into a depression, sustaining severe emotional distress and repeated nightmares. He has had to spend considerable amounts of money for medical care. Mr. Sinn was not in any personal danger of physical impact when he saw the accident from the front door of his home.

Under the traditional rule, bystanders could not recover for mental injury unless they also suffered physical injury or were within the zone of danger, that is, they were in personal danger of physical impact. This rule, however, is unreasonably restrictive in cases where a parent views the death of a child, a situation which would cause at least as much emotional distress as being within the zone of danger. Here the injury was foreseeable since the plaintiff was the child's father, the plaintiff was near the scene of the accident, and the shock resulted from his sensory and contemporaneous observance of the accident. Therefore, the court below incorrectly dismissed the claim.

Kratzer v. Unger

The plaintiff sued the driver of a car, which struck and seriously injured her foster child, for negligent infliction of emotional distress. The child had lived with the plaintiff for over eight years. The plaintiff may bring a claim for negligent infliction of emotional distress.

Cathcart v. Keene

Ms. Cathcart sued her husband's employer for negligent infliction of emotional distress. She alleged that he had contracted asbestosis on the job and that she suffered emotional distress in witnessing his continual deterioration and death. Although the plaintiff did have a close relationship with the victim, this court must dismiss her claim since her injuries did not arise from the shock of viewing a single, identifiable traumatic event.

Long v. Tobin

Ms. Long sued the driver of a car for negligent infliction of emotional distress caused by her viewing her neighbor's child being struck by a negligently driven automobile. She alleged that she

became nervous and upset as a result of seeing the accident, since she has a child of the same age.

This court will grant the defendant's motion to dismiss the claim. Ms. Long does not have the requisite close personal relationship with the victim. Moreover, the mental distress she alleges is not sufficiently severe to warrant recovery. The type of stress required is that which no normally constituted reasonable person could endure.

In reading through the case summaries, you will have noticed that the most extensive discussion of this tort is given in *Sinn v. Burd*. *Sinn* is the leading case in the jurisdiction on the claim of negligent infliction of emotional distress. It sets out the basic standard for recovery: a person may recover for negligent infliction of emotional distress if the emotional distress is foreseeable. Distress is foreseeable when the plaintiff was the parent of the victim, when the plaintiff was near the scene of the accident, and when the distress resulted from a sensory and contemporaneous observance of the accident.

The other cases either elaborate on the elements raised in *Sinn* or introduce new elements. For example, the decision in *Kratzer* indicates that relationships other than parent and child can qualify, and thus elaborates on this prong of the test. Ms. Kratzer was not a parent, but a foster parent. The *Cathcart* decision elaborates on the relationship between plaintiff and victim by extending the coverage of the tort to spouses. In addition, the court in *Cathcart* establishes a new element. To be actionable, the distress must arise from a single, identifiable traumatic event. The court in *Long* also establishes a new element. To be actionable, the plaintiff's distress must be severe.

If you had identified the elements the courts address in determining whether a plaintiff states a claim for negligent infliction of emotional distress and made a list, the list would look something like this:

1. whether the plaintiff was closely related to the victim
2. whether the plaintiff was near to the scene of the accident and whether the plaintiff's shock resulted from a sensory and contemporaneous observance of the accident
3. whether the shock resulted from a single, identifiable traumatic event
4. whether the plaintiff's distress was severe.

Each of these elements becomes an issue that you would discuss in analyzing the tort.

Exercise 4–E

Read the following case summaries and determine which factors a court will consider in analyzing whether to grant a motion to quash service of process.

Finch v. Crusco

The question before this court is whether a Delaware resident who brought a contract claim in Pennsylvania is immune from service of process in an unrelated action, if he was served in Pennsylvania while attending court proceedings in his contract claim. Philip Crusco was in Pennsylvania to testify in his breach of contract claim. When he came out of the courthouse, he was served in an unrelated tort action.

The courts in this state have long provided that non-resident parties and witnesses in civil actions are immune from service of process. The purpose of this grant of immunity is not to protect the individual, but to assure that the courts' business is expedited and that justice is duly administered. The rule provides an incentive to those who might not otherwise appear whose attendance is necessary to a full and fair trial.

However, courts should deny immunity where it is not necessary to provide this incentive. Where both cases arise out of the same transaction, the courts should not grant immunity. Under this circumstance, the reason for granting immunity would be outweighed by the importance of fairly resolving the full dispute between the parties. Nor will the courts grant immunity to a party or witness who is in the jurisdiction to serve his own interest, since he does not need an incentive to appear.

Mr. Crusco falls into the second category. He did not require an incentive to appear in the state court since he had brought the suit himself and was personally benefitting from the court hearing. Therefore, his motion to quash service of process is denied.

Dulles v. Dulles

Mr. Dulles was given a grant of immunity as a condition of his appearing and giving testimony in a matter relating to the Girard Trust Company. He remained in the jurisdiction for nineteen days after the matter regarding the Trust Company was resolved. On the nineteenth day, he was served with process in an action for support by his former wife.

Mr. Dulles had immunity for a reasonable time before and after his testimony. But there was no need for him to remain in the jurisdiction for such a lengthy period of time after the testimony. Therefore, at the time he was served, he was no longer immune from service of process.

Cowperthwait v. Lamb

Mr. Lamb was served with process in a tort action as he was leaving a proceeding before the Secretary of Revenue regarding the suspension of his motor vehicle license. He argues that he was immune from process because he was summoned to testify before this administrative tribunal.

The rule granting immunity should be applied when a party is testifying before a tribunal which is judicial in nature, whether the hearing takes place in a court or not. This proceeding was judicial in nature. The Secretary may suspend the license only after a finding of sufficient evidence. He passes on the credibility of witnesses and applies law to the facts. The purpose of the rule, to have a full and fair hearing unhampered by the deterrence of the important witnesses, is just as important in proceedings of an administrative nature as before a court.

State v. Johnson

The defendant was charged with the criminal acts of fraud and obtaining money by false pretenses. Moments after appearing before a magistrate and being freed on bail, Johnson was served with process in a civil matter. His motion to dismiss the complaint on grounds that he was immune from service of process is denied. Immunity from service of process is granted to a defendant in a civil action as an inducement to appear and defend. But a criminal defendant has no choice but to appear. Therefore, there is no need to extend the rule to provide such inducement.[5]

4. The Rule Is Vague and You Must Extract the Factors From an Opinion or a Series of Opinions and Balance Them

When a court explicitly identifies the elements of a common law claim for you, or when the language of a statute supplies the ele-

[5] Case summaries in this example are based on, and use language from, *Cowperthwait v. Lamb*, 95 A.2d 510 (Pa. 1953); *Crusco v. Strunk Steel Co.*, 74 A.2d 142 (Pa. 1950); *Commonwealth v. Dulles*, 124 A.2d 128 (Pa. Super. 1956).

ments, you will not find it too difficult to know which issues to analyze or how to organize them. Often, however, a particular common law or statutory claim is defined more vaguely. Then the courts will frequently flesh out the requirements by identifying facts that are particularly relevant to deciding whether the rule is satisfied. In this situation, you must identify as factors the types of facts important to a court and organize around those factors.

Suppose you want to bring a negligence suit in federal court but there is a question about whether the plaintiff, a minor, could sustain a motion to dismiss for lack of diversity jurisdiction. The child's mother is a widow who has been in a one-year job training program in Massachusetts, where she intends to accept a job. While the mother was in this program, the child lived with her grandparents in New York, where she has always lived. Read the following case to determine what factors the court considers relevant in deciding whether the child has the domicile of the mother in Massachusetts, or the domicile of the grandparents in New York. These factors will form the organizational structure of your analysis.

Elliott v. Krear

It is alleged that on August 21, 1976, the defendant, 9-year-old Michael Krear, approached 10-year-old Keith Michael Elliott in a backyard in Virginia and, with a slingshot, shot a gumball at Keith causing an injury. Plaintiff's complaint alleges diversity jurisdiction under 28 U.S.C. § 1332. There is no question about the Virginia citizenship of the defendants. On the eve of trial, however, the court became aware that the plaintiff may have been a citizen of the Commonwealth of Virginia on the day this suit was filed. Accordingly, a hearing was held. The question of the court's jurisdiction is now ripe for disposition.

The court finds the facts to be as follows. Plaintiff is the son of divorced parents. His mother has custody. After the divorce, plaintiff continued to live in Virginia with his mother until early 1976, when his mother went to California to study law. The plaintiff was left in the custody of his maternal grandparents, who were citizens of Virginia. While in California, the plaintiff's mother formed an intent to remain indefinitely in California. The plaintiff's mother was residing in California when the gumball incident occurred. Though the incident occurred in August, the plaintiff's grandparents, who were caring for the plaintiff and paying for all

of his support, did not inform plaintiff's mother of the incident until she returned to Virginia at Christmas time, 1976. Complete medical treatment and legal advice and services were sought and obtained by the grandparents without reference to plaintiff's mother. In the spring of 1977, the plaintiff went to California to live with his mother. In the spring of 1978, the plaintiff moved back to Virginia. In the fall of 1978, the plaintiff's mother decided to return to Virginia.

The applicable date for determining the citizenship of the plaintiff is the day on which the law suit was filed, August 21, 1978. The elements necessary to establish citizenship are the same as those to establish domicile: residence combined with an intention to remain indefinitely. An infant's citizenship must be determined by reference to the citizenship of some other person, because an unemancipated infant is not capable of forming the requisite intent to establish independent citizenship.

The domicile of an infant whose parents are divorced is, for federal diversity jurisdictional purposes, the domicile of the parent to whom custody has been given. However, strict adherence to this rule is appropriate only if the result obtained comports with the underlying policies.

The principal purpose of diversity jurisdiction was to give a citizen of one state access to an unbiased court to protect him from parochialism if he was forced into litigation in another state in which he was a stranger and of which his opponent was a citizen. Strict adherence in the present case does not comport with this policy.

Neither the plaintiff in this case, his grandparents, or his mother is a stranger to Virginia. Plaintiff was born in Virginia and has spent all of his life in this Commonwealth except for a one-year stay in California. Plaintiff's mother has returned to Virginia. Moreover, although plaintiff's mother was apparently awarded custody of plaintiff, it is clear that plaintiff's mother was not exercising control and did not have actual custody of the plaintiff at the time this suit was filed. Plaintiff's grandparents were and had been acting *in loco parentis* in providing for plaintiff's support, maintenance, protection and guidance at the time this suit was filed. Plaintiff's grandparents made all the important decisions affecting plaintiff's medical care, legal services, and education.

These considerations lead us to hold that the courts of Virginia would not view plaintiff in this matter or view any person who could conceivably be considered his custodian as a stranger. Thus, the policy that underlies diversity jurisdiction will not support jurisdiction in this case. Accordingly, the Court holds that plaintiff had the citizenship of his grandparents when suit was filed and there is no diversity of citizenship between the parties to this law suit. Thus the Court lacks subject-matter jurisdiction over this action.[6]

In *Elliot v. Krear,* the court tells us that an adult's citizenship is determined by residence and intent to remain in a state for an indefinite time, but that a child's citizenship must be determined by reference to the citizenship of an adult because an unemancipated child is not capable of forming the requisite intent to establish independent citizenship. Generally, a child has the citizenship of the parents or of the divorced parent to whom custody has been given. Sometimes, however, the child has the citizenship of the adult acting in *loco parentis.* To determine whether a child has the citizenship of the parent or of the adult acting in *loco parentis,* the court considers a number of factors.

—duration in a state
—intent of the adult to stay in a state
—actual custody and control of child
  who supports the child?
  who provides guidance?
  who protects the child?
  who is the decision-maker about medical treatment, education, legal advice?

When courts consider and balance a series of factors like these, they are engaged in what is called a totality of circumstances analysis. In a totality of circumstances analysis, you typically do not have to prove or disprove each factor. Instead you identify the most important factors in your case and decide, for example, whether on balance they establish citizenship in Virginia or in California.

[6] This example is based on and uses language from *Elliott v. Krear,* 466 F. Supp. 444 (E.D. Va. 1979).

Sometimes a vague rule is clarified in a series of opinions. For example, all states have adopted the Uniform Commercial Code § 2–302, which permits a court to refuse to enforce an unconscionable contract. The statute does not define unconscionable. The courts, however, typically require two types of unconscionability, procedural and substantive. Moreover, over time, courts have identified factors that can show that a contract is substantively or procedurally unconscionable. For example, one court held that a contract was procedurally unconscionable because of unequal bargaining power. Another court held a contract was procedurally unconscionable because one party had no meaningful choice. Finally, a third court held that hidden terms rendered the contract unconscionable. These factors must be synthesized to form an organizational structure for your paper.

You would start with the statutory language of § 2–302: "If the court as a matter of law finds the contract ... to have been unconscionable at the time it was made, the court may refuse to enforce the contract...." Then analyze procedural and substantive unconscionability separately, breaking each type of unconscionability into the factors that courts have identified. For example, because procedural unconscionability can result from unequal bargaining power, absence of meaningful choice, or hidden terms, you would analyze each relevant factor in relation to the contract in your case.

To prove this claim, like many totality of circumstances claims, you usually do not have to prove each of the factors you have identified, although the more factors you can prove, the stronger the claim. Thus, a contract may be procedurally unconscionable although it does not have hidden terms, if the parties were in unequal bargaining positions and the plaintiff lacked meaningful choice of terms. These factors could weigh strongly in the plaintiff's favor. (For more on the organization of this analysis, see Chapter 8).

You may organize a totality of circumstances discussion in several ways. You may decide to analyze each factor separately. Then you should determine whether all the factors must be proven, and if not, how important the factors are relative to each other.

At other times, however, it may make more sense to organize a totality of circumstances problem around the principles the court has articulated for weighing the factors, if a court has done so. In other words, instead of taking each factor separately, use the court's

guidelines for assessing the factors to organize your discussion. For example, suppose the court has said, as it did in *Elliott*, that diversity jurisdiction is appropriate only to give a stranger to the state access to an unbiased court. A good way to organize your assessment of the factors is to group those that show plaintiff is not a stranger to Virginia, and then to weigh those against factors that show plaintiff is a stranger. You then determine which set of facts is stronger.

An alternative organization is by the parties. Group the factors that favor one party, then the factors that favor another party. Then evaluate the strength of each party's case. This might be the best way to analyze a statute that requires the courts to consider seven factors to determine the best interests of a child in a custody dispute:

1. the wishes of the child's parent or parents as to custody;
2. the wishes of the child as to his custodian;
3. the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
4. the child's adjustment to his home, school, and community;
5. the mental and physical health of all individuals involved;
6. the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person; and
7. the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child.

In a custody dispute, each parent may be requesting custody of the child, and the court will evaluate the strength of their requests. The child may wish to remain with her mother, but may interact well with both parents and both sets of grandparents; the child would remain in her current school if she lived with her mother, but not with her father; the fifth and sixth factors may not be relevant; and the mother may be less willing than the father to encourage the child to retain a close relationship with the other parent. The court will then have to weigh the child's wish to stay with her mother and the importance of remaining in the same school against the father's greater willingness to continue the child's relationship with the other parent.

Exercise 4–F

The Illinois Marriage and Dissolution of Marriage Act § 601 regarding proceedings to determine child custody permits a person other than a parent to petition for custody "but only if [the child] is not in the physical custody of one of [the child's] parents." Read these case synopses to determine what "physical custody" means. Then outline the factors involved and write a paragraph explaining the balance that is required.

1. James and Joyce Peters had one child, Lynn. At their divorce, the court awarded custody of Lynn to Joyce and visitation rights to James. Joyce and Lynn moved in with Joyce's parents. Joyce contracted a fatal and disabling disease, during which her parents cared for her and for Lynn at their home. James exercised his weekly visitation rights during this time. After Joyce died, James asked for the child, but was refused, and James and Joyce's parents then filed petitions to modify custody. The court dismissed the grandparents' petition. It held that the grandparents did not have physical custody of Lynn but only possession. Joyce had physical custody until her death and Lynn was then in her father's physical custody. It would not have occurred to James that the grandparents were developing a position of physical custody by which they could deprive him of custody of the child. To hold otherwise would encourage the parties to engage in child abduction in order to remove the child from the parents, which was against the policy of the Act.
2. After her divorce, Barbara turned over her younger daughter to the temporary care of Barbara's older adult daughter. This daughter then turned over the child to a friend who frequently had taken the child for overnight stays. The friend filed for custody. The court held that Barbara had never relinquished physical custody of her child and dismissed the friend's petition.
3. Mennan left his child with his parents when his wife died. The grandparents kept the child for 7 years during which time they had almost no communication from Mennan. When Mennan returned, he took the child from them by force. The court held that the grandparents could petition because Mennan had voluntarily relinquished physical custody to them. Allowing the petition would promote the policy of the Act to foster stability in the child's home environment.

Exercise 4–G

Read the following cases, all of which deal with the question of a hospital's liability for the suicide of one of its patients. Ask yourself what the basic rule is regarding the standard of care and what factors the courts will consider in determining a hospital's liability.

Ross v. Brown Hospital

The plaintiff's wife committed suicide four days after she was admitted to the defendant mental hospital. The patient had twice tried to commit suicide before her admission to the hospital. The last time was the day before she was admitted.

The court denied the defendant's motion to dismiss and stated that the hospital owed the plaintiff a duty of exercising reasonable care to protect her from injuring herself. That duty was proportionate to her needs and constituted such reasonable care as her known mental condition required.

Smith v. Stevens Hospital

An acutely depressed patient was left unobserved in his hospital room by his nurses for successive periods of two hours each during the night and early morning. During the last of these periods, he hung himself with a bed sheet. The court held that the hospital did not exercise reasonable care in supervising the patient and was liable.

Moore v. United States

The patient voluntarily admitted himself to a hospital. His preadmittance diagnosis was arteriosclerosis. His examination revealed no signs of suicidal tendencies or any psychiatric disorder. He had no history of mental illness. The doctors accordingly placed him in an open ward.

Four days later, the patient's behavior changed. He became paranoid and in fear for his life. The doctors then transferred him to a closed ward. The doors were kept locked and heavy screens were placed over the windows. The attendants routinely counted the silverware on his meal tray. There was a high number of personnel per patient in this ward. Nurses observed the patient several times and saw no unusual behavior. One night the patient pried open the screen in front of a window and jumped out. The court held that the hospital had used reasonable care in diagnosing the patient in light of his history and in treating him.

Brown v. General Hospital

The plaintiff's wife had attempted suicide and had voluntarily admitted herself to the psychiatric department at General Hospital. For five months she was in a closed ward and received electroshock treatment. When her condition improved, her doctor transferred her to an open ward.

Under modern psychiatric theory, allowing patients as much freedom as possible is consistent with reasonable care. Doctors believe that an open ward is more conducive to the establishment of a therapeutic atmosphere in which the patient comes to trust the doctor than is a closed ward. Ms. Brown's doctor recommended a program of drug treatment and occupational therapy. For six months, Ms. Brown remained in the open ward and her condition continued to improve. She then took her life. The court held that the hospital had used reasonable care in supervising her and was not liable for negligence.[7]

What is the basic standard that the courts use in determining whether a hospital is liable for the suicide of one of its patients? Make a list of the factors the courts consider in analyzing this standard. These factors are the issues that you would discuss in analyzing the hospital's liability. They form the organizational structure of your analysis.

[7] Case summaries in the example are based on *Stallman v. Robinson*, 260 S.W.2d 743 (Mo. 1953); *Smith v. Simpson*, 288 S.W. 69 (Mo. App. 1926); *Moore v. United States*, 222 F. Supp. 87 (E.D. Mo. 1963); *Gregory v. Robinson*, 338 S.W.2d 88 (Mo. 1960).

5

Organization of a Legal Discussion: Small-Scale Organization

I. Introduction

IN CHAPTER FOUR, WE DISCUSSED the need to organize a legal analysis around the legal issues of each claim for relief. In this chapter, we focus on the organization of a discussion of a single legal issue and suggest an organizational pattern that will enable you to write a clear analysis of that issue. The pattern presented here is a fairly standard format for fact-based legal problems because it logically orders the steps necessary in this type of legal reasoning. We focus here on fact-based problems because these are common assignments in both legal practice and first-year legal writing courses. Be aware, however, that a different kind of legal problem—one involving the meaning or the validity of a law, for example—will require you to adapt this pattern so that your focus is on statutory construction, weight of authority, judicial reasoning, or underlying policies rather than on factual comparison (see Chapter 11).

With this caveat in mind, a useful pattern for analyzing a single legal issue often has the following structure:

1. Explanation of the applicable rule of law
2. Examination of how the rule is applied in the relevant precedents
3. Application of the law to the facts of your case and comparison with the precedents
4. Presentation and evaluation of counterarguments
5. Conclusion

In other words, begin by explaining the controlling rule in the jurisdiction in which your problem is located. If there is no controlling rule in that jurisdiction, then discuss what the rule should be by

looking at rules in other jurisdictions. The general rule comes from the elements of a statute or statutes or from a common law claim, and from the holding of a previous case or from a synthesis of holdings from more than one case on a topic. Summarize the explanations of a rule that have been offered by those authorities that have established and applied it. Explain the relevant facts of those cases. Then apply that rule to the facts of your case, and compare and contrast the facts of those precedents to the facts of your problem. Discuss the counterarguments and the exceptions that may apply. Finally, evaluate the arguments and counterarguments to reach a conclusion as to the outcome of your problem.

Adherence to this pattern ensures that the reader gets necessary information in an order which is readily understandable. You should not begin the discussion with a summary of the facts of your case, for example, because the reader cannot assess the legal significance of those facts without your having first explained the controlling rules and examined the relevant case law and the kinds of facts courts have previously decided were legally significant. Therefore, you usually examine relevant case law before you discuss how the law applies to the facts of your own case. Similarly, you should raise and answer counterarguments before you reach a conclusion because the success with which you handle a counterargument should be reflected in your final conclusion.

Sometimes the analysis of an issue is so clear cut that you can include all five analytic steps in a single paragraph. For example, if the case law in your jurisdiction on false imprisonment requires that a plaintiff be aware that he was confined and the plaintiff in your problem was clearly aware of his confinement, you can treat that requirement quickly. For most issues, however, you will need to break your analysis into parts. You can subdivide your discussion without sacrificing its logical structure if your paragraphs reflect those steps. You should also use topic and transition sentences to remind the reader what you have covered and to indicate where the discussion is going.

II. Steps and Organization of a Legal Analysis on a Single Legal Issue Using a Single Case

THE FOLLOWING PAGES ATTEMPT to illustrate the development of a discussion of one element in an action for intentional infliction of emotional distress. The client, plaintiff Livia Augusta, wants to sue

Olympia Department Store for emotional distress suffered while the store attempted to collect payment for a debt she never incurred. The discussion is based on one primary authority, a case from the same jurisdiction as the problem, *Davis v. Household Finance,* and on one secondary source (full citations are omitted).

A. Paragraph or Paragraphs on the Rule of Law

The discussion of a particular legal issue should begin with a sentence or one or more paragraphs that set forth and explain the governing rule of law. When the rule of law appears to be both straightforward and clearly articulated, a complete paragraph explaining it may be unnecessary. In these instances, you would still need to begin with a topic sentence informing the reader of the governing rule, but you could follow this sentence with a discussion of its application in decided cases. When the intent and the scope of the law is more complicated, however, you may need to write a much longer explanation clarifying its meaning or components. These explanations may require you either to analyze the language of a constitution or a statute, to set out the tests governing a law's application or the competing explanations, or to summarize a court's discussion of that rule or a pertinent discussion in a secondary authority, which has, perhaps, been adopted in that jurisdiction.

A paragraph that explains the applicable law governing a defendant's outrageous conduct might look as follows (the marginal comments refer to the paragraph's mode of construction).

The first element for intentional infliction of emotional distress is whether the defendant's conduct was extreme and outrageous. *Davis v. Household Finance.* Outrageous conduct is distinguishable from minor insults, threats, or annoyances. *Id.* A defendant has engaged in outrageous conduct only if he has engaged in a "prolonged course of hounding by a variety of extreme methods." W. Prosser, *Law of Torts* 57 (4th ed. 1971). Such methods include abusive language, shouting, repeated threats of arrest, withdrawal of credit, and appeals to the debtor's employer. *Davis.*	Topic Sentence Announcing Element Explication of Rule

B. Paragraph or Paragraphs on Case Law

After analyzing the governing rule of law, your next step is to examine the relevant case law from which that rule came or in which it has been applied. In a fact-based problem, you should recount the relevant facts of the precedents because it is by identifying how the rules of law were applied to the facts of those cases that you give the rules meaning. Then by identifying similarities and differences between the facts of the precedents and those of your client's case, you predict the outcome of an action. It is also necessary to give the court's holding since, under stare decisis, it is the holding for each important case which establishes how the facts are to be interpreted. Finally, you should summarize for the reader the reasons and policies behind a court's determination of an issue. This type of analysis provides a basis for generating arguments about whether the legal requirements of that claim will be satisfied in your case. We illustrate this step with one paragraph because this discussion is based on only one precedent. A more complex discussion might require more than one paragraph.

It is important to remember that you are examining these cases to shed light on the legal principle you introduced in the opening paragraph. You must, therefore, connect the case discussion to that principle. If you fail to show how the precedent illustrates, limits, expands, or explains the law, the discussion falters. One general rule of thumb here is to avoid beginning this paragraph with a sentence giving the facts of a case, as "In East v. West, where a defendant stood in front of a door to prevent three men from exiting, the court found no basis for recovery." Rather, start either with a topic sentence setting forth the legal principle that case shows or with a transition sentence that makes it clear you are continuing the same topic.

Topic Sentence on Legal Principle	When the defendant is a creditor, it may use reasonable if somewhat embarrassing and annoying methods to collect legitimate debts. *Davis.* In *Davis,*
Holding	the court held that Finance Corp.'s conduct was not outrageous when it made numerous phone calls and visits to Mrs. Davis at her home and at the hospital where she visited her ailing daughter. *Id.* Finance Corp. made these phone calls for seven months. The *Davis* court reasoned that a creditor must be given

some latitude in collecting a past due obligation and that Finance Corp.'s conduct fell within reasonable limits. Indeed, Mrs. Davis herself did not allege that Finance Corp.'s agents used abusive, threatening, or profane language. *Id.* Although the court said that Finance Corp. acted wrongly when it induced Davis to write a bad check, it found that one isolated act was inadequate to show the prolonged course of harassment that is required for a showing of outrageous conduct. The court permitted the creditor reasonable latitude to collect its debt, which it had a legal right to do. *Id.*	Reasoning Pertinent Facts

C. Paragraph or Paragraphs on Application of Precedents

The next step in a legal analysis involves applying the facts, policies, and reasons of decided cases to your case. In a memorandum, you should set out and evaluate the similarities and differences between the precedent and your case and determine their importance. The central job in this stage of analysis is to compare each relevant fact in the decided cases to those in your own case and to evaluate the strength of the claim you wish to make in light of these comparisons. You also apply the reasoning or policies of a decided case to your own case.

It is helpful to begin this step with a transition sentence which weighs the merits of the client's case in light of established precedent.

Augusta's situation is distinguishable from that of Ms. Davis in two ways. First, Augusta does not owe a debt to Olympia. Thus the reasoning in *Davis*—namely, giving a creditor latitude to collect debts—does not apply to Olympia. Olympia was not doing what it had a legal right to do. Second, Olympia's conduct was more extreme than that of Finance Corp. For example, the language of Finance Corp.'s personnel was neither abusive nor vituperative. Olympia's language, however, became increasingly abusive and vituperative—an employee called her "a	Transition Sentence Distinguishing Cases Distinguishing Facts

> welsher and a four flushing bastard." Thus, Olympia engaged in a type of conduct that the court said was not present in *Davis*. In addition, Olympia's wrongful conduct was not an isolated act, like inducing a plaintiff to write a bad check, but occurred over a period of many months. The billing department sent daily letters that demanded payment and that threatened to cancel her charge account and to report her delinquent account to the Credit Rating Bureau.

When you believe your adversary has no authentic counterargument on this issue, do not feel compelled to create one. Instead, end your discussion with a conclusory sentence, for example, "Since these letters continued arriving for three months, Olympia engaged in a prolonged course of harassment." Normally, however, your adversary will have a valid argument that you must assess before coming to a conclusion, as discussed below.

D & E. Paragraph or Paragraphs on Presentation and Evaluation of Counterarguments and Legal Conclusion

A thorough discussion requires you to present and evaluate counterarguments. Evaluation of a counterargument is usually the last step before the conclusion in a legal analysis. When the evaluation is complex, it may require an extended analysis of one or more paragraphs.

Discuss those precedents and those facts from your problem that your opponent is going to rely on. Opposing counsel will highlight facts which are clearly unfavorable to your client or which can be interpreted differently by the parties. In an objective analysis, it is important to raise all reasonable interpretations of the issues. When issues are complex, the application of law to fact is rarely clear-cut and will often support more than one interpretation. Your job is to evaluate the strength of these interpretations.

When a legal memo is written analyzing a client's case, you will want to consider whether you can meet a counterargument by showing 1) that it is based on legally insignificant or incomplete facts or on a misapplication of the law to the facts, or 2) that it relies on inapplicable reasons or policy arguments. On the other hand, your analysis of the opposing argument might convince you that your cli-

ent cannot prevail on this issue. If this is the case, you should say so. An office memorandum is an objective exploration of your client's legal situation and the basis for legal advice. (See Chapter 7.) You do not want to be misleading in a document of this nature.

The final sentence should be the legal conclusion, a conclusion grounded in the prior analysis of the law, precedent, and facts. This conclusion differs from the one given in the thesis paragraph that begins the Discussion section of the memorandum. (See Chapter 6.) That conclusion offers an assessment of a client's overall chance of winning a suit or defending himself against a charge. Here, the conclusion refers only to the issue that has been under discussion.

Arguably, Olympia has not done anything as extreme as Finance Corp. Whereas Finance Corp. induced Davis to write a bad check and then phoned an acquaintance of Davis to inform her that Davis wrote bad checks, Olympia did nothing so publicly humiliating. Whereas Finance Corp. called Davis several times a week, frequently more than once a day, for a period of seven months, Olympia sent out daily letters and made daily phone calls only over a three month period. The court in *Davis* found that Finance Corp.'s numerous phone calls did not establish a prolonged course of hounding because there was no indication that the agents of Finance conducted themselves other than in a permissible manner during those calls. Thus, even if less extreme conduct is actionable when the plaintiff is not a debtor, Augusta may not be able to establish a prolonged course of harassment involving more than minor insults and threats.	Topic Sentence: Counter-argument Opponent's Facts & Reasoning Opponent's Conclusion
This argument should not prevail, however. Even if Olympia did not commit so extreme an action as inducing Augusta to write a bad check, and even if its course of harassment was four months shy of Finance's, Olympia's abusive language and threats of ruination of credit are not permissible conduct under *Davis*. Had Augusta actually been a debtor, Olympia's conduct in comparison to that of Finance Corp. might nonetheless have stated a claim. Given	Transition Sentence: Rebuttal Facts & Reasoning Supporting Rebuttal

Legal Conclusion	that Augusta was not a debtor, and that the reasoning of *Davis* is therefore inapplicable, Augusta will satisfy the element of outrageous conduct in an action for intentional infliction of emotional distress.

Although you can handle counterarguments in separate paragraphs, it is possible, if also more difficult, to weave rebuttal into your analysis and application of the case law. (In the fact application paragraph of step three, for example, the writer begins to rebut potential opposing arguments by distinguishing the facts of the cases.) When the counterargument or the rebuttal is complex, however, or when the counterargument is based on policy or reasoning rather than precedent, it may be preferable to handle the rebuttal separately, as in the paragraphs above.

Exercise 5–A

In order to win a suit against Olympia Department Store on the grounds of intentional infliction of emotional distress, Livia Augusta must show that the conduct of the store was intentional or reckless. Read the following summary of *Davis v. Finance Corp.* on the requirement of reckless conduct. Then read Augusta's account of Olympia's reckless conduct. List the points you will make to show Olympia was reckless. Then list the points that show Olympia was not reckless. After this, write a discussion on whether Augusta can show Olympia acted recklessly.

Davis v. Finance Corp.

Defendant's conduct must be intentional or at least reckless to be actionable. If reckless, the conduct must be such that there is a high degree of probability that the plaintiff will suffer severe emotional distress and the actor goes ahead in conscious disregard of it.

Mrs. Davis told Finance Corp. that its visits to her at the hospital where she visited her ailing daughter were upsetting her daughter so much that her recovery was being impeded. Davis added that she herself was becoming extremely anxious, worried, and angry that Finance was dragging a patient into a dispute that "was none of the patient's doing." Upon hearing this, Finance Corp. suspended its visits to the hospital. At a later date, Davis informed Finance that "its harassment was driving her nuts."

The court held that the conduct of Finance Corp. was not reckless because it suspended its visits to the hospital when it became apparent that there was a high degree of probability that severe emotional distress would follow from those visits. It also stated that Davis's warning that Finance was "driving her nuts" did not sufficiently establish reckless conduct leading to severe distress since the phrase is routinely used to describe such trivial reactions as a parent's irritation at a child's misbehavior.

Livia Augusta told her attorney that she began informing Olympia personnel that its harassment was causing her insomnia, nightmares and weight loss after three weeks of abusive phone calls. After four weeks, Livia wrote the following letter to the president of Olympia.

> The conduct of your personnel in pursuing payment for a purchase I never made is having a horrendous impact on my health and emotional stability. My physician is giving me tranquilizers around the clock to control the acute anxiety I have been experiencing. This situation is intolerable, and I expect you, as president of the store, to clear this matter up before I become a complete wreck.

The president wrote back to Augusta promising that he would resolve the matter, but telling her it might take a week or so to clear up the confusion. Two weeks after this response, Augusta received a letter from Olympia saying it had reported her delinquent account to the Credit Rating Bureau.

III. Case Synthesis in a Legal Analysis of a Single Legal Issue

OCCASIONALLY, ONE CASE LIKE *Davis* will provide all of the authority you need to resolve a legal question. More frequently, however, you will need to use more than one case to analyze that question. The following example is an analysis of one part of a false imprisonment case brought by Alma Kingsford against her former employers. Alma Kingsford claims that her employers summoned her to an office where one of them blocked the exit by standing in front of the door. They then proceeded to threaten and shout at her in an effort to force her to resign from their firm and forgo severance pay. The requirements of this tort are that the defendant must actually have confined the plaintiff, that the defendant intended to confine the

plaintiff, and that the plaintiff was aware of or harmed by the confinement. This part of the discussion is an analysis of the first element: actual confinement. In researching this problem, you will have found a number of cases dealing with the elements of a false imprisonment action. For the moment, set aside all of the cases that decided elements other than actual confinement. You will address those cases later.

In examining your cases on the element of confinement, you will discover that confinement can be brought about in several different ways. Kingsford's argument is that the defendant confined her in a room to question her by threatening to use physical force if she left the room. Your focus should therefore be on those cases that show confinement by threat of physical force.

Your discussion of confinement by threat of physical force must make sense of all the different factual situations which courts have held establish that requirement. In other words, you must synthesize the cases your research has turned up by articulating the factors that make analytic sense of decisions involving diverse fact patterns. In this false imprisonment problem, your case synthesis will reveal that a threat of physical force can be established by a defendant's actions, tone of voice, or size advantage. These are factors that have proven confinement in other cases. The cases also reveal two other factors necessary to a finding of confinement by threat of physical force, namely, that the defendant had the ability to carry out the threat and that the confinement was against the plaintiff's will. You should discuss each of these factors separately, and you should begin each discussion with a topic sentence that states how those factors can be established.

When you synthesize cases in your discussion, do not feel compelled to give all cases equal treatment. First, always give more weight to and begin with precedents from the jurisdiction of your problem than to precedents from other jurisdictions. Second, let your treatment of a case depend on its relevance to your client's situation. Some cases, for example, may not provide useful facts for comparison but may provide a rule of law or relevant policy. In this situation, a one sentence summary of the rule or policy may be all you need to use. Where, however, a case is especially relevant to your problem—either for the facts or for its discussion of the rule—your discussion of the precedent should be more extensive. In reading through the sample discussion that follows, notice when a one-sentence summary

is used to state a rule or to characterize a set of facts and when a case is more thoroughly treated.

Notice also that the sample discussion begins with an introductory paragraph, the first sentence of which introduces the element of whether the plaintiff had been confined. The paragraph then identifies the factors that prove confinement and concludes with a statement about whether the element can be satisfied in the problem case.

The rest of the discussion demonstrates how the basic technique for organizing a discussion of an issue when working with a group of cases is similar to that used when working with one case—the rule is presented, the precedent or precedents are discussed, the facts of your case are compared, opposing arguments are raised and evaluated, and finally, a conclusion regarding that issue is stated. Notice in the sample discussion that when a requirement can be easily established, all the analytic steps described above are covered in a single paragraph. When the discussion is complex or case law abundant, however, the discussion is subdivided into paragraphs indicative of the steps in a legal analysis. Also notice that counterarguments are not always raised. When counterarguments seem insubstantial, this step can be omitted or incorporated into the fact application paragraph. Note, all cases are from the jurisdiction of the problem, but full citations have been omitted.

Pattern of an Analysis Involving Case Synthesis

The first element of false imprisonment requires that the defendant confine the plaintiff. In Kent, a defendant can confine a plaintiff by physical barriers, overpowering physical force, threats to apply physical force if the victim goes outside the boundary fixed by the defendants, submission to other types of duress, and submission to an asserted legal authority. *Johnson v. White* (adopting Restatement (Second) of Torts). Kingsford's chances of establishing confinement depend on her showing that the defendants threatened physical force. A plaintiff may be confined through threat of physical force by a defendant's action, *see Atkins v. Barton,* or by a defendant's tone, *see Tyler v. Jones.* Under any of	Topic Sentence: Confinement Case Used for General Rule Cases Provide Rule For 1st Subissue: Threat

For 2nd Subissue: Ability

For 3rd Subissue: Involuntariness

Legal Conclusion

these circumstances, the defendant must also have the ability to apply force. *East v. West.* Finally, the restraint must be against the plaintiff's will. *Id.* If the plaintiff voluntarily agrees to stay, he or she has not been falsely imprisoned. *Lopez v. Winchell.* Kingsford was confined because Peterson and Smith were able to carry out the threat they made and she submitted to them against her will.

Topic Sentence: 1st Subissue

Case on 2 Ways Threat Can Be Made

An action so intimidating that its effect is to confine the plaintiff by threat of physical force may result from the defendant's movement and gestures and from the plaintiff's perception of the defendant's size advantage. *Atkins v. Barton.* In *Atkins,* the plaintiff successfully sued a deprogrammer, Barton, for false imprisonment. Barton was 6′2″ and 225 pounds. When he stepped in front of the door to the plaintiff's bedroom, blocking her exit, she reasonably believed that she was confined by threat of physical force even though he did not say a word. Id.

Comparison with Problem Case

Similarly, Ms. Kingsford may have been confined by the threatening gestures of her supervisors. Smith moved to the door and leaned against it when Kingsford rose from her chair as if to leave. In addition, Smith has a size advantage. At 5′6″ Smith is five inches taller than Ms. Kingsford. She is also athletic and works out at a health club several times a week.

Transition Sentence on Counter-argument

Nonetheless, because Smith is significantly smaller and lighter than the defendant in *Atkins,* defendants will doubtlessly argue that Kingsford's reliance on *Atkins* is misplaced. In addition, whereas the female plaintiff in *Atkins* perceived the male defendant as having an unfair physical advantage because of his gender, there is no gender disparity between Kingsford and Smith. Yet these differences are probably not significant. Courts have consistently regarded the comparative sizes of the parties as more important for establishing intimidation than size or gender alone. *See Cane v. Downs* (defendant

Pertinent Facts

was six inches taller and fifty pounds heavier than plaintiff); *Carey v. Robier* (although defendant was only 5′5″, plaintiff was four inches smaller). *See also Mussel v. Wimple* (defendant was a 5′11″ male, plaintiff a 5′6″ male). Thus, based on their gestures and size advantage, the defendants threatened physical force.

Parentheticals Support Rebuttal

Legal Conclusion

If the defendant does speak, his tone may be sufficient to establish a threat of physical force, even if he made no explicit threat. In *Tyler v. Jones*, the defendant accused the plaintiff of stealing money from his car. The defendant demanded that plaintiff be searched in front of his fellow workers. The defendant's confrontational manner and his belligerent tone of voice made it clear that there would be serious trouble if the plaintiff did not allow himself to be searched. Id. In calling his friends over to witness the "frisk," the defendant created a threatening atmosphere. Id. In Ms. Kingsford's case, threats of physical force, if not actually articulated, were at least implicit in Peterson's tone of voice, which Kingsford described as "loud" and "harsh." She also referred to a lot of "screaming and shouting." Thus, the defendants' actions and tone established a threat of physical force.

Topic Sentence On 3rd Way to Show Threat

Case Provides Example

Comparison with Problem Case

Conclusion

The ability to carry out a threat can be established if defendants outnumber the plaintiff. See *Appley v. Owens* (two defendants confined plaintiff); *Atkins* (parents and deprogrammer confined a single woman). Like the defendants in these cases, Peterson and Smith outnumbered the plaintiff. As Kingsford said, "there were two against one."

Topic Sentence On 2nd Subissue: Ability

Precedent Facts

Comparison

Finally, there is no confinement unless the plaintiff remains involuntarily. *East v. West*. The plaintiffs in *East* remained voluntarily. When told the police had been called, they agreed to wait. Id. In *Lopez v. Winchell*, the plaintiff, who was accused of

Topic Sentence on 3rd Subissue: Involuntariness

Case Analysis

stealing money from her employer, remained voluntarily. She decided to remain in the store with her employers so that she could clear her name.

Transition Sentence Suggests Counter-argument

Like Lopez, Kingsford agreed to remain in Peterson's office. Peterson and Smith had initially summoned Kingsford to the office to fire her. They also wanted her to agree to leave their firm without receiving severance pay. When Kingsford said that she would never agree to such a condition and that she would not hang around to be bullied into submission, Peterson told her that if she left, he would not only refuse to give her a reference but would actively spread the word that she was a sullen, incompetent, and lazy employee. Threatened by the prospect of both present and future unemployment if Peterson did as he said, Kingsford agreed to remain in the office to discuss the matter further, as Lopez did to clear her good name.

Pertinent Facts

Transition Sentence: Rebuttal

Yet this similarity between Lopez's situation and Kingsford's is probably not dispositive. A submission which is procured by an act or threat to take something of value from the plaintiff is not voluntary. *Goodhart v. Butcher Restaurant.* In *Goodhart,* a restaurant owner took and held onto a patron's wallet until he could determine if the patron had paid his bill. During this time, the patron remained because he did not want to lose the wallet's valuable contents. The court held that the plaintiff had not remained voluntarily when the defendant took something of value from the plaintiff in order to ensure the plaintiff remained. Id. Although Peterson did not take a tangible object like a wallet, he did have control over Kingsford's professional reputation, which is a thing of value. In contrast, although the plaintiff in *Lopez* was worried about her "good name," her employer did not threaten to give Lopez a bad reference if she left. Thus, *Goodhart* is the

Case Supports Rebuttal

Distinguishing Adverse Decision

controlling case here, and Kingsford should be able to show that she was confined against her will. All three requirements for confinement by threat of physical force can, therefore, be established.	Restatement of Legal Conclusion

Two important writing techniques for handling case synthesis have been used in this discussion. First, the paragraphs often begin with topic sentences that state in general terms the principles that have been extracted from the precedents. Thus, the fact that the plaintiffs in *Appley v. Owens* and *Atkins v. Barton* were outnumbered is the basis of the author's general claim, made in the topic sentence of paragraph four, that "the ability to carry out a threat is established when defendants outnumber the plaintiff." Similarly, the defendants' overbearing size and movements in *Atkins v. Barton, Cane v. Downs,* and *Carey v. Robier* give rise to the topic sentence in paragraph two that "an action so intimidating that its effect is to confine by threat of physical force may result from the defendant's movements and gestures and from the plaintiff's perception of the defendant's size advantage." Constructing such general statements is one important way of bringing to your reader the results of your analysis. The topic sentences also promote clear organization by orienting the reader to the paragraph's place in the analysis.

The second important writing technique used in this discussion is the writer's considered use of parenthetical discussion. Because the deprogrammer Barton is such a clear and dramatic example of size advantage, the author discusses *Atkins* thoroughly in order to establish the main point. The references to *Cane v. Downs* and *Carey v. Robier* are necessary because they refine the point that size advantage can be relative, but the facts can be parenthetical because these cases are used to supply details and general support of *Atkins.* By using these parentheticals, the author keeps the text free from the specific factual details of these cases.

Exercise 5–B

To win a suit against Olympia Department Store, Livia Augusta needs to establish not only that Olympia used outrageous collection tactics, but that her distress was severe. Read Augusta's account of her emotional state and the following summaries of controlling precedents. Then

write a discussion on the issue of whether Augusta can show her emotional distress was severe.

Augusta reports a variety of reactions to Olympia's tactics, including insomnia, nightmares, and weight loss (15 lbs.). When she began hyperventilating after each phone call from Olympia, Augusta became worried about her health. She went to see her doctor, who diagnosed her as suffering from acute anxiety. He gave her a prescription for 10 mg. valium and told her to take one tablet four times a day. Although Augusta has been following this regimen, she complains the medication has been interfering with her job performance and social life. She has trouble concentrating, dozed off during an important meeting, and feels too lethargic to go out in the evenings. Her employer has told her to "shape up." The tranquilizers have helped to control her anxiety and sleeplessness, but Livia is worried about their long term effect on her physical health.

Davis v. Finance Corp.

The tort of intentional infliction of emotional distress requires a showing that the distress is severe. Mental conditions such as fright, horror, grief, shame, humiliation, or worry may fall within the ambit of the term emotional distress. However, these mental conditions alone are not actionable. The distress inflicted must be so severe that no reasonable person could be expected to endure it. The court decided that Davis's distress was severe because she suffered shame and anxiety and required medical attention, but it dismissed the case because Davis was unable to establish the separate element of outrageous and reckless conduct.

Marlboro v. First Bank of Gilford

June Marlboro, a fifty-five-year-old widowed schoolteacher, was diagnosed as suffering major depression in June 1987. Four months prior to this diagnosis, Marlboro had defaulted on a home improvement loan from the First Bank of Gilford because she had lent her retired brother money to purchase a new car. In the month following the default, Marlboro received daily threatening letters. Later, the bank's collection agent began making nightly, obscene phone calls. June found herself going on eating binges after these calls. After the bank called the principal of her school to inform him of her default, June's symptoms of depression became more pronounced. She was often fatigued and began taking naps

during the day and oversleeping in the mornings. She experienced a loss of self-esteem. She was unable to make decisions. She gained twenty pounds. She went to her physician, who found that her weight increase had raised her blood pressure. He put her on a salt-free diet and told her that she had to lose weight. He also referred her to a psychiatrist. The psychiatrist testified that June's mental health has been seriously threatened. The court found Marlboro's distress so severe no reasonable person could be expected to endure it.

Dale v. New City Hospital

Jim Dale lost his job when his employer went bankrupt. In the months that followed, money became increasingly tight. Then, Mrs. Dale was hospitalized with leukemia. Dale, who had never bought medical insurance to replace his old employee coverage, was unable to pay the hospital bills. The hospital turned his account over to a collection agency, which began hounding him for payment. Shortly thereafter, Dale sank into a serious depression. He suffered from an emotional paralysis so severe that he was unable to leave his apartment. He refused to visit his wife in the hospital and missed several job interviews. His physician placed him on anti-depressants. Although the court found Dale's distress so severe as to interfere with normal functioning, it concluded that his distress was not the result of the defendant's actions, but of his wife's diagnosis and his unemployment.

Histrionic v. Credit Inc.

Histrionic, a seasoned actor in rehearsal for an off-broadway musical, defaulted on his payments to Credit Inc. When Credit Inc. attempted to collect the debt, Histrionic reacted emotionally. He broke down several times during rehearsal, ranting about Credit Inc.'s persecution of him and weeping that he was misunderstood. On more than one occasion, he threw himself down on the stage, pounding the floor and moaning that he was ruined. His doctor testified that Histrionic's response to Credit's collection methods was extreme and that he had prescribed a mild sedative for Histrionic. Although Histrionic tended to forget his lines while on this medication, the musical, when it opened, was a smashing success. Histrionic was singled out for his excellent performance. The court found Histrionic's emotional distress not actionable. It said that Histrionic's feelings of hysteria and anxiety had not grossly impeded his functioning and that his behavior was in some measure consistent with his prior character and professional training.

6

The Thesis Paragraph

A LEGAL DISCUSSION SHOULD BEGIN with a paragraph that introduces the reader to your client's claim for relief, to the legal issues it involves, and to your reasoned conclusions about their probable resolution in your client's situation. This paragraph is frequently called a thesis paragraph because it states your thesis, that is, your position on the outcome of a client's prospective case. One benefit of providing this kind of introduction early in the discussion is that it makes it easier for your reader to evaluate the analysis as it is being built. Another benefit is that it sets out the organization of the discussion.

One logical way of arranging relevant introductory material in a thesis paragraph is to

1. Identify the claim or defense in your problem;
2. Set out the rules that govern that claim in the order you intend to discuss them and explain how those rules relate to each other;
3. If length permits, or complexity requires, briefly apply those rules to your facts;
4. State the thesis (your legal conclusion).

If your memo is fairly simple, however, or if your professor or firm requires a Conclusion section rather than a Short Answer section (see Chapter 7), you may want to shorten your thesis paragraph by eliminating or abbreviating some of the steps outlined above. One thing you can do is to eliminate step 3, the application of the law to the facts. You can also combine steps 1 and 4 and begin with a thesis sentence that introduces the topic of the discussion and gives your conclusion as to the claim or defense in your problem. After this,

you could still indicate the organization of your discussion by introducing the rules that govern that claim in the relevant jurisdiction or, in a case of first impression, in other jurisdictions.

Assume you are writing about a due process problem based on the following facts.

Alice Doone, mother of three minor children, receives payments under the Aid to Families with Dependent Children program (AFDC), a federal program administered by the state. Her payments were reduced when she enrolled in a work-training program which paid her a stipend. Having unsuccessfully challenged the reductions at an administrative hearing of the state Social Services Department, Doone sought to appeal to the State of Kent Court of Appeals. Such appeals are authorized by state law. However, under state law, the filing of a civil appeal requires a $40 filing fee. Ms. Doone claimed she was unable to pay the fee and sought leave to proceed *in forma pauperis* (permission to proceed without liability for court fees); leave was denied without an opinion. Alice Doone would now like to file suit in the United States District Court for the Western District of Kent, claiming that application of a fee to indigent appellants violates the due process clause of the fourteenth amendment.

You might begin your discussion with a thesis paragraph like the one below.

Topic Sentence on Claim	To proceed with her claim against AFDC, Ms. Doone needs to show that the statutory $40 filing fee, as applied to her, violates the due process clause of the fourteenth amendment to the United States Constitution. Due process demands that an indigent person not be denied access to the courts for failure to pay a fee when (1) the court is the only forum for resolving the dispute, (2) the underlying subject matter is itself of constitutional significance, and (3) the constitutional interest overrides a countervailing state interest. *Boddie v. Connecticut*, 401 U.S. 371 (1971). In this case, the court is the only forum in which Ms. Doone can challenge the Department's reduction of her benefits. However, the underlying subject matter, an increase in welfare payments for
Applicable Rules	

family support, is not constitutionally significant. Thus, the state's interest in defraying the costs of the judicial system will override Ms. Doone's interest. The filing fee will, therefore, probably be found constitutionally permissible under the due process clause.	Application Legal Conclusion

This paragraph is an effective introduction in that it clearly states the legal question, the relevant legal tests and their applicability to the client, and the author's conclusion. A lot of this information is in the next sample thesis paragraph but in a less explicit manner.

In *Boddie v. Connecticut*, 401 U.S. 371 (1971), the Court held that requiring a filing fee from an indigent seeking access to a state court for dissolution of a marriage was unconstitutional. Ms. Doone's situation is similar to that of the *Boddie* plaintiffs. Therefore, a court will probably find the fee must yield to Ms. Doone's right to have an opportunity to be heard in court regarding her challenge to the reduction of her AFDC payments. The court is the only forum for resolution of a dispute involving Ms. Doone's ability to provide basic necessities.

There are a number of problems with this thesis paragraph, foremost of which is the absence of a topic sentence which clearly sets forth the legal claim. By introducing the topic in terms of the *Boddie* holding, the sentence incorrectly identifies the paragraph as being only about *Boddie*. The first sentence also introduces the discussion too narrowly. It is unclear if the *Boddie* ruling on the constitutionality of filing fees extends to an indigent's appeal on grounds other than divorce. In order to avoid this kind of confusion, it is a good idea to begin a thesis paragraph with a topic sentence that sets out the legal claim in general terms, or in terms of your client, instead of tying it to the facts of a particular case.

Another shortcoming of this paragraph is that it does not make it clear that *Boddie* created standards for determining the constitutionality of filing fees. In the last sentence, two of the three *Boddie* standards are referred to in passing, but we are not specifically told that they are the tests announced in *Boddie*—nor is it clear that the statement about Ms. Doone's ability to provide basic necessities is the writer's attempt to establish the required presence of a fundamental, constitutionally protected interest. Thus, as readers, we are uncertain of the legal issues and legal principles involved and unclear about where the discussion is heading.

Because a legal analysis is supposed to include a fully developed discussion of the thesis, it is important to delineate the legal issues and conclusions carefully. A weak discussion is frequently one which begins with a vague introductory paragraph that leaves the reader unclear about which issues need to be discussed, how they relate, and how they will be resolved.

Although you want to provide an introduction that orients your reader to the analysis that follows it, be careful that the length of your thesis paragraph is proportionate to the length of your discussion. Although you must introduce the reader to a synthesized statement of what you will analyze, the thesis paragraph is not the place to offer an elaborate explanation or application of a rule. If your problem involves many rules of law and intricate facts, shorten or eliminate your application of the rules to the facts of your case. After listing the prongs of the controlling test, for example, you could conclude by saying, "Because Ms. Doone cannot satisfy all three prongs, it is unlikely the court will allow her to proceed *in forma pauperis*." Another way to keep your thesis paragraph to a manageable length is to begin with a thesis sentence that presents both the claim and your conclusion about that claim, as in, "Jane Simon will not be convicted of assault in the second degree for failing to act to prevent the injury of a minor whom she had taken care of for five years."

The Doone problem involved only one claim and thus it was possible to announce and apply all three legal requirements. When several claims are involved, however, each of which has several elements requiring discussion, you may need to rethink your strategy in order to prevent your thesis paragraph from becoming too long. One helpful tactic is to write a thesis paragraph that sets out all the claims and that explains how they relate and how they will be resolved. Then write separate introductory paragraphs which set out the elements of each claim, placing each introductory paragraph at the beginning of your discussion of that claim.

Assume, for example, that your client is embroiled in a dispute arising out of a contract within which there is a mandatory forum selection clause. Your client wants to know if that clause is enforceable. You might begin your discussion with the following thesis paragraph (citations are omitted).

In deciding whether paragraph thirteen of the contract between Alta and MMI ousts it of jurisdiction over a dispute arising from the contract, the Southern District of New York must first decide whether the paragraph should be interpreted as a mandatory forum selection clause conferring exclusive jurisdiction on the courts of Milan, Italy for any dispute arising out of the contract, or simply as consent to Milan jurisdiction should a related action be brought there. Even if it finds that the Milan court has exclusive jurisdiction, however, the court may in its discretion decline to enforce the provision if it finds that to do so would be unjust and unfair under the circumstances. On the first issue, the court is likely to find that the language of paragraph thirteen unambiguously provides Milan with exclusive jurisdiction. In addition, it will probably find that it is reasonable to enforce the forum selection clause in this case.	Topic Sentence on Claim First Issue Second Issue Conclusions

This thesis paragraph, which bridges the issues and synthesizes the analysis, might then be followed by a more detailed introduction to the rules governing the first issue.

To determine whether the language of a forum selection clause is mandatory or permissive, New York courts generally examine whether the language is clearly mandatory and all-encompassing, or whether there are two opposing, yet reasonable, interpretations of the clause. In particular, courts look for words like "shall" or "must" since these words commonly signify a command. If they fail to find that language, they will usually apply the traditional contract rule of interpreting ambiguous language against the drafter.	Topic Sentence on Rule Governing First Issue Factors

After this introduction to the factors involved in construing the language of a forum selection clause, the writer would analyze this issue in depth. Upon finishing that analysis, the writer would then write

an introduction to the second issue, listing the five factors courts use to determine the reasonableness of enforcing a forum selection clause.

Of course, not all problems involving multiple issues or claims are necessarily complex. When you have a problem involving a couple of relatively uncomplicated issues or claims, you may still use one thesis paragraph to introduce all the issues, their relation to each other, their governing rules and their disposition. This is the situation in the following problem, where Paul Hart is contesting his late father's will.

Topic Sentence on Claim	Paul Hart has two different grounds upon which to challenge his father's will disinheriting him. The first ground is that the will is invalid because his father, who had been adjudicated insane, lacked the
First Issue	capacity to execute a will. An insane person can execute a valid will, however, if he is lucid at the time
Application & Conclusion	he executes it. *Arnold v. Brown*, 200 Kent 50 (1962). Because the evidence shows Mr. Hart was lucid when he executed the will, Paul's first challenge should fail. The second ground is that even if the will is valid,
Second Issue	his father's will did not effectively disinherit him under Kent Rev. Code § 100 (1975), which requires a parent's will to show an intent to disinherit a child.
Application & Conclusion	Mr. Hart's will does not do so. Thus, Paul Hart's second challenge should be successful. Under Kent Rev. Code § 150 (1975), he will be entitled to a one-third share of his deceased father's estate.

If you wanted to shorten this thesis paragraph, you could rewrite as follows:

Topic Sentence on Claim	Paul Hart has two different grounds upon which to challenge his father's will disinheriting him. The first ground is that the will is invalid because his father, who had been adjudicated insane, lacked the
First Issue	capacity to execute a will. The second ground is that
Second Issue	even if the will is valid because his father was lucid when he executed it, his father's will did not effectively disinherit him under Kent Rev. Code § 100 (1975). This section requires a parent's will to show

an intent to disinherit a child. This second challenge should be successful, and under Kent Rev. Code § 150, Paul Hart will be entitled to a one-third share of his deceased father's estate. | Conclusion

After either of these two introductions, you would discuss each ground separately.

Exercise 6–A

1. Your client, John Wheeler, wants to sue Donald Lindhorst in a federal district court in Connecticut for negligence. There is a threshold question, however, as to whether the district court would have the power to hear this case. Lindhorst is a citizen of Arkansas. Wheeler lived in Arkansas until he was sent to serve a prison sentence in Connecticut, where he is still an inmate. If Wheeler is still a citizen of Arkansas, the federal court will lack diversity jurisdiction. Which thesis paragraph for this problem is better and why?

Thesis A

Wheeler is a citizen of Connecticut based on the decision in *Ferrara v. Ibach.* In *Ferrara,* the court ruled that serviceman Ibach was a citizen of South Carolina because of his physical presence there and his intention not to return to his former domicile in Pennsylvania. He established domicile by moving his family to South Carolina, renting a house there, enrolling his children in public school there, and maintaining a bank account there.

Thesis B

John Wheeler, a domiciliary of Arkansas before his incarceration in a Connecticut prison, would like to bring suit for negligence against Donald Lindhorst, an Arkansas domiciliary. In order to sue in federal court, however, Wheeler must be a domiciliary of Connecticut for the purposes of establishing diversity jurisdiction under 28 U.S.C. § 1332 (1994). In cases involving a person's involuntary relocation, there is a presumption in favor of an original domicile over an acquired one. Nonetheless, this presumption can be overcome by showing that the person clearly and unequivocally intended to make the new domicile home. *Jones v. Hadican.* The Wheeler family's actions and Wheeler's statements

demonstrate such clear intent to make Connecticut the Wheelers' new home that diversity jurisdiction can be satisfied.

2. Livia Augusta wants to sue Olympia Department Store for emotional distress suffered while the store attempted to collect payment for a debt she never incurred. Which thesis paragraph is a clearer introduction to the problem and why?

Thesis A

Ms. Augusta's claim for damages rests on Olympia Department Store's negligence in billing procedures. The claim for damages from severe emotional distress depends on the store's intentional employment of outrageous collection methods which Ms. Augusta asserts precipitated her severe emotional distress. Also Olympia's collection department was harassing Ms. Augusta without right since she was not indebted to them.

Thesis B

Olympia's liability to Livia depends on her satisfying the three standards that establish intentional infliction of emotional distress in the state of Kent. First, the defendant's conduct, which gives rise to the distress, must be extreme and outrageous. Second, the plaintiff's distress must be severe. Third, the defendant's conduct must have been intentional or reckless. *Davis v. Finance Corp.* The Kent courts have extended considerable latitude in interpreting these standards in favor of creditors pursuing legal debts. In this case, there was no legal debt, so Olympia's actions will not be granted that latitude. Livia Augusta will be able to satisfy the tests for this tort because Olympia threatened Livia for over six months, her distress required medical attention, and Olympia knew that its harassment would cause such distress.

3. Read the following facts and rules of law and then write a thesis paragraph on whether John Starr and Alice Doe can recover for negligent infliction of emotional distress as a result of Pennsylvania Deluxe Hotel's negligence in hiring and supervising the security guard who fired at Jane Starr (you can assume the negligence for the purpose of this exercise).

On Election Day, John Starr, the husband of candidate Jane Starr, and Alice Doe, Jane's great aunt and former guardian, decided to watch the

television election coverage at campaign headquarters at Pennsylvania Deluxe Hotel. They were waiting for Jane to return to the hotel after visiting her supporters at local campaign offices. The campaign had been marred by numerous threats of violence against the candidate and her family.

At 9:30 p.m., Jane and several staff members arrived at the hotel, and Jane began walking to the hotel's entrance. Halfway there, a psychotic hotel security guard pulled out a pistol and shot at Jane. The television cameras picked up the guard pointing and shooting his pistol in Jane's direction. The shot was heard on the T.V. The cameras did not actually show Jane being hit and falling, but they did immediately show her lying on the sidewalk, unconscious, in a pool of blood.

John and Alice were watching the T.V. as the entire scene unfolded. They say they realized immediately after the shot was fired that Jane was seriously hurt. John immediately collapsed, and Alice became hysterical.

Although Jane's injuries were not fatal, both John and Alice were extremely depressed in the months following the incident. Alice was put into a sanitarium to recover from a breakdown. John was too shaken to work for three months. John and Jane's marriage suffered as John insisted that Jane resign the post she had just recently won. Neither John nor Alice has any physical ailment associated with their emotional problems.

As you may recall from Chapter 4, case law establishes the legal requirements of this tort as follows:

1. The plaintiff must be closely related to the victim, as opposed to being distantly related or unrelated;
2. The plaintiff must have been near enough to the scene of the accident that the ensuing shock was the direct result of the impact of a sensory and contemporaneous observance of the accident, as opposed to shock which results from learning about the accident from others after its occurrence;
3. The shock must have resulted from a single, identifiable traumatic event; it cannot be the result of a condition that occurs over time;
4. The plaintiff's distress must be severe, although there need not be a physical manifestation of a psychic injury.

7

Writing a Legal Document: The Legal Memorandum

I. Introduction

IN THE PREVIOUS CHAPTERS we have discussed how to analyze and apply legal authority. We have also discussed how to write a case brief, which law students usually write for their own use. Most legal writing, however, is done to communicate with others. As a first-year law student, you will receive legal problems and will be asked to analyze the problem and write up the results of that analysis. The typical vehicle that lawyers use to do this is the legal memorandum. When you write a memorandum, you will make use of the several analytical skills you have been developing. This chapter explains the form and content of a legal memorandum.

A. Purpose of a Memorandum

A legal memorandum is a document written to convey information within a law firm or other organization. It is a written analysis of a legal problem. The memorandum is usually prepared by a junior attorney or by a law clerk for a more senior attorney early in the firm's handling of a legal dispute. The writer analyzes the legal rules that govern the issues raised by that problem and applies those rules to the facts of the case. The attorneys will then use the memo to understand the issues that the case raises, to advise the client, and to prepare later documents for the case.

The memorandum should be an objective, exploratory document. It is a discussion in which you explore the problem, evaluate the strengths and weaknesses of each party's arguments, and reach a conclusion based on that analysis. It is not an advocacy paper in which you argue only for your client's side of the case. The memorandum

should be persuasive only in the sense that you convince your reader that your analysis of the problem is correct. However, in practice, you will find that the assigning attorney does not want you to give up easily on the firm's client's case.

B. Audience

When you write a memorandum, you should be aware of your reading audience and its needs and expectations. The hypothetical audience for a student memorandum assignment is usually an attorney who is not a specialist in the field. Most attorneys for whom you write will be very busy and will have certain expectations that you must fulfill. For example, they will expect to receive a core of information about the controlling law and its application to the facts of the problem, but will not expect to be given a lesson in fundamental legal procedure. Because the reader is an attorney, you will not have to explain the legal process steps of the sort that you have been learning the first weeks of law school. You need not explain, for example, "This case is from the highest court of this state and so is binding in this dispute." You may wish to give this information to a lay reader, but a lawyer knows that a case decided by the jurisdiction's highest court is binding. On the other hand, the lawyer probably does not know the facts, holding, and reasoning of that case and does expect that you will supply that information.

C. Writing Techniques

Your reader will also have expectations about how the memorandum should be written. The legal profession is dependent on language. However unfamiliar you are with legal analysis and its presentation in a professional document, you are still writing English and you should continue to follow the principles of good written English. The general characteristics of good writing need to be cultivated because legal analysis can be complicated and involve difficult ideas. In order to communicate these ideas clearly to your reader, you need a firm control over language. Chapters 9 and 10 and Appendix A explain the principles for clear writing.

The memorandum is a formal document in that it is a professional piece of writing. Thus, you should use standard written English and avoid slang, other kinds of informal speech, and overuse of contrac-

tions. For example, you should not write, "for starters, we have to decide if John Doe's parents are immune from suit." Say instead, "the first issue is whether John Doe's parents are immune from suit." On the other hand, you should not be pompous and stuffy. Use simple, direct words and sentence structures. You do not have to say, "one can conjure multiple scenarios for fulfillment of these objectives." Say instead, "the agency can fulfill its goals in several ways." In addition, you should not write a verbose sentence like, "in applying the above precedent, it is clear that the lack of action by the school implies that the incident was not considered to be unlawful." Just say, "the school's inaction implies that school officials did not consider the incident unlawful." Since the revised sentence is of reasonable length and contains no empty phrases, it is easier to understand. Moreover, since the sentence is written in the active voice, there is no ambiguity about who considered the incident lawful.

Another aspect of presenting yourself as a legal professional is that you are writing as the client's attorney. Many students forget that role, and, for example, may write, "John Doe's attorney moved for a continuance." Remember that you are John Doe's attorney, or part of a team of attorneys, and instead should write, "we filed for a continuance." You should not, however, inject yourself into your legal analysis by using the first person pronoun. The purpose of the memorandum, and of many other legal documents, is to analyze the law and facts. You want to communicate that analysis persuasively and convincingly, not present it as your opinion only. For example, you should say "in *Doe v. Doe* the court held ...," not "I believe [or I think] that in *Doe v. Doe* the court held...."

One problem of legal writing that deserves particular attention is the problem of legalese. Lawyers frequently are criticized for using archaic terms and incomprehensible sentence constructions in legal documents. This criticism is especially aimed at the form documents that many attorneys use. An example is a form that begins "whereas the party of the first part," and uses expressions like "herein" and "hereinbefore." This type of legalese usually does not afflict law students, and we hope it will not afflict you. In the end, you will sound more professional and more in control if you use a vocabulary and syntax with which you feel comfortable.

Some legal terms are substantive, however, and you should use them. For example, you should use the operative language of a statute or of a judge's formulation of a rule when that language controls

the analysis of a problem on which you are working. Although that language may not strike you as admirable, it supplies the general principle of law to which you must give meaning. Your reader should be told what that language is and will expect you to repeat those operative terms.

Your language should also be responsive to your audience. You will be writing for several different audiences during your legal career and you will have to adjust your prose accordingly. Not all of your readers will be lawyers. For example, often you will write to your clients, to administrative personnel, and to other government officeholders. Although you should write accurately about the law, you should also explain your message in good written English, using terms that a non-lawyer can understand. When you write to lawyers, you should also use good written English, although you may use legal terms without as much explanation. Keep in mind that each audience has a different need, but that all audiences need and appreciate good writing.

Nonetheless, if as a law student you face the particular challenge of navigating between legalese and terms of art, in most respects, legal writing requires only what any thoughtfully written paper requires. As long as your prose adheres to the rules of standard written English and composition and respects legal terms, you will fulfill your reader's expectations for memorandum style.

II. Format

MOST OFFICE MEMORANDA ARE DIVIDED into sections that are assembled in a logical order.

There is no required format that all lawyers use or that all law schools use for a legal memorandum. Most memoranda, however, are divided into from three to six sections, each of which performs a particular function within the memo and conveys a necessary core of information: the Statement of Facts, the Question Presented, the Short Answer or Conclusion, the Applicable Statutes, the Discussion, and perhaps a final Conclusion. Under some formats, the Question Presented may come before the Statement of Facts.

You do not need to write the memorandum in the order you assemble it, however. Instead, you may first want to write tentative formulations of certain sections (such as the Question Presented) and then rewrite those sections when you have a final draft of the

part of the memo that is pivotal to your writing process, usually the Discussion. After that pivotal section is written, you should rewrite the sections you wrote earlier to ensure they are in accordance with the finished section. This type of writing process requires drafts and revisions before you reach your final copy.

The memorandum usually begins with a heading with the following information:

To: Name of the person for whom the memo is written
From: Name of the writer
Re: Short identification of the matter for which the memo was prepared
Date:

Then the body of the memo may be divided into the sections described below.

A. Statement of Facts

Because the heart of legal analysis is in applying the law to the facts, the facts of the problem can be the most important determinant of the outcome of a case. Each case begins because something happened to someone or to some thing.[1] The Statement of Facts introduces the legal problem by telling what happened.

The purpose of this section is to state the facts and narrate what happened. Therefore, use only facts in this section; do not use conclusions, legal principles, or citations to authorities. This section should include all legally relevant facts, all facts that you mention in the other sections of the memo, and any other facts that give necessary background information. If the problem for your memo is already in litigation, you should include its procedural history.

Facts are relevant or irrelevant in relation to the legal rules at issue. In order to know which facts are relevant, you will need to know what the issue in the problem is. If the issue is whether the client committed a crime, then you must know the elements of that crime

[1] You may be assigned to write a memorandum that involves a legal issue only, such as how a new statute has changed the common law. Then, you may wish to omit a Statement of Facts, and perhaps substitute a short Introduction.

from the statute. The relevant facts are those that are used to prove or disprove those elements.

Do not omit facts that are unfavorable to your client. The attorney for whom you are writing the memo may rely on the Statement of Facts to advise the client, for negotiations with other attorneys, and to prepare other documents for the case. Without the complete facts, the attorney for whom you are writing will be surprised and unprepared while handling the case.

Be careful to use objective language. The facts should not be slanted, subtly or not so subtly, toward either party. Sentence one of each of the following sets describes facts using partisan language inappropriate for a memorandum. Sentence two of each set uses language more appropriate for a memorandum.

1. John Smith endured three hours of his family's presence.
2. John Smith remained with his family for three hours.

1. Because Ms. Jones deserted her husband, he was left the unenviable task of raising three children.
2. After Ms. Jones left her husband, he raised his three children by himself.

Whether you are given the facts with your assignment or you gather them yourself, you should sort them out and organize them rather than repeat them as the information came to you. Put the crucial information first. Generally, in the first paragraph, you should tell who your client is and what your client wants, or what the problem is about. By doing so, you provide a framework for the problem. The reader then can more easily evaluate the rest of the facts within that framework. For example, compare these two paragraphs, each of which was written as the first paragraph of a Statement of Facts for the same problem.

1. John Davis is a high school graduate who has been unable to keep a job. He first worked as a machinist's apprentice, but after two years he was asked to leave. Since then he has worked at various trades, including carpentry and plumbing, in retail stores, and at McDonald's. None of these jobs lasted more than a year.

2. Our client, William Mathews, has been sued by John Davis for fraud. The charge stems from statements that Mathews made to Davis in the course of a stock investment proposal.

Example 2 is better because it tells the reader the context of the problem. The reader of the first paragraph does not know what the problem is about. Is it an employment contract case? An unemployment compensation application problem? The reader of the second example knows that she should read the rest of the facts with an eye toward a fraud suit.

Use the rest of this section to develop the facts. Explain who the parties are and give any other descriptions that are necessary. Always group like facts together. For example, if your memo topic is a false imprisonment topic about a person confined in a room, you may want to present in one paragraph or series of paragraphs all the facts that describe the physical appearance of the room.

For many of the assignments you receive, the best and easiest way to develop the events is chronologically, that is, in the order in which the events occurred. For some problems, however, a topical organization in which you structure the facts in terms of the elements you need to establish or by the parties involved, if there are many parties, may work better.

You also may want to include what relief your client wants, or what you have been asked to analyze in the memo. This information often provides a natural ending to the section.

Exercise 7–A

Which Statement of Facts about a prisoner's domicile for a memo about a diversity jurisdiction issue is best? Why?

1. Mr. Fred Wheeler is a prisoner in the federal prison in Danbury, Connecticut. Wheeler was convicted of bank robbery in Arkansas, which was his domicile at the time of the robbery. He has asked us to sue his attorney in that case for malpractice. The attorney, Donald Lindhorst, is a domiciliary of Arkansas. We would like to sue in the United States District Court if we can establish diversity jurisdiction.

Wheeler is in the second year of a five-to-seven year prison term. His wife and son moved to Danbury four months ago, and his wife is now

working here. His son is enrolled in the Danbury public school. Mrs. Wheeler has registered to vote in Danbury and has opened an account at a bank there. The Wheelers have no financial interests in Arkansas. His wife's sister, who is her only family member still alive, lives in nearby Bethel, Connecticut. Wheeler's brother-in-law has offered Wheeler a job there after Wheeler's release from prison. Wheeler has said he will not return to Arkansas, and that he wants to "start fresh in Connecticut."

This memo analyzes whether Wheeler is a citizen of Connecticut for purposes of federal diversity jurisdiction.

2. Donald Lindhorst is a lawyer in Little Rock who unsuccessfully defended Fred Wheeler against a bank robbery charge in Arkansas. Wheeler is now in federal prison here in Danbury and wants to sue Lindhorst for malpractice. Wheeler has called Lindhorst a "rotten lawyer" and "a crook," who was only interested in getting his legal fee from him.

Wheeler is serving his second year of a five-to-seven year prison term. He hates the prison because of the food and lack of recreational facilities. His wife has moved to Danbury with their son and visits him often. Wheeler wants to remain in Connecticut when he gets out of prison and take a job offered him by his brother-in-law in nearby Bethel. His wife is working in Danbury and his child is in school here.

Lindhorst had been recommended to Wheeler by a mutual friend in Arkansas, and now Wheeler is sorry he hired him. He says that Lindhorst spoke to him only once, and did not interview any witnesses before the trial. He has asked us to handle his malpractice case. We would like to sue in the United States District Court in Hartford if we can establish diversity jurisdiction.

3. On March 4, 1986, Fred Wheeler was convicted of bank robbery in the federal district court in Arkansas. At his sentencing hearing in May 1986, he was sentenced to a five-to-seven year term in federal prison in Danbury, Connecticut. Wheeler was represented by a Mr. Donald Lindhorst, an Arkansas attorney, in the bank robbery case.

Wheeler now wants to sue Lindhorst for malpractice, and wrote us on March 10, 1988, asking us to represent him in this suit. We want to sue in the federal district court in Hartford. When I interviewed him last month, Wheeler told me that he does not intend to return to Arkansas and wants "to start fresh in Connecticut."

Mrs. Wheeler moved to Danbury in January, 1987. That month she enrolled their son in the public school and opened a bank account. In February, she started work in Danbury, and has remained with that job. Mrs. Wheeler visits her husband frequently. Her brother-in-law has offered Wheeler a job in Connecticut when he gets out of prison.

B. Question Presented

The most important inquiry for the memo writer, as it is in other legal inquiries, is "what is the legal issue in this problem?" The Question Presented is a sentence that poses the precise legal issue in dispute that the problem turns on. There are two ways to formulate the questions for a memorandum. The first, and easier way, is to be very specific to the problem and identify people by name and identify events by reference to them. This type of question works if the reader already knows the facts of the problem. For example, suppose you have a contract problem and the fact statement includes the facts that Mr. Smith is mentally incompetent and Mr. Jones is Smith's guardian. If the issue is written as "is the contract between Mr. Smith and Mr. Jones valid?" the reader who has read the facts will probably understand that the problem in the case is whether a contract between a mentally incompetent person and his guardian is valid. Many law firms require only this type of specific identification in the Question Presented of a memorandum. If you write a very specific question, the important things are to be sure that the reader knows the facts already and that you identify the issue correctly.

The other way of formulating issues is to write them so that they can be understood by a reader who does not know the facts of the problem. It is usually necessary to write the Question this way if the Question Presented precedes the Statement of Facts. Then the Question Presented should be written to include not only the legal principle that controls the claim, but the key facts that raise the issue. A Question written this way does not describe people or events specifically by name, however, because the reader does not know who or what they are. Instead, the issue must be written more generally by describing the relevant characteristics or relationships of people and events. This type of question is written to apply to anyone in the position of the person described in the question. For example, the contract question would be written, "Is a contract between a mentally incompetent adult and his guardian valid?" This question

does not name the parties to the contract but describes their relationship and the relevant characteristics that raise the contract issue. It is a good idea to identify people by relationships appropriate to the cause of action. For an adverse possession problem, for example, you could identify the parties as a "possessor of land" and a "title holder."

You can write the Question Presented either in the form of a question as in sentence one below, or as a statement beginning with the word "whether," as in sentence two. Issues written as questions usually begin with a word such as "does" or "is."

1. Does a prisoner's domicile change to that of the state in which he is incarcerated for purposes of satisfying federal diversity jurisdiction?
2. Whether a prisoner's domicile changes to that of the state in which he is incarcerated for purposes of satisfying federal diversity jurisdiction.

You may find it helpful at first when you begin research for the problem to isolate the issue in specific terms (Is the Smith–Jones contract valid?), but then after you begin writing the memorandum, you should rewrite that specific question into more general terms.

Typically, the question should identify the cause of action, either a common law cause of action or the statutory or constitutional provision that the plaintiff is suing under or the state is prosecuting, the key relevant facts, and the people involved described in general terms.

An exception to this pattern exists, however, if the problem involves a question of law only rather than a question of law applied to facts. For example, the issue may be whether a jurisdiction will adopt a new cause of action, or an element of an established cause of action. Then, the question may not require specific facts of the problem. In the following set of questions for a memo, the first issue is a question of law. The second issue asks how the law (assuming the new rule is adopted) applies to the facts. The second question thus includes specific facts of the problem, and is logically linked to the first question.

1. In Illinois, must a plaintiff in a false imprisonment claim be aware of the confinement?