement.

3. Statute: Distribution of Damages in Wrongful Death Action:[1]

The jury in any wrongful death action may award such damages as may seem fair and may direct how the damages shall be distributed among the surviving spouse, the children, and grandchildren of the decedent.

[1] A wrongful death statute provides a civil recovery against a person who caused the death of another.

Facts:

Martha Smith, for whose death a wrongful death action was brought, was survived by her husband, by a natural born child of the marriage, by an adopted child, and by her non-marital child.

4. Statute: Worker's Compensation

If an employee suffers personal injury by an accident arising out of and in the course of the employment, the worker is entitled to recover under this Act.

Facts:

Nathan Hail was employed by a university's tennis facility as a teacher at its tennis camp for children. The facility sold summer passes and also solicited people to contribute as subscribers. The director of the facility made clear that the teachers should be friendly to the subscribers. Sam Hardy, a subscriber, asked Nathan to play one afternoon after Nathan got off work teaching tennis classes. During the match, Nathan twisted his ankle and had to stop working for the rest of the season.

5. Statute: The Animal Control Act

If a dog or other animal, without provocation, damages another's property or injures any person who is peaceably conducting himself in any place where the person may lawfully be, the owner of the dog or other animal is liable for the damages or injury caused.

Facts:

Joan Robinson brought her two young children, Missy and Eli, to visit her friend Jamie Meadows. Ms. Meadows owned two dogs, which stayed in the living room where they all were sitting. While they were there, the doorbell rang, and the dogs ran excitedly to the door, barking and jumping. When Eli started yelling at the dogs, the dogs ran back to the living room and one of them bit Missy.

When you brief a case or write any legal analysis in which there is a statutory issue, your writing should reflect the statutory nature of the case. You should state the issue to reflect the exact question that the statute raised and you usually should include verbatim the operative language of the statute. Your statement of the holding of the case should answer that question, also in terms of the statute and its exact language.

The following are examples of issues written for a case brief.

1. Is a will "entirely written, dated, and signed by the testator" as required by the Probate Code if it is a handwritten will, dated with the month and year, but not the day?
2. Does a person enter a "building" within the meaning of the burglary statute if she without authority goes into a tent pitched in a park?
3. Is a signed writing that says only "I revoke my will," a "subsequent will which revokes the prior will" as required by the Probate Code?

Exercise 3–D

Write the issues for the five exercises beginning on page 57 as you would write them for a case brief.

Exercise 3–E

For the following exercise, read the statute and the facts to which you will apply the statute.

Statute: Theft of Lost or Mislaid Property

A person who obtains control over lost or mislaid property commits theft if that person

(1) Knows or learns the identity of the owner or knows of a reasonable method of identifying the owner, and
(2) Fails to take reasonable measures to restore the property to the owner, and
(3) Intends to deprive the owner permanently of the use of the property.

10 Kent Rev. Stat. § 20 (1985).

Facts:

Bill Smith saw a 14k gold locket on the ground of the park softball diamond at 1:30 p.m., just after a team from the YWCA had been practicing there. The diamond is located just west of a residential area of Kent and is in a large park that also contains children's playground fa-

cilities and tennis courts. The locket was engraved with three initials. Although he did not know the people on the team, Smith knew the name of the team because of the YWCA uniforms they wore. Smith was making deliveries for a nearby supermarket, where he worked a 10 a.m. to 4 p.m. shift. He also worked evenings for a newspaper.

Smith picked up the locket, looked it over, saw it was stamped 14k gold and saw that the initials were the same as those of his sister, who was in school 300 miles away. The locket needed polishing and had two pictures inside it. One was of a movie star. Smith pocketed the locket. He walked toward the street for his next delivery, in the opposite direction from the YWCA. About a block from the place where he picked up the locket, John Lyons robbed Smith of the groceries, Smith's own money, and the locket.

Someone who knows Smith saw him pick up the locket and gave his name to the police, who claim he violated the statute.

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a. What does the prosecutor have to prove in order to convict Smith of Theft of Lost or Mislaid Property?
b. What are the statutory issues?
c. What are the legally relevant facts?
d. Write an analysis of whether Smith violated the statute.

III. Techniques of Statutory Interpretation

ONCE YOU IDENTIFY THE EXACT DISPUTE about the application of the statute, you then analyze what the statute means in order to resolve how the statutory language applies to the facts of the case. Because a legislature enacts a statute to apply to future conduct, some of which is unforeseen at the time of enactment, rather than to a particular situation that has already occurred, legislative language is often more general than is the language in a judicial opinion. In written opinions, judges can tailor their language to apply specifically to the events that gave rise to the litigation. Statutory language may not be as specific to the events, however, and judges cannot rewrite the text of the statute, although they can direct its application.

In statutory litigation, then, the judge must often decide how the relatively general language of legislation, such as language that refers to a class of things, applies to a particular case. For example, a

statute may require registration of motor vehicles. A court may have to determine which specific types of vehicles are included in that category, such as whether the requirement applies to a person's private airplane. Besides being general, statutory language may also be vague, sometimes purposely so. The statute may use terms like "fair use" or "reasonable efforts." The court must then determine the content of those vague terms within the framework of specific litigation. Statutory language, like all language, may also be ambiguous; it may have more than one meaning and the court may have to decide which meaning to apply. For example, a municipal ordinance revokes the license of a cab driver if he is convicted for a "second time of any offense under the Motor Vehicle Act." This statute may mean that the driver must be convicted twice of the same offense, but may also mean that the license will be revoked upon a conviction for a second but different offense. In all of these situations, a judge may be called upon to interpret what the text means.[2]

A. Legislative Intent

The court determines what statutory language means by asking what the legislature intended it to mean. The first source of the legislature's intended meaning is the language of the statute itself. Often, however, the court must examine other evidence about the statutory language. Moreover, a court may seek to determine what policy the legislature intended to pursue through the statute by determining the purpose of the statute. Then the court interprets the statute in a way that furthers that policy.

1. Plain Meaning

Courts employ a variety of approaches to determine what the legislature intended the statute to mean. The first step for most courts is to determine whether the statute has a single plain meaning. This process determines whether the parties may submit evidence besides the statute itself to support their interpretations of the language. If the court can interpret the statutory language according to a plain

[2] *See* Reed Dickerson, *The Fundamentals of Legal Drafting*, 31–43 (1986).

meaning, then it often will decide not to permit the parties to submit other evidence to explain the statute's meaning; it will use only the statute itself to indicate what the legislature meant.

For example, the Freedom of Information Act requires government agencies to disclose documents to any person who requests disclosure, subject to several statutory exemptions. One of those exemptions, Section 7, excludes from disclosure federal records that are compiled for law enforcement purposes if the production of those records would "disclose the identity of a confidential source." The plaintiff sought the production of documents from the government which the government argued were exempt from production because they would disclose confidential governmental agency sources. The plaintiff argued that the exemption referred only to human sources and not to foreign, state or local law enforcement agencies. The court decided, however, that the plain and ordinary meaning of the language "confidential source" is any confidential source without distinction among types.

"Plain meaning" is often, but not always, the ordinary meaning, sometimes the dictionary meaning, rather than a technical meaning of the statutory words. However, words in some statutes, such as statutes that regulate a particular industry, may be interpreted according to their technical meanings in that industry. Some words may be interpreted according to their technical legal meaning. For example, if a lawyer drafts a document and uses the word "heir," that word will most likely be given its technical meaning (a person who inherits if the decedent died without a will). If a layman uses the word, it may be given its more colloquial meaning (a person's children).

Besides the "plain meaning" of the particular statutory language at issue, other internal aids to interpreting the scope of the disputed language can come from similar language in other parts of the same statute. If the exact language is used elsewhere in the statute, that use may provide the intended meaning of the words. If similar words are used, the difference in the wording may aid you in interpreting the disputed language. For example, if a statute refers to a person's "residence premises" in one section, but refers to "place of actual residence" in another section, a comparison of the terms indicates that the term "residence premises" is not restricted to the place at which the person is actually residing. Where the legislature intended that restriction, it used different wording. Of course, if the statute

includes a definition section, that section should be the first place to look.

Exercise 3–F

The Right Times is an independent journal published by a student organization at a local university. The organization members distribute copies in stands located around the campus, and place signs inviting passersby to take a copy. The defendant Salter removed all the copies from the stands and threw them away.

1. Right Times sued Salter under one section of a mischief statute that prohibits a person from "intentionally damaging personal property contained in a structure located at a school or community center."

   a. Is the university a school? A community center?
   b. Does the term "school" have a plain meaning or do you need other evidence?

2. Right Times also sued for conversion. The conversion statute prohibits a person from "intentionally exerting unauthorized control over property of another person."

   a. Were the journals in the distribution stands the "property" of Right Times?
   b. Do you need other evidence to interpret this statute?

2. Extrinsic Evidence

If the court cannot determine a plain meaning from the statutory language itself, but decides that the language is "ambiguous" (used in this sense to mean doubt exists about the meaning of the language), then it will permit the parties to introduce other evidence to show what the legislature intended the statute to mean. There is also considerable case law to the effect that these may not be exclusive steps, and a court can use other evidence as aids in construing the statutory language even if it can ascribe a plain meaning to the words. For instance, even if a plain meaning is discernible, a court will permit the parties to submit evidence explaining what the legislature intended in order to show that an ambiguity exists, or to show that enforcing the first meaning would lead to absurd or to unintended results.

For example, a federal statute prohibits importing aliens "under contract to perform labor or service of any kind in the United States." Has a church violated this statute by contracting and bringing from England an English minister to perform services as minister for the church? If it seems absurd to construe this statute to impose a monetary penalty on a church because it employed a minister from England, then the court will admit evidence to show that Congress did not intend the statute to prohibit that type of employment.

The most favored evidence that parties employ to determine the legislature's intended meaning is the legislative history of the statute. A legislative history consists of different elements. One part of a legislative history is the predecessor statutes to the one at issue. More importantly, legislative history consists of the documents that were produced during the statute's legislative journey from its beginning as a bill introduced in the legislature, through proceedings in the committee or committees to which it was assigned, and to its passage into law. You use this type of legislative history to find legislators' statements about what they meant by the disputed language. In the case of the statute that prohibits importing aliens, for example, the transcripts of committee hearings, the committee report, and the Congressional Record account of the debate on the floor of Congress all show that Congress intended to prohibit importation of contract labor crews to perform unskilled labor, not to prohibit hiring an individual from abroad to perform professional services.

If, however, the documents do not reveal the legislators' intended meaning or if they show that the legislators never thought about the application of the statute to the particular problem posed by the case, then you read the documents to try to find the more general purpose of the statute and you interpret the language in a way that promotes that purpose.

For federal statutes, the legislative history can be extensive, the most favored source being committee reports. For example, committee reports played a considerable role in one court's interpretation of Exemption 6 to the Freedom of Information Act. This section exempts from mandatory disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The section required judicial interpretation because of an ambiguous modifier. It is unclear which terms are modified by the phrase "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

The restriction could apply only to similar files or it could modify personnel files, medical files, and similar files.

If the restriction applies only to "similar files," then personnel and medical files are under a blanket exemption from disclosure regardless of whether their disclosure would constitute an invasion of privacy. A person requesting disclosure of personnel files would interpret the modifier to apply to all three descriptions of files. The government agency would interpret the modifier to apply only to "similar files."

Because of the ambiguous syntax of Exemption 6, the statute's plain language is unhelpful. Thus, the court facing this issue of statutory interpretation used the following information and reasoning to decide that the "invasion of privacy" language applied to all three types of files.

1. That court had already interpreted the policy behind the entire FOIA statute as one of disclosure, not secrecy.

2. The Congressional committee reports included language that applied to all of Exemption 6. That language requires a court to engage in a balance of the two policies of protecting an individual's private affairs from unnecessary public scrutiny and of preserving the public's right to governmental information. A court would not engage in that balance for medical and personnel files if those files were under a blanket exemption from disclosure.

3. The committee reports had no language about blanket exemptions in Exemption 6.

Thus, although the legislative history contains no explicit information, the court used these sources to decide that the limiting language modified the three types of files listed so that none was under a blanket exemption from the Act.[3] By doing so, the court interpreted the statutory language to promote the statute's policy of disclosure.

Unlike the materials available for federal statutes, the legislative materials available for state statutes may be meager. Even if considerable state or federal materials exist, however, they may be inconclusive as to what the legislature intended the litigated language to mean, or how the purposes of the statute bear on the application of the particular language to the facts of the case. The lawyer must assemble all the relevant pieces to form a coherent interpretation of legislative intent.

[3] Based on *Department of Air Force v. Rose*, 425 U.S. 352 (1976).

Exercise 3–G

Some of the relevant legislative history of the Freedom of Information Act § 7 exemption described previously is set out below. Based on this legislative history, did the court interpret the § 7 exemption correctly? Was the statute intended to mean only human sources?

1. Original version of statute:
The original version of § 7 exempted records that would "disclose the identity of an informer." The committee to which the bill was referred amended the term "informer" to "confidential source."

2. Committee Report:
The Committee Report contains the following statements:

a. "The substitution of the term 'confidential source' in § 7 is to make clear that the identity of a person other than a paid informer may be protected if the person provided information under an express assurance of confidentiality."
b. "The bill in the form now presented to the Senate ... has been changed from protecting the identity of an 'informer' to protecting the identity of a person other than a paid informer.... Not only is the identity of a confidential source protected but also protected from disclosure is all the information furnished by that source to a law enforcement agency...."

3. Congressional debate:
The debate on the floor of the Senate recorded in the Congressional Record contains the statement by a senator on the committee, "we also provided that there be no requirement to reveal not only the identity of a confidential source, but also any information obtained from him in a criminal investigation."

How do you evaluate the following arguments in support of the court's plain meaning interpretation that § 7 applies to all sources including other law enforcement agencies and not human sources only?

a. The use of the word "person" in the Committee Report is similar to the use of any collective noun and refers to a variety of entities in addition to human beings.

b. The singular masculine pronoun, such as the "him" used by the senator, is often used where the sex of the referent is unknown or where it refers to a collective noun consisting of entities of more than one sex. A person using a pronoun during debates is not grammatically precise.

c. Congress was concerned that it not impair the ability of federal law enforcement agencies to collect information. The plaintiff's interpretation of § 7 would make other law enforcement agencies or other entities reluctant to share information with federal agencies.

d. The legislative history materials are themselves ambiguous and should not control the customary meaning of words in the statute.

Exercise 3–H

For the following exercise, read the facts of the problem. The case following the facts will provide some arguments relevant to the issue in the problem.

Facts:

The Oz Licensed Nursing Home Act § 15 provides a hearing for any licensee that has been charged with abusing a patient. The section provides "The Department shall commence a hearing within thirty days of the receipt of a nursing home's request for a hearing."

On April 10, 1986, the Department determined that TranQuil Nursing Home had abused a patient. TranQuil then requested a hearing on May 1, 1986. The Department, however, overlooked the request and did not schedule a hearing until December 1, 1986. At the hearing, the Department again determined that TranQuil was guilty of abuse. The home now seeks judicial review of that determination and has moved to dismiss the Department's proceedings for lack of timeliness because it was held after the thirty day period.

Adam v. Personnel Board

The Personnel Code of Oz § 20 requires that the Personnel Board provide a review for all state personnel protesting their discharge. Section 20 provides that the review "shall be held within 60 days of a discharged employee's request for review." Donald Adam requested review on September 1, 1980. The Personnel Board hearing, which confirmed his discharge, was held January 15, 1981. Adam has asked this court to void the Board's decision on the grounds that it was not timely.

The plain meaning of the word "shall" is that of a mandatory verb. The dictionary so defines it. The word has sometimes been construed as directory, however. That is, it has been interpreted as "may." If the statute states the time for performance but does not deny performance after a specified time, then "shall" is usually considered directory. If the time period safeguards someone's rights, it is mandatory.

Section 20 is designed to protect the rights of government employees who protest their discharge. A delay in their hearing could prejudice their rights. We therefore interpret the section as mandatory.

1. Which statutory argument will the plaintiff TranQuil Nursing Home make?
2. Which arguments will the state make?
3. Which arguments are better?

Exercise 3–I

Acme Collection Agency sent three collection letters to the plaintiff Bass. The letters did not meet the requirements of the Fair Debt Collection Practices Act (FDCPA), and Bass wants to sue Acme under that statute. Bass had written a check at the supermarket to pay for his groceries, but the check bounced. The market ultimately sent the check to Acme for collection. The only issue is whether the payment obligation from the bad check is "a debt" as defined in the FDCPA.

The Act defines "debt" as "any obligation ... of a consumer to pay money arising out of a transaction in which the money, property ... or services which are the subject of the transaction are primarily for personal, family, or household purposes...."

Acme has argued that the debt must flow from a specific type of transaction, that is, that the consumer transaction must be a credit transaction, and that the FDCPA does not apply to bad checks given in immediate payment for goods, because the goods were not sold on credit. How do you analyze this argument?

1. Look first to the statutory language. Does the definition of debt have a plain meaning, and if so, does the definition include this transaction?
2. Is there any ambiguity in the definition because it does not define "transaction"?
3. Is a statement in the committee report definitive that "the Committee intends that the term 'debt' include consumer obligations paid by check or other non-credit consumer obligations"?

4. Should the court consider the FDCPA's statutory structure? The FDCPA was passed as an amendment adding a subchapter to the Consumer Credit Protection Act. This Act, as its name suggests, applies to credit transactions only.
5. Should the court defer to another federal appellate court that concluded, on a different issue, that the word "transaction" in the above definition does not include tort liability (the case involved a person sued for conversion[4] because he pirated microwave television signals). However, this court went on to say that "transaction" involves the offer or extension of credit to a consumer.

B. The Canons of Construction

Another long-standing—and frequently criticized—method of determining statutory meaning is to apply what are called "canons of construction." These canons are maxims or guides that suggest possible interpretations of certain verbal patterns in statutes and certain types of statutes. The canons, however, often yield inconclusive results.

A well-known canon used to interpret verbal patterns is the canon known as *ejusdem generis*. *Ejusdem generis* is applied to mean that whenever a statute contains specific enumeration followed by a general catchall phrase, the general words should be construed to mean only things of the same kind or same characteristics as the specific words (*ejusdem generis* means "of the same genus or class"). For example, in the language "no one may transport vegetables, dairy, fruit, or other products without a certificate of conveyance," the catchall words "or other products" could be interpreted to mean food products but not manufactured goods. However, the term may also be interpreted to include non-manufactured goods that are not foods, such as fresh flowers or lumber. To determine the scope of this phrase, it may be more important to know that the legislature's purpose in requiring a certificate of conveyance was to ensure sanitary conditions during transport.

Another example is a criminal code that makes illegal the shipment of obscene "books, pamphlets, pictures, motion picture films, papers, letters, writings, prints or other matter of indecent charac-

[4] Conversion is a taking of property that completely deprives the owner of its value.

ter." In a prosecution under the statute for mailing obscene phonograph records, application of the rule of *ejusdem generis* would require that the statute be interpreted to not include obscene phonograph records because the enumerated list includes matter taken in by sight, not by hearing.

The Supreme Court, however, did not use the canon to construe this statute because to have done so would have defeated the obvious purpose of the statute, which was to make illegal the use of the mails to disseminate obscene matter. The Court read the entire statute, beyond the portion under which the defendant was charged, to construe the statute as a "comprehensive" one that should not be limited by a mechanical construction.

Another well-known canon, which is again always referred to in Latin, is *expressio unius, exclusio alterius* (expression of one thing excludes another), usually shortened to *expressio unius. Expressio unius* is applied to mean that if a statute expressly mentions what is intended to be within its coverage, then the statute excludes that which is not mentioned.

For example, the statute that prohibits importing aliens contains a section that excludes actors, artists, lecturers, professional musicians, and domestic servants, but does not exclude ministers. A court applying *expressio unius* would interpret the list of exemptions as an exclusive one, yet the legislature may not have intended the enumerated exclusions to be exclusive or may not have thought about other categories of people who should also have been excluded from the statute's broad coverage.

A third well-known canon is "statutes in *pari materia* (on the same subject matter) should be read together," that is, they should be interpreted consistently with each other. For example, a section of the Family Law Code on the topic of adopted children provides, "the adopted child shall be treated for all purposes as the natural child of the adopting parents." A section of the Probate Code provides that the property of a person who dies without a will should be distributed "one-third to the surviving spouse and two-thirds to the surviving children." If this statute and the section of the Family Law Code are to be read in *pari materia* so as to be consistent with each other, then the word "children" in the Probate Code should be interpreted to include adopted children of the person who died.

Of course, the statutory language of one or both statutes may show that the statutes should not be interpreted together. For example,

the Family Law Code may provide that the adopted child be "treated for all purposes, including relations with the kin of the adopting parents, as the natural child of the adopting parents." The Probate Code, however, may provide only that "the adopted child shall inherit from the adopting parents as would a natural child." If the issue is whether the adopted child inherits from an adopting parent's mother (where the adopting parent has died), the differences in language between the statutes now make a difference. The Probate Code does not employ the specific language about "kin of the adopting parents," nor does it define the child as a natural child "for all purposes." Because the drafters of the Probate Code did not use that language, they may not have intended that the statute apply to all the situations to which the Family Law Code applies. Of course, the drafters also may not have read the Family Law Code, and had not thought about problems arising from interpreting the two statutes consistently. The court will have to decide if it should do so, or whether the more narrow language of the Probate Code should control because it is the statute that more specifically applies to this problem.

Some canons are used to help interpret types of statutes by the presumed policy behind those statutes. An example is "a penal statute should be strictly construed." This means that if it is not clear whether the language of a criminal statute (or a civil statute that imposes a penalty) applies to a particular defendant's conduct, the statute will be interpreted narrowly in favor of the defendant, that is, it will be interpreted not to apply. This type of construction is based on a policy that people should have fair warning of conduct that is punishable. Other canons of this type are "statutes in derogation of the common law should be strictly construed," which is a somewhat outdated canon, and "remedial statutes should be liberally construed." If the remedial statute is one that changes (is in derogation of) the common law, however, such as a worker's compensation act, then the two canons' presumptions conflict. You will find that the opposing lawyers often can supply a conflicting interpretation based on another canon.[5]

Canons do not explain what the legislature meant in enacting the particular statute being analyzed. Rather, they suggest what people

[5] As has been pointed out, many canons point to opposite conclusions. *See* Karl Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed," 3 Vand. L. Rev. 395 (1950).

usually mean by common language patterns. A canon such as "a penal statute should be strictly construed" supplies a presumption about how any legislature enacting that type of statute would intend the statute to be interpreted. Thus, because the canons do not analyze the reasons for the particular statutory language being applied, a canon should not by itself compel a particular interpretation. Indeed, in the case involving the criminality of sending obscene phonograph records through the mail, the Court did not interpret the statute according to this canon either. Instead, it read the statute as a whole to determine the enacting legislature's purpose. You should become familiar with the canons because many courts employ them as aids in construing language, especially if there is no legislative history available, but they are not conclusive about meaning.

Statutory interpretation often can be a difficult process of analyzing the language of text, the pre-enactment legislative history materials related to that text, other materials related to the statute, such as proposed amendments, and the canons of construction. But just as you apply case law to further the policies behind legal precedents, you use the techniques of statutory analysis to determine the legislative policy in enacting the statute and to interpret the text to further that policy.

C. Stare Decisis and Statutes

Once a court interprets a statute, the principle of stare decisis applies and the court will then follow the interpretation it has previously adopted unless it overrules it. For each new case with the same statutory issue, the court then reasons by analogy to the facts of the prior cases in order to apply the statute to the new case.

When you write about a problem that involves statutory analysis and arguments, you should include these analytic steps in your written analysis. Focus on the exact statutory language and its possible interpretations. Summarize the relevant legislative history, if any, and its interpretations, and, if the canons are relevant, explain how they apply to the language. If the statute has been interpreted by the courts, discuss the case law. If there is binding precedent interpreting the statute, explain how that interpretation applies to the facts of your problem. You will find that after a statute has been interpreted by the courts, its history becomes less important to its interpretation.

Exercise 3–J

The following two exercises are examples of constitutional issues for which a court has already applied the disputed constitutional provision in a precedent. For the purposes of these exercises, consider that the same principles of stare decisis apply to prior interpretations of constitutional language as to statutory language. Use Case 1 in each exercise as the controlling precedent for Case 2.

1. Does a city's display of a creche at Christmas time violate the establishment clause of the first amendment to the United States Constitution that says "Congress shall make no law respecting an establishment of religion"?

Case 1

A city owned and displayed a Christmas scene in a privately owned park located near a shopping area. The display consisted of many figurines and decorations, including a Santa Claus and sleigh, a decorated tree, several carolers, animals, clowns and a creche scene. The court decided that the display of the creche did not violate the establishment clause of the first amendment, which prohibits government activity that establishes religion. One part of the test of whether the establishment clause has been violated is whether the activity has the effect of advancing religion. The court decided that although the creche by itself is a religious symbol, within the overall context the display was a seasonal rather than religious display, and the creche demonstrated the historical origins of the holiday. Thus, the city did not act unconstitutionally by including the creche scene because the scene did not have the effect of advancing religion.

Case 2

Another city, one of the ten largest in the country, displayed a city-owned creche in the lobby of the City Hall. The city also decorated the lobby with Christmas wreaths above the elevators, a large Christmas tree just inside the entrance, and a Santa Claus and sleigh in the lobby, which it designated as the collection spot for food donations. These decorations are from ten to ninety feet away from the creche. Is this city's creche an unconstitutional endorsement of religion?

Compare Case 2 with Case 1. You must determine if Case 2 should be decided differently from Case 1 for purposes of whether the city en-

dorses religion by displaying a creche. You do that by examining whether the facts are essentially analogous or distinguishable.

In Case 1 the creche is one part of a large diverse display. In Case 2 the creche is not side-by-side with other figures. Is it a self-contained religious exhibit because it is ten to ninety feet from other holiday decorations? Or is it just one element of an ensemble of seasonal holiday decorations? Are the two cases analogous or distinguishable on this point?

In Case 1, the holiday display was owned by the city but set up in a privately owned park. In Case 2, the city-owned display is in the lobby of City Hall. Does this difference in location and the ownership of the display make the cases distinguishable in terms of whether the two cities endorsed religion by setting up a creche at Christmas time?

2. Does the fourth amendment require that police acquire a search warrant in order to accomplish aerial observation of a person's premises within the fenced area around the person's home?

Case 1

Municipal police, acting without a search warrant, used a small airplane to fly 1000 feet over the house and backyard of the defendant. The yard was completely enclosed by a ten-foot fence. From the airplane, the officers saw marijuana plants growing in the defendant's yard. The court held that the police, although acting without a search warrant, did not violate the fourth amendment by their observation of the defendant's backyard. The fourth amendment is interpreted to mean that a person is entitled to its search warrant protections if he has a reasonable expectation of privacy in the object of the challenged search. This defendant's expectation of privacy from observation was unreasonable because the police were in an airspace open to public navigation, viewing what was visible to the naked eye.

Case 2

Municipal police acting without a search warrant flew in a helicopter at 400 feet over the defendant's premises. Police observed the defendant's greenhouse adjoining his house. The officers were able to look through openings in the greenhouse roof and sides to see marijuana growing inside the greenhouse. Did the officers violate the defendant's reasonable expectation of privacy and thus conduct an illegal search under the fourth amendment by observing the premises from a helicopter without getting a search warrant?

Does Case 1 require a decision that the police did not need a search warrant in Case 2? What are the analogies between these two cases? What are the differences that are relevant to the question of whether the defendant had a reasonable expectation of privacy that was violated?

Exercise 3–K

John Hume is charged with violating 18 U.S.C. § 2114 (1988), which provides

> whoever assaults any person having lawful charge ... or custody of any mail matter or of any money or other property of the United States with intent to rob or robs any such person of mail matter or of any money or other property of the United States shall be imprisoned....

Hume assaulted an undercover Secret Service agent while attempting to rob him of $2000 of United States money entrusted to the agent to "purchase" counterfeit money from Hume.

Hume's defense is that the language in § 2114 "any money or other property" applies only to crimes involving robbery of postal money or postal property. The predecessor statutes to § 2114 all applied only to mail robbery and appeared in the section of the Criminal Code about offenses against the Post Office. The Postmaster General requested Congress to amend the statute to include robberies of money and other valuables as well as mail from a Post Office.

How would you evaluate the following arguments about the question of what the statutory language means? Which arguments would be used by the prosecutor and which by the defendant?

P 1. The statutory language is plain and unambiguous: the statute applies to any lawful custodian of three distinct classes of property. Nothing on the face of the statute limits its reach to offenses against custodians of postal money or postal property. PLAIN LANGUAGE

D 2. The principle of *ejusdem generis* demonstrates that the general terms "money" and "other property" should be limited by the specific term "mail matter" to postal money or postal property. CANON OF CONST.

D 3. The bills introduced to amend the predecessor statute, which broadened its language, were referred to the Post Office Committees of both the Senate and the House of Representatives. A member of the House Post Office Committee said on the floor of the House that "the only purpose of the pending bill is to extend protection of the present law to

property of the United States in the custody of its postal officials, the same as it now extends the protection to mail matter in the custody of its postal officials." LEGIS. INTENT

P 4. The Committee Reports of both the House and Senate Committees say that "the purpose of the bill is to bring within the provisions of the Penal Code the crime of robbing or attempting to rob custodians of government moneys." LEGIS INTENT

D 5. The federal Criminal Code § 2112 contains a general statute penalizing thefts of government property with a much lesser sentence than the one imposed by § 2114.

D 6. In an earlier case, the Solicitor General of the United States conceded that § 2114 covered only postal crimes. STARE DECISIS

4

Organization of a Legal Discussion: Large-Scale Organization

I. Introduction

IN THIS CHAPTER, YOU WILL LEARN how to identify the legal issues that are relevant to analyzing a problem and to use these issues to organize a written analysis of a legal problem, as it might appear, for example, in the Discussion section of a legal memorandum. See Chapter 7. In Chapter 2, in the context of briefing a case, we used the word "issue" to describe the basic question that the court has to answer to resolve the dispute between the parties. Here we use the word "issue" to describe the points that must be discussed when you analyze a claim.

To write an analysis, you must break a subject into its component parts. To analyze a legal subject, you first identify the claims or defenses (which we will call the claims) in your problem. Then you break each claim down into its parts. Then where needed, you break each part down into its sub-parts. Once you have identified the parts and sub-parts, you arrange them in a logical order. This logical order forms the organizational structure of your discussion.

II. Organizing a Discussion

A. Overall Organization

THE FIRST ORGANIZATION, that of an entire discussion, is dictated by the topic of your problem. If your problem contains only one claim, then your entire discussion will be an analysis of that claim. If your problem contains more than one claim, then you discuss each separately. For example, if your client has two claims, one for assault and one for battery, you should divide the discussion into two main sections, one for assault, and one for battery.

The order in which you discuss the claims depends upon the particular problem. If the problem requires resolution of a threshold question, then logically you should analyze it first. A threshold question is one that the court will answer first because its decision on that issue will determine whether the litigation will continue or whether the court must decide the other issues.

An example of a threshold question is whether the plaintiff waited too long to file a complaint and whether the period for filing that type of complaint (governed by legislation known as a statute of limitations) has expired. A court will resolve this first, because if the plaintiff has waited too long to file, the court will dismiss the complaint. Therefore, you should discuss it first in your analysis. Your resolution of the threshold question, however, should not end the discussion. The judge may disagree with your conclusion on the threshold question, or your reader may want an analysis of the entire subject.

If there are no threshold questions, you may want to organize the claims by degree of difficulty. You may decide to analyze the simpler claim first to dispose of it quickly and then work toward the more difficult one. Or you may decide to attack the most complex claim first while you have the reader's attention, and then follow with the claim that you think is easier to establish.

B. Organization Within One Claim—Identifying the Issues

After identifying the claims in your assignment and deciding the order in which you will discuss them, you must break down each claim into its constituent parts, that is, into the legal issues raised by that claim. These issues may come from an established definition, such as the elements of a tort or crime. Or they may be factors that the courts have previously considered in determining how to decide particular cases. In any event, you need to identify these issues and analyze each separately. They will form the organizational framework for your analysis. The fundamental principle to remember is that when you analyze a claim, you organize your analysis around the issues that the claim raises, not around individual cases.

There are several different ways of finding these issues.

1. A court's opinion identifies the elements of a rule.
2. The terms of a statute identify the elements.
3. A rule may evolve over a series of opinions.

4. The rule is vague and you must extract the factors from an opinion or a series of opinions and balance them.

1. The Court's Opinion Identifies the Elements of a Rule

Sometimes, a court opinion will tell you what issues must be discussed in a claim by defining the claim, for example, the elements of a tort. Read the following opinion to find out what the elements are of the tort of intentional infliction of emotional distress. These elements will provide the organizational framework for the analysis of this claim.

Davis v. Finance Co.

Luella Davis (Davis) sued Finance Company (Finance) seeking to recover on the theory of intentional infliction of emotional distress.

In this jurisdiction, the courts have adopted the definition of intentional infliction of emotional distress provided in the Restatement (Second) of Torts. First, the defendant's conduct must be extreme and outrageous. Liability will be found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency.

Second, the plaintiff's emotional distress must be severe. Mental conditions such as fright, horror, grief, shame, humiliation, or worry are not actionable. The distress inflicted must be so severe that no reasonable person could be expected to endure it.

Third, the conduct must be intentional, or at least reckless. If reckless, the conduct must be such that there is a high degree of probability that severe emotional distress will follow and the actor goes ahead in disregard of it.

In this case Finance's conduct was not so extreme and outrageous as to constitute a basis for recovery under this tort. Davis claims that agents of Finance called her several times weekly, that they went to her home one or more times a week, and that they twice called her at a hospital where she was visiting her sick daughter. She alleges that Finance continued its practices even after she told them she was on welfare and was unable to make any additional payments. Davis, however, was legally obligated to Finance and had defaulted in her payments. A creditor must have latitude to pursue reasonable methods of collecting debts. Finance was at-

tempting to collect a legal obligation from Davis in a permissible though persistent and possibly annoying manner. Such conduct is not outrageous, and therefore, Davis does not state a cause of action for intentional infliction of emotional distress.[1]

In the *Davis* case, the court identifies three elements to the tort. First, the defendant's conduct must be outrageous. Second, the plaintiff's distress must be severe. Third, the defendant's conduct must have been intentional or, at least, reckless. The plaintiff must prove each of these in order to succeed. Therefore, you would organize an analysis of a problem dealing with intentional infliction of emotional distress around the three elements of the tort, in the order they appear in the definition. They become the issues you would discuss.

You may find that some issues will require extensive analysis, and others need be discussed only briefly. For example, in *Davis,* the most difficult issue to resolve was whether the company's conduct was extreme and outrageous. Finding that it was not, the court did not need to discuss the other two issues, since all of the elements of the tort must be met for the claim to succeed. If your facts paralleled those in *Davis,* you would discuss all of the elements in writing a memorandum on this subject. But you would devote more space to your analysis of whether the defendant acted outrageously than to the other issues, because it was the most complex.

Sometimes, however, you may want to discuss the elements out of order, for example, because one of them is more important than the other, or, you may want to discuss the less controversial issues first in order to dismiss them quickly. Then you would go into detail on the most problematic issue. For example, in another case dealing with intentional infliction of emotional distress, the real controversy might be over whether the plaintiff's distress was severe. You might decide that the analysis of whether the defendant acted outrageously and intentionally was so clear-cut that it could be disposed of quickly. You would then discuss extensively the more complex issue of whether the plaintiff's distress was severe. The discussion might run several paragraphs and be organized this way:

[1] This example is based on and uses language from the case of *Public Finance Corp. v. Davis,* 360 N.E.2d 765 (Ill. 1976).

Paragraph 1—The defendant's conduct was both outrageous and intentional.
Paragraph 2—The plaintiff's distress was not severe because X.
Paragraph 3—The plaintiff's distress was not severe because Y.
Paragraph 4—The plaintiff's distress was not severe because Z.

If you analyze the elements out of order, include a brief explanation of why you are doing so. Otherwise, your reader will expect you to analyze them as they appear in the definition.

A variant on this pattern occurs when you work with a rule that is followed by explicit exceptions. In this situation, your client may come within the rule, but the important analysis is whether your client comes within an exception to that rule.

Exercise 4–A

Read the following case and identify the three elements of the tort of false imprisonment. Each element will be an issue in the analysis of a false imprisonment claim. Does the court break down any of these issues into subissues?

East v. West

Carol West appeals from a judgment that she falsely imprisoned the three plaintiffs.

The plaintiffs were comparing voter registration lists with names on mailboxes in multi-unit dwellings. They intended to challenge the registration of people whose names were not on the mailboxes. Plaintiffs testified that they entered West's house through the outer door into a vestibule area which lies between the inner and outer doors to West's building. They were checking the names on the mailboxes when West entered and asked what they were doing. They replied that they were checking the voter lists. She first told them to leave and then changed her mind and asked if they would be willing to identify themselves to the police. Plaintiffs said they would. West then asked her husband to call the police. While they waited, she stood by the door, but neither threatened nor intimidated the plaintiffs. In addition, the plaintiffs did not try to get her to move out of the way. When the police came, they said the plaintiffs were not doing anything wrong and could continue to check the lists. Plaintiffs later sued West for false imprisonment.

An actor is liable for false imprisonment if he acts intending to confine the other or a third person within boundaries fixed by the actor; if his act directly or indirectly results in such a confinement of the other; and if the other is conscious of the confinement or is harmed by it.

The evidence here is not sufficient to support the conclusion that West's acts directly or indirectly resulted in the plaintiffs' confinement. Confinement may be brought about by actual physical barriers, by submission to physical force, or by threat of physical force. The question in this case is whether confinement was brought about by threat of physical force. We think it was not. Plaintiffs acknowledge that West did not verbally threaten them. Since none of the plaintiffs asked her to step aside, they could no more than speculate whether she would have refused their request, much less physically resisted. Moreover, the three of them are claiming confinement by a single person. Accordingly, the judgment below is reversed.[2]

According to the *East* case, what are the three elements of the tort of false imprisonment? These are the three basic issues and provide the organizational structure for your discussion. Of the three elements, on which does the court focus its discussion? As to this element, what are the different ways in which it can be met? These different ways suggest subissues that you must also consider in organizing your analysis of a false imprisonment problem.

Make an outline of how you would organize a false imprisonment problem. First, list the three elements of the tort—the basic issues that you must consider. Then look at the opinion and see how each of these elements is met. If any element can be met in different ways, list those ways beside the element. These are the subissues in the problem. This list provides the basic organizational structure for your analysis. Remember that subissues may also merit different degrees of analysis, depending on their applicability to the facts of your case, their intrinsic complexity, and the other subissues involved.

Sometimes the court defines the claim, but does not clearly outline the elements. Then you must identify and outline them yourself.

[2] This example is based on and uses language from the case of *Herbst v. Wuennenberg*, 266 N.W.2d 391 (Wis. 1978).

Suppose your client, Mr. Smith, wishes to hire a new employee. He wants the employee to sign a restrictive covenant that he will not compete with him if the employee decides to leave Smith's employment in the future. In a restrictive covenant, the employee agrees not to engage in certain conduct that competes with the employer after she leaves employment with the employer. Read the following case. What does the court in this case consider necessary to determine whether a covenant not to compete will be enforced?

Columbia Ribbon v. Trecker

We are required to determine whether a covenant made by a salesman not to compete with his employer after the termination of employment is enforceable in whole or in part.

Defendant Trecker was employed by Columbia Ribbon as a salesman for several years. He signed an employment contract with the following restrictive covenant:

1. The employee will not disclose to any person or firm the names or addresses of any customers or prospective customers of the company.
2. The employee will not, for a period of twenty-four months after the termination of his employment, sell or deliver any goods of the kind sold by the company within any territory to which he was assigned during the last twenty-four months prior to termination.

After Trecker was demoted, he terminated his employment with Columbia Ribbon and took a job with a competitor, A–1–A Corporation. Columbia then sued to enforce the terms of the covenant.

Restrictive covenants are disfavored in the law. On the other hand, courts must also recognize the employer's legitimate interest in safeguarding its business. Enforceability, therefore, depends on the reasonableness of the terms of the covenant. In this case, the terms of the covenant are broad and sweeping. The affidavits do not suggest that Trecker was privy to any trade secrets which he would then use or disclose. Nor are there any confidential customer lists; the employer's past or prospective customer names are readily ascertainable from sources outside its business. Trecker was a good salesman, but he did not possess any unique or extraordinary abilities or skills.

Since there are no factors present indicating unfair competition, there is no need to consider whether the time and geographic restrictions are reasonable.

Accordingly, Columbia's motion for summary judgment is dismissed.[3]

In the *Columbia Ribbon* case, the court tells you it will enforce covenants that protect the employer's interests only under certain circumstances. A court will enforce a covenant if the employer can show that the employee had access to trade secrets or confidential customer lists or that the employee's services are unique. The court, however, tells you at the end of the decision that it considers these factors to prevent the employee from engaging in unfair competition. And then, even if the circumstances indicate unfair competition, the covenant's time and geographic restrictions must be reasonable. These elements, like those of a tort or crime, provide the organizational structure for the analysis of the problem.

An analysis of whether a covenant not to compete is enforceable could use this organizational structure:

1. The contract does not involve unfair competition
   a. no trade secrets

   or

   b. no confidential customer lists

   or

   c. no unique employee's services

   and

2. The contract terms are reasonable
   a. reasonable time restrictions

   and

   b. reasonable geographic limitations

[3] This example is based on and uses language from the case of *Columbia Ribbon & Carbon Manufacturing Co. v. A-1-A Corp.*, 369 N.E.2d 4 (N.Y. 1977).

Notice the order of the issues in this problem. Reasonable terms are relevant only if unfair competition is involved. Thus section 1 must be discussed before section 2.

Exercise 4–B

1. Read the following summary of a case involving the issue of whether the defendant breached a restrictive covenant in an employment agreement. In this segment of the case, the court explains the common law requirements for a restrictive covenant. If you were analyzing a restrictive covenant, outline how you would organize your analysis of this topic. The citations in the court's decision are omitted.

Woodbrook v. Donna

A post–employment restrictive covenant will be enforced if its terms are reasonable. It must be reasonable in geographical and temporal scope, and necessary to protect a legitimate business interest of the employer. Prior to analyzing the reasonableness of a covenant not to compete, the court must make two determinations: (1) the covenant must be ancillary to a valid contract, that is, it must be subordinate to the contract's main purpose; and (2) there must be adequate consideration to support the covenant. A restrictive covenant agreement can be ancillary to either a valid employment contract or to a valid employment relationship if there is no written contract.

2. The Terms of a Statute Identify the Elements

If you are analyzing a problem which is governed by a statute, the terms of the statute itself may identify the major issues you must analyze. These are the requirements for the statutory claim. The language will tell you to whom the statute applies and the kind of conduct it governs.

Consider the following statute, also discussed in Chapter 3.

§ 140.20 Burglary in the third degree.

1. A person is guilty of burglary in the third degree if he knowingly and unlawfully either enters or remains in a building, and

2. does so with the intent to commit a crime.

Most criminal statutes are composed of elements of a crime, each of which must be proved at trial. As with the elements of a tort, the elements of a statute become the issues that you will discuss. The elements in this statute provide the organizational structure for an analysis of the crime of burglary.

To determine those elements, first consider the overall structure of the statute. If any parts of the statute are given in the alternative, only one element need be satisfied, but you may have to analyze each. If parts of a statute are connected by the word "and," both parts must be considered.

Once you have a sense of the overall structure of a statute, you can go on to identify its elements. You identify the elements of the crime by looking at the terms of the statute. Each term may be significant and require some discussion. However, as with a tort, some elements will require detailed analysis, while others need be analyzed only briefly.

The statute defining burglary in the third degree is short and fairly simple. However, even this short statute includes a number of terms which identify the elements of the crime that must be analyzed.

According to the statute, guilt of burglary in the third degree is established if:

1. [a] person
2. a. knowingly enters unlawfully [in a]

   or

   b. knowingly remains unlawfully [in a]
3. building
4. [with] intent
5. [to commit a] crime

You might organize your analysis by disposing of some elements, such as whether the defendant entered a "building" in a sentence or two, and analyzing others in a paragraph or series of paragraphs. Some elements may be so obvious, i.e., that the defendant is a person, that they need not be mentioned at all. As with the elements of a tort, your treatment of each statutory element depends on its complexity in relation to the facts of your case.

Exercise 4–C

Consider what issues are raised by the following statute, a section of the Uniform Commercial Code.

§ 2–315. Implied Warranty: Fitness for Particular Purpose

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified under the next section, an implied warranty that the goods shall be fit for such purpose.

According to the statute, to whom does the statute apply? What time period is relevant? What type of warranty is created? What must the seller know for the warranty to arise? How may the warranty be excluded or modified?

Make an outline showing the organizational structure of an analysis of implied warranty of fitness for a particular purpose.

Exercise 4–D

According to the following statute, what are the elements of burglary in the second degree? Notice that the structure of this statute is more complex than burglary in the third degree.

§ 140.25 Burglary in the second degree

A person is guilty of burglary in the second degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein, and when:

1. In effecting entry or while in the building or in immediate flight therefrom, he or another participant in the crime:
   a) is armed with explosives or a deadly weapon; or
   b) causes physical injury to any person who is not a participant in the crime; or
   c) uses or threatens the immediate use of a dangerous instrument; or
   d) displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; or
2. The building is a dwelling.

To identify the elements of this crime, you must first examine the overall structure of the statute. Look for the relationships among the words connected by "and" and "or." Notice that the statute contains two sections that follow the introductory section. You must determine how sections 1 and 2 relate to each other and to the introductory section. By considering questions like these, you will be able to identify the essential elements of the crime.

In a discussion analyzing whether someone had committed burglary in the second degree, you would have to decide which, if any, of the subsections of section 1 you could prove. You might decide that of the subsections of the statute, subsection (b), was totally irrelevant to your case, and that three subsections (a), (c), and (d) might be relevant. You might decide to briefly dispose of the irrelevant section, and then fully discuss those subsections that seem to be relevant to your case.

Make an outline showing the organizational structure of an analysis of burglary in the second degree assuming that subsection (b) is not relevant to your problem.

3. A Rule Evolves Over a Series of Cases

Organizing an analysis is more difficult when the elements of a claim are not found in a single case, but emerge from a series of cases. One case may provide the basic standard without identifying all of the elements eventually required. Thus you must read all the relevant cases on the general topic to identify the elements of the claim and the ways those elements can be proven.

Read the following summaries of cases about the tort of negligent infliction of emotional distress. All of them are from the same jurisdiction and all are relevant to this topic.[4]

Sinn v. Burd

The plaintiff, Robert Sinn, sued to recover damages for the emotional injuries he suffered when he saw his minor daughter struck and killed by a car. Mr. Sinn became hysterical and then lapsed

[4] Case summaries in this example are based on *Sinn v. Burd*, 404 A.2d 672 (Pa. 1979); *Kratzer v. Unger*, 17 Pa. D. & C.3d 771 (Bucks Co. 1981); and *Cathcart v. Keene Indus. Insulation*, 471 A.2d 493 (Pa. Super. 1984).