In legal writing, you are not likely to assume extreme voices or personalities. But not all legal correspondence should sound the same either. Within somewhat narrow boundaries, there is a range of personae you might want to adopt. For example, as a probate lawyer for a grieving widow, you might want to appear as a "family solicitor"—reliable, comforting, experienced. But when you are representing the state, which has charged a business partner with embezzlement, you would present yourself as a hard-nosed prosecutor—sharp, efficient, authoritative. In contrast, when you are drafting an informative rather than persuasive letter, you will probably don the persona of a neutral reporter. Since your only purpose is to convey data, you will offer an objective, impersonal perspective on the material.

2. Tone

Tone is an extension of the writer's persona and is similarly limited by notions of professional decorum. Generally, lawyers' letters are courteous, cooperative, reasonable, straight-forward, clear, precise, and assured. They avoid invective, exaggeration, sarcasm: displays of anger, contempt, or boredom are unprofessional and counterproductive. Yet between the intemperate and the impersonal exists room for the human touch.

When writing to a colleague, a long-time client, or a young adult, you might wish to adopt a friendly, somewhat informal tone. Convention would still require grammatical correctness and educated diction, but your style could be more relaxed than in a memo. Contractions and personal pronouns, for example, would be permissible. You might decide to use first names in the salutation and signature.

In fact, personal pronouns are often used to establish solidarity and rapport with clients. Simply by using the first person plural, as in "we need to review your options here," you identify with your reader and establish rapport. Another popular technique is to use the second person singular, as in "you asked me to research possible claims against AC Company." By directly addressing the reader, you bring her into the flow of discourse.

Other letters might require greater distance and formality. A letter to a business client might resemble an office memorandum in format and tone. To an adversary, you might write a brisk, chilly letter. Such a letter might have a "bottom-line" attitude conveyed by short, to-the-point sentences and a no-nonsense, concrete vocabu-

lary: "Your client cut the boy three times on his face and arms. He then left him to bleed in the alley." In contrast, to an elderly "old-world" client who needs assurances of your attention and good will, a discursive, leisurely letter might be the most effective. "I trust your recovery will proceed speedily as you continue in the care of your doctors and wife, and as we strive to reach a prompt and equitable resolution in your action against Kent City Taxis. Indeed, some progress has already been made."

As suggested by the above examples, variations in tone are determined in part by sentence length and diction. A discursive, leisurely letter like that above has a goodly share of long sentences with parallel, coordinate clauses—totally unlike that "bottom-line" letter, which has a blunt, businesslike effect. But even more important to tone than sentence length is diction. To motivate and persuade a reader, use vivid language. Vividness requires specificity and sensitivity to connotation. To bring home the heinous conduct of a defendant who knifed a child, you could write to the defendant's attorney about how the victim was "cut" or "slashed." To distance yourself or your reader from the subject matter, however, use general language. If you were writing to the boy's mother and wished to spare her further distress, you might more generally refer to how the boy was "injured." Word choice reveals the author's attitude toward the reader and the subject matter.

Juxtaposition is another powerful way to communicate attitude. By yoking together two antithetical statements, for example, you can express incredulity without actually stating it: "You said the check was in the mail. I have not received it." Or, if you juxtapose bad news with an acceptable alternative, you demonstrate empathy and alleviate your client's disappointment.

No matter whom you are writing, however, remember that most attorney letters are courteous. Even with adversaries, diplomacy is often needed, especially when the relationship between attorneys is likely to be long term. Thus, lawyers must be able to confront each other as politely as they do forcefully if they are to serve their clients well. Framing requests or denials of requests indirectly is one important way attorneys can be both civil and effective. For instance, requests framed as imperatives are often perceived as threatening and hostile, and generate resistance rather than acquiescence: You must "provide us with this information before our next meeting." If this directive is framed indirectly, as a question or declarative statement,

it is more likely to achieve the results desired: "Can you provide us with this information in time for us to review it before our next meeting?" Or "We would welcome an opportunity to review this information before our next meeting."

Refusing a demand or request also requires tact. Avoid abruptness. Instead, give reasons why you cannot perform the requested act: "The pressure of work makes it unlikely we can compile the information you want in time for our next meeting."

3. Treatment of Law and Facts

A general desire to present a reader with a comprehensive legal analysis must be balanced against your audience and purpose. For example, in an advice letter, a detailed analysis of authority is probably appropriate if you are writing to a corporation's in-house counsel. Yet many lay clients would be confused by this kind of in-depth analysis and would profit more from a simple application of law to facts. Sometimes, even if your audience has the intellectual sophistication to understand a comprehensive analysis, you would nonetheless be wise to keep your analysis of the issues short. If your reader is suffering under time constraints, for example, an accurate but crisp summary of the issues might be better appreciated than a lengthy exposition. Finally, thoroughness must be informed by purpose as well as audience. When writing to an adversary, for instance, you must make a strategic decision about how much of your research you wish to share.

Purpose also governs your recitation of the facts. When you are checking facts for their accuracy, your summary should be exhaustive. When you are summarizing facts for an adversary, however, you might choose, within the bounds of professional responsibility, to be more selective.

4. Organizational Concerns

Up to a point, your organization of material in a letter is governed by the conventions of the genre. An opinion letter, for example, has a format somewhat similar to an office memorandum. Yet within these confines, there are many organizational decisions to make.

In letters, as in memos, introductory paragraphs usually define the issues and frequently provide a roadmap informing the reader of the document's organization. Yet many letter writers regard introductory

paragraphs as an equally important opportunity to develop a relationship with the reader. Early rapport makes the reader more receptive to later more complicated matters. Thus, the opening sentences might inquire after an injured client's medical progress, acknowledge a harried reader's hectic schedule, or appeal to a hostile reader's sense of fair play. In taking the time to show your concern and good faith, you may be able to secure the cooperation of a depressed, impatient, or defiant audience.

Strategy is behind a number of other organizational decisions. Should you announce your conclusion up front or lay the groundwork for it first? Generally, readers are anxious to know your conclusion, and thus stating it early is advisable. Should you put your reader on the defensive by opening with a warning or threat, or should you begin with the events that underline the threat? An analysis of the rhetorical situation will help you answer these questions.

II. Letters

A. Opinion or Advice Letters

WHEN A LAWYER COMMUNICATES her legal analysis and advice to a client, she is writing either a formal opinion letter or an advice letter. A written opinion letter is a formal expression of your belief that a specific course of action is legal, and it most typically involves financial transactions. It is not a guarantee of legal rights, however; it is restricted to its jurisdiction, to the law at the time the letter was written, and to its facts. Moreover, it usually contains a caveat testifying to these limitations. Nonetheless, because clients place great reliance on them, and because opinion letters are the grounds of malpractice actions when they fail to meet established standards, law firms often limit the number of attorneys who can issue opinions on their behalf.

In contrast, advice letters are written by most attorneys. These letters are informal evaluations of the relative merits of the client's case and of its probable outcome. They are meant to guide clients in decision-making. Indeed, Rule 1.4 of the Model Rules of Professional Conduct requires a lawyer to explain "a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Because advice letters are thus more frequently written than opinion letters, we focus on them here. Be aware, however, that advice letters also open an attorney to liability, as well as protect her from it. When the client's legal problem is carefully researched, analyzed, and communicated, they are proof of professional conduct.

An advice letter opens with an introductory paragraph that states the issue and conclusion. Often it then summarizes the facts that gave rise to the dispute. The facts are followed by an explanation and application of the law, and this in turn leads to a discussion of the alternatives. Finally, the closing paragraph indicates the next step in the proceedings.

Some attorneys separate these sections with headings, especially when the subject matter is complex, or the letter is long, or a business-like appearance is appropriate. Many times, however, section headings are unnecessary and off-putting, especially when you are writing to a lay client about a relatively uncomplicated matter. Topic sentences and unified paragraphs are good substitutes for section headings in this situation.

1. The Introductory Paragraph

The introductory paragraph should, at a minimum, articulate the question that your client asked and that your letter analyzes and answers. Often the question is two-sided, involving first, an inquiry into the client's legal position, and second, an inquiry into the legal alternatives.

Frequently your introductory paragraph also answers the question you pose. Not only are many clients made anxious and annoyed by having to wait for a conclusion in which they have a stake, but many find they can concentrate on the analysis more easily when they know where the discussion is heading. Some few attorneys do defer the conclusion until after the analysis, especially when the legal outcome is unfavorable. They hope their discussion will make the disappointing conclusion understandable, if not entirely palatable. The general consensus seems to be, however, to summarize your conclusion early in the letter—but be careful to indicate your conclusion is an opinion, cogent and reasoned, but not definitive.

Above and beyond framing and answering the issue, most introductory paragraphs also try to set a tone conducive to a good working relationship. Sometimes this is achieved by explicitly

sympathizing with your reader: "I know you've been anxious about finding grounds for an appeal." Often you can tie your legal conclusion to an expression of solidarity or sympathy: "I know this has been a difficult time for you, so I am pleased to report that your claim is strong." Occasionally, if you have gotten to know your reader well, you may address the reader by his first name: "Dear John" instead of "Dear Mr. Doe."

The paragraph below begins an attorney's advice letter about a widower's claim against a mental hospital for negligently failing to prevent his wife's suicide while she was a patient there. The widower is a thirty-five-year old architect who is still recovering from his wife's protracted mental illness and eventual suicide.

February 24, __

Mr. John Braun
114 Garden Place
Heights City, Missouri 1230__

Re: Park Crest Hospital

Dear Mr. Braun:

I hope I will be relieving some of your distress by informing you that your claim against Park Crest Hospital for its negligent care of your wife seems to be well founded. You have, therefore, several available options, including a suit against Park Crest. Another option is to attempt to negotiate a settlement. I will suggest some of the advantages and disadvantages of these alternatives after reviewing both the facts of your case and the law that governs them.

2. The Facts

Most advice letters include a summary of the facts similar to that in an office memorandum. This account should be objective, narrated chronologically or topically, and concisely focused on the legally relevant facts. In addition, to protect yourself from liability in the event that other material facts become known at a later date, make it clear in your statement that your opinion is based on the facts stated and might change if other facts are disclosed. This disclaimer does not absolve you, however, of the responsibility of checking and rechecking the facts before you write your advice letter.

Before I summarize the tragic events that underlie this suit, however, please note that my opinion is based on the facts as stated and might change if others become known. I would therefore appreciate it if you read the following account for accuracy and completeness and report any mistakes or omissions.

On June 21, ____, the day after her second attempt at suicide, your wife, Rachel Braun, voluntarily checked herself into Park Crest Hospital. Park Crest is a private hospital that specializes in the treatment of mental disorders. After she was admitted, Dr. Richmond, the attending physician, diagnosed Ms. Braun as severely depressed with suicidal tendencies. He ordered that she be monitored closely for any suicide attempt and prescribed a program of anti-depressants and psychotherapy.

For the first 18 days of her hospitalization, your wife was placed on accompany status in a ward for acutely ill patients. Access to this ward was restricted. Hospital personnel could enter and exit the ward only through locked elevator and stairway doors. Visitors could come only once every two weeks. Nurses checked on patients every 20 minutes.

At the end of this period, Dr. Richmond noted in your wife's chart that she showed good response to her treatment. Her mood was brighter, and she seemed less preoccupied and withdrawn. Because of her improved condition, he transferred her to an open ward. Patients on an open ward could leave their rooms and congregate in the halls and lounges. Nurses were present on the ward at all times. Twelve nurses worked 3 eight-hour shifts, taking care of a total of 23 patients.

For the next ten days, your wife continued to improve. She began and appeared to enjoy occupational therapy. She socialized with other patients. Dr. Richmond then told her she was well enough to go home. That night, two days before her scheduled release, Ms. Braun was agitated. The nurse noted in her chart that she found Ms. Braun weeping. When the nurse questioned her, Ms. Braun expressed worry about whether she could manage in the "real" world. In response, the nurse administered sleep medication, for which the doctor had left an "as needed" order. The nurse also noted that a visitor, the spouse of another patient, had reported seeing Ms. Braun earlier that day swallowing pills taken from her pocket.

There is nothing in Ms. Braun's chart indicating that any physician acknowledged or responded to these observations of your wife's increasingly disturbed condition. The release order was not rescinded.

On her last night at the hospital, the nurses checked your wife every two hours, noting she was sleeping heavily and her breathing was depressed. At 6:30 A.M., your wife was found in her bed, dead of a self-administered overdose of sleeping pills. Ms. Braun had not been searched for contraband when she was first admitted to the hospital, or at any other time.

3. Legal Analysis

Like the discussion section in a memorandum, the analysis section of an advice letter should be organized around the issues. Where there are many issues or subissues, you may want to begin this section with a roadmap orienting your reader to your organization.

As discussed in Part I of this chapter, your analysis of each issue must be tailored to your audience. At a minimum, you want to apply the law to the facts and come to a conclusion. Occasionally, when your client has some legal background or special need for a full discussion, you might decide to provide a full review of legal authority (citing both statutes and cases). Never, however, go into an extensive analysis of a point just to show the research you have done if the bottom line is undisputed.

Although discussion of legal authority tends to be less extensive in letters than in memos, many lawyers do not stint their discussion of the relative merits of each party's claims and defenses. Your client will be especially interested in learning the legal arguments supporting his side and wiser for learning those of his opponent. Informed decisions cannot be made without this kind of full coverage.

Park Crest's liability for the suicide of one of its patients depends on whether it used such reasonable care as the patient's known mental condition required. The hospital's duty is proportionate to the patient's needs. In examining a hospital's conduct, courts look at the propriety of the medical judgment and at the sufficiency of the nonmedical ministerial care. Park Crest probably breached both duties of care.

The propriety of a medical judgment is measured against the skill and learning ordinarily used under the same or similar circumstances by members of the medical profession. Medical judgment includes determining the appropriate level of supervision. The hospital's initial care of Ms. Braun seems to meet this test. At in-take she was properly diagnosed and treated. It was appropriate to place her on a closed

ward while she was acutely depressed and it was appropriate to move her to an open ward as she improved. Indeed modern psychiatric theory dictates that patients receive as much freedom as is consistent with their safety. Normal interaction is regarded as the best way of restoring the confidence necessary to mental health. Nonetheless, the hospital was negligent in failing to search for contraband at intake and for failing to address, or even to acknowledge, the developing depression the R.N. noted in your wife's medical chart.

Park Crest will probably argue that a hospital is not an insurer of a patient's safety. Given that psychiatry is an inexact science and that treatment involves taking calculated risks in the hope that increasing freedom will cure the patient, it will claim it exercised reasonable care in gradually easing Ms. Braun's supervision. The absence of any notation that Ms. Braun's depression continued past the restless night supports its contention that it could not have reasonably anticipated Ms. Braun's suicide. However, given your wife's mental history, Park Crest's failure to follow up on the nurse's observations, especially when she noted that Ms. Braun might have been in possession of her own supply of drugs, is a breach of the hospital's duty to safeguard Ms. Braun.

In determining whether the nonmedical ministerial care was sufficient, courts apply the standard of ordinary care. Factors that determine what is ordinary include the regularity of observation, the number of nurses in attendance, and the safety of the premises. The hospital here cannot be faulted for insufficient staffing or dangerous conditions. The nursing staff could be faulted, however, for its failure to search and seize contraband from Ms. Braun. It might also be liable for failing to notify a physician of your wife's depressed breathing, since the nurses had not administered any sleeping medication and depressed breathing is often a symptom of over-medication.

4. Recommendations

Your legal analysis prepares for your recommendations. Begin by explaining the client's various alternatives—often to file a lawsuit, to begin negotiations, or to suggest defenses. Your job sometimes involves coming up with a plan to protect someone from liability. You may suggest to an employer, for example, that it implement procedures against sexual harassment to prevent future liability. After describing your proposals or a client's alternatives, outline the advantages and disadvantages of each suggestion. If the client has

pressed you for an opinion on what he should do, indicate which you think is the best course of action in light of the client's objectives. Remember, however, that the decision about how to proceed is your client's, and it is inappropriate to push too hard for any particular course of action. Thus you should conclude this section by requesting instructions or suggesting that further discussion in person may be appropriate.

> Under either test, therefore, a jury might well find Park Crest breached its duty of care. Were we to go to trial, it is possible you would win substantial monetary relief. However, trials are costly, time-consuming, and ultimately unpredictable. Thus I think you should also consider pursuing an out-of-court settlement with Park Crest. Although negotiations tend to result in lower awards, they have two primary advantages. First, they would save you from the continuing stress that will undoubtedly be encountered by litigating your claim. Second, negotiations are likely to succeed. It is in the hospital's interest to avoid the negative publicity that would accompany a trial, and additionally, a settlement is likely to cost both parties less in legal fees and damages than a lawsuit. Thus it is likely we can bring Park Crest to the bargaining table.

5. Closing Paragraph

Your closing paragraph provides you with a second opportunity to demonstrate your personal concern and goodwill. Reiterate, for example, your willingness to be of service. It is also the paragraph in which you inform the client of the next step in the proceedings. If the next step must be taken within a specified time period, be certain your reader is aware of it. "Very truly yours" or "Yours sincerely" are the traditional complimentary closings.

> I suggest we meet to discuss these options, their risks, and their advantages so that you can make a thoroughly informed decision. You also need to phone about any corrections or additions you think need to be made to the statement of facts. Once you have decided how to proceed, we can discuss the next step in the process of compensating you for your terrible loss.
>
> Very truly yours,
>
> Jane Turner

One final reminder: client letters almost always need to be rewritten. Even if you analyzed the rhetorical situation before you began your letter, writers tend to use first drafts to work through their own thinking. This is natural. Until the subject matter is clear to you, it is difficult to clarify it for another. By the second draft, however, you should be writing for the reader, looking for an organization and tone appropriate for just that audience.

B. Letters to an Adversary

Your first letter on behalf of a client may be one informing the opposing party of your client's claims. Frequently this letter explores the possibility of an out-of-court settlement.

The format of such letters may not differ radically from the client advice letter. They too might open with statements identifying the purpose or, in this case, the demands of the letter. They may then go on to summarize the facts and arguments that support the client's claim. Finally, they might close by reiterating the client's demands and the consequences of failing to meet them.

Yet each part of an advocacy letter is informed by your persuasive purpose. Thus your treatment of the subject matter may be quite different from that in an advice letter. In particular, the degree to which you expound on the facts and the law depends on the strategy you have devised for that case.

1. The Opening

It is common to begin a first advocacy letter by identifying yourself as your client's legal representative. After this sort of ritual recital, present your client's claims and demands. In presenting these demands, most lawyers adopt a courteous, reasonable tone. Certainly as long as a compromise is possible, you want to appear cooperative. If negotiation falters, you may decide to assume a firmer, more indignant, or more threatening tone. But at no time should you become so strident and angry that you put your client's case in jeopardy.

2. Factual and Legal Summary

When writing to the opposing party, strategy dictates your treatment of the factual and legal basis of your client's claim. Where your case

is strong, a thorough and well-crafted presentation of facts and law may convince the opponent it is better to concede or to compromise than to persist in opposition, especially if you couple your analysis with explicit warnings about your other less pleasant, but legal, alternatives.

On the other hand, you might decide not to do your opponents' work for them, believing that they will see the strength of your position only if they do the research themselves. Within the bounds of professional responsibility, you might also decide to withhold facts or to remain silent about legal theories.

3. Closing

An effective way to close an advocacy letter is to suggest the parties will mutually benefit from a compromise. This conciliatory gesture might be followed by a reminder of the actions you will take if your letter fails to effect this desired resolution. To avoid uncertainty and needless delays, be sure to set a date by which the other party must respond and be prepared to act if the party does not.

What follows is the first letter Mr. Braun's attorney wrote to Braun's adversary, Park Crest Hospital. The letter is addressed to the president of the hospital, but an obvious second reader is the hospital's attorney. Both these readers are likely to have fairly broad knowledge of the law governing medical malpractice. The letter tries to convince Park Crest that settlement is its best option.

March 21, __

James Jones
President
Park Crest Hospital
3405 South Main Street
Heights City, Missouri 1230___

Dear Mr. Jones,

I represent Mr. John Braun in his claim against Park Crest Hospital for breach of its duty to exercise reasonable care to prevent the suicide of his wife, Ms. Rachel Braun, while she was a patient at your hospital. As you know, liability depends on the propriety of the medical judgment and the sufficiency of the nonmedical ministerial care. Once you

have reviewed the facts of this case, you will realize that Park Crest breached both duties. Thus, it is in your own interest to agree to my client's offer to settle this case quietly, quickly, and equitably.

The facts that have led to this claim are unfortunate and painful. On June 21, 200__, the day after her second attempt at suicide, Rachel Braun voluntarily checked herself into Park Crest Hospital. Upon admission, Dr. Richmond, the attending physician, diagnosed Ms. Braun as severely depressed with suicidal tendencies. He ordered that she be monitored closely for any suicide attempt and prescribed a program of antidepressants and psychotherapy. He did not search her for contraband.

For the first 18 days of her hospitalization, Ms. Braun was placed on accompany status in a ward for acutely ill patients. At the end of the period, Dr. Richmond transferred her to an open ward.

After ten days on the open ward, Dr. Richmond told her she was well enough to go home. That night, two days before her scheduled release, Ms. Braun became agitated. The nurse noted in Ms. Braun's chart that she found the patient weeping. When the nurse questioned her, Ms. Braun expressed worry about whether she could manage in the "real" world. In response, the nurse administered sleep medication, for which the doctor had left an "as needed" order. The nurse also noted that a visitor, the spouse of another patient, had reported seeing Ms. Braun earlier that day swallowing pills taken from her pocket. Regrettably, she took no action other than to record this report. No one searched Ms. Braun for unauthorized drugs. Nothing in Ms. Braun's chart indicates that any physician acknowledged or responded to your nurse's observation that Rachel Braun was becoming increasingly depressed. Certainly, the release order was not countermanded.

On Ms. Braun's last night at the hospital, the nurses checked the patient every two hours, noting she was sleeping unusually heavily and her breathing was depressed. At 6:30 A.M., they found her in bed, dead of an overdose of sleeping pills.

You are well aware that a hospital's liability for the suicide of one of its patients depends on whether it used such reasonable care as the patient's known mental condition required. Courts have held that the determination of the proper degree of supervision is a medical judgment and that the propriety of that medical judgment is measured against the skill and learning ordinarily used under the same or

similar circumstances by members of the medical profession. Your failure to search Ms. Braun's person and possessions when she was reported to have an unauthorized supply of drugs is, in light of Ms. Braun's medical history, a breach of your duty to safeguard her from harm. *See Stuppy v. United States*, 560 F.2d 373 (8th Cir. 1977). Equally reprehensible is your failure to reassess your medical diagnosis after receiving the nurse's report that Ms. Braun was becoming increasingly distressed about her release.

Park Crest was also negligent in its ministerial supervision. The nursing staff as well as the physicians can be faulted for their failure to search Ms. Braun. In addition, the nurses were negligent by failing to notify a physician of Ms. Braun's unusually deep sleep and depressed breathing, given that these are symptoms of overmedication and the staff had not administered sleeping medication to Ms. Braun that evening. See *M.W. v. Jewish Hosp. Ass'n of St. Louis*, 637 S.W.2d 74 (Mo. App. 1982).

In light of these instances of serious misconduct, I believe a trial court would award Mr. Braun the damages that he justly deserves. Nonetheless, I am concerned that protracted court procedures would only add to the suffering Mr. Braun has already endured. Since settlement would enable both parties to avoid the costs, publicity, and burdens of litigation, I suggest we meet in an effort to resolve this unfortunate dispute.

I welcome your serious consideration of this request and invite you to call my office as soon as possible to arrange a meeting. If I do not hear from you by April 18, ___, I will proceed to file Mr. Braun's claim.

Very truly yours,

Jane Turner

C. Letters to Third Parties

As an attorney, you will need to write to witnesses, experts, investigators, agencies, and numerous other parties. Sometimes you will be requesting information or favors from them. At other times, you will be informing them of some development. But whatever the occasion, your letters will be stronger if you consider your audience and purpose before drafting them. Keep the following general considerations in mind.

When you are asking the reader to do something for you, you may have to create a little incentive. If you acknowledge the burden you are imposing but then appeal to your reader's good will, you might secure the reader's cooperation: "I realize compiling this information will probably take more time than you can easily afford. Yet Mr. Doe's claim cannot proceed without it." If possible, offer any assistance that could ease the burden. When simple appreciation fails to create incentive, however, a warning might be in order: "I am sorry that I will have to inform your supervisor that my last three requests for copies of Mr. Doe's insurance claims have gone unnoticed."

When you are relaying neutral information, your task is simple. State your news quickly and clearly, and then explain why you are communicating it. Readers like to feel you value their understanding.

More difficult to write are letters conveying bad news, which is often best communicated on the phone or in person. But if you need to do it in writing, try to soften it by first extending one or two courtesies. "I appreciate your reluctance to get involved in a dispute between your employer and a co-worker. Regrettably, you are the only witness to the altercation that occurred on March 13th." After this, state your bad news clearly: "Thus I must inform you that a deposition has been set for ...." The temptation to misunderstand is too great to permit even minor evasions. Nonetheless, where possible, look for options or ways to mitigate the effect and soften the blow.

The following is a letter to Ms. Diana Wells, who—while visiting her husband at Park Crest—had observed Rachel Braun taking unauthorized drugs.

September 30, ___

Ms. Diana Wells
123 First Street
Heights City, Missouri 1230___

Dear Ms. Wells,

I have just received your letter expressing your reluctance to testify about the events leading to Ms. Braun's tragic suicide.

Let me assure you that I appreciate the difficult position you are in. From your letter, I infer that, having entrusted Park Crest Hospital with the care of your husband, you feel it is imperative to maintain good relations with the hospital's administration and staff. Thus, al-

though you empathize with Mr. Braun's bereavement, you wish to avoid becoming involved in a dispute between them.

If your testimony were not so vital, I would not press you on this matter. Unfortunately, you are an important link in establishing that Park Crest knew Ms. Braun had her own drug supply and failed nonetheless to take steps to prevent her from harming herself. I think you will agree with me that a jury ought to be allowed to determine Park Crest's liability not only because Mr. Braun deserves to be compensated for his painful loss, but because other patients, like your husband, may need to be protected from such fatally negligent conduct.

I suggest that we meet to review your potential testimony. Such a meeting would enable me to prepare you for the courtroom experience and thereby allay some of the natural anxiety you may feel about participating in this trial. I will call you in a few days time to arrange a meeting at your convenience. I would sincerely regret having to subpoena you to obtain testimony that I believe you would freely give in happier circumstances. Let me assure you I will do all I can to minimize the repercussions of your participation.

Very truly yours,

Jane Turner

D. Transmittal Letters

Transmittal letters are cover letters that usually accompany documents and provide instructions to the recipient. Transmittal letters are often quite short, yet it is surprising how badly written and organized many are. These letters should be written clearly and logically. They should not be written in old fashioned legalese, but neither should they be casually thrown together. For example, you need not write "Enclosed herewith please find as per your request two copies of the Anderson agreement. Said agreement should be kept by you in and only in your safety deposit box. I remain yours faithfully." But also, do not write "Here are the copies of the agreement you asked for. Keep them safe. Yours...." A middle ground is the simple, "I am enclosing two copies of the Anderson agreement that we discussed this morning. Please keep the copies in a secure place, preferably your safety deposit box. Let me know if you need any other documents. Yours truly...."

When you write instructions, make sure the recipient understands the purpose of the transaction, and explain the steps in the order that they should be done. For example, "Please read through this agreement to ensure that it is in the form we discussed. If the agreement is acceptable to you, bring it to a notary public. You should sign it in front of the notary at the line marked 'Signature.' Sign your name exactly as it is typed under the line. Write the full date on the line marked 'Date.' The notary will then sign and stamp the agreement. Bring the agreement with you to our next appointment on May 4th."

If the instructions involve several steps or several documents, number them. For example, "I am enclosing the forms you will need to probate your aunt's will:

1. Petition to Admit the Will to Probate and Appoint an Executor
2. Oath on the Bond
3. Waiver of Notice
4. Affidavit of Heirship
5. Petition for Independent Administration."

Then explain in turn your instructions for each document.

Exercise 15–A

Critique each of the following excerpts from letters to Mr. John Starr concerning possible action against the Pennsylvania Deluxe Hotel for negligent infliction of emotional distress.

1. Sample openings

Do the following introductory paragraphs effectively establish rapport, provide an organizational roadmap, and summarize options?

a) Dear Mr. Starr,

The decision to seek legal advice concerning your situation was intelligent, and one I commend you for, because the laws concerning the infliction of mental injuries are complex. You do have several options, both legal and otherwise, in attempting to obtain redress from the Pennsylvania Deluxe Hotel, and I will explain them to you.

b) Dear Mr. Starr:

After carefully scrutinizing the facts of your situation and the relevant laws and cases, there is no question that your reasons for wanting to sue Pennsylvania Deluxe Hotel are well founded. However, the courts take many things into consideration when making such decisions. The facts of your case are such that a jury could conceivably find either way on whether or not the Hotel negligently inflicted emotional distress. There are a number of courses of action we can take at this point, including taking your case to court or seeking a settlement. It is my opinion that we first try the latter, to resolve the situation privately by seeking from the Hotel a public acknowledgment of wrongdoing and an apology, and perhaps some compensatory damages. I will explain why I have come to this conclusion after I review the facts of your case and Pennsylvania law pertaining to your situation.

c) Dear Mr. Starr:

I would like for us to meet on April 30, at 4:00 p.m. in order to discuss your options in dealing with its matter. Before coming to the meeting, I would like you to have an understanding of how the law has treated situations similar to yours.

2. Sample Presentation of Law

Does this paragraph clearly communicate the law in terms that are ethical and accurate and that a lay person could understand? Does the attorney appropriately apply the law to the client's circumstances?

To recover for negligent infliction of emotional distress in this state, we have to prove that the plaintiff is closely related to the victim, that the plaintiff's distress was severe, that the shock resulted from a single identifiable traumatic event, and that the plaintiff was near the scene of the accident and that his or her shock resulted from a sensory and contemporaneous observance of the accident.

We will have no trouble proving the first three elements, although it would strengthen our case if you continued to refrain from working to underscore the severity of your injury. The last prong is problematic, however. We would have to convince the court that seeing a live action event on T.V. is the same as seeing it in person. In Trask v. Vincent, this prong was not satisfied when plaintiff was in a phone booth with her back to the sidewalk when her husband was floored

by a falling window box. She emerged two minutes after the incident to find a crowd around her husband, who was lying on the pavement in a pool of blood. Since you were not even as near the scene as the Trask plaintiff, and similarly failed to witness the actual shooting, we may have trouble satisfying this test.

3. Sample Presentation of Options

Does the following paragraph effectively consider the non-legal implications of each option and convincingly communicate that the decision on how to proceed is the client's?

> It may be in your best interest to try to talk with your wife and great aunt before you seek a legal remedy since your aunt's health and your marriage might suffer if you proceed against their wishes. Both parties seem to want to put the event behind them. Moreover, were you to litigate, there is a real chance you could lose since you were not at the scene of the shooting.
>
> Another less stressful option is settlement talks. Since you seem most interested in holding the Hotel accountable for its negligence, we could seek a public statement of accountability and a public apology instead of compensatory damages, though we could ask for some out-of-pocket reimbursement if you wish it. Whatever course of action you decide upon, I will support absolutely.
>
> The ultimate decision on how to proceed is yours and yours alone. Please do not hesitate to call me if you have any questions. When you've decided what to do, we can discuss the specifics of what the next steps will be.

Exercise 15–B

1. You are an attorney for Mr. Timothy S. Eliot. Read the following facts and cases. Make an outline of the law relating to covenants not to compete. Then edit the letter to Mr. Eliot that follows the case summaries.

Facts

> Your client, Mr. Eliot, has been a salesperson for Kid–Vid Corporation, which manufactures and sells electronic toys like video games, robots, computers, etc. He is fifty years old, married, has two children (one in college, one in high school), and lives in a four-bedroom house in a suburb of New York City.

Mr. Eliot has been with Kid–Vid for ten years. He sells the Kid–Vid line to department stores and toy store chains all over the country, and he is well known and well respected by the store buyers. Last year he earned $75,000 in salary and commissions. Mr. Eliot has no written employment agreement with Kid–Vid and the company has been having financial problems. Thus, he is looking for a new job.

Mr. Eliot knows from preliminary conversations with other toy companies that finding a good position will be difficult. His age and experience are actually working against him. The big companies usually hire youngsters whom they can train and pay peanuts. Mr. Eliot is set in his ways—which, by the way, work—and he has a family to support. On the other hand, it is time to find something new. Mr. Eliot could wind up on the street.

Recently, Mr. Eliot had lunch with the CEO of Toydyno, Ms. Baer. Toydyno has a novel product, the Knobot. Knobots are amazingly dexterous and articulate robots which can be programmed to play with children. Toydyno wants experienced, savvy, aggressive sales people to put Knobots into toy departments, where Mr. Eliot already has extensive contacts. It also wants salespersons to develop contacts in bookstores, camera shops, and sporting good stores. It doesn't have time to train novices. At lunch, Ms. Baer said she thought Mr. Eliot fit the bill and suggested he come to work for Toydyno. However, one of the terms in the Toydyno contract concerns a covenant not to compete. The covenant provides that if the Employee leaves for any reason,

1) The Employee is prohibited from
   a) selling electronic toys to anyone anywhere,
   b) using lists of customers who buy Knobots from Toydyno for resale to the public, and
   c) disclosing the "computer source codes" which make the Knobots do what they do, or disclosing the Employer's technique for making the "flange-hinges" which give the Knobots digital flexibility.
2) The Employee must turn over all customer lists in his possession. The lists are not merely of the names of customers. They also will include pertinent data regarding credit, merchandise turnover, buying patterns, volume of sales, and merchandise returns. The data will have been gathered by Toydyno personnel, including Employee.

Mr. Eliot has asked you to research this issue in New York and determine if, and to what extent, the courts are likely to enforce such a covenant. He wants to know whether he should negotiate any of the terms of the covenant not to compete.

Case Law

Columbia Ribbon & Carbon Manufacturing Co. v. A–1–A Corp., 369 N.E.2d 4 (N.Y. 1977)

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

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

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

In determining whether a salesman is bound in whole or in part by a covenant not to compete with an employer after termination of employment, the court said that restrictive covenants are disfavored in the law. Powerful public policy considerations militate against depriving a person of his or her livelihood. Thus restrictive covenants are enforced only if they are limited in time and geography, and then only to the extent necessary to protect the employer from unfair competition which stems from the employee's use or disclosure of trade secrets or confidential customer lists. If, however, the employee's services are truly unique or extraordinary, and not merely valuable to the employer, a court will enforce a covenant even if trade secrets are not involved.

The court said that the broad sweeping language of the covenant in this case had no limitations keyed to uniqueness, trade secrets, confidentiality, or even competitive unfairness. The affidavits made no showing that any secret information was disclosed, that Trecker performed any but commonplace services (his work did not require the highly developed skills of learned professionals like doctors or lawyers), or that any business was lost. Moreover, nothing in the purely conclusory affidavits by Columbia contravened the points in Trecker's own affidavit that no trade secrets had been involved in his employment, that he had taken possession of no customer lists, and that all customers were publicly known, or obtainable from an outside source.

Accordingly, Columbia's showing was insufficient to defeat summary judgment. The court therefore affirmed the order below denying enforcement.

Greenwich Mills Co. v. Barrie House Coffee Co.,
459 N.Y.S.2d 454 (App. Div. 1983)

Three salesmen worked for Greenwich Mills, a company that sold coffee, tea, and related products to hotels, restaurants, and stores. When they were hired, they entered into a restrictive covenant with Greenwich Mills. Eventually they left Greenwich Mills and began working for Barrie House, which engaged in a similar business. Their former employer, Greenwich Mills, sought an injunction to uphold the covenant.

In denying Barrie House's motion for summary judgment, the court held that restrictive covenants will not be enforced absent trade secrets or special circumstances, but that knowledge of the precise blends of coffee that various customers of their former employer preferred might be considered a trade secret. Information on the technology and manufacturing process of a product that is unique is a trade secret. The court further stated that any trade secret through which a party might gain an unfair advantage would be sufficient to make a covenant enforceable if it is reasonable in time and area and bans solicitation of former customers rather than a total ban on competition. The court said a trial was necessary to determine whether there were trade secrets justifying an apparently reasonable one year ban on solicitation of Greenwich Mills customers.

Scott Paper Co. v. John J. Finnegan Jr.,
476 N.Y.S.2d 316 (App. Div. 1984)

A regional sales manager signed a restrictive covenant with Scott Paper Company, a paper manufacturer. The covenant provided that the manager would not engage in any work that involved confidential information obtained at Scott within 150 miles of the manager's last assignment for a period of not less than six nor more than twenty-four months. When the manager left, the paper manufacturer sought to enjoin him from using this information.

The court said that confidential information includes any information relating to the company which is not known to the general public, such as pricing and promotional information, customer preference data and buying records, customer lists, product sales records, market surveys and marketing plans, and other business information. The court did not enforce this covenant not to compete, however, because most of this information was outdated or generally known within the industry.

Quandt's Wholesale Distributors Inc. v. Giardino,
448 N.Y.S.2d 809 (App. Div. 1982)

Quandt, a distributor of restaurant food, had salesman Giardino sign a restrictive covenant that provided that for six months following termination of his employment, he would not compete with Quandt in the area to which he had been assigned.

The court held the distributor's six-month, three-county restrictive covenant was reasonable. However, plaintiff distributor made no showing concerning the unfair competition criteria mentioned in *Columbia Ribbon*. Customer names were readily available from directories. Giardino was well-trained and effective, but his services were not unique. Nor had plaintiff suffered an irreparable injury. In fact, five weeks after Giardino left, the sales on his route were greater than what they had been when Giardino left. Therefore, the court held that the restrictive covenant was invalid.

In editing the following letter, consider the following:

1) the audience for the document,

2) the purpose of the document, and
3) the writing techniques adopted to serve that audience and that purpose.

More specifically, assess

- the effectiveness of the writer's persona and tone, particularly in the introductory and concluding paragraphs,
- the strategy, logic, and clarity of the writer's organization,
- the appropriateness of the letter's length, comprehensiveness, and use of supporting legal authority,
- the need for an objective or adversarial recitation of the facts.

Dear Mr. Eliot,

This letter gives you my opinion of how a New York court would rule on the restrictive covenant contained in your prospective employment contract at this moment in time. I cannot guarantee the court will agree with my analysis. In addition, the law upon which I am basing my analysis is always subject to change by the courts or possibly the legislature. Furthermore, I have written this letter for your benefit only and not for the benefit of third parties. The letter is not to be used for any purpose other than for your information. Finally, I have based my opinion in part on the facts that you gave me at our meeting. If you misstated them then, or have since remembered facts, please let me know since a change in facts might change my analysis.

In determining whether a covenant not to compete is reasonable, courts examine a number of factors. First, an employer has a legitimate interest in enforcing a restrictive covenant not to compete in order to protect himself from unfair competition resulting from the loss of an employee's unique services. Although an employee's extraordinary services can be justification for the enforceability of a covenant not to compete, enforcement usually is not granted merely on the basis of the uniqueness of the employee's services. Reasonable time and geographic restrictions must be set forth in a covenant in order for it to be enforceable. In *Quandt,* a covenant not to compete that contained reasonable time and territory limitations was not enforced because the salesperson's duties were not extraordinary in nature. The

services of an employee who acts merely in the capacity of an effective and well-trained salesperson may be valuable but are not so unique that their loss would result in irreparable damage or unfair competition to the employer. *Quandt's Wholesale Distrib. v. Giardino,* 448 N.Y.S.2d 809, 810 (App. Div. 1982). In fact, in *Quandt,* the sales in the employee's territory were equal if not greater once he terminated his employment.

The salesperson being hired by Toydyno will be expected to solicit new customers to promote the Knobots. However, this is not an extraordinary job requirement that any salesperson would not be expected or able to fulfill. The anticipated duties of this salesperson are not so unique that performance by another individual would cause Toydyno to incur a loss.

Although an employee's skills may not be classified as unique, a restrictive covenant may be enforced in order to prevent the use or disclosure of confidential customer information or trade secrets. It is highly likely that the "source codes" and the technique for making "flange-hinges" would be considered trade secrets. Not only is this information highly technical and probably the result of long hours of costly research, but it is so intrinsically related to the manufacture of the Knobot that its exploitation would cause Toydyno considerable harm. Therefore, it is likely that a court would uphold the provision of the covenant that prohibits you from disclosing this information.

The customer lists that you will be privy to may also be construed as confidential since they will contain business information that might give you an unfair competitive advantage. In *Scott Paper Co. v. Finnegan,* 476 N.Y.S.2d 316 (App. Div. 1984), a regional sales manager employed by a paper manufacturer signed a restrictive covenant prohibiting him from using business information including customer preference data, pricing and promotional information, customer buying records and other business information. When he left his employer and began working for another paper company, his former employer attempted to enjoin him from using this information. The court, however, held that it was either readily available from other sources like distributors in the paper industry or, as was the case with the pricing information, no longer relevant.

It is not clear if the business information on the client lists that you will have possession of would be obtainable from different sources. Assuming that it would not be—particularly the credit information—

it is possible that you could gain an unfair advantage were you to use it. Hence, the information will most probably be deemed confidential and you will not be able to keep the lists.

Even though you will not be able to keep the lists, you will be able to maintain your customer contacts. The test applied by the courts in deciding when the identity of a customer is confidential is whether the customer's name is readily obtainable from an outside source. *Columbia Ribbon v. A–1–A Corp.*, 369 N.E.2d 4 (N.Y. 1977). The customer contacts you will make will not be confidential. Your customers will include camera stores, bookstores, and sporting goods stores. Since the identity of these customers can be obtained in any business directory, a court would not consider them trade secrets. For the same reason, your original contacts in department stores in the region could not be construed as confidential either.

There is also the issue of the reasonableness of time and geographic restrictions. Here courts examine their scope and duration as well as a showing of unfair competition. If you were to use or disclose the business information on the customer lists, it would be reasonable only to enjoin you from competing in the area where that information would be relevant. It should be noted, however, that no geographical limitation could prevent you from selling electronic toys or anything else absent your possession and utilization of a trade secret or confidential customer lists.

To sum up, since Toydyno's "computer source codes," and the technique for making "flange-hinges" are trade secrets, the court may prevent you from disclosing or using them. Although you may have to return the customer lists because they contain confidential business information, you will be able to maintain your customer contacts since they are readily obtainable from other sources. Thus, you will be able to compete with Toydyno as long as you do not use any trade secrets or confidential information.

Ultimately, therefore, you should agree to clauses 1(c) and 2. Not only is Toydyno within its rights in demanding this information be kept confidential, but in all frankness, your employment prospects are not so bright that you can flatly reject all restrictions. However, you should not agree to 1(a) and (b), at least in their present form. I will write to Toydyno proposing these terms. Please call me if you have any questions.

Very truly yours,

2. Rewrite the advice letter to Mr. Eliot.

3. Assume Mr. Eliot has agreed to your course of action. Write an "advocacy" letter to Toydyno introducing yourself and attempting to advance your client's cause.

Exercise 15–C

Often when you counsel a client about a proposed transaction, you discuss the transaction with the client in person, rather than by letter. You might, for example, meet with a client about a proposed contract. Review the facts and cases described in Exercise 15–B, in which you are an attorney representing Timothy Eliot in a transaction involving an employment contract that includes a covenant not to compete. Assume that Mr. Eliot is going to come to your office for advice. Plan the counseling meeting.

Ordinarily you would review each of the proposed terms of a contract, even if you do not intend to discuss every term with the client. For purposes of this exercise, the counseling meeting will focus on a single term of the contract, the covenant not to complete.

How would you explain this contract term to Mr. Eliot? What are Mr. Eliot's likely objectives? What options does Mr. Eliot have? What are the pros and cons of each? What are the risks? What is likely to be most important to Toydyno? What aspects of the covenant might be successfully renegotiated?

How would a personal meeting look and sound different from a letter? What kind of relationship would you hope to establish in the meeting? Would the result be the same? Does one method of counseling (by letter or in person) seem to be more effective in this situation? If you decide meeting with Mr. Eliot in person would be more effective, can a letter play any role in the process?

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Writing to the Court: An Introduction to Advocacy

I. Introduction

IN CHAPTER 7 WE DISCUSSED how to write a legal memorandum that would be used within a law office to analyze a legal problem. The purpose of such a memorandum is to analyze the problem in an objective, exploratory way and to reach a conclusion based on that analysis. When you are writing to a court, however, your purpose is very different. You are then writing as an advocate representing one side in a dispute, and your purpose is not to explore, but to persuade the court to decide the case for your client.

A. The Purpose of Trial and Appellate Briefs

Attorneys submit many documents to trial and appellate courts. Important among those are trial and appellate briefs in which the attorney tells the court about the case and argues the case for the client. Both trial and appellate briefs seek to persuade the court of the validity of one point of view, but they differ in some important respects. A trial brief tends to be shorter than an appellate brief and less rigid in format. A document written for a trial court (called a memorandum of law, an advocacy memorandum of law, or a trial brief) is frequently submitted in support of or in opposition to a motion, which is a request to the court for a ruling on a legal question. Attorneys may also submit a trial brief to present their side of any disputed issue, to summarize the evidence, to support or oppose post-trial motions, and to request particular instructions to the jury. Finally, attorneys may file extensive post-trial briefs at the end of the litigation to present the court with their final arguments based on the facts adduced at trial.

An appellate brief is a more formal document submitted to an appellate court by which an advocate presents a case to a court for review. An appellate brief differs from a trial brief in that it is written from a record on appeal, and is written to convince an appeals court to affirm or reverse a lower court's decision. An appellate court does not hear evidence in the case as does a trial court. Rather, the appellate court reviews the trial court's decision and determines whether, based on the record below, the trial court committed error in hearing or deciding the case. An appellate court's review is limited by the power of the court to review particular questions, by the standard of review that is appropriate to the court and to the case, and by the record in the court below.

B. Court Rules

Whether you are filing a motion before a trial court or filing an appeal before an appellate court, you must familiarize yourself with the applicable court rules. Some rules apply to all courts of a certain type, such as the Federal Rules of Civil Procedure (governing civil cases filed in all federal trial courts), or the Federal Rules of Appellate Procedure (governing cases filed in all federal appellate courts). Other rules apply to particular local courts. Often, more than one set of rules will be relevant. For example, an attorney suing in federal district court in the Eastern District of New York will have to be aware of the Federal Rules of Civil Procedure, the applicable local court rules of the Eastern District, and any rules of individual judges. An attorney filing an appeal in the United States Court of Appeals for the Second Circuit would be bound by both the Federal Rules of Appellate Procedure and the rules of the Second Circuit.

Rules cover a variety of points, some substantive and some technical. For example, Rule 23 of the Federal Rules of Civil Procedure establishes the prerequisites for a class action, but Rule 6 is only technical, describing the method for computing periods of time under the Federal Rules. Local rules governing motion practice may prescribe the content of a memorandum in support of or in opposition to a motion, set out time and page limitations, or require attorneys to confer with opposing attorneys before bringing any motion to compel discovery.

You should learn the applicable court rules at the start of your case. Failure to do so could be disastrous.[1] You do not want to discover the night before you submit a 75 page brief that the page limit for your type of brief is 65 pages, and that an application to file a longer brief had to be submitted 15 days ago. Nor do you want to miss a deadline for filing a brief because you thought you had 20 days to file a reply brief, and the correct period of time is 14 days.

II. Advocacy

A. Audience

THE AUDIENCE FOR BOTH trial and appellate briefs is a judge (or judge's law clerk), who reads many briefs every day and who decides many cases. A secondary audience is the opposing party. Since judges play the crucial role in litigation, it is worth your time and effort to consider carefully what information they need from your trial and appellate documents, and how that information can be clearly and quickly communicated. When you write an interoffice memo, you write to a person who makes important decisions about your own career. But when you write to a judge, you write to a person who makes important decisions affecting someone else, your client.

Unless you are told differently for your particular assignment, you should assume the judge is a generalist, that is, the judge sits on a

[1] For example, see this excerpt from *Swicker v. Ryan*, 346 N.W.2d 367, 369 (Minn. App. 1984):

> While we are mindful of ... the court's discretionary authority to consider the matter on the merits irrespective of legal procedural defects, the case load before Minnesota appellate courts in 1984 requires a firm application of the new rules of appellate procedure. The bench and bar had sufficient time since August 1, 1983, the effective date of the new rules, and November 1, 1983, the effective date of the implementation for the Court of Appeals to become aware of the necessity for firm judicial and calendaring administration. Failure of counsel to follow the rules, or to timely make appropriate motions cannot be countenanced. Unfamiliarity with the rules, a heavy work load, or overwork is not good cause. The rules must be viewed as the guideposts for efficient court administration. We intend to apply them firmly and reasonably.
>
> Failure of appellant to process an appeal, appealing from a non-appealable order and failure to timely order a transcript, are sufficient grounds to grant the motion of dismissal. This matter is dismissed.

court of general jurisdiction rather than on a specialized court, such as a bankruptcy or tax court. And although a judge most likely is familiar with some aspects of the case, such as procedural rules, you should still include information such as the burden of proof or the standard of appellate review where appropriate. Your most important task, however, is to introduce your case. Whether you are responding to a motion or entering an appeal, remember that the judge probably will know nothing about the facts of your case except those you include in your documents, and may know little specifically about the legal rules and arguments involved, except those you formulate and develop. Therefore, the documents you submit to the court will be its first (and sometimes only) source of this information, and your preparation must be meticulous. Although oral argument is the second source of this information, not all cases are argued before a judge, and those that are may be allotted only a short time.

B. Persuasion

When you write to a court, you write to inform the court about the case. You also write to persuade, that is, to convince the court to decide in favor of your client. For lawyers, the importance of effective, persuasive writing cannot be overstated. Many principles of persuasion come from classical rhetoric, as conceived long ago by Aristotle. He identified three components of persuasion:[2] appeals to ethics, to emotion, and to reason. Each plays a role in lawyers' communication.

1. Ethics

The ethical appeal concerns the lawyer's credibility, not only by reputation, but gleaned from the document itself. For example, the document may make arguments with ethical implications. The document will also reveal whether the speaker is intelligent, and a person of good moral character and good will.[3] The ethical appeal also comes

[2] Aristotle's theory of rhetoric applied to oral persuasion but applies as well to persuasive writing.

[3] Translation in W. Ross Winterowd, *Rhetoric, A Synthesis* 31 (1968). *See also* Edward J. Corbett, *Classical Rhetoric* 94 (1977) ("sound sense, high moral character, and benevolence").

from a sense of trust and of shared values. An attorney who has not earned the trust of the court has little chance of success in that court.

Some values that attorneys share come from the special ethical obligations imposed by professional codes of conduct.[4] Indeed, the Code of Professional Responsibility imposes the obligation to maintain "the integrity and competence of the legal profession."[5] Both codes require candor to the courts. For example, under the Model Rules, an attorney must not make false statements of material fact or law[6] and must disclose material facts and legal authority.[7] Although an attorney also owes the client a duty of zealous advocacy,[8] that duty stops short of inaccuracy. In addition to compliance with professional codes of conduct, the lawyer's duty to the court as an officer of the court requires compliance with court rules.

Your credibility also depends on some more mundane concerns. If your work is careless, for example, if you cite cases incorrectly or if you inaccurately describe the decisions you rely on, the court may not trust any of your work. Once you lose credibility with the court, you have not only damaged yourself professionally, but you have injured your client.

2. Emotion

Many people believe that emotion is inappropriate for a lawyer, at least for certain types of argument. But an appeal to emotion can be proper and effective, if it is restrained. You can evoke sympathy for your client's suffering, anger at the defendant's cruelty, or respect for the values of fairness and justice. An emotion that is inappropriate is hostility towards the opposing counsel and parties. Most important, you should convey your conviction for the merits of your client's case, and positive feelings towards your client. You want to make the judge, even an appellate judge, care who wins the case.

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[4] States have adopted either the ABA's Code of Professional Responsibility (MC), or the Model Rules of Professional Conduct (MR).

[5] MC Canon One.

[6] MR 3.3 (a) (1);

[7] MR 3.3 (a)(2)(3). Under § 3.3 (a)(3) a lawyer must disclose legal authority in the controlling jurisdiction that is directly adverse and that is not disclosed by opposing counsel.

[8] MC Canon 7.

3. Reason

Of course, reason is what we most associate with successful advocacy. Your appeal to reason is an appeal to the shared expectations of the legal profession about how arguments are structured and the kinds of support you need for your claims. A good deal of the material in this book is relevant to your appeal to reason. In trial and appellate briefs, the most explicit appeal to reason is in the Argument section of the document. Thus, the rest of the information in this chapter provides an introduction to techniques for writing a persuasive Argument in a brief and memorandum, that is, for an effective appeal to reason. The following two chapters provide more detailed information about writing each type of document.

The Argument in the trial and appellate brief is the analog of the Discussion in a memorandum. The term "argument" is not used to mean a pugnacious statement, but is used in the more traditional sense of a presentation of reasons that support a conclusion. In the Argument section of the document, you analyze the law and apply the law to the facts of your case. However, an Argument differs from a Discussion in terms of the audience, which is a court, and the purpose of the document, which is to persuade the court to decide the case favorably for your client. So you will write in a more assertive tone, that is, as an advocate.

In the Argument, you develop reasons why your client should prevail in order to convince the court to accept your conclusions. The reasoning that you engage in involves the same types of legal analysis you have been doing all year. For example, you may be applying fairly settled law to the facts of your case, and your conclusions depend on how you interpret the precedents and how you analogize and distinguish them. Or, you may initially analyze a question of law, for example, how to interpret a statute, and then apply that statute to the facts of your case. The difference is that in an Argument you always interpret the law and its application as requiring a conclusion favorable to your client.

Another difference is that you *must* come to a conclusion, and tell the court what that conclusion should be. This is not the place to engage in neutral presentations and even-handed analysis. For example, in a brief you would not write, "the courts are divided over how to read these statutes together: one way is unfavorable to the defendant, and one way favorable." Instead, you tell the court how

to read the statutes in the way favorable to your client. "The provisions of Statute X must override those of Statute Y because X is more specific to the subject matter of this dispute."

An important tool of the advocate is the topic sentence. The topic sentence should be a conclusory one, such as the sentence above about Statute X overriding Statute Y. By using topic sentences in this way, you make your argument clear to the court. You then go on to provide the reasons that support your conclusion.

In addition, a successful argument requires you to explain away the points against you. The judges know there is another side to this dispute, for example, that statutes X and Y may be read in more than one way, or the case would not have been litigated and would not have been appealed. To ignore the case against you diminishes your credibility and the strength of your argument. Thus, even if you are the party who submits the initial brief, that is, you are the moving party of a motion or the appellant in an appeal, your analysis should include rebuttal of the other attorney's arguments. By framing those arguments in the way you want the court to understand them, you help the court understand the case, and you "innoculate" the court against the opposing attorney's memorandum or brief.

The kinds of arguments you emphasize will depend in large part on the court to which they are addressed. Arguments to lower courts are more factual and precedent oriented, because the lower courts are bound by the decisions of the jurisdiction's higher courts. Appellate arguments may be more policy oriented and concerned with the impact of a proposed decision. The jurisdiction's highest court has the power to overrule its own decisions and change a rule.

C. Choosing Precedent

The persuasive power of your Argument will also depend on your choice of precedents. Begin your discussion of the precedents with the strongest cases supporting the proposition you need to advance your argument. As a general rule, you should try to discuss and apply favorable precedents and come to an affirmative legal conclusion before raising and distinguishing unfavorable precedents.

You will not be able to discuss every authority that you have found, nor should you try to. Instead, you have to make judgments about their relevance. Several factors must be considered in determining which cases would best promote your argument. First consider the

weight of authority. Whenever possible, base your argument on previous decisions of the highest court in the jurisdiction of your problem, especially decisions of the Supreme Court of the United States if you are analyzing constitutional or federal issues. Even if that court has not ruled yet on the particular issue in your assignment, relate your arguments to prior decisions of that court in analogous areas of the law, and to statements that the court has made in dicta.

Besides the decisions of the Supreme Court, the most important cases are always the controlling precedents of the jurisdiction. A court always wants to know the law of the jurisdiction. Rely on these decisions and show how they are consistent with the higher court's decisions and policy. Then, you may need to use persuasive decisions on the same point by a court that does not bind your court.

Choose cases because they are particularly relevant, first as binding authority, then because they are factually similar or the reasoning is otherwise appropriate. The reader should not be wondering why you have chosen a particular case to write about.

Many first-year students get caught up in trying to be persuasive and forget the basics of using legal sources. Remember, the first step to persuasion is to include information that the court needs in order to understand the issues. Quote the controlling statutory language and tell the court what the cases are about, in whatever detail is necessary. Do not try to analyze a case and also explain the facts within a single sentence. Remember that quotes and case names are not a substitute for thorough explication. A strong argument instead requires you to marshal many sources, to work out their meaning, and to apply those sources carefully to your client's case.

If you want the court to be aware of a number of cases, none of which requires individual discussion, group them together with parenthetical explanations—do not merely string cite.

Example

Gold did nothing more than push a shopping cart on a public street in broad daylight. This innocuous conduct does not even create an "objective credible reason" for the police to request information. *People v. De Bour,* 40 N.Y.2d 210, 213, 352 N.E.2d 562, 565, 386 N.Y.S.2d 375, 378 (1977). Indeed, it is hard to imagine a less remarkable picture on the urban landscape than a person pushing a shopping cart. *Accord People v. Howard,* 50 N.Y.2d

583, 408 N.E.2d 908, 430 N.Y.S.2d 578 (1980) (man carrying shopping bag does not justify stop); *People v. Lakin*, 21 A.D.2d 902, 251 N.Y.S.2d 745 (2d Dept. 1964) (man carrying woman's purse does not justify stop).

D. The Theory of the Case

One important skill of the advocate is that involved in creating a theory of the case. Your theory of the case is the story you tell about the case, and the framework within which you want the court to understand it. A good theory of the case is a theme that will win over your reader, and it will explain all the parts of your Argument.

The theory of the case combines two elements: the legal framework from which you present your client's position, and the facts in your client's "story" that justify relief under that legal framework.[9] It summarizes the reasons why your client deserves to win. For example, the plaintiff's theory in a libel case may stress how the defendant magazine damaged her career and her life by its defamatory story about her, and why there is minimal social value in protecting the magazine and its sleazy practices. The defendant's theory of the case, its defense, will stress first amendment values and the important role the media plays in a democratic society. In an employment discrimination suit, the plaintiff's theory of the case may be that affirmative action for blacks and latinos is necessary to achieve real racial equality, while the defendant company would characterize such relief as reverse discrimination.

In order to develop a theory, you must first become familiar with the facts, and with the controlling law. Think about the possible strategies available to you, and determine which is the strongest and most appealing presentation you can make. Often, you need to know which judges you will be arguing to in order to determine the strategies that work best with that judge.

The following chapters explain in detail how to write persuasive trial and appellate briefs.

[9] *See* Marilyn J. Berger, *et al., Pretrial Advocacy: Planning, Analysis & Strategy* 18 (1988).

III. Principles of Style

A. Achieving Tone

THE TONE OF YOUR BRIEF SHOULD REFLECT the serious responsibility that you have assumed as your client's advocate. You are not going to place that client at risk by irritating the court with flippancy, informality, or hysterical overstatement. Nor are you going to lecture the judges by telling them what they must or must not do. Therefore, you should avoid imperative sentences, since it is inappropriate to issue commands to a judge. You should also avoid being belittling or sarcastic, especially in regard to other judges. You may say that the judge below misapplied the law, or found the facts incorrectly, or reached an incorrect decision, but you should say it respectfully. In addition, avoid using exclamation points or italics. Your readers will more readily believe what you say if you sound reasonable.

To be persuasive, you need to sound objective, preserving at least the appearance of calm neutrality about the facts of the case, but revealing a firm concern and determination that no miscarriage of justice occurs. You want to impress upon the court the thought you have given to your client's problem, your commitment to your client's representation, and your respect for the court. In other words, you want to exhibit candor, conviction, and intelligence to serve your persuasive purpose and achieve an ethical appeal.

Tone in large measure results from the interplay between diction (word choice) and attitude. Irony is a clear example of this interplay in that the words convey a message belied by the speaker's tone of voice. Lacking tone of voice in the written medium, you can convey tone by skillful use of diction, juxtaposition (or context), and syntax (sentence structure).

B. Diction

Diction is a basic means of conveying attitude or tone. Many words have both explicit and implicit meanings. Select words on the basis of both their denotation (their explicit meaning or stipulated properties) and their connotation (their implicit meaning or overtones that have evolved from usage). To refer to a person as an informant, for example, is far more neutral than to label that person a snitch, which connotes double-dealing and self-interest. If you use the term

"snitch" throughout your brief, however, a court might infer that the defendant's feelings about informants are largely your own. To suggest the unsavory character of the victim once might be productive; to hammer away at it might be counter-productive.

Pay particular attention to verbs because they, without a lot of embellishment, immediately and forcefully characterize an action. "Ogling" connotes a lasciviousness that "staring" does not capture. "Jab" minimizes an action that "wallop" maximizes. Because you want your prose to move, let your verbs, not only your adjectives, describe.

Certainly, an adjective or adverb is sometimes in order. In this regard, note that one apt adjective is often preferable to a series of them because it focuses the reader on the most telling detail. It is enough to know someone was accosted by a man screaming racial epithets. To add they were bigoted, insulting, and demeaning is unnecessary. If the adjectives do not materially refine the point, they dilute the impact of any given description. Understatement is, therefore, often more forceful than overstatement because of its bare concentration on the essential. It also acknowledges your readers' abilities to grasp your point while allowing them to draw their own conclusions. Out of a similar respect, you should avoid using qualifiers and intensifiers (very, clearly, possibly, absolutely) since insistence without substance is more irritating than persuasive. For example, to say simply that "this case arises from a tragedy," can be more forceful than "this case arises from a tragedy of a truly and clearly terrible magnitude."

C. Context

Context and juxtaposition are other good ways to establish tone. Instead of stridently denouncing testimony as incredible, juxtapose conflicting statements and calmly remark on their discrepancy. Similarly, you can juxtapose an opposing argument with facts or precedents that cast doubt on its validity or applicability. In the following example, the prosecution marshals a series of facts to undermine defense counsel's contention that there was insufficient proof that defendant intended to cause damage to the building, an element of second degree arson.

> In October 1989, Dick Terney ignited five separate fires on a sofa cushion and on the mattress on which Beth Lot's body was lying and then

fled from the building, leaving the blaze to consume all of the mattress, to char Lot's body beyond recognition as a human being, to create an opaque wall of thick, black smoke from floor to ceiling inside the apartment, and to generate heat intense enough to deteriorate the bedroom door. Yet the defense contends the evidence is not legally sufficient to prove beyond a reasonable doubt that Terney intended to damage the building and not simply to destroy his girl friend's body.

D. Sentence Structure

The principles of good English sentence structure set forth in Chapter 10 and Appendix A apply to persuasive writing. Particularly important are those principles which promote clear and affirmative expression.

1. Active voice is more forceful than passive voice. Active voice points the finger ("The defendant held Ms. White at gunpoint"). However, use passive voice to deemphasize the actor in the sentence ("Ms. White was held at gun point"). Also use passive voice when you want to direct your reader to the facts ("Acting as an arm of the prosecution, hindering the presentation of the defense, and giving unconstitutional jury instructions were characterized as acts of judicial misconduct"), and to promote continuity between sentences ("The plaintiff supported his evidence with a 1996 study of environmental hazards. This environmental study was conducted in three counties.")

2. Affirmative sentences are more dynamic than negative sentences.

3. Shorter sentences adequately related to each other are preferable to longer sentences. They flow more fluidly. Long sentences slow the reader down if they contain a series of interrupting phrases or clauses that separate the subject and predicate. However, a series of short, staccato sentences can be abrupt and choppy.

4. Transitional sentences or phrases should be used so that your reader can clearly comprehend the logical development of your argument.

5. Rhetorical questions should be avoided. They raise questions that you should answer explicitly.

E. Quotations

Whenever you use language that is not your own, quote the language exactly, place the words within quotation marks, and cite the source of the quotation. Failure to do so is plagiarism. Whenever a quotation is fifty words or more, use a block quotation, that is, indent and single space the quote and do not use quotation marks. Place the citation as the first nonindented text after the quotation.

Be selective in choosing quotations. Use them principally for statutory language and statements of the rule of a case or cases, or for particularly apt language that you cannot equal yourself. When you do quote an authority, do not immediately just repeat it in your own words. Instead, tell the reader how the quotation relates to your point. If the quotation is long, however, you help your reader if you forecast its essential point.

Do not employ quotations where you can convey that information just as well or better in your own words. It is often difficult to integrate quotations smoothly, and even if this is done successfully, differences in style may be distracting. Moreover, too many quotations will slow the flow of your argument, and a reader may decide to overlook them. A reader might also ignore a lengthy quotation because the quotation is visually oppressive. Try, therefore, to use your own words, but be sure to supply a citation to the source. (See Appendix A, section B for further information on quotation.)

17

The Trial Brief: Memorandum of Law in Support of or in Opposition to a Motion

I. Introduction

WHEN YOU HAVE A CASE BEFORE A TRIAL COURT, it is often necessary or advisable for you to file one or more motions with the court. A motion is a request to the court for a ruling on a legal question. The court will respond to a motion with a ruling called an order. You may make the motion on your own initiative or the court may request that all parties file memoranda on a legal question that has arisen in the course of litigation. Motions are usually accompanied by 1) a "notice of motion" which will notify the other side that a motion has been filed, 2) a memorandum of law which supports the motion,[1] and 3) a proposed order (a ruling in your favor which the judge could sign). Supporting documents, like affidavits (a person's written statements either sworn to or affirmed), may also be appropriate. The attorney opposing the motion will submit a memorandum in opposition to the motion.

Attorneys make motions at many different stages of litigation. You will probably discuss these motions in your Civil Procedure class. Motions may be made before trial, during the trial, or post-trial. The plaintiff's attorney may file a motion for a preliminary injunction at the same time that the complaint is filed. The defendant's attorney may respond to the complaint with a motion to dismiss the complaint for failure to state a claim. If the case proceeds, the plaintiff's attorney may move for certification of a class. Either party's attorney may move for summary judgment. Either attorney may move to compel discovery, or move for judgment as a matter of law at the

[1] Some attorneys combine the motion with the supporting statements, known as a speaking motion, and do not file a separate supporting memorandum.

close of the evidence offered by an opponent at trial. Finally, a party who has lost after a trial may enter a renewed motion for judgment as a matter of law, or move for a new trial or to alter or amend the judgment.

II. The Essentials of a Memorandum of Law

IN THIS SECTION WE DESCRIBE a particular type of trial brief, the memorandum of law in support of or in opposition to a motion, especially those filed with motions to dismiss and motions for summary judgment. When you write this type of memorandum, you need to think especially about how to be responsive to your audience, to the rules that govern the motion, and to the purpose of the motion.

A. Audience

The primary audience for these memoranda is a trial judge,[2] who is an extremely busy person and who may not have a law clerk. Therefore you need to make your point and make it quickly. At the stage of these motions, most judges will not be familiar with the case and the particular area of the law involved, and will look to your memo for explanations. Besides being very busy, most trial judges share other characteristics. For example, they are bound to follow the precedents of that jurisdiction, and they want you to tell them, reliably and clearly, what those precedents are. The judges also want to reach a fair result. You have the opportunity to influence their sense of fairness by how you present your facts and your legal arguments. Another characteristic is that most judges do not like to be reversed. Thus, you must convince the court that you have strong arguments on your side. And judges are lawyers, often successful lawyers. They have developed questioning minds and healthy skepticism. Thus, you must carefully support what you write.

When you are in practice, you will learn the individual characteristics of the judges that you come before. In your first year of law school, however, the role of the judge is usually filled by the legal writing faculty.

[2] The audience is also the opposing party, who will look carefully for flaws in your memo.

B. Governing Rules

The memorandum should include the technical standards by which the court judges the motion. For example, under Fed. R. Civ. P. 56, a federal district court judge will grant a motion for summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. The memorandum should state these requirements. You should also include the case law within each jurisdiction imposing additional requirements; for example, the court must resolve ambiguities and draw reasonable inferences in favor of the party opposing the motion. When you analyze your case, it is important to remember that the court is going to review the facts from this perspective.

C. Purpose of the Motion

Next, the substance of the memorandum must be responsive to the type of motion it supports or opposes. For example, a defendant files a motion to dismiss in response to the complaint, so this motion is decided very early in the litigation. It challenges the legal sufficiency of the complaint. The defendant must accept as true the facts alleged in the complaint, so the memorandum will not challenge the accuracy of those facts. Instead, the defendant wants to show that under no state of facts and no interpretation of the law can this plaintiff be entitled to relief. For example, if the plaintiff is the legal representative of a minor who claims loss of consortium of a parent, the defendant will argue that no interpretation of the facts regarding his negligence would permit the plaintiff to succeed, because that jurisdiction recognizes only the loss of consortium of a spouse.

Because a motion to dismiss responds to a complaint, the defendant's memo sets out the plaintiff's claims in that complaint. If the complaint includes more than one claim, organized by counts, the defendant's memo sets out each count of the complaint and identifies the count or counts at which the motion is directed. Each count should be placed under a separate heading of the memo.

Another common motion is the motion for summary judgment, which may be submitted by either party. This motion is submitted after the pleadings are filed and the parties have developed the facts, for example, through discovery and affidavits. A successful motion will dispose of the case or a part of the case obviating the need for a

trial. A memorandum in support of or opposition to this motion also must explain the plaintiff's claims as set out in the complaint, and the count or counts towards which the motion is directed.

Because the motion can be granted only if there are no disputed material facts, an important part of the moving party's memorandum is to show why the material facts are not disputed. The party opposing the motion, of course, will try to show that there are disputed material facts. The party weaves a narrative that shows the facts are either disputed or undisputed, identifies the relevant facts of record from sources such as depositions, and cites to the record. For example, a defendant employer in an Americans With Disabilities Act (ADA) case may move for summary judgment on the ground that the company did not have to provide the disabled plaintiff her requested accommodation. Under the ADA, an employer must reasonably accommodate only known disabilities of the plaintiff and the parties must engage in what the courts call "an interactive process" to determine those accommodations. The defendant would claim that it did not know of the plaintiff's disability at the relevant time. The defendant's memorandum in support of its motion will garner all the facts that are learned from discovery and affidavits relevant to show that it did not know of the plaintiff's disability.

The plaintiff's memorandum will do the same to contradict the defendant's memorandum and emphasize facts that show that the defendant knew the plaintiff was disabled. If the memos reveal disputed facts on that question, the court will deny the motion so that the issue will be resolved at trial. The parties will do the same for the facts regarding whether the parties engaged in an interactive process. Many courts require the parties to list the disputed and the undisputed facts in their memoranda.

The moving party must also show that it is entitled to judgment as a matter of law. Thus in this section of their memoranda, the parties' legal arguments will apply the ADA as interpreted in that circuit to the facts of the case. This requires building arguments in the ways explained in Chapter 11, on arguing questions of law, and in Chapter 18, on argument in a brief.

A last point that applies to memoranda also applies to all your work: avoid insults to opposing counsel and outlandish statements about the quality of that person's work. You will gain no points with the court with those tactics. And, of course, never insult the judge.

III. Format of a Memorandum in Support of or in Opposition to a Motion

THE REMAINDER OF THIS CHAPTER explains a suggested format of a memorandum of law. In the following chapter we explain appellate briefs. Much of the information in the next chapter is also relevant to writing these memoranda.

Although there is no required format for the memorandum of law, courts generally require that the moving party set forth both the grounds for the motion with citation to supporting authorities, and the specific relief sought. Memoranda may be divided into the following sections: the Caption and Title, the Introduction, the Statement of Facts, the Question(s) Presented, the Argument, the Conclusion, and any supporting affidavits or appendices.

A. Caption and Title

The first page of a memorandum contains at a glance the basic information about the case: the caption includes the name of the court, the names of the parties, the docket number, and the initials of the judge to whom the case has been assigned. It also includes the title of the memorandum in support of or in opposition to the motion. The cover page of the memorandum will usually contain the same information along with the name, address, and phone number of the attorney. A sample caption and title follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

JANE SMITH, JOAN JONES,	)	
and MARY DOE, individually	)	
and on behalf of all others similarly	)	
situated,	)	94 Civ. 284
Plaintiffs,	)	(M.R.W.)
-against-	)	
	)	
CONSOLIDATED ELECTRIC	)	
CORP.,	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR DETERMINATION OF THE CLASS

B. Introduction

An Introduction is designed to provide a context for the motion and to provide the court with basic information about the case. The Introduction should at least identify the kind of case, the parties, the nature of the motion, the relief sought, and the reason. The court must be told the complete procedural history of the case, which can be in the Introduction or in a Statement of Facts. The Introduction to a memorandum in opposition to a motion would explain in one or two sentences why each basis of the moving party's motion should fail.

The following is a sample Introduction to a Memorandum in Support of a Plaintiffs' Motion to Certify a Class.

> Plaintiffs Jane Smith, Joan Jones, and Mary Doe sued defendant Consolidated Electric Corporation alleging discrimination in employment on the grounds of sex in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1988). This memorandum of law is submitted in support of plaintiffs' motion pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure for an order:
>
> (a) allowing this action to be maintained as a class action pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure, and
> (b) defining the class represented by plaintiffs as all female employees of Consolidated Electric Corporation who have unsuccessfully sought or who, but for the discriminatory acts and practices of the defendant, would have sought management positions with Consolidated Electric Corporation.

The party opposing the motion might write the following Introduction.

> This suit is brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) et seq. (1994). Plaintiffs

allege that Consolidated Electric Corp. discriminated in violation of the Act. The plaintiffs have moved for certification as a class under Rule 23(c)(1) of the Federal Rules of Civil Procedure, and for definition of the class. The plaintiffs' motion fails because

(1) the alleged class is not so numerous that it is impracticable to join all members (Rule 23(a)(1)),
(2) there are no questions of law and fact common to the alleged class (Rule 23(a)(2)),
(3) the plaintiffs' claims are not typical of the claims and defenses of the class they allege (Rule 23(a)(3)), and
(4) the plaintiffs cannot fairly and adequately represent the class they allege (Rule 23(a)(4)).

Exercise 17–A

Which Introduction to the Memorandum in Support of Defendant's Motion to Dismiss is better and why?

1. The plaintiff filed a complaint on September 1, 1998, alleging that General Corp. discriminated against her in violation of the Americans With Disabilities Act, 42 U.S.C. § 12101 et seq. (ADA or the Act). General Corp. has moved to dismiss, under Fed. R. Civ. P. 12(b)(6). This memorandum is filed in support of that motion.

In Count I, the plaintiff, who is an employee of General Corp. and a diabetic, alleges that she is disabled as defined in § 12102(2)(A), and that the defendant has not accommodated her disability.

In Count II, plaintiff alleges as an alternative, that she is disabled because General Corp. regarded her as disabled in violation of § 12102(2)(C) of the Act.

Both counts of the complaint fail to state a claim and should be dismissed. As to Count I, plaintiff is not disabled as defined under § 12102(2)(A) of the Act because her diabetes is controlled by medication. Count II fails to state a claim because, even if General Corp. regarded her as disabled, under the law of this Circuit, General Corp. is not under a duty to accommodate.

2. This memorandum is filed under Fed. R. Civ. P. 12(b)(6) in support of defendant's motion to dismiss plaintiff's complaint. The plaintiff has no claim under the American With Disabilities Act (ADA or Act), because she is not disabled. Plaintiff has diabetes, which is controlled by her medication. Thus, General Corp. does not have to accommodate

her condition. Moreover, General Corp. has not regarded her as disabled and even if it did, it does not owe her the duty to accommodate in this Circuit.

Thus the court should dismiss the complaint for failure to state a claim.

Exercise 17–B

Evaluate the following Introductions.

1. Memorandum of Law in Support of Defendants' Motion for Summary Judgment:

Introduction

Come now the defendants by their counsel with their motion for summary judgment. Pursuant to the order of this Court entered July 28, 1997, defendants/counterclaim-plaintiffs Tonetic, Inc. and Dr. Steven Nickel (collectively referred to hereinafter as defendants) submit this Memorandum of Law in further support of their motion seeking dismissal of all of plaintiff's copyright infringement claims on the grounds that, inter alia, in accordance with prior rulings by the Court of Appeals for the Second Circuit, plaintiff's description of defendants' software is too vague and insufficient to provide a basis for any injunctive and/or monetary recovery.

2. Memorandum of Law in Support of Motion of Defendant Pressman, Inc. to Dismiss for Forum Non Conveniens or in the Alternative to Transfer Venue:

Introduction

In a classic example of vexatious litigation, plaintiff Davis Corporation has filed this action in California—purportedly based on tort and contract claims that arose in Illinois, will be decided solely by reference to Illinois law, and has little or no connection to California—in a blatant attempt to bully the defendant Pressman, Inc. into dropping or compromising its previously-filed collection action in Illinois state court. Davis Corp. is thwarted by the facts, however, which demonstrate that