2. If so, is a plaintiff who believes a door will not open because it is stuck, when it has been locked by the defendant, aware of his confinement?

If the problem contains more than one issue, such as an assault and a battery, then set each out as a separately numbered question. If the problem has one issue, but two or more sub-issues, you may consider using an inclusive introduction and then sub-parts. For example, a wills issue could be written as follows:

Is a handwritten unwitnessed will valid under the Wills Act if

a. the will is dated with the month and year but not the day, and
b. the will is written on stationery that contains a printed letterhead?

One important decision you must make is the level of generality to use for your description of facts. To identify parties, we have suggested that you not name the parties specifically, but, instead describe them more generally in relation to the claim at issue. "Mr. Smith" then becomes "a mentally incompetent person" and Mr. Jones is "his guardian." But do not generalize the category so much that you obscure the issue in the problem. For example, if the case involves the duties of a school district to provide services, then "an arm of the county government" is not specific enough. The proper level of generality here is probably just "a local school district".

The facts other than the identities of the parties should be described specifically enough to be understood. The issue in a problem involves how the law applies to those particular facts. If a contract is at issue between Smith and Jones, call it a contract, not a business relationship. If the school district is being sued for not providing a sign language interpreter to a hearing impaired student, do not write "appropriate instructional aids" instead. If the defendant is sued for building a one-car garage that intrudes over a property line, do not write "a small structure." One benefit of using specific facts is that you will avoid inappropriately inserting judgments into the Questions. For example, if you called a garage a "small structure," you have made a judgment about the size of the structure that intrudes

over the property line. If you said a "one-car garage," you avoided that judgment.

Consider these other suggestions for a good Question Presented.

1. Isolate the specific issue. The issue should not be so broadly stated as to encompass many possible issues under the cause of action. For example, "Was Carey denied due process?" is a poorly conceived question because due process refers to many different legal issues and the question does not specify the relevant one. A question that adequately isolates the issue is, "Is a juvenile denied due process because he is not represented by counsel at a delinquency hearing?"

2. Do not make conclusions. The Question should pose the inquiry of the memorandum, not answer it. You will avoid making conclusions if you use facts and legal principles. For example, if the case law in a jurisdiction establishes that a person can be guilty of criminal contempt if he disobeys a court order intentionally or recklessly, the following question contains a conclusion: "Is a person guilty of criminal contempt if he recklessly does not read a court order and disobeys it?" The inquiry in this case is whether the person acted recklessly. By concluding that the defendant acted recklessly, the writer has concluded that the defendant is guilty. The writer should have asked whether the defendant is guilty under these facts, as in the question, "Is a person guilty of criminal contempt if he disobeys a court order because he did not listen to or read the order?"

3. Keep the question to a readable length. You should not include all the relevant facts in the question, just the key ones that raise the issue. The following question includes too many facts: "Is a person guilty of criminal contempt if he disobeys a court order that he never read because he left the country for several weeks, his attorney's letter was lost while he was gone, his seven-year-old daughter forgot to write down the telephone messages she took, and his cat shredded the messages from his wife?"

4. If the question does become complicated, keep it readable by moving from the general to the specific. One way of doing that is to first identify the claim and then move toward the specific facts, as in these examples.

Did a person commit theft of lost or mislaid property when he pocketed a locket that he had found on a baseball field just after the con-

clusion of a YWCA team practice, and that locket was stolen from him as he walked away from the field?

Whether a prisoner's domicile changes for purposes of federal diversity jurisdiction when he is incarcerated in another state, the prisoner's family moves to the state of incarceration, and the prisoner has secured employment there upon his release from the penitentiary.

5. Questions are less ambiguous and are easier to understand on a first reading if they begin with a short concrete subject that is quickly followed by an active verb, rather than if they begin with a long abstract subject. For example, for these questions, the writers have used abstract nouns (the failure, the entrance) as the subjects of their sentences.

Whether the failure to appear in court for a scheduled trial by an attorney is contempt of court if he was notified of the date of the trial but never wrote it in his calendar.

Does entrance into a tent pitched in a park constitute entering a building for purposes of burglary?

The subjects of these questions are nominalizations, that is, they are nouns or noun phrases that have been constructed from verbs. Sentences that begin with nominalizations are often difficult to understand because the reader has to unpack the event described in the nominalization (the failure to appear in court ... by an attorney) and then fit that event into the question.

Another type of abstract subject that can be difficult to understand on first reading is a subject that is a gerund. A gerund is a present participle of a verb that is used as a noun. Because a gerund is a form of a verb, it may be ambiguous whether the word is the subject or the verb of the sentence. In the following question, "refusing" is a gerund.

Did refusing to give an entrapment instruction by the trial court because the defendant pleaded not guilty constitute error?

In this question, "refusing" is the subject. But the sentence is about the trial court. "Refusing" is what the trial judge did.

These questions should be rewritten so that they use short concrete subjects that name who the sentence is about, followed quickly by the verb.

> Did an attorney commit contempt of court when he failed to appear for a scheduled trial if he was notified of the trial date but never wrote it in his calendar?
>
> For purposes of burglary, does a person "enter a building" if he enters a tent pitched in a park?

See Chapter 10 for more information about nominalizations and concrete subjects.

C. The Short Answer or Conclusion

The function of this section is to answer the Question Presented and to summarize the reasons for that answer. This section can be written in either of two ways. One way is to write a short answer of one or two sentences, such as "Yes, a juvenile is denied due process if he is not represented at a delinquency hearing. Due process does not require that the juvenile be represented by an attorney, however." To write this form of Answer, you answer the Question Presented and add a sentence that summarizes the reason for your conclusion or adds a necessary qualification to the answer. Some lawyers write only one or two sentence answers to the Question. For your assignments, the Short Answer may be more appropriate for a short memorandum, such as one of three or four pages.

The alternative form is a section, here called a Conclusion rather than a Short Answer, that answers the Question and then summarizes the reasons for that answer from the Discussion section of the memo. A Conclusion should be longer than the Short Answer, but it still should be a summary only, and it should answer the Question. Depending upon the complexity of the problem and the length of the memorandum, the Conclusion may be one or two paragraphs or, for a long memorandum, it may require a few paragraphs. You should have a Short Answer or Conclusion for each Question Presented and number each to correspond to the number of the Question it answers.

Sometimes you cannot confidently reach a conclusion because the law is too uncertain or you need more facts. In that situation, ex-

plain briefly why your conclusions are tentative, or what the alternatives are, or which additional facts you need.

The following are suggestions for writing this section.

1. Be conclusory. A Short Answer or Conclusion should be an assertion of your answer to the issue you have posed. But it is not a discussion of how you evaluated strengths and weaknesses of alternate arguments in order to reach that conclusion. That evaluation and a full discussion of your reasons for the conclusion belong in the Discussion. Which of these examples is conclusory?

a. Jones was falsely imprisoned because he reasonably believed that he was confined by Smith's dog. Jones's belief was reasonable because the dog growled at him and Jones knew that the dog had bitten other people in the past.
b. Jones may have been falsely imprisoned depending upon whether he reasonably believed that Smith's dog would bite him if he moved. Several facts show that Jones could have reasonably believed he was in danger because the dog had bitten other people before. But some facts do not. For instance, the dog had been sent to obedience school after those incidents. The issue depends on the importance of these latter facts.

Example a is conclusory. The writer has reached an answer to the Question Presented. The writer of example b is discussing and weighing alternate arguments.

2. Do not include discussions of authority. Although your answer to the question will necessarily come from your analysis of the relevant primary and secondary authorities, your discussion of those authorities belongs in the Discussion section. In the Conclusion or Short Answer, you need not discuss or name particular cases or other authorities you rely on.

Which of the following examples is better?

a. The Popes adversely possessed the strip of land between their lot and Smith's. Although they occupied the land mistakenly believing it was theirs, their mistaken possession should be considered hostile as to Smith's ownership.
b. Whether the Popes adversely possessed the strip of land between their lot and Smith's if they mistakenly believed

> that the strip is theirs depends upon whether the Oz court relies upon old decisions that a claimant's mistaken possession cannot be hostile to the title holder. Several courts in other jurisdictions recently have decided that a person who possesses land mistakenly thinking it is his own can still possess the land hostilely to the true owner. The Oz court has strongly indicated that it may adopt those rulings.

Example b is a discussion of authority but not a conclusion about the adverse possession problem. Example a is an answer to the problem.

One exception to this rule arises when the problem is a statutory issue, in which case you should refer to the statute and include the essential information about the statutory requirements.

> Smith did not violate the Theft of Lost or Mislaid Property Act, 12 Oz Rev. Stat. § 2 (1960). The statute applies only if a person "obtains control over lost or mislaid property." Because Lyons robbed Smith of the locket almost immediately after Smith found it, Smith never obtained control over the property.

Another exception occurs if one case is so crucial to deciding the issue that it controls the analysis and cannot be omitted. In this situation, you should also include the citation.

> The defendant attorney should be liable for malpractice even if the plaintiff is not in privity of contract with him. The Oz Supreme Court has held that a notary public who practiced law without a license by writing a decedent's will was liable to the decedent's intended beneficiary for his negligence. *Copper v. Brass*, 10 Oz 200 (1965). This decision should apply to attorneys as well as to notary publics. If so, the defendant will be liable to Jones for negligently drafting the Jones will.

Exercise 7–B

Evaluate the following pairs of Question Presented and Conclusion. Which pair is best? Why? What is wrong with the others?

1. QP: Whether an attorney should have been convicted of criminal contempt of court for negligently failing to appear at a scheduled trial

and not representing his client if he was told the date, had cases in other courts that same day, and had already failed to appear in court once before.

Conclusion: The attorney should not have been convicted. Applying the precedents to this case, his failure to record the trial date and his failure to appear will not be criminal contempt.

2. QP: What shall determine if an attorney's failure to appear in court for his client's trial constitutes criminal contempt?

Conclusion: In Oz, whether an attorney is in criminal contempt for failure to appear at trial depends on the attorney's intent. If the attorney shows that the failure to appear was not willful disregard of duty, then there is no contempt. Mr. Bass should be able to show that.

Add jurisdiction!

3. QP: Is an attorney who does not appear in court for his client's trial guilty of criminal contempt if he was notified of the trial date but did not record it, and on the day of the trial, had the case file in his briefcase along with files of cases for which he did appear?

Conclusion: The attorney should not be held guilty of criminal contempt. In Oz, the attorney's failure to appear must have been willful, deliberate, or reckless. Mr. Bass did not act with the intent required. Instead, he inadvertently did not appear in court because he forgot to write down the court date and never took the case file from his briefcase in the rush of his other court appearances.

4. QP: Does an attorney who fails to appear at his client's trial commit criminal contempt of court under Oz law?

Conclusion: In Oz, an attorney is in criminal contempt of court if he acts willfully, deliberately, or recklessly in disregarding a court order. The court will have to decide. If the court can be persuaded that Mr. Bass did not so act when he did not appear for his client's trial, then Bass will not be in contempt.

D. Applicable Statutes

If your problem involves the application of a statute, a section of a constitution, or an administrative regulation, set out the exact language of the pertinent parts in block quote form. Include the citation.

A block quote is indented, single spaced, and does not include quotation marks.

E. Discussion

Up to this point, the memorandum contains the facts of your problem, poses the specific legal question that those facts raise, briefly answers that question, and sets out the relevant enacted law. In the Discussion, you will analyze the question by applying the relevant legal rules and their policies to the facts of the case. The process of analyzing is a process of breaking down a subject into its component parts. To analyze a legal subject, you break it down into its issues and then break each issue down into subissues. You give content to the legal rules you have found by examining the facts of the cases from which the rules came and in which the statutes were applied. You also examine the reasons for the rules and compare those cases to your problem. Only then can you determine what those rules mean. The purpose of this inquiry is to reach a conclusion and predict the outcome of the problem, that is, to determine whether the requirements for that claim are satisfied by the facts of your problem. This analysis provides the reasons for your conclusion about the outcome.

Because a memorandum is used to advise a client or prepare for further steps in litigation, the reader is looking in this section for a thorough analysis of the present state of the law. Thus, the Discussion should not just be a historical narrative of the relevant case law and statutes or a general discussion of that area of the law. Instead, you should discuss the law specifically as it controls your problem.

The Discussion provides an objective evaluation of the issues. Thus, you should evaluate all the interpretations possible from applying the law to the facts, not just the interpretations that favor your client. Analyze as many arguments for your client that you can think of, but also analyze those arguments against your client. In addition, evaluate which ones are most persuasive. Do not predict an unrealistic outcome only because that outcome favors your client. If you will need more facts than you have been given in order to reach a conclusion, then explain which facts you need and why they are relevant.

A legal discussion is written according to certain patterns of analysis. These patterns were discussed in Chapters 4, 5, and 6.

F. Conclusion

In some formats, where the memorandum includes a Short Answer of one or two sentences after the Question Presented, the memo-

randum ends with a Conclusion section that summarizes the Discussion. We have explained this type of Conclusion in Part C above.

Editing Checklist: Memoranda

I. Statement of Facts
   A. Did you provide an introduction that sets out the context of the problem?
   B. Did you then arrange the facts in an organization that is easy to understand, such as chronologically, topically, or chronologically within a topical organization?
   C. Have you included all the facts that bear upon the analysis of the problem and are necessary to understand the problem?
   D. Have you omitted distracting and irrelevant facts?
   E. Does this section include only facts and not analysis or argument?
   F. Did you include procedural facts, if any?

II. Question Presented
   A. Have you identified the correct and the specific issue and referred to the common law, statutory, or constitutional claim?
   B. Unless the issue is solely a question of law, have you incorporated the facts that raise the issue?
   C. Have you identified the facts as specifically as appropriate, rather than use an overly generalized description?
   D. If there is more than one issue, have you organized the issues in a logical order, which you will adhere to through the memo?
   E. Is the Question readable?

III. Conclusion or Short Answer
   A. If you use a Short Answer, have you accurately and clearly answered the Question Presented?
   B. If you use a Conclusion,
      1. have you accurately and clearly answered the Question Presented, and
      2. have you summarized the analysis in the Discussion and briefly applied the controlling law to the facts of your problem?

IV. Discussion (See Chapters 4–6)

A. Did you begin with a thesis paragraph, the length of which is appropriate to the length and complexity of the discussion?
B. Have you organized your discussion logically?
   1. Is the discussion organized into separate claims that are presented in a logical order?
   2. Is each claim broken down into the issues and sub-issues by which the claim is analyzed?
C. For each issue and sub-issue, do you
   1. analyze the controlling rules drawn from the jurisdiction's statutes and case law and then the persuasive authorities,
   2. apply the legal rules from those statutes and cases to the facts of your problem,
   3. draw analogies and distinctions to the precedents, and
   4. objectively evaluate and explore all credible interpretations?
D. Does your analysis reflect an accurate synthesis of the authorities so that you explore all the ramifications of a topic as a related analysis?
E. Have you kept firmly to what is relevant for the claim or defense you are analyzing?
F. Have you explained and supported your conclusions with adequate reasons? Do you analyze all interpretations before coming to an unqualified conclusion?
G. Are you creative in using facts and analogizing to similar issues?
H. Have you supplied citations to authority and are they accurate?

V. Writing Style (See Chapters 9–10 and Appendix A)
A. Are your paragraphs unified around a topic and is that topic clear?
B. Do you use transitions to show the logical relationships between sentences and between paragraphs?
C. Do your sentences carry the reader forward rather than bog the reader down?
   1. Are your sentences a readable length without too many interrupting phrases and clauses?
   2. Do the verbs of your sentences carry the action or have you nominalized the verbs?

3. Do you use concrete nouns as subjects rather than abstract ones?
4. Are most of your sentences in the active voice?
5. Did you edit out unnecessary throat clearing words and phrases?

D. Have you checked for correct grammar and punctuation?
E. Do you use past tense for events that already occurred?
F. Do you use quotations only when necessary, and do you fit them into your text?

8

The Writing Process

I. Introduction

THE FIRST TIME YOU ARE ASKED to prepare an inter-office memorandum is often the first time you have to integrate many of the concepts being taught in your legal writing course: identification of rules, statement of holdings, application of law to fact, issue organization, citation, and memorandum format. Many first-year law students become frustrated as they try to work with all these pieces and put a memorandum together. In an effort to alleviate that frustration, this chapter focuses on the process of writing that memo and tries to break the process down into smaller, less overwhelming pieces. The chapter deals only with the process of analyzing and writing about the materials. It assumes that your research is complete or, as is common in many first memorandum assignments, that your teacher provided copies of or cites to relevant cases and statutes. This chapter also assumes that your first memo requires you to apply established rules to facts, rather than to predict new rules of law. (For more complex issues of law, see Chapter 11.)

The suggestions offered here have helped many students to break through writers' block and move onto the next step. Still, there are other effective methods of writing. If you have done a lot of writing and have a process that works well in helping you organize your thoughts and put them on paper, you may want to continue to use that process. But if you have not done a lot of writing, or if you have had difficulty getting started, these suggestions may help you avoid hours of staring at blank sheets of paper or empty computer screens.

Even if you have done a lot of writing, you may want to read these suggestions with an open mind. Legal writing is different from a lot of college and graduate writing in that it does not build to a crescendo;

it starts with its conclusion and moves on to justify it. This structure is as much a part of the "convention" of legal writing as a newspaper lead consisting of "who," "what," "when," "where," and "why" is a convention of journalism. Thus, even if you have a successful method of writing, you may want to adopt some of the suggestions here in order to smooth the transition from writing in other fields to writing legal documents.

We suggest a four-step process to get ready to write.

- Read the problem to understand your assignment.
- Read the cases and statutes (and other materials) to see what they are about.
- Read the materials again and take notes.
- Transform your notes into a topical outline.

When you write, we suggest you do the following.

- Write a first draft.
- Revise for organization and analysis.
- Revise for fluidity and clarity.

The suggestions below are linear in that they suggest a series of steps from beginning to end. The writing process, however, is recursive, and at any point along the way, you may find you have to go back, either to reassess some of your primary authorities to take account of new insights, or to add or omit something from an earlier discussion.

II. Beginning Your Assignment

OUR FIRST RECOMMENDATION is that you start to work on your assignment as soon as possible, preferably immediately after you receive it. Your writing assignments will take more time than you think. Even if you have a successful track record writing papers as an undergraduate or graduate student, or in a business or professional career, your legal writing assignments involve many new skills. Until you have had more practice and some of the work, such as citation form, becomes more automatic, even short assignments will take a lot of time. Do not expect to hand in a successful paper if you begin only the day before the memorandum is due. Even if you are willing to pull an all-

nighter, legal writing requires more time for reflection than you will have if you start at the last minute.

Once you are ready to begin, make sure you understand the problem you have been assigned. Read the facts carefully, and look for the issue that you are to write about. In your first assignments, the issue is probably identified for you. Carefully read the question you have been asked to address and be sure you respond to that question. For example, if you have been asked whether the facts alleged by the plaintiff state a cause of action for negligence, do not write a memo analyzing whether the defendant was in fact negligent. That is a different issue. In addition, be sure to note any assumptions your assignment tells you to make, as well as any instructions to ignore certain other issues that may be presented by the materials. Sometimes legal writing teachers include this type of information to help you stay focused on the issue assigned.

The next step is to start researching the problem. Once you have most of the relevant materials, either through your own research, or because they were provided to you, read them through once. The purpose of this first reading is simply to help you familiarize yourself with the issue and with the language the courts use in addressing it. When you are given the cases and statutes, you can assume that they were chosen because they are about the issue/s in your assignment. When you do your own research, an additional goal of your first reading should be to ensure you have found relevant law.

After you have read the materials once to familiarize yourself with the issue, you should begin to re-read them to learn precisely what the law is and how that law applies to different facts. You are now ready to move from the relatively "passive" stage of simply reading statutes and cases to the more "active" and difficult stage of working with those materials to organize and analyze your problem.

Think about what you need from a case: issue, facts, holding, and reasoning (see Chapter 2). Then concentrate on how the issue is raised by the facts of the case and on the rule that the court applies to resolve the issue. Sometimes, different courts use different language but they are really using the same rule. For example, some courts in false imprisonment cases talk about "restraint," while others talk about "confinement." (If the rule is different, then your assignment may involve a question of law, that of choosing the best rule.) Ask how that case applies to your assignment. Your goal is to use these

materials, first to identify the rule that controls your issue, and then to analyze separately each of the elements of that rule.

Thus when you re-read the cases and statute(s), start taking notes so that you can understand precisely what the law is and how the law applies to different facts. Keep in mind your two slightly different but related purposes. First, use the cases and statutes to identify the controlling rule. Second, regardless of whether the issue is resolved by a common law rule or by a statute, use the cases to flesh out the meaning of the elements of the controlling rule.

At this phase of the research process, you may want to take a few precautionary steps to avoid inadvertent plagiarism that could occur later on when you are writing your memo. When using electronic research sources, it is easy to carelessly cut and paste language into your memo without quoting and citing the source. To avoid this, change the font or formatting in the electronic documents you are using in your research. Then the pasted text will look different from the rest of your memo and remind you to quote and cite the language. See Chapter 1, Section V for further discussion.

III. From Research to Outline

ONCE YOU HAVE BRIEFED YOUR CASES and thought about how they apply to your problem, you need to organize your notes into an outline. Rewrite your case summaries so that they are organized around the elements of the rule that govern your problem. This outline of the rule is the large-scale organization of your memorandum discussion. Then flesh out that outline using the analytic steps that comprise the small-scale organization of a memorandum discussion.

The next pages use several examples to illustrate how to organize your notes into an outline. First, take your case briefs or summaries and rewrite them so they are organized by issues. For example, suppose you had written the four case summaries for the parental immunity synthesis in Chapter 2, Part IV. When you reread these case briefs, you notice that in each case the court mentions the child's age. In Case 1, the child was a minor and the parent was immune from suit. In Case 2, however, the child was a minor but the parent was not immune from suit. In seeking an explanation for this difference, you notice that a second requirement is involved, the type of tort, whether an intentional tort or negligence. In Case 4, the parent was negligent, but the child was not a minor and the parent was not

immune from suit. These two requirements now become the building blocks of your notes: 1) the child must be a minor, and 2) the child must sue for negligence.

Instead of organizing your notes by each case you read, organize instead by these two topics. If you take notes on index cards, then head each card by one topic: child's age or type of tort. Write on each card the information from one case relevant to that topic. Include citation and page numbers so that you do not have to go back later. If you take notes on a word processor, use these same topics for your entries. The important point is to organize by topics or issues, not by cases.

Your next step is to change your note cards into an outline. As explained in Chapter 4, your outline is dictated by the structure of the claim. You would outline the parental immunity topic into the two primary divisions.

If your assignment involves the intentional tort of battery, the cases will tell you that battery is usually defined by a three-part test:

1. whether the defendant causes an unconsented contact with the plaintiff,
2. whether the contact is harmful or offensive, and
3. whether the defendant intended the contact.

Organize your outline by those three parts. This is your large-scale organization. Lawyers, that is, your readers, expect this kind of structure.

If the common law or statutory claim does not have a fixed definition, then read the cases to find out the factors that the courts use. For example, the Uniform Commercial Code § 2–302, which permits a court to not enforce an unconscionable contract, does not define the term unconscionable. However, the cases tell you that the courts break down unconscionability into procedural and substantive unconscionability. Those two requirements will form the large-scale organization of your outline.

Once you have outlined the requirements for each issue, you are ready to analyze what each requirement means. For this step, you must find the types of facts that satisfy or do not satisfy the requirements. These become the next subdivisions of your outline. By pulling out these facts and categorizing them, you create the subissues by which to analyze the meaning of each requirement in order to

determine whether the claims will be successful. For example, if you are outlining the issue of procedural unconscionability, you will find that procedural unconscionability is an abuse of the bargaining process. Often this abuse arises because the purchaser did not understand the contract terms. There may be several reasons why he or she did not: perhaps the purchaser did not understand English well, or the contract was written in legalese, or printed in small type. You may find that another important factor is whether the agreement was voluntary; contracts may be procedurally unconscionable if the terms were not negotiable or if there was unfair disparity in bargaining power. These factors become subissues in the outline of procedural unconscionability cases that follows.

I. Procedural Unconscionability: Abuse of the bargaining process produces "absence of meaningful choice" on the part of one party to a contract. *Williams v. Walker-Thomas*

   A. Purchaser Did Not Understand Contract Terms.
      1. Lack of Education/Understanding
         a. *Zabel v. Circleville Enterprises:* Door-to-door salesman's specifically drafted contract clause requiring new customer to purchase over 150 compact disks within the next two years held procedurally unconscionable because salesman's continued "badgering" during sale combined with plaintiff's second grade education level indicated he did not understand the clause and thus had no meaningful choice.
         b. *Wunsch v. Big Truck:* Hispanic lawyer's assent to contract clause requiring 150% interest on loan for new Toyota 4-Runner held not procedurally unconscionable although clause in small type on back. Plaintiff's education and occupation indicated he understood the terms of the contract, even though English not first language.
      2. Clause "Hidden" or "Unreadable"
         a. *Kelsh v. Airless Tire Co.:* Clause in fine print in corner of reverse side of contract that limited defendant's liability for defective motorcycle tires held procedurally unconscionable because purchaser unaware of the clause due to manufacturer's deceptive trade practices.

b. *Essig v. Fast Go–Carts, Inc.:* Clause numbered No. 20 in contract containing 53 listed clauses all in readable size type held not "hidden" despite fact plaintiff never actually read the clause, which indicated the go-cart would be sold without an engine. Plaintiff had done other shopping.

B. Agreement Not Voluntary: Lack of Bargaining Power/Grossly Unequal Bargaining Power.
   1. *Henningsen v. Bloomfield Motors:* Car manufacturer's limitations of warranty to "repair or replacement" of defective part(s) held procedurally unconscionable because purchaser, average middle class U.S. buyer, had no power to negotiate for alteration of warranty in "take it or leave it" contract that all car manufacturers offered.
   2. *Shmikler v. Rip–Off, Ltd.:* Department store's exorbitantly high credit terms and sales contract clause allowing repossession of all purchased items for default upon one item held not to be procedurally unconscionable because plaintiff travelled to particular store and store across the street had much more favorable credit terms. Purchaser had a meaningful choice.
   3. *Kelsh v. Airless Tire Co.:* Purchaser under time pressure. Needed motorcycle quickly for job. Plaintiff's job put him at low economic level. Thus, lack of bargaining power.

After outlining procedural unconscionability, you would go on to outline substantive unconscionability.

Many people turn their first case outlines into more detailed outlines that reflect the five-step analysis discussed in Chapter 5 on small-scale organization. To fill in your outline of each factor, supply both information from the cases about that point, and information about how the law and precedents apply to your case. By this point you should not be parroting language, but you should be asking questions about the cases' relevance to your problem. You will probably be listing cases in more than one place. Remember to include cites and specific page numbers.

It is especially important to be open-minded and thoughtful about different ways to interpret the facts and to draw inferences from them. Usually not all the factors you identify for your small-scale

organization must be present in any one case. Thus, you must evaluate their importance. Remember also that in writing a memorandum, you want not only to analyze the reasons that lead to one set of conclusions, but also the reasons for the opposite conclusions. The cases should give you ideas about what kinds of arguments to raise for both sides of the issue. For example, if, in the precedents, the defendants who had incurred liability all acted in bad faith, can you discern any facts by which to characterize the defendant's conduct as bad faith in your case, or to characterize the conduct as good faith? Is there any way that the facts you characterize as showing bad faith can be explained differently? The last entry on your outline for each issue should summarize how the point applies to your assignment. You may want to use two columns here: one for cases and analysis that lead to one conclusion, the second column for those that lead to the opposite conclusion.

What follows is an example of a more complete outline for an assignment involving a battery. The parties were arguing while riding together in Fleming's car. The day was hot, the windows were up, and the car air conditioning was on. Rondo said something that angered Fleming while Fleming was driving past a house where the water sprinkler was on in the front yard. The water reached to the street. Fleming used the power button to lower Rondo's window. The water from the sprinkler came in the car and splashed on Rondo's seat. Rondo sued Fleming for battery.

The outline here includes the first part of the "contact" element of battery, namely, whether there was a contact at all. A complete outline of this element would have two other subissues (numbered 2 and 3), discussing whether the contact was caused by the defendant and whether the plaintiff consented to it. The other elements of battery (intent and harmfulness of contact) would be outlined as parts B and C. Any second claim would be Part II of the outline.

I. Battery

A. Defendant Caused an Unconsented Contact with Plaintiff

1. Contact with Plaintiff:

a. Rule:

The contact need not be directly with the plaintiff's body. "Actual physical contact with the plaintiff's body is not necessary to constitute a battery so long as there is contact with

the clothing or an object closely identified with the body or attached to it, for example, an object plaintiff holds in his hand." *Carousel v. Manager,* 35 Kent 69, 72 (1984).

b. Cases:

Carousel: defendant pulled plaintiff's lunch plate from his hands, insulting plaintiff as he did so. A contact.

Rogers v. Evans, 40 Kent 105 (1987): plaintiff was riding a horse. Defendant hit the horse on the saddle and the horse galloped off. A contact.

Daley v. Ryan, 43 Kent 170 (1989): defendant pulled chair away as plaintiff was about to sit down and plaintiff hit the ground. A contact.

Helmut v. Chapeau, 5 Kent 47 (1902): defendant used his cane and knocked plaintiff's hat off his head. A contact.

c. Application to Problem:

Although water from sprinkler hit on the seat of the car where Rondo was sitting and didn't touch Rondo, direct contact with plaintiff's body not necessary. Though Fleming didn't touch Rondo's clothing (*Helmut*), or an object Rondo held in his hand (*Carousel*), or anything physically attached to plaintiff, contact can be with the surface plaintiff sitting on. In *Daley,* plaintiff's contact was direct with the ground, but in *Rogers,* contact was with saddle that plaintiff sat on, and was indirect.

d. Counter–Analysis:

Plaintiff wasn't "identified" with the vinyl car seat in Fleming's car. In *Rogers,* the saddle belonged to plaintiff and plaintiff used it often so could have been an object more "identified with the body" than is a vinyl car seat. In *Daley,* Plaintiff hit the ground, a direct contact. This is indirect: water on car seat—car seat with plaintiff.

e. Conclusion:

Contact with seat on which plaintiff sitting is too indirect.

Some students find it difficult to develop this kind of issue outline. They find it hard to move from a case-by-case survey to an issue analysis. Often students have read so much and become so bogged

PROCEDURAL UNCONSCIONABILITY

Case	Plaintiff did not Understand K Terms		Unequal Bargaining Power or Duress	Proven
	Lack Ed./ English	K Difficult to read		
Zabel v. Circleville	Yes—2nd grade		Yes—salesman badgering	Yes
Wunsch v. Big Truck	No—professional degree, high economic status	Yes		No
Kelsh v. Airless Tire		Yes	Yes—duress	Yes
Essig. v. Fast Go Cart		No—but many clauses	No—did other shopping for Go Cart	No
Henningsen v. Bloomfield Motors	No—middle-class		Yes—important case—K of adhesion	Yes
Shmikler v. Rip off			No—other terms available elsewhere	No

in specifics that they lose the big picture and overlook patterns and trends. Some students find graphic representations of their research help them obtain the perspective they need to develop an outline. If you have a visual imagination, you might want to try diagramming your cases. List the cases down the margin. Write the issues across the top and then fill in the boxes.

You can use this chart to develop the kind of outline that has been illustrated in this section.

IV. The First Draft: Putting It Down on Paper

AFTER DEVELOPING AN OUTLINE, you are ready to begin writing your first draft of the memo. Before actually putting pen to paper, however, remember that a legal memorandum has several sections; you need to review the format and decide where to start. Each part of the memo has its own purpose, and each part should be written with

that purpose in mind. The purpose of the Question Presented, for example, is to raise the issue in the case, not to conclude on the issue. Answering the Question Presented is the purpose of the Conclusion section. The Conclusion also summarizes your analysis, so it should not include material that is not in the Analysis section. The Facts section is supposed to include the "relevant" facts. To determine the relevant facts, you must know how you are going to analyze the issues in the Discussion section.

Thus, you probably do not want to write the memorandum in the order you present the sections. Instead, you may want to write a rough statement of the Question and either an outline or a rough draft of the relevant facts. Then concentrate on writing the Discussion. When you complete your Discussion, you will be able to cross-check that your Question isolates the issue you wrote about, and that you selected facts for the Question and the Fact section that actually are relevant to the issue. Similarly, once you have completed the Discussion, you can ask yourself what the essential elements are and summarize each for the Conclusion. The important point in approaching each section is to remember its purpose and the type of information it includes.

Sometimes, despite all the above advice on how to get started, you may experience a paralyzing uncertainty about where and how to begin your memorandum. Almost all authors confront writers' block at one time or another. Fortunately, there are a couple of techniques that may help you get started.

Writers frequently have trouble getting started because they find introductory or thesis paragraphs hard to write. Until the analysis has been completed, for example, you may be unsure of your thesis or conclusion. Thus, it may come as a relief to know that you do not need to write your thesis paragraph first. In fact, you do not need to write up your issues in the order you finally present them. If one issue is easier to analyze than other issues, write the easier one first. Then go on to the next easiest. Not only does your confidence grow as the document grows, but the sorting and thinking that occurs as you write the easier sections may equip you to handle the difficult issues. You then have to rearrange the sections in the right order.

Although writing in the order-of-ease often makes a lot of sense, you must be careful to review your organization once you have put all the sections together. Do you address threshold issues first? Does your thesis paragraph reflect your final structure? Do you provide

transition sentences? It is important to make sure your final draft is consistent and has smooth logical connections.

If you are the kind of writer who finds it either difficult to outline or difficult to flesh out an outline, you might find "freewriting" is a helpful technique to get started or to break a writer's block. Freewriting is stream-of-consciousness writing. When you freewrite, you dump every idea you have about your topic on paper without regard for logical sequence, grammar, or spelling. You simply put your pen on the pad, or fingers on the keyboard, and record all your passing thoughts. If you are unable to think of anything to say, that is what you type until you have a breakthrough.

> I can't think of anything to say. I still can't think of anything. Still not. Not. Not. Still no thoughts. This is boring ... it's also making me feel silly. Guess I'd better focus harder on covenants not to compete. What should I say? Did I mention geography seems to be a big factor? It comes up in quite a few cases. Let's see. One case says....

As the example suggests, freewriting often begins as a rambling, even banal, muttering. But after a paragraph or page of private inanity, valuable thoughts usually begin to emerge. For a while, therefore, just go with the flow. Then, when some useful thoughts have been committed to paper, stop writing and reread your musings to determine what they amount to. Do certain points crop up more than others? Why? Do some facts loom large? Why? Do some points seem related? Try some provisional re-ordering: group related paragraphs and points, separate primary and secondary ideas, try to articulate headings or categories that encompass details.

This sorting, grouping, and categorizing may enable you to undertake a more focused type of freewriting. Summarize in a sentence or two one of the main ideas in your initial freewriting. Then embark on further free association just on that topic. Make lists of every aspect of that topic, focus on what confuses you, role play—explore your case as if you were your opponent. Once some profitable thoughts emerge, stop and assess your work again. Perhaps your role playing has led to a viable counter-analysis. Perhaps your confusion stems from an ambiguity or gap in the law. Does this ambiguity or gap help you or harm you? As your freewritings become more directed you may find that you are able to work some of these more focused meditations into your actual first draft with only minor revision.

Sometimes you may get bogged down in the middle rather than at the beginning of a draft. You may find you have gotten stuck on a particular point and keep writing and rewriting that section. If this rewriting is unproductive, generating more frustration than insight, abandon that section temporarily. Some distance on the topic may help you gain perspective. You may have gotten so bogged down in detail that you lose the forest for the trees. There is often a tension between picking up the important details in the cases and losing track of the main points.

Sometimes writers bog down because they become confused about terms, defenses, or exceptions as they probe a problem. When this happens, you must go back to your cases and rethink them. For example, if you are working on a battery problem, you may realize that you no longer understand what is required for a contact. You may have to go through the materials again to build up the meaning of those terms. For example, can contact be indirect as well as direct? Ask yourself at what point the contact is too indirect. When you have reclaimed the meaning of these terms, return to thinking about how they apply to your assignment.

Sometimes writers use rewriting as an evasive maneuver designed to postpone confrontation with a thorny issue. If you find yourself doing this, try "invisible" writing. Turn off your computer screen to end your tinkering and forge ahead. As soon as you are immersed in your next analysis, turn the screen back on. Rewriting is an important step in the writing process, especially when it is done to clarify your thoughts. But you should not become so focused on finding the exact words that you become distracted from your primary task, which is to get all your ideas out on paper.

V. Rewriting

EVEN THOUGH YOUR FIRST TASK is to get your ideas down, most people will do some revision from the beginning. This is especially so if you use a word processor. In the process of writing a first draft, you may find yourself moving whole sections, omitting paragraphs, and even altering your conclusion. This occurs because the first draft is typically the place where you clarify your ideas as you struggle through the analysis. The process of writing is a means for thinking through the problem, learning where you need more information, and arriving

at a conclusion which you may not even have been aware of when you started the writing process.

Once you have written the first draft, however, it is very important to put the work aside for a day, or at least a few hours, so that when you come back to it, you can view it from a different perspective. (Few people have any perspective on their writing at three a.m., let alone a different perspective.) To revise your draft, you need to think about your work in a somewhat different way. You need to consider whether the document answers the question that you have been asked, and whether the reader, who does not have your familiarity with the issues, can understand your analysis. The first is easier to determine. Go back to the original question in your assignment and make sure that your analysis responds to that question. It is more difficult, however, to take a hard look at your own work to see whether you have presented your analysis to the reader in a logical, coherent manner.

You will probably find it easier to revise your work if you do the revision in stages instead of trying to do everything at once. The most important and most difficult revision is in checking the organization and analysis (see Chapters 4, 5, and 6). When you are reasonably satisfied with that, you can next focus on paragraph unity and coherence (see Chapter 9) and sentence level changes (see Chapter 10 and Appendix A). The final step, and one which should not be forgotten, is proofreading. You do not want to create a bad impression and detract from the substance of your work with spelling errors, typos, and incorrect citation form.

A. Revising Your Organization and Analysis

The most important part of a legal document is the section in which you present your analysis of the problem. Throughout the writing of the first draft, you have attempted to identify the issues, put them in logical order, and analyze them fully, relating the law to your particular problem. But it is hard to assess your work from a reader's perspective. A number of different techniques are available to help you do this.

First, try to put yourself in the position of the person you are writing the document for. Ask yourself whether that person, who does not have your familiarity with the research and analysis that you have just done, would be able to follow your analysis. A second technique in revising is to use the Editing Checklist for Memoranda on pages

159–161. A third method is to use the thesis paragraphs as a check. See if you have started each major section with a thesis paragraph that states the issues, identifies the basic legal context, and concludes, applying the law to the facts of your case. If so, then check to see whether you in fact have analyzed the issues that you identified in the thesis paragraph, generally in the order in which you raised them.

Another technique is to make a topic sentence outline. If you are using a word processor, you can block and then print all of the headings, sub-headings, and topic sentences in your analysis. Or you can take a copy of your draft and, with a colored marker, either underline or highlight the headings, sub-headings, and topic sentences. As you read this outline, ask yourself whether the topic sentences accurately identify the material in the paragraph, whether the topic sentences in the outline seem to be in logical order, and whether each step in the analysis is included. Where there is ambiguity, the idea in the paragraph may be appropriate but the topic sentence may not identify the idea. So write a new topic sentence. Or the topic sentence may be the correct next step, but the paragraph is about something else. Then revise the paragraph. Or the problem may be that a step in the analysis has been omitted (See Chapter 6). You have gone from A to D assuming the reader understood B and C. In this case, supply B and C. Or the problem may be that the issues are not in the logical order. In this case, revise the order of the paragraphs. After you make these changes, make sure that you have included transitions that clarify the relation between paragraphs.

B. Revising Sentences

Some sentence level problems will disappear once your analysis is effectively organized. However, you still need to look at the sentences you have written and make sure that you have presented your ideas grammatically, clearly, and concisely (See Chapter 10 and Appendix A). Avoid long, complicated sentences. A sentence that runs more than four lines in the text should be scrutinized. Omit wordy, unnecessary phrases ("It is established that," "It is clear that," "It must be shown that"). Omit legalese. Put the action of the sentence into the verb. In general, use the active voice. Keep your language simple and straightforward. If you have been told that you have a particular sentence level problem—like faulty parallelism or misplaced modifiers—try editing your work just looking for that one thing. Another helpful technique is to read the document aloud. A sentence that does not

work when you read it aloud probably does not work in writing either. Finally, check and correct your punctuation.

C. Proofreading

Nothing detracts as much from a document as spelling errors, typos, or omitted words or phrases. If you have a program on your computer which checks spelling, use that first. Do not, however, rely solely on spell-check. Such programs do not pick up on errors like typing "statue" for "statute" or "the" for "they," nor do they detect omitted words, or an incorrect homonym like "their" for "there." Thus you must read the document aloud to yourself, or even better, read it line by line, using a ruler to help your eye focus on one sentence at a time. Then, proofread your citation form. Finally, make sure that you have not exceeded the page limitation of the assignment, and that your pages are in the right order and numbered.

9

Effective Paragraphs

I. Introduction

A PARAGRAPH IS OFTEN DESCRIBED as a group of sentences developing a dominant idea that is usually expressed in a topic sentence. A paragraph should have both unity and coherence. It has unity when every sentence relates to the topic. It has coherence when there is a smooth and logical flow between sentences and a clear and explicit connection between any one sentence and the topic of the paragraph.

While unity and coherence are essential for any effective paragraph, well written paragraphs in a lengthy discussion have an additional function. They must not only be understandable internally, but they must also indicate their place in the overall argument. Clear writing depends on providing the reader with signals so that the direction and point of an analysis are always apparent. The most common way of achieving continuity and logical progression is to begin paragraphs with topic and transition sentences. Topic sentences introduce new issues and sub-issues and show their connection with the thesis presented in the thesis paragraph. Transitional sentences bridge subjects or connect the steps within an analysis.

II. Topic Sentences and Paragraph Unity

A PARAGRAPH IS A SUBDIVISION OF A TEXT indicating that the sentences within the subdivision develop one idea. That idea is usually expressed in a topic sentence which pulls the lines of a paragraph together by summarizing the basic idea developed in that paragraph. Without this summarizing sentence, the reader may have difficulty understanding the paragraph and its place in the analysis. Thus, the topic sentence expresses the writer's intention for the paragraph the

way a thesis paragraph expresses the writer's intention for a paper. And just as a thesis paragraph ought to be the first paragraph in your discussion, so a topic sentence should generally be the first sentence of a paragraph.

Topic sentences can unify ideas which might appear unrelated by establishing a context which makes their relation and the point of a paragraph clear. Consider this paragraph.

> In *Red v. Black*, five-year-old Johnny Black broke a windshield while throwing rocks. The court held him to the standard of conduct of a reasonable person of like age, intelligence, and experience under like circumstances. *Id.* Similarly, a twelve-year-old was held to a child's standard of care for his negligence in swinging a badminton racquet and hitting a teammate. *Nickelby v. Pauling.* However, the same court held an eight-year-old to an adult standard of care when the infant defendant injured a spectator while driving a go cart on a golf course. *Delican v. Cane.* That decision was affirmed two years later when an adult standard was applied to an eleven-year-old girl who shot another child with an arrow during archery practice. *Marion v. Hood.*

Although each sentence seems vaguely connected to the others, the reader does not understand their precise relation. The discussion suffers from the vagueness that often occurs when a paragraph begins with the facts of a case rather than with a topic sentence. A topic sentence eliminates this vagueness or confusion by establishing a context for understanding the cases. For example,

> Infants are held to a child's standard of care for damages occasioned by their tortious acts, except when those infants engage in adult activities involving dangerous instruments for which adult skills are required. *Delican v. Cane.*

Thus, topic sentences play a key role in ensuring paragraph unity by forcing the writer to articulate the point and the function of the paragraph. If the topic sentence given above was added to the sample paragraph, the author would have at least presented the principle explaining how these cases fit together instead of having offered a mere summary of her research. In fact, if the author had written that topic sentence, the substance of the rest of the paragraph might have improved. The writer would probably have realized the rel-

evance of the courts' explanations of why archery and go cart driving are adult activities, and would have included those discussions in her paragraph.

Not only do you need topic sentences to present your analysis of a case or group of cases, but you need topic sentences to introduce legal issues and subissues. In a problem involving the admissibility of expert testimony on the Battered Wife Syndrome, for example, you would need a topic sentence to introduce each prong of a test that is often used to determine admissibility. For example,

> To determine the admissibility of expert testimony, many courts first decide if the subject matter is so distinctly related to some science, profession, or occupation that it is beyond the ken of the average juror.

Because the first sentence in a paragraph plays a crucial role in informing the reader of the point of the paragraph, it should not be wasted on a citation. Citations often distract the reader from the point you mean to stress. The following sentence should have introduced the claim, not the facts behind a precedent which recognized that claim.

> In *Apple v. Baker,* 688 N.E.2d 600 (1988), the plaintiff brought an action for breach of warranty based on the blighted quality of 20% of the wheat delivered to him.

It would have been preferable to use the first sentence to introduce the basic idea of the paragraph. Then, if appropriate, follow with a citation that shows your authority. After this, you can use the case as an illustration of the basic idea.

> An implied warranty of merchantability is breached when the goods are not fit for their ordinary purposes. *See Apple v. Baker,* 688 N.E.2d 600 (1988). In *Apple,* the plaintiff brought an action for breach of warranty based on the blighted quality of 20% of the wheat delivered to him.

In addition, you do not want to waste your opening statement on a sentence that merely "treads water," that is, one that does not go anywhere and that immediately needs to be explained.

> The court has had to deal with the issue of a child's suit for loss of parental consortium. In a recent case, the court has held that the child has no cause of action.

The paragraph should immediately say that the court has held against the claim, not that the court "dealt" with it.

Although topic sentences play a major role in orienting your reader to your organization, not every paragraph requires a topic sentence. A complicated topic will require several paragraphs to explain, and thus a new paragraph may just be continuing the topic of the preceding paragraph. For this series of paragraphs, you would use a topic sentence in the first paragraph, and then use transitional words or sentences to begin the next paragraphs. Transitions are discussed in section III of this chapter.

After you have written a first draft, you can focus on your topic sentences as a method of editing your work. Topic sentences, or the lack of them, can help you to assess paragraph unity. You can check the body of a paragraph against the topic sentence to see if the paragraph contains more than one topic, wanders into an irrelevant digression, or lacks development. If so, you should divide, edit, or develop the paragraph to achieve unity. If you find yourself unable to state the topic in a sentence, your paragraph needs to be sharpened, focused, or omitted.

Evaluate the following two paragraphs for unity.

> **Example 1:** In determining whether an infant will be held to an adult standard of care, courts first examine the infant's activity to see if that activity involves a dangerous instrument which requires adult skills. In *Marion v. Hood,* archery was considered an adult activity because of the intrinsic danger of arrows and the skill required in operating a bow and arrow. See also *Delican v. Cane* (go carts are intrinsically dangerous and require skill in handling). In contrast, in *Nickelby v. Pauling,* a badminton racquet was found so lightweight as not to constitute an intrinsic danger.
>
> **Example 2:** An infant will be held to an adult standard of care if the infant was engaged in an activity involving a dangerous instrument for which adult skills are re-

quired. *Marion v. Hood.* Because of the intrinsic danger of arrows and the skill required in using a bow and arrow, archery was found to be an adult activity in *Marion v. Hood.* In *Delican v. Cane,* an infant driving a go cart was held to an adult standard of care because of the intrinsic danger of go carts and the skill required in their handling. Although the court in *Ashley v. Connor* did not scrutinize a squash racquet for its intrinsic danger, it found squash to be an adult activity because knowledge of the game's traditions and customs is required to mitigate the potential risks of the game. In squash, it is customary for a player to yell "clear" before taking a shot directed at the partner in order to avoid striking that player.

Example 1 has a clear topic sentence supported by the succeeding sentences. The paragraph exhibits direction and unity. Each sentence develops the general principle articulated in the topic sentence by setting forth authority for that principle.

Example 2 lacks unity because it introduces a factor not announced in the topic sentence. The paragraph begins well. It initially focuses on one factor the courts examine to determine whether a game is an adult activity: whether the instrument used in the activity is so inherently dangerous as to require adult skill. Yet the writer gets sidetracked in the last two sentences. The *Ashley* court's silence on the first factor leads the author to a second: whether traditions and customs have evolved to mitigate the risks of the game. This is an important factor and deserves discussion. But the discussion should begin in the next paragraph and should be announced in a separate topic sentence. Having written a topic sentence that refers to the first factor only, the author should be guided by it.

Attention to paragraph unity and topic sentences may help with paragraph length also. Long paragraphs—paragraphs the length of a page or more than 250 words—should send you looking for logical subdivisions, which are often natural places for paragraph division. In contrast, a very short paragraph, when used other than for emphasis, is often part of a larger discussion and should, therefore, be combined with another paragraph. A one sentence paragraph, for example, is frequently the conclusion of a prior paragraph or an in-

troduction to the next. If it is not, a short paragraph should be examined for lack of development.

Examine the following paragraph for a logical subdivision.

> A landlord's duty to maintain the premises in safe and sanitary condition does not require the landlord to provide protection from criminal activities directed against persons lawfully on the premises. *Pippin v. Chicago Housing Authority. Pippin* was a wrongful death action against the landlord concerning not so much the conditions, but the policing, of the premises. Pippin had been an acquaintance of one of the tenants in the building. During an argument with the tenant, Pippin was fatally stabbed. The *Pippin* decision was a simple restatement of the common law in Illinois: a landlord does not have the duty to protect a tenant from criminal acts, nor does it have a duty to protect a third party lawfully on the premises from criminal activities. Nonetheless, a landlord who has provided part-time guard service may have a duty to make security provisions for the hours when the guards are not on duty. In *Cross v. Wells Fargo Alarm Services,* the court held the landlord responsible for the safety of the building during those hours for which it had not provided guard service. The court relied on the theory that the provision of part-time guard service had the effect of increasing the incidence of crime when the guards were not there. The plaintiff had been injured by several unknown men at a time when the guards were not on duty.

The paragraph breaks naturally after the fifth sentence when the writer begins explaining an exception to the common law rule that a landlord has no duty to provide protection from criminal activity. The writer should indent and begin a new paragraph there.

Decide which of the following paragraphs can be logically combined with another.

> In *Holley,* the plaintiff paid $5.00 a month as a security fee, aside from the regular rent. The court stated that this fee created a contractual duty on the landlord to provide protection to the tenants. Ms. Parsons was charged a $10.00 a year security fee. This fee, like the one in *Holley,* was for the purpose of maintaining a security system. Although Ms. Parsons paid $50 a year less than the plaintiff in *Holley,* the $10 fee could establish a contractual duty for Fly-by-Night to provide the

plaintiff with protection against third party crimes occurring on the defendant's premises.

If the duty is not contractually established, Fly–by–Night may still be under a duty to protect the tenant from the results of reasonably foreseeable criminal conduct. See *Ten Associates v. McCutchen.*

For example, in *Stribling v. Chicago Housing Authority,* the plaintiff was a tenant whose apartment was burglarized on three separate occasions. On each occasion, the thief entered the plaintiff's apartment through a wall shared with a vacant adjacent apartment. The landlord negligently failed to secure the apartment after the first burglary, despite many demands by the plaintiff. The court held that the landlord was liable because the second and third burglaries were reasonably foreseeable.

The second paragraph should be combined with the third. That sentence provides a transition from the first paragraph and introduces the issue illustrated by the third.

III. Paragraph Transitions

TRANSITIONAL PHRASES OR SENTENCES are often used to show the relationships between an individual paragraph and the preceding and succeeding ones. They tend to appear either at the end or at the beginning of paragraphs and are used to summarize what has been covered and introduce what is to come. They are particularly important in long or complex discussions to prevent a reader from feeling lost. Although you can expect your reader to read carefully, you should not expect that reader to do your work, to provide the clarity, structure and development which are not in the paper itself. You can avoid overreliance on your reader if you use transitional phrases or words to show how a paragraph advances your discussion.

Sometimes transitions announce a change in subject. Thus they can underscore a shift in topic which might otherwise be announced in a heading or topic sentence. Sometimes transitions track the steps in an argument, informing the reader, for example, that a case just described is now going to be distinguished or that a rule just discussed will now be applied. There are numerous ways to effect these transitions.

1. You may want to raise a new point with a sentence that summarizes a completed discussion while relating it to the upcoming issue.

> Although the prosecution will have little difficulty showing assault, it may have trouble proving battery.

2. You may want to keep track of the issues with enumeration.

> The second exception to the employee-at-will rule arises when there are implied contractual provisions such as terms in an employee handbook.

3. You may want to show the relation between paragraphs by showing a substantive connection.

> A. There is no causal connection offered to link Joan's prior passivity with her present aggressive activity.
>
> A similar causal element was missing in the expert testimony on the battered wife syndrome offered in *Buhrle v. Wyoming.*
>
> or
>
> B. The *Tarasoff* holding has been applied in this jurisdiction.

4. You may want to link paragraphs with a simple transitional word or phrase showing the logical connection one paragraph has with another.

> Therefore, although a court will not enforce that part of the contract which is unconscionable, it will generally refuse to award punitive damages.
>
> In *Frostifresh,* however, the court awarded the seller not only the net cost but also a reasonable profit.

Since transitions play so central a role in showing the reader how you are building the argument, it is especially important that your transitions be thoughtful. You should not mechanically insert tran-

sitional words or phrases between your paragraphs without thinking about the relationship you wish to establish. Imprecise, erroneous, or ambiguous transitions can be misleading because they point the reader in the wrong rather than the right direction. The list of transitional expressions provided below, therefore, should be used cautiously. Although it supplies some of the phrases that establish particular kinds of logical relationships, you must still check that the transition you have selected is the one most appropriate for the connection you wish to establish. You should also be sure that you are entitled to use the transition. For example, the word "therefore" signifies a conclusion. Yet, before you can persuasively signal your conclusion with "therefore," you must be sure that you have provided supporting reasons.

Transitional Expressions

1. To signal an amplification or addition:

   and, also, moreover, in other words, furthermore, in addition, equally important, next, finally, besides, similarly, another reason, likewise.

2. To signal an analogy:

   similarly, analogously, likewise, again, also.

3. To signal an alternative:

   in contrast, but, still, however, contrary to, though, although, yet, nevertheless, conversely, alternatively, on the other hand.

4. To signal a conclusion:

   therefore, thus, hence, as a result, accordingly, in short, consequently, finally, to summarize.

5. To establish a causal consequence or result:

   because, since, therefore, thus, consequently, then, as a result, it follows, so.

6. To introduce an example:

   for example, for instance, specifically, as an illustration, namely, that is, particularly, in particular.

7. To establish temporal relationships:

   next, then, as soon as, until, last, later, earlier, before, afterward, after, when, recently, eventually, subsequently, simultaneously, at the same time, thereafter, since.

8. To signal a concession:

   granted that, no doubt, to be sure, it is true, although.

Exercise 9–A

1. Reread Exercise 5–B. Write a topic sentence synthesizing the holdings in *Dale v. New City Hospital* and *Histrionic v. Credit Inc.*
2. Reread Exercise 2–I. Write a topic sentence synthesizing the holdings in cases 5, 6 and 7.
3. Read the following discussion. Then provide topic and transition sentences where appropriate.

Ellen Warren must show that Diethylstilbestrol (DES) was more than a merely possible cause of her various injuries in order to present her negligence claim against the manufacturers to the jury. Since statistics show that DES is a probable cause of adenosis, distortion of the uterus, and cervical cancer, the question of the defendant's liability for Ellen Warren's injuries should be presented to the jury. However, Ellen Warren will have a harder time showing that DES is more than a merely possible cause of her infertility, although she can probably establish this also.

In *Kramer Service Inc. v. Wilkins,* the defendant negligently cut the plaintiff's skin. Two years later a skin cancer developed at the spot. Two medical experts testified. One said the cancer was not caused by the cut; the other said it was possible that the cut caused the cancer, but the chances were only one out of one hundred. The court ruled that this evidence was not sufficient to permit the jury to find the defendant liable for the cancer. The court held that a plaintiff must show more than

a merely possible connection between the defendant's negligence and the plaintiff's injury to permit a jury to consider whether the negligence caused the injury.

Ellen Warren's evidence includes the FDA decision to ban DES for use during pregnancy; the statistics that a substantial percentage of women exposed to DES develop cancer; and her doctors' diagnoses that adenosis, distortion of the uterus, and cervical cancer are characteristic of DES exposure. These facts demonstrate that DES is more than merely a possible cause of those injuries.

Ellen Warren's family has a hereditary history of cancer. Because heredity does not seem a more likely cause than DES, particularly in light of Warren's combination of DES-related disorders, this argument does not negate the evidence that DES is a probable cause of her cancer.

While DES causes or contributes to infertility in a substantial percentage of exposed women, many women are infertile without exposure. Moreover, Warren has suffered some other reproductive disorders that may be to blame. Nevertheless, given her combination of DES-related symptoms and the statistical evidence the DES contributes to infertility, Warren still has more evidence of causation than Wilkins did and should be able to present the issue to the jury.

IV. Paragraph Coherence

A PARAGRAPH HAS COHERENCE if it promotes continuity of thought. Even a unified paragraph—that is, a paragraph with a single topic—can seem choppy and disconnected if the sentences are not in a logical order or are not clearly related to each other.

Paragraph coherence depends in part on clear paragraph organization; you must arrange your sentences in a logical order. If the final sentence of a paragraph contains information that the reader needs in order to understand the first sentence, then the paragraph will be hard to understand, regardless of the clarity of these sentences.

Although logical sequence promotes easy comprehension, it alone does not ensure paragraph coherence. Smooth progression from one sentence to the next often requires you to use connectors or transitions, just as you use transition sentences to get from one paragraph to the next. Sometimes, of course, you can juxtapose two ideas and feel confident the reader can infer their logical connection. For example, a reader can probably infer the connection between the following sentences: "You said you put the check in the mail a week

ago. I have not received it." The discrepancy between these two events alerts the reader to the writer's skepticism about the first assertion, even without a connector like "but." Sometimes, however, the specific relation of one sentence to the next is not obvious. In this situation, part of your second sentence must be devoted to giving directions which enable your reader to perceive an otherwise buried connection. One way writers do this is by repeating key words or by using transition words and connectors. Another way writers promote continuity of thought is to overlap their sentences so that a new sentence begins with a brief summary of an idea in the prior sentence. By moving from old, known information to new information, the writer links the sentences together and moves the reader forward.

Of course, coherence on the paragraph level cannot be achieved without sentence coherence, that is, there must be clear and logical connections between the parts, even the words, of a single sentence. See Chapter Ten for suggestions on how to achieve sentence coherence.

A. Paragraph Coherence: Organization

The sense of a paragraph becomes clearer when ideas are put in a logical order. What is logical depends, of course, on the purpose of a paragraph. If, for example, you are trying to narrate events, such as in a Statement of Facts, you would probably use a chronological order. If you are developing an analysis, however, the order of ideas will probably follow either a deductive or inductive pattern of reasoning. Although thought processes are frequently inductive—that is, an examination of particulars enables you to formulate a generalization—most written arguments benefit from a deductive presentation—that is, the argument opens with a generalization which is then supported by particulars.

When ideas are not in a logical order, as in the following paragraph, the sense of that paragraph is hard to understand.

> A mental hospital has a duty to provide its patients with such care as would be reasonable to prevent self-injury given their individual mental problems. *Stallman.* Ms. Brown was a nonviolent suicidal patient whose cure had been progressing steadily during her sixteen month hospital stay. The standard of care is based upon the reasonable antici-

pation of the probability of self-inflicted harm. *Gregory.* In *Stallman,* the court found the duty breached when a violently suicidal woman was left unattended for 30 minutes. Based on Ms. Brown's progress, the doctors would not have reasonably anticipated her suicide.

If the writer had discussed the test defining a hospital's duty of care before launching into the facts of Brown, i.e., if the ideas had been organized deductively, this paragraph would have been easier to understand.

A mental hospital has a duty to provide its patients with such care as would be reasonable to prevent self-injury given their individual mental problems. *Stallman.* The standard of care is based upon the reasonable anticipation of the probability of self-inflicted harm. *Gregory.* In *Stallman,* the court found the duty breached when a violently suicidal woman was left unattended for thirty minutes. Ms. Brown was a nonviolent, suicidal patient whose cure had been progressing steadily during her sixteen month hospital stay. Based on Ms. Brown's progress, the doctors would not have reasonably anticipated her suicide.

B. Paragraph Coherence: Sentence Transitions

1. Transition Words and Coherence

For a reader to follow your thought processes, you must provide transitions that signal where you are taking your analysis next. After finishing a discussion of a general rule, you must clearly indicate to the reader that you now want to explain an exception. If you have just described two requirements for a cause of action, announce that you are now going on to the third. Transitions (perhaps "nevertheless" in the first instance, "in addition" or just "third" in the second) will tell the reader what you are doing.

The following passage is an example of a paragraph which lacks coherence because the sentences are not explicitly connected to each other.

Express oral contracts between unmarried, cohabiting couples are enforceable. Implied contracts in these situations are unenforceable. Vague terms render a contract unenforceable. Jessica Stone and Michael Asch expressly agreed that Mr. Asch would repay his share

of their living expenses once he began practicing law in exchange for Ms. Stone's support for three years. They entered into an enforceable contract. Ms. Stone may bring an action for its breach. Ms. Stone's understanding that Mr. Asch would support her during graduate school is unenforceable since it is an implied agreement. Mr. Asch's boast to "take care of" Ms. Stone forever is too vague to be enforced.

The sense of this passage would be clearer if more transitional expressions were used to establish the logical relationship one sentence has with another.

Although express oral contracts between unmarried, cohabiting couples are enforceable, implied contracts in these situations are unenforceable. Vague terms also render a contract unenforceable. Because Jessica Stone and Michael Asch expressly agreed that Mr. Asch would repay his share of their living expenses once he began practicing law in exchange for Ms. Stone's support for three years, they entered into an enforceable contract. Ms. Stone may, therefore, bring an action for its breach. Ms. Stone's understanding that Mr. Asch would support her during graduate school is unenforceable, however, since it is an implied agreement. Similarly, Mr. Asch's boast to "take care of" Ms. Stone forever is too vague to be enforced.

2. Other Connectors

Transition words are used to show the reader the logical connection between sentences. Other kinds of connectors orient your reader in time or place or inform your reader that you are looking at the material from a particular point of view or perspective. The underlined phrases in the following passages illustrate the use of these kinds of connectors.

During Mardi Gras week 1989, Jeffrey Bond boarded a trolley in New Orleans and sat down in the rear of the car. At a later stop, three teenage boys, Joseph Claiborne, Robert Landry, and Thomas Vallee, boarded the trolley. The four boys wore stockings over their heads and streamers around their necks. They were obnoxiously loud and drunk. At one point, Claiborne, who was 6′7″ tall, turned to Bond and demanded, "What are you looking at?" The two other boys gathered in behind Claiborne, blocking Bond's exit through the aisle.

Given these circumstances, Bond thought it best not to antagonize this group of teenagers; thus he averted his eyes and kept quiet. From a tactical point of view, however, this proved to be a mistake. Claiborne started screaming, "Answer me when I speak to you!" Then he stood up, drew a gun, and shot Bond in the leg.

3. Overlapping Sentences

Cohesion is often achieved when a new sentence opens with a brief reference to all or part of the prior sentence. In other words, you begin a sentence with old information and then move on to new information. This overlapping of sentences leads your reader gently into the new idea. The underlined phrases in the following passage illustrate overlapping.

Ms. Moultry has been addicted to crack for the past two years. During this time, she gave birth to a son, a baby born with a positive toxicology. After his birth, Ms. Moultry placed her child into temporary foster care so that she could enter an in-patient drug rehabilitation program. While there, she repeatedly said that her resolve to come "clean" would weaken if she was denied visitation with her infant. To prevent such a relapse, Ms. Moultry's foster care worker sanctioned visitation. The initial visits went smoothly; the foster parents were supportive of Ms. Moultry and Ms. Moultry felt good about the care her baby was receiving. Then Ms. Moultry learned she tested positive for the AIDS virus. When the foster parents learned she was HIV positive, they refused to admit her into their home. Ms. Moultry disappeared three days later.

4. Coherence and Complex Sentences

Complex sentences—sentences with a dependent and independent clause—often establish relationships more economically than do compound sentences—sentences consisting of two independent clauses joined by a coordinating conjunction. Dependent clauses begin with subordinating conjunctions that establish that clause's temporal or logical connection with the main sentence. Therefore, complex sentences clarify relationships between ideas within a sentence. There are many subordinating conjunctions, but some key ones are *because, since, if, when, while, although.*

In contrast, independent clauses joined by the coordinating conjunction "and" are clauses which are juxtaposed but not related. "And" is a vague connector; it joins sentences without establishing a logical connection between them.

Example: Richard began suffering from arthritis in 1981, and he stopped working.

Rewrite: Because Richard began suffering from arthritis in 1981, he stopped working.

5. Coherence and the Repetition of Key Words

Continuity is better served by the repetition of key words than by elegant variation. For example, transitions and key words effectively bridge these paragraphs.

> Thus the only factual distinction between *Hughes* and this case seems to be the emotional nature of Mr. Jackson's response.
>
> Emotions, however, are at the core of many family matters, especially those involving finances.

It is also important to use consistent terminology when referring to the parties to a suit. In the following sentence, it is unclear whether the court is referring to one person or two persons. It is also unclear whether the court is referring to the particular defendant before it or is stating a principle of law:

> In *Windley*, the court stated that if a person has any personal or financial interest in bringing trade to the seller, then the defendant was not acting solely as an agent for the buyer.

Some of the ambiguity in this sentence also comes from the change in verb tense. Propositions of law should be stated in the present tense while the facts of a case should be described in the past tense. Thus, the sentence should be rewritten in one of the following two ways.

> In *Windley*, the court stated that if a person has any personal or financial interest in bringing trade to the seller, then that person is not acting solely as an agent for the buyer.

or

In *Windley,* the court stated that if the defendant had any personal or financial interest in bringing trade to the seller, then the defendant was not acting solely as an agent for the buyer.

Exercise 9–B

1. Reorder the sentences in the following paragraph to improve organization.

   In *Kelly,* the court found that the defendant, who had demonstrated a long and broad experience with the legal process, had knowingly and intelligently waived counsel, although the trial judge made no detailed inquiry. *Kelly v. State,* 663 P.2d 967, 969 (Alaska Ct. App. 1983). In some cases, a defendant may be permitted to waive his right without detailed inquiry. *Id.* Furthermore, unlike Miller, Kelly availed himself of some of the services of court appointed counsel while defending himself. *Id.* Here, although Miller stated that his mother had married an attorney after his father's death, this cannot be construed as meaningful legal experience. Because a waiver of the right to counsel may not be lightly inferred, *Ledbetter v. State,* 581 P.2d 1129, 1131 (Alaska 1978), the degree of the court's inquiry must be tailored to the particular characteristics of the accused. *O'Dell v. Anchorage,* 576 P.2d 104, 108 (Alaska 1978).

2. Add transition words to improve the coherence of the following passage.

   The degree of judicial inquiry will also depend on the complexities and gravity of the legal issues raised by the charge against the defendant. *O'Dell v. Anchorage,* 576 P.2d 104, 108 (Alaska 1978). Traffic misdemeanor cases are easily understood by lay persons and the consequences are usually not severe. *Id.* The inquiry in such cases need not be extensive. *Id.* Miller, if convicted, faces a mandatory jail term and not a simple parking fine. The severity of the charges mandated a more extensive inquiry by the judge.

3. Rewrite to improve the coherence of this paragraph. Use transition words, connectors, subordinate clauses, and sentence overlapping.

The state's suppression of evidence in a criminal prosecution may constitute a violation of the defendant's due process rights. Whether the defendant's rights were in fact violated depends on four conditions. The state must be responsible for the loss of the evidence. The evidence must have had exculpatory value that was apparent before it was lost. Then the defendant must show that he would be unable to obtain comparable evidence by any other reasonable means. If the evidence was only potentially exculpatory, the defendant must demonstrate that it was lost due to bad faith on the part of the state. Roger Keith can show that the state was responsible for the loss of the alleged murder weapon, the car. The car disappeared from the police garage before it was examined. Its exculpatory value was never demonstrated. It would be difficult to determine what comparable evidence might consist of. The record offers little to prove that the loss of the potentially exculpatory car was due to bad faith on the part of the police. Keith cannot meet the conditions for determining violation of his due process rights because of state suppression. The court will most likely deny the motion for dismissal.

4. Rewrite the following paragraph to improve its organization and coherence.

The parties agree that First Sergeant Valiant of C. Company first picked up the phone to learn who was being called. During the first few seconds after picking up the phone, Valiant overheard a conversation between members of His Company that began "Do you have any of the good stuff?" He recognized the speakers, who were later court martialed on drug charges. Valiant had not "intercepted" the conversation. The sergeant's act in picking up the phone must be considered in the ordinary course of business. When the use of an extension comes within the ordinary course of business, no unlawful interception of the defendants' communication occurs. When there are several extension phones, as there are in the orderly room, it is not unusual that when a call comes in, a person will pick up the receiver to see who the call is for.

V. Paragraph Development

YOU CANNOT WRITE CLEARLY IF YOU ASSUME too much knowledge on your reader's part. Your papers must be self-explanatory; they must

follow through on an idea, consider its meaning and significance, and come to a logical conclusion. Do not cut your discussions short; develop them. It is only in the development that the meaning of a paragraph becomes apparent.

The principal methods of development include A) comparison, B) illustration, C) classification, D) definition, E) cause and effect, and F) description and chronological narration. Frequently, these methods of development occur in tandem. If you are defining prosecutorial misconduct, for example, you might define it by offering illustrations of what constitutes misconduct and what does not.

A. Comparison

Paragraphs developed by comparison are common in legal writing since the principle of stare decisis requires factually similar cases to be decided by application of the same rule of law and to result in the same decision. By comparing and contrasting the facts of your problem with those of the precedents, you will be able to show how the rules of those cases fit your case.

For a comparison to be fruitful, you must compare things which are not only alike, but which are relevant and significant. For example, in a claim involving a hospital's negligent failure to prevent a mentally ill patient's suicide, a central issue is whether the patient received reasonable supervision given that patient's medical history. Thus, it might be fruitful to contrast the care of a patient who had attempted suicide twice to the care of a mentally ill patient who had no history of self-inflicted injury, as the difference is germane to the issue of supervision. On the other hand, it would be fruitless to spend time establishing that one patient did watercolors as occupational therapy and the other did weaving because the difference is irrelevant to the issue of reasonable supervision in light of the medical history. A comparison is useful, therefore, only if you are comparing relevant and significant things.

You must also take care to compare like things. It would be meaningless to compare the supervision of an acutely depressed patient with the supervision of a patient with chronic back pain because one condition involves a patient's psychiatric history and the other involves a patient's medical history. You must, therefore, compare similar things for a comparison to be illuminating.

It is generally easier to avoid the impact of a previous decision by distinguishing your facts from the precedent facts than by asking a court to overrule its previous decision. Thus, comparisons are as central a device in writing a persuasive argument as they are in predicting the outcome of a suit in a memorandum. In the following example, the author distinguishes Carol Smith's situation from that of the victim in a decided case in order to overcome that adverse decision.

Example: Comparison

The right of confrontation includes the literal right to confront adverse witnesses face-to-face when they testify. *Dowdell v. United States; Mattox v. United States.* Thus, lower courts have repeatedly held that procedures which prohibit face-to-face confrontation violate the defendant's constitutional right of confrontation. In *Powell v. Texas* and *Long v. Texas*, the defendants' confrontational rights were held to be violated where children who were victims of sexual abuse testified on videotape without having to hear or see the defendants. However, in *State v. Sheppard*, the court permitted testimony without face-to-face confrontation because the crime involved was incest and the witness was a child testifying against her father.

Carol Smith's situation is distinguishable from that of the victim in *Sheppard.* Not only had the defendant in *Sheppard* lost his confrontation rights because he had physically threatened and abused his child, but the crime was more serious than that charged in the present case. Williams is charged with lewd conduct, not incest. In addition, he did not physically threaten or abuse Carol Smith. Thus Carol's situation is more akin to that of the victims of sexual abuse in *Powell* and *Long.* Although the trial court permitted Carol to testify without being able to see or hear Williams, the Court of Appeals will probably find the defendant's confrontation right was abridged.

B. Illustration

Paragraphs may be developed by illustration. A general principle, the meaning of which is abstract, can be made concrete, and thereby clarified, by examples. In the following passage, two illustrations clarify when a party owes a duty to an incidental beneficiary of a contract.

Example: Illustration

A putative wrongdoer may be liable to one with whom he or she does not have a contractual relation if by acting or failing to act, the wrongdoer works an injury to the non-contracting party. The court in *Rensselaer* offers two examples of a putative wrongdoer's liability to a third party. An auto manufacturer may be liable to third parties who are injured as the result of its failure to inspect. Similarly, an engineer is liable to a casual bystander who receives burns as a result of that engineer's failure to shut off the steam. See *H.R. Moch Co. v. Rensselaer Water Co.*

C. Classification

Classification is a process which involves locating the class to which an object belongs in order to gain greater understanding of that object. Classifying requires you to identify the common characteristics of that category or class. After identifying the class by articulating the significant property shared by all the members of that class, you may want to divide that class into subclasses. In subdividing, the relationships between classes become sharper because division clarifies which classes are subordinate to others and which are coordinate with others.

In law, classifying is routinely done. Lawyers classify factual situations as particular causes of action. They also develop legal arguments by classifying their clients' facts as falling or failing to fall under the categories established in a decision or a statute. When courts interpret law, they do it by formulating their holdings in such a way that the classifications involved have either a broad or narrow reach. When courts make law, they erect new categories. Thus, classification is an essential part of legal analysis and legal writing.

Classifying is often crucial in attempting to clarify and establish a legal conclusion, as in the following example.

Example: Classification

The issue is whether Pappagano is violating the state's Wild Animal Act by keeping birds in his aviary. The statute prohibits the capture or restraint of wild animals and applies only to ani-

mals known in the common law as *ferae naturae*. This classification consists of animals usually found at liberty. J.W. Blackstone, *Commentaries* 349 (1845). The statute does not apply to domesticated animals, which are those that are accustomed to living in association with humans and that are not disposed to escape. *Id.* Pappagano keeps birds such as robins, blue jays, and sparrows in his aviary. Because the birds are usually found at liberty, flying freely, and migrating with the seasons, they are *ferae naturae*, and Pappagano is violating the statute.

D. Definition

Definition provides the meaning of a term by establishing its borders, that is, by announcing what it does and does not refer to. In clarifying what is and is not distinctive about a term or concept, definition further refines classification and strengthens it as an analytical tool. A formal definition begins by placing the term within a class and then differentiating it from other members of that class. Sometimes a term requires an entire paragraph before it is adequately defined. Such extended definitions are developed or built by example, comparison, analysis, stipulation, or function (defining what something is by describing what it does).

Example 1: Definition

A wrongful threat exists when one party to a contract threatens to breach the contract by withholding goods unless the other party agrees to a further demand. The court in *Austin* found a wrongful threat when a subcontractor would not deliver on a first subcontract unless it got a second contract. It is, however, not wrong to threaten if there is a legitimate contract dispute. In *Muller,* a delay in construction increased the costs of construction. The builder said the defendant must pay those costs or face a slowdown. Defendant then served notice to terminate the construction contract. The court found there was no wrongful threat since the threat to terminate the contract was related to a relevant dispute about the contract.