the Central District of California is not the proper forum for this lawsuit and that the action must be dismissed or, in the alternative, transferred to the Northern District of Illinois, a more appropriate forum for deciding this controversy.

C. Statement of Facts

The Statement of Facts usually includes both the procedural history of the case as it relates to the motion and the relevant facts. Keep two main points in mind as you write it. First, because the court is dealing with many different matters and cannot be expected to be familiar with the facts of your case, you must provide this information. Second, because you are looking for a favorable ruling, you want to present the facts of your case in such a way that the court will be inclined to decide the motion in your favor.

If your Memorandum contains an Introduction, you will need to decide which information should be provided in the Introduction and which in the Statement of Facts. The procedural history in the discrimination claim mentioned above could be written as follows:

Statement of Facts

On February 21, 1998, plaintiffs Jane Smith, Joan Jones, and Mary Doe filed a complaint individually and on behalf of others similarly situated challenging a course of conduct by defendant Consolidated Electric Corporation. Plaintiffs alleged that the defendant discriminated on the basis of sex in the terms and conditions of employment relating to hiring and promotion for management positions.

Plaintiffs have moved for certification as a class pursuant to Fed. R. Civ. P. 23.

After the procedural history, you would present the facts of the case that support your motion. To do this effectively, you must be familiar with the legal standards that govern the motion that you are bringing. A class action motion in federal court, for example, is governed by Rule 23. This Rule outlines certain prerequisites for class certification, including the requirements in Rule 23(a) that

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law and fact common to the class, (3) the claims or defenses of the parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately represent the interests of the class.

Therefore, you would include facts that support the requirements of numerosity, commonality, typicality, and representativeness. These facts would likely come from pleadings, discovery documents (interrogatories and depositions), and affidavits, which you should cite. In the sex discrimination case, for example, you could include facts showing that the class is so numerous that joinder of all members of the class would be impracticable because Consolidated Electric has offices in five different states and because more than 80 women are potential members of the class.

In addition to the legal standard, you should think of how you can present the facts in a way that would be most convincing. Although it is inappropriate in the Statement of Facts to adopt an argumentative tone, it is still possible to arrange facts and choose words in such a way that they incline the court to see the case and the motion from your perspective. More detailed suggestions on writing a Statement of Facts are contained in section IV of Chapter 18.

Exercise 17–C

1. Rewrite sentences (a) and (b) as the criminal defendant's lawyer to use more vivid language. Rewrite sentence (c) as the plaintiff's lawyer.
   a. The policeman stood in between the defendant and his car.
   b. He was experiencing fear of imminent harm to himself from his father.
   c. At the age of seven years, the plaintiff was involved in an automobile accident, being hit by a car, which resulted in the loss of use of his leg.
2. Read the following list of facts from a case involving the claim of a biological father for a hearing to prevent his nonmarital child from being placed for adoption. The standard for determining the father's right to a hearing is whether the father had established a relationship with the child or a family unit including the child.

The Facts

____ Frank Rock and Mary Hall met in 1987

____ Frank and Mary lived together 1990–92

____ Baby born 1992

____ Mary told people, including welfare office, that Frank was the father

____ Frank visited Mary in hospital, after baby's birth

____ Frank did not know where Mary and child were after Mary left hospital

____ Frank never supported baby

____ Mary married

____ Frank found Mary in 1994 by hiring a detective

____ Mary did not permit Frank to visit the baby

____ Mary and husband filed petition for adoption Dec. 1994

____ Frank filed petition to establish paternity Jan. 1995

Write a Statement of the Facts of one or two paragraphs for a memorandum of law for Frank, supporting his petition for a hearing, and then write one in opposition to Frank's claim (for the state agency).

D. Question Presented (Statement of Issues)

Some memoranda of law include a section in which the attorney states the legal questions that the motion raises. A memorandum could have one or more Questions Presented. This section could either precede or follow the Statement of Facts, or come at the end of an Introduction, or be omitted altogether.

The Question should both focus the court's attention on the basic issues in your motion and suggest an answer that would support a decision by the court in your favor. The Question combines the relevant facts of a case and a legal rule. For example, a person seeking to intervene in an action in federal court pursuant to Fed. R. Civ. P. 24 must make a "timely application". Therefore, one ground on which

to oppose a motion to intervene is that the motion was not timely. A Question Presented raising this issue could be stated as follows:

> Is the agency's motion to intervene timely when it was made more than three years after the action was commenced and almost ten months after the judgment was entered?

To intervene as of right pursuant to Fed. R. Civ. P. 24(a)(2), an applicant must also show a legally protectable interest. A party opposing the motion could state the following:

> Did a preliminary injunction remedying racial discrimination against non-whites create a legally protectable interest, within the meaning of Fed. R. Civ. P. 24(a)(2), for white persons who seek to intervene as plaintiffs to obtain union membership for themselves?

The question in both of these examples focuses on a legal issue that the court must consider in deciding whether to grant or deny the motion (timeliness, legally protectable interest) and is framed in such a way that the attorney's argument is clear. More detailed suggestions on writing a Question Presented can be found in section III of Chapter 18.

Exercise 17–D
Write a Question Presented for a memorandum for Frank Rock and one for the state opposing Frank's petition.

E. Argument

The Argument is the heart of your memorandum. In it you provide the facts, citations to authority, and reasoning to convince the court to rule in your favor on the motion. The Argument is often divided into sections representing the main legal arguments or the counts in the plaintiff's complaint, although a short memorandum may have only one basic argument.

Each section of the Argument usually begins with a point heading that states the conclusion that you want the court to reach on that legal point. The point heading is a conclusory sentence that combines the facts of the case with the legal principles analyzed in that

section. The headings help the court find your arguments and tell the court what your point is.

Example: All Counts of the Complaint Must Be Dismissed Because the Communications Complained of Are not Defamatory Per Se.

The heading should be followed with a thesis paragraph that tells the court the conclusion you want it to reach (the complaint should be dismissed) and why. If your motion is based on a rule that is divided into required elements, then you may have a separate section in your memorandum for each of these elements. As noted in the section on the Statement of Facts, a plaintiff who wishes to bring a class action must satisfy all four requirements of Rule 23(a). It may be appropriate, then, to discuss each requirement in a separate section.

As to the order of arguments, you should begin with any threshold arguments. Then, if the claim is defined by elements, as in certification of a class, discuss each in the order of the definition. If not, then begin with the strongest argument supporting your position on the motion.

Make your arguments affirmatively as an advocate, use persuasive language and remember to interweave the facts of the case with the legal points. Extensive suggestions on writing an Argument are contained in Chapter 18.

Exercise 17–E

1. Assume you are representing an employee-at-will. An employee-at-will can be fired at any time for any or no reason. Rewrite the following statement so that it is more persuasive.

> Although the Pennsylvania Supreme Court has never held there is an exception to the employment-at-will doctrine, the lower courts have recognized a limited exception to the doctrine when an employer's discharge violates a clear mandate of public policy.

2. Assume you represent two children in a loss of parental consortium claim (loss of intangibles like love, companionship, solace). Rewrite the following argument so that it is affirmative.

In all but thirteen jurisdictions that have recently considered the issue, children cannot sue for loss of parental consortium.

3. Assuming you want an exception to the statute of limitations to apply, phrase more effectively.

While a mere post-traumatic neurosis is not enough to toll the statute, a "post-traumatic depression" coupled with "severe depressive reaction" has been held to constitute the requisite insanity that tolls the statute of limitations.

4. Assuming you want to invoke an exception to government immunity from liability, phrase more persuasively.

Generally a municipality is not liable to an individual for failing to provide police protection. However, there is an exception if the police assume a "special relationship" or "special duty" towards an individual.

F. Conclusion

The Conclusion is a brief statement, often one sentence, reminding the court of the relief you are seeking. It is often followed by a phrase like "Respectfully submitted," and then by the signature and name, address, and telephone number of the attorney of record. For example,

For the foregoing reasons, plaintiff's motion for preliminary injunction should be granted.

Respectfully submitted,
Attorney's Name
Attorney's address
Attorney's phone number

Attorney for Plaintiff Jane Doe

18

Writing the Appellate Brief

I. Introduction

THE PURPOSE OF AN APPELLATE BRIEF is to convince a court to grant relief to your client for the issues on appeal by affirming or reversing the decision of the court below. Thus, your task as a brief writer is to present persuasively those arguments and that evidence which would convince a court that your client's position is the only one that comports with law and justice and that the lower court or courts either correctly or incorrectly decided the case. An appeal is not a re-trying of a case. Appellate courts do not hear evidence in the case as do trial courts. Rather, an appellate court's review is typically limited to a review of the trial court's decision to determine whether, based on the record of the evidence, the court below committed error in hearing or deciding the case. The function of the appellant's attorney is to search the record to determine what errors the trial court may have committed, to select the issues that have the best chance of convincing an appellate court to reverse the decision below, and to shape the arguments as convincingly as possible. The primary function of the appellee's attorney is to argue in favor of affirming the judgment below and to rebut the appellant's arguments.

A. Selecting Issues for Appeal

Usually, the first step in preparing an appeal is to review the record closely and research the law carefully in order to narrow the issues to those that are truly arguable. Because you want your brief to be credible, you need to avoid making both frivolous claims and too many claims. As the Supreme Court has observed, "a brief which treats more than three or four matters runs serious risks of becoming too

diffuse and giving the overall impression that no one claim of error can be serious."[1] In the Court's estimation, if you cannot win on the merits of your stronger points, you will not win on your weaker points; an attorney should, therefore, winnow out the weaker arguments.[2] In the first-year legal writing courses, the issues may have been selected for you by your teachers. You should be aware nonetheless of some of the considerations that go into selecting issues for appeal.

For a real appeal, you would begin by reading the record to get a feel for the case.[3] Since the facts surrounding each legal issue give rise to initial impressions about your client's claims, appraise the record first from this viewpoint. Read carefully the decision appealed from. Also examine as possible grounds for appeal each motion or objection made by trial counsel and decided adversely to your client. Then try to grasp the trial counsel's and the opposing counsel's theories of the case. After this, research the legal issues thoroughly.

On the basis of this initial research, begin to plot out your strategy. Ascertain which facts are material, which arguments are consequential (that is, which arguments would give your client the greatest relief, like a dismissal of charges), and which arguments are persuasive (that is, which are likely to convince a court to rule in your favor but which will not necessarily give your client the same degree of relief, like a new trial or a modified sentence). After you identify those arguments for which there is a basis of appeal, decide which combination of persuasive and consequential arguments would most help your client. You have now, at least tentatively, selected your issues.

B. Standard of Review

An attorney must also consider the standard of review that is appropriate to each case. The standard of review that an appellate court uses will depend on a number of factors, including the court itself

[1] *Jones v. Barnes*, 463 U.S. 745, 752 n.5 (1983).

[2] *Id.* at 751–52. Note also that the Code of Professional Responsibility, DR–102A(1), says, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." *See also* Model Rules of Professional Conduct, Rule 3.1.

[3] The suggestions offered here are paraphrased from William E. Hellerstein, "Appeal to Intermediate Appellate Courts," in *Basic Criminal Law Practice* (1985).

(federal, state, intermediate appellate, highest appellate), the nature of the case (civil, criminal), and the type of error alleged. It is important, though not always easy, for the attorney to determine the appropriate standard of review. The standards of review cover a wide range:[4]

- review of questions of law
  An appellate court does not have to defer to the trial court's decision on a question of law and can decide the issue de novo (without regard to the lower court's determination).
  E.g., Can an unmarried cohabitant sue for loss of consortium?
  Did a school board violate its students' first amendment rights by denying them access to their high school for meetings after school?
- review of questions of fact

a) jury trials—
   An appellate court will give great deference to a jury verdict and will generally not reverse that verdict. In civil cases, a jury verdict will be reversed only if it is unsupported by any evidence. If the verdict is supported by some evidence, however, to get appellate review of the weight or the sufficiency of the evidence, the attorney must have made a timely motion below. In criminal cases, the verdict will be set aside if the appellate court determines that no rational jury could have found the elements of the crime beyond a reasonable doubt.

b) trials by the court
   Findings of fact made by a trial court are also given significant deference, though not as great as that given jury verdicts. Under the Federal Rules of Civil Procedure Rule 52(a), for example, a federal trial court's findings of fact will not be set aside unless they are "clearly erroneous."

[4] The categories are taken from Ursula Bentele and Eve Cary, *Appellate Advocacy, Principles and Practice* 84–87 (3d ed. 1998).

E.g., Was the trial court's finding that the promotions were not the result of discriminatory intent clearly erroneous?

- review of mixed questions of law and fact

  The standard of review is difficult to characterize because the courts have not adopted a single approach as to whether these questions should be treated more like questions of law or questions of fact.

  E.g., Was the plaintiff constructively discharged from his job?

- discretion of the trial court

  Trial courts have discretion to determine certain issues. For example, many statutes give the trial judge discretion to award attorneys' fees. A discretionary decision by the trial court may be reversed for abuse of the discretion, for improvident exercise of the discretion, or for a failure to exercise discretion. The extent of the trial court's discretion will depend on the matter at issue.

  E.g., Did the trial court abuse its discretion in denying the plaintiff back pay in an employment discrimination suit?

In analyzing your case and in writing your brief, you should include a reference to the appropriate standard of review, and, if necessary, an argument as to the correct standard. The standard of review that the appellate court uses can determine the outcome of the case. Therefore, in writing an appellate brief, the attorney should be aware of the strength of the issues not simply in terms of the merits, but also in terms of how likely the appellate court is to reverse the trial court's decision.

C. Choosing Arguments in Support of an Issue

Once you have decided which issues to appeal and the standard of review that applies, you must decide which arguments to raise in support of your claims. Usually your research will suggest the legal arguments and the policy arguments you ought to put forward. Limit your brief to your best arguments. When considering your options, be careful not to raise contradictory, inconsistent claims. You can argue, for example, that a court improperly denied a request for an adjournment because, although trial counsel exercised due diligence,

he was unable to interview a key witness who was in the hospital. If you make this point, however, you cannot also argue that a court improperly denied a request for an adjournment because a key witness was never interviewed due to ineffective counsel who failed to exercise due diligence.

Also, consider whether raising an argument in the alternative is strategically appropriate. Alternative arguments are common tools of an attorney, and are appropriate when your client could materially benefit from the alternative argument. Assume, for example, that a child defendant in a negligence suit was held to an adult standard of reasonable care because the child was engaged in an adult activity. On appeal, you might argue first that the lower court applied the wrong standard because an exception to the rule applied. Under that exception, very young children can be held to a child's standard regardless of their participation in an adult activity. You would go on to show that your client is not liable under the child's standard of reasonable care. Then, if you think the facts would warrant a reversal even under the adult standard, it would be appropriate to raise this as an alternative argument.

D. Ordering Issues

After selecting your issues, you must decide how to order them. Generally, a brief follows the order of importance, that is, you begin with the most persuasive and consequential argument and move in a descending order down to the least important argument. There are two primary reasons for organizing your brief this way. First, the realities are such that a judge might not read your entire brief; in order to ensure that your most important argument will at least be read, you will want to put it in a prominent place in the brief. Second, by beginning with your most important argument, you set a positive tone for your brief as well as establishing yourself as a serious, credible, and thoughtful advocate. Of course, to organize a brief in order of importance, you must determine which of your arguments is the most important. Logic and strategy must be considered.

Strategy involves weighing the merits of your most persuasive argument (that which is most likely to succeed) against the merits of arguments affording your client greater relief. You must come to a realistic decision about whether your client is best served by beginning with the most persuasive argument or with the most consequen-

tial. When your arguments are of unequal strength, most attorneys advise beginning with your most persuasive argument, i.e., that argument which has the greatest chance of success based on the law and the facts. When your arguments are of comparable weight, however, most attorneys advise that you begin with your most consequential argument, i.e., the one which will most benefit your client. Common sense dictates that if you can argue a point that will give your client substantial relief as convincingly as a point that gives less relief, you begin with the argument that has greater consequences.

There may be times, of course, when you wish to depart from these established conventions. If, for example, your most persuasive argument really will not materially assist your client, you might decide to begin with the argument which would most benefit your client. You might also consider whether your client has expressed a strong preference for one argument, or whether the court to which you are appealing is more receptive to one kind of legal argument than another. An intermediate court of appeals, for example, would probably be more receptive to a fact-centered or doctrinal argument. A state supreme court, however, might be more open to a policy-centered argument (one which focuses on the purpose of the rule and the desirability of the end) or to an institutionally-directed argument (one which focuses on whether a legislative body or a court should create a rule).

Strategy is not the only factor in ordering your issues. You must also consider logic. Discuss threshold issues before other issues. Threshold questions–involving, for example, jurisdiction or a statute of limitations–take logical priority over other issues because the court's decision with respect to the former may obviate and preclude the court from considering the latter. If you have interdependent issues such that one question must be resolved before another question can be meaningfully addressed, logic dictates that you treat the initial question before the dependent question. For example, a decision must be rendered on whether a party consented to a search before an argument can be made about whether that party revoked consent.

Other problems will present you with different types of legal questions, for example, a constitutional and a statutory question. Barring special considerations, you would deal with the statutory question first and the constitutional question second. For example, a state sodomy statute would be scrutinized first for whether the

defendant violated the statute. If the defendant did not violate the statute, then the court need not decide whether it is unconstitutional.

The interrelation of some issues might also be a factor in ordering issues. You might decide to shift a persuasive argument into a less prominent position in order to follow one point with discussion of another related point. Assume, for instance, that you have a persuasive argument that the trial judge unduly interfered with the cross-examination, a moderately strong argument that someone was improperly excused for cause during jury selection, and a weak argument that the prosecutor made an inflammatory summation. You might decide to follow the argument on the prejudicial conduct of the judge with the argument on the prejudicial conduct of the prosecutor if the two issues involve similar facts and legal questions.

These, then, are some of the factors you consider in ordering your issues. To check on the order and organization of issues and subissues, many people prepare an outline, which helps to clarify the logical relationships among ideas (rules of outlining are discussed in the section on Point Headings). Once you have decided upon an order, make sure your Questions Presented, Point Headings, and Arguments adhere to that order.

II. Format of an Appellate Brief: Introductory Information

A. Title Page

THE TITLE PAGE IS THE outside front cover of your brief. At the top of the page you identify the court to which the case is being appealed and provide the index number to your case. The Title Page also includes the name of the Appellant and Appellee and may identify the Plaintiff and Defendant below. Under this information, you name the court from which the case is being appealed, the party whose brief this is, and the name and address of the attorney representing that party.

B. Table of Contents

The Table of Contents should contain page references for each section of your brief, including the other introductory tables. These sections usually include the following:

Table of Authorities
Question Presented
Statement of the Case
Summary of Argument
Argument
Conclusion
Appendix (if any)

In addition, the Table of Contents includes the point headings (and subheadings, if any) for the sections in the Argument. The outline of the point headings gives the court a quick summary of the content of the Argument and permits the court to find the page at which any particular point begins. Type the headings in the Argument in upper case; type the subheadings in upper and lower case, indented and underlined.

C. Table of Authorities

In the Table of Authorities, you provide page references in your brief for the authorities you relied on in the Argument. Ordinarily, you divide the authorities into categories. Put cases in alphabetical order with citations. (If a case is repeatedly cited, use passim instead of a page reference.) Then list the Constitutional and Statutory Provisions and the Administrative Regulations. Other authorities may be put under the heading of Miscellaneous, or you may set out other categories.

Some schools will require that their students' briefs conform to the format required by the Rules of the Supreme Court of the United States. Under these Rules, the brief should also include sections entitled Opinion Below, Jurisdictional Statement, and Constitutional and Statutory Provisions Involved. See Sample Appellate Brief, Appendix F.

III. Question(s) Presented

THE QUESTION PRESENTED SETS OUT the legal issue that the parties will argue, incorporating the key facts of the case, in order to tell the court what the appeal is about. Like all other parts of the brief, the Question Presented is also intended to persuade the court of the cor-

rectness of your client's position. You can use the Question Presented as a way of getting the court to see the issues in the case from your client's point of view by framing the question so that it suggests a response in your favor.

Under most court rules, the Questions Presented must appear at the beginning of the brief. Thus, the Questions Presented are in effect the introduction to your brief and will be the first part that the judges read. The Question or Questions must introduce the case to the court by setting out the legal issues that the parties will argue and by providing a factual context that explains how those issues arose. Rule 14 of the Supreme Court of the United States requires that the questions be "short and concise." They should also be understandable, preferably on first reading.

If your topic contains more than one issue, then you must pose more than one Question. Put your Questions in the order in which they will be argued. Each Question should be written in the same form, either as a statement beginning with "whether" or in question form, beginning, for example, with "may" or "does."

Some suggestions for writing the Questions follow.

A. The Questions should include a reference to the constitutional provision, statute, or common law cause of action under which the case arises, as in the following example.

> Is the decision by a private nursing home to transfer a patient from a skilled nursing care facility to a health-related facility subject to the procedural requirements of the due process clause of the fourteenth amendment?

This Question identifies the due process clause as the constitutional provision at issue in this case. It tells the Court what the case is about. For a lesser known cause of action, for example, one that arises under a statute, you may want to include the operative statutory language in the Question.

> Did a person violate 18 U.S.C. § 1071, which prohibits harboring or concealing a person for whom a federal warrant has been issued, when, on four occasions, he gave a fugitive money and lied to the authorities about the fugitive's whereabouts?

B. Unless you are dealing with a pure question of law, the Question should also provide the facts of the case as they relate to the issue. Because a judge must decide each case according to its facts and must apply the established principles of law to those facts, the Question should include some of the factual aspects of the case which gave rise to the legal question. Try, therefore, to avoid "label" or abstract questions that identify the type of action that is before the court but tell nothing about the particular facts of the case, as in the question below.

> Did the police seize the evidence in a search of petitioner's residence that violated his fourth amendment rights?

This Question labels the case as a search and seizure problem, but does not indicate the particular nature of the fourth amendment problem. The sentence could be the issue in almost every fourth amendment case. The writer of this Question should have identified why the police seizure of evidence may have violated the fourth amendment.

> Was the evidence seized in a search of petitioner's residence inadmissible on fourth amendment grounds when petitioner gave his consent to search only after the police officer implied he had legal authority for the search regardless of consent?

Similarly, the nursing home question provides the facts of the case as they relate to the requirements of the fourteenth amendment. When you provide a factual context, you help the court by defining the particular issue your case poses.

Note, however, that appeals based on questions of law (rather than on questions involving application of law to facts) need not include the particular facts that gave rise to the dispute. Instead they should include details about the rule under judicial scrutiny.

> Does a statute violate an advertiser's first amendment right to free speech if it bans the advertisement of tobacco products in places offering "family" oriented entertainment?

Or again, in the question below, it is unnecessary to relate specific facts establishing the child witness's likely trauma if forced to testify

in front of the accused because the question is about the constitutionality of the statute, not its applicability to the particular child witness in this trial.

> Is a statute valid under the sixth amendment right of confrontation if it allows a child witness in a sex-offense prosecution to testify outside of defendant's presence by one-way closed-circuit television when the statute can be applied only upon a showing of individualized, clear, and convincing trauma to the witness?

C. State the Question as a general principle that would apply to anyone in the particular situation of these parties. One consequence of placing the Questions Presented first is that the reader knows nothing about the parties. Therefore, you should identify the parties by general description rather than by name. In the following example, the appellant is identified as a member of the bar, not as "appellant" or by name.

> Do the first and fourteenth amendments protect a member of the bar from disciplinary action when she advises members of an organization of their rights and discloses the price and availability of legal services?

Another consequence of placing the Questions first is that you must avoid general and vague references to facts that the reader has not yet been given, as in the Question below.

> Under the circumstances of this case, were the petitioner's fourth amendment rights violated by the manner in which police secured consent?

Instead, flesh out the "circumstances."

> Is an individual's consent to a search of his premises coerced and involuntary under the fourth amendment when that consent follows a statement by a law enforcement officer implying legal authority for the search regardless of consent?

D. Let the Question suggest an answer favorable to your client, but do not overstate your client's case. The Question that follows is overstated and will lose credibility with the court.

> Does a person violate 18 U.S.C. § 1071 if he does absolutely nothing to help a fugitive except to let him walk off with a few pieces of old clothing and to feed him to prevent starvation?

Most court rules require that the Question not be argumentative. The Question should, therefore, appear neutral. Probably the best way to write a persuasive Question that is not unduly slanted is to incorporate favorable facts without any shrill commentary on them. For example, a Question that is posed favorably but which is not unduly slanted might be as follows:

> Under 18 U.S.C. § 1071, which prohibits harboring a fugitive so as to prevent his discovery, does a person harbor a fugitive by providing him with some worn clothing and an occasional dinner?

Incorporating the facts into the Question ensures a measure of objectivity by telling the court what the parties actually did. In the Question above, the writer suggests the evidence is insufficient to establish a violation of the statute, but the court is given room to come to its own decision.

Some writers disagree with the advice that the Question Presented should be framed to suggest the answer favorable to the client, but instead advise that you formulate the issue so neutrally that the opposing counsel will accept it.[5] The nursing home question would meet this criterion.

E. Do not usurp the function of the court by coming to conclusions that assume a favorable resolution of legal and factual issues that the court must decide. The underlined phrases in the examples below are improper because they are conclusions of law.

[5] See, e.g., Robert J. Martineau, *Fundamentals of Modern Appellate Advocacy* 145 (1985).

> Did the respondent Disciplinary Commission's reprimand of the petitioner for actions not likely to cause substantial harm violate the petitioner's rights to freedom of expression and association under the first amendment?
>
> Is the evidence obtained from a warrantless search conducted pursuant to consent inadmissible on fourth amendment grounds where the consent is not voluntarily given and where the search conducted exceeds the scope authorized by that consent?

In these Questions, the author assumes the very point that is at issue: whether the actions were likely to cause substantial harm; whether the consent was voluntary; and whether the search exceeded the scope authorized by that consent.

Be equally careful not to give away your case in the Question by conceding arguments to the opposing party and then trying to recapture them. The following Question does this:

> Whether a search, conducted pursuant to consent by the defendant, is unreasonable merely because it exceeds the bounds of the consent given.

By concluding that the search exceeded the defendant's consent, the writer has conceded that the search was not valid. The word "merely" will not retrieve the lost case.

F. Although you should not concede an argument, your Question may pose alternative arguments. You may appear to concede a contested point in order to argue the next issue that follows logically from the first point. When you use this sort of alternative argument, you are implicitly saying, "but even if I am wrong on the first point, then the other party still should not prevail because of my arguments on point two." Utilizing this technique, the writer concedes the first point only for the purpose of meeting opposing counsel's next argument.

In the fourth amendment search and seizure problem, for example, the appellant can make an alternative argument: even if he did consent to the search initially, he then withdrew that consent. Appellant admits to the consent only for the limited purpose of making his second argument. Such a Question might look as follows:

> Even if the petitioner initially consented to a search, is the evidence obtained from that warrantless search nonetheless inadmissible on fourth amendment grounds because the petitioner withdrew his initial consent to that search?

G. Finally, to make questions readable, keep related ideas together. For example, use the first half of the sentence to pose the legal question. Then use the second half to raise the legally relevant facts. Take particular pains to keep the subject of the sentence near the verb since this type of construction is the easiest to understand. Do not separate the subject of the sentence from the verb with a series of interrupting clauses or modifiers. The following question is hard to comprehend because eighteen words (those modifying the main noun) intervene between the main noun (statute) and the verb.

> Whether a statute allowing a child witness in a sex-offense prosecution to testify outside of defendant's presence by one-way closed-circuit television is valid under the sixth amendment right of confrontation when the statute can be applied only upon a showing of individualized, clear, and convincing trauma to the witness.

The question is more readable if the main noun of the sentence is near the verb, as in our earlier version of this question.

> Is a statute valid under the sixth amendment right of confrontation if it allows a child witness in a sex-offense prosecution to testify outside of defendant's presence by one-way closed-circuit television when the statute can be applied only upon a showing of individualized, clear, and convincing trauma to the witness?

Exercise 18–A

1. The following Questions Presented have been prepared for appellant, Alice Bell. Ms. Bell is suing her husband Alan Bell for civil damages under a federal statute popularly known as the federal wiretapping act or Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Alice Bell claims her husband wiretapped her business telephone. Which is the best Question and why? What is wrong with the other Questions?

a. Did the trial court err in dismissing Ms. Bell's claim against her husband for damages for using an extension telephone to intercept her private communications without her consent?
b. Does Title III of the Omnibus Crime Control and Safe Streets Act prohibit the appellee's interception of the appellant's telephone conversations?
c. Did the trial court err in dismissing the appellant's claim since her husband's unauthorized actions of intercepting her oral telephone communications are clearly prohibited by Title III of the Omnibus Crime Control and Safe Streets Act and do not come within the exceptions to the Act?
d. Does Title III of the Omnibus Crime Control and Safe Streets Act, which prohibits an individual from intercepting any wire or oral communication, provide a cause of action for a wife against her husband who eavesdropped on an extension telephone and secretly recorded her private telephone conversations?

2. The following Questions Presented have been prepared for Juliet Stone's appeal of the trial court's dismissal of her wrongful life claim against Dr. James Eagle. Juliet Stone is a child who was born with birth defects. Dr. Eagle is the obstetrician. The issue is whether there is a legal remedy for the injuries she has sustained. (For more information, see section VII(E).) Which is the best Question and why? What is wrong with the other Questions?
a. Whether infant Juliet Stone may sustain a claim for wrongful life against an obstetrician who negligently failed to inform the infant's parents of the advisability of having an amniocentesis test, thereby depriving them of the choice to abort, when the infant has suffered legally cognizable injuries.
b. Whether an infant born with severe congenital birth defects has a legally cognizable claim against her mother's physician.
c. Can an infant born with severe birth defects sustain a claim for wrongful life when the obstetrician failed to inform the parents of the risk of Down's Syndrome and the availability of amniocentesis, and thereby deprived them of making an informed choice about terminating the pregnancy?

3. Assume you are a prosecutor appealing a pre-trial order suppressing evidence of the photographic identification of a robber by the only eyewitness to a bank robbery. The judge had found the photographic identification procedure conducted by the police was (1) "unduly and unnecessarily suggestive" and (2) the identification itself was not "in-

dependently reliable." Your student intern has written two versions of the Question Presented. You find one of them conclusory and both of them unpersuasive and unreadable. Using the information they provide, write a persuasive and readable question.

a. Whether the court properly suppressed the eyewitness's photographic identification testimony where photographs, each one basically resembling the others, were shown to the witness from which she identified the accused as the perpetrator of the crime without any influence from the police officer, and where during the course of the crime, the witness, who had an excellent opportunity to view the criminal, attentively observed the criminal for about a minute in strong light, thus enabling her to give a detailed description of the criminal that closely resembles the accused, on the ground that the procedure was unduly and unnecessarily suggestive and the identification itself was unreliable.

b. Whether the pretrial photographic identification was unnecessarily and impermissibly suggestive when, weighing the various factors which affected the reliability of the witness's description of the perpetrator against the level of suggestiveness of the photographic procedure, there does not exist, in light of the totality of the circumstances, a substantial likelihood of irreparable misidentification, given the facts that the witness, although terrified, had seen the robber at close quarters and the officer's only comment after she tentatively identified the defendant's photo was that she was "doing just fine, a good job."

IV. The Statement of the Case

FEW ATTORNEYS DISPUTE THE IMPORTANCE of the Statement of the Case. The Statement is your opportunity to focus only on the facts and to present your client's version of those facts so convincingly that a court is ready to rule in your client's favor even before reading the Argument.

The Statement of the Case frequently includes two components: an opening paragraph and a Statement of Facts. The opening paragraph, often called the Preliminary Statement, includes procedural information about how the case got to that court. It describes the nature of the action, the parties involved, the wrongs alleged, the losses sustained, the decision below, and the relief requested. It also tells the court the type of order from which the appeal is taken.

In the Statement of Facts, you should present the material facts of the case, but in a way that inclines the court to your client's perspective. By selecting and arranging the facts, and by artful writing, you may accurately portray the events giving rise to the litigation, yet still present those events from your client's point of view.

The contrast between the appellant's and the appellee's Statements of the Case in most appeals illustrates that the same transcript can be used to convey very different impressions of the facts. These different impressions result from the attorney's judicious selection and arrangement of facts and are legitimate advocacy as long as you also honor your obligation to state your facts accurately and fairly. A lawyer who knowingly misstates the facts violates the Code of Professional Responsibility.[6] You must not only be accurate about the facts which you include, but you must include all the known facts that are material to the case so as to avoid giving a distorted impression of the events. If you misrepresent the facts or allow a misleading inference to be drawn, you will lose credibility, and will be quickly corrected by opposing counsel–to your client's disadvantage.

Before you write this section, ask yourself what a reader who does not know the case would have to know, and in what order. Some students become so preoccupied with writing the facts to persuade that they omit important information and confuse the reader as to what the case is actually about or what happened. Be careful, therefore, that you include and logically order all the material facts, favorable as well as unfavorable, so that the court need not rely on the opposing brief to understand the dispute.

Nonetheless, the significance of a fact or event may well become apparent only after you have put it in a meaningful context; facts do not speak for themselves. Thus, although your portrait should ultimately be fair and understandable, you should arrange the facts in a context which is as advantageous to your client as possible.

Your initial selection of facts and interpretation of their significance should, therefore, be provisional. The interpretation, the selection, and the ordering of facts may need to be changed to reflect your growing understanding of how they can be used in your legal

[6] Canon 7, DR7–102A(5) says in pertinent part, "In his representation of a client, a lawyer shall not knowingly make a false statement of law or fact." *See also* Model Rules of Professional Conduct, Rule 3.3(a)(1) (which have been adopted in some jurisdictions and prohibit a lawyer from making false statements of material fact or law).

arguments, and how your facts set the stage for your theory of the case. If you write your facts with this purpose in mind, the court, after reading the Statement of the Case, ought to be aware not only of the boundaries within which it must work, but of the legal arguments to come.

A. The Opening Paragraph or Paragraphs

Many brief writers begin the Statement of the Case with a brief synopsis of the case from a procedural point of view. Procedural history is essential to an appellate judge, who has to know how and why the case is before the court. The overview should be given in the opening paragraph of the Statement and include procedural information about how the case reached that court as well as information about the nature of the action, the parties involved, and the relief requested. Make sure you explain the background of procedural issues if your appeal involves any. For example, if you are appealing a judge's refusal to give an instruction to the jury, include in the procedural facts the party's request for the instruction and the judge's denial of the request. Some lawyers also summarize the lower court decision in the opening paragraph(s). Others, however, conclude the Statement of the Case with this information (see section IV, C).

Some attorneys separate the procedural history from the summary of relevant evidence by having separate headings for each. The procedural history may go under the heading "Preliminary Statement." The summary presenting the facts goes under the heading "Statement of Facts."

Example of a Preliminary Statement

This is an appeal from a judgment of the Supreme Court, New York County, rendered October 9, 1986. A jury convicted the appellant, Sam Mann, of burglary in the third degree, N.Y. Penal Law § 140.20 (McKinney 1975), and the court sentenced him to a prison term with a maximum of seven and a minimum of three-and-a-half years.

Mr. Mann filed a timely notice of appeal, and on November 19, 1986, this Court granted appellant leave to appeal as a poor person on the original record and typewritten briefs. On July 14, 1987, Una Bent, Esq., was assigned as counsel on the appeal.

B. Developing the Facts

1. Organization

To sustain your reader's interest, you want to develop the facts in a coherent and sympathetic narrative. Usually, a chronological order works best. Before you begin this chronological narrative, however, it is sometimes appropriate to have a paragraph recounting significant emotional facts, if there are any, which might elicit the reader's sympathy or antipathy. If you are a prosecutor, for example, you might want to begin with the details of the murder. If there are many issues and the Statement of Facts is somewhat lengthy, you may want to use a topical organization instead of a simple chronological organization. If you divide the facts into topics, you may use short topical headings before each new section. You might organize the facts into topics like the evidence at trial, the rulings of the trial court, and the charge to the jury. These subsections summarize and organize the facts pertinent to a legal issue you intend to address in the Argument section of the brief. If you are including witnesses' trial testimony, include that testimony under the appropriate topic, not in a witness-by-witness summary. You would still organize the facts relevant to each topic chronologically.

Before you write the Statement of the Case, you may want to identify the events to be covered and the facts material to them. Work out a structure that frames and maximizes the facts most favorable to your client and that limits the impact of facts damaging to your client. Bury damaging facts in the middle of a narrative and in the middle of paragraphs and sentences; juxtapose unfavorable facts with favorable facts; place favorable facts in positions of emphasis (at the beginning and end of sentences, paragraphs, and the narrative). Finally, allocate space according to importance. For example, as attorney for appellant in a criminal case, you would emphasize, even repeat, facts establishing your client's innocence or the closeness of the case, but condense and bury unfavorable material.

2. The Narrative Approach

Although the Statement of the Case is not an occasion for displaying talent in creative writing, it is a prose narrative and should unfold logically. To promote the narrative flow, you should usually refrain from parroting the record in a witness-by-witness procession and

instead concentrate on integrating the testimony of the witnesses and using that testimony to describe events. It is perfectly legitimate to mix direct and cross examination if doing so strengthens and clarifies the narrative flow.

To avoid monotony, you may also want to include quotations from the record. Although direct quotation should be used sparingly because it threatens to interrupt the continuity of the narrative, testimony that seems to capture the true significance of an event can have a dramatic impact on the narrative. It may, for example, be worth quoting the following statement in a prosecutor's brief, "When the officer said he was going to write out a speeding ticket, the appellant said, 'maybe there is something I could do to make you change your mind, maybe you're short of cash or something'."

Direct quotation should be buttressed by summaries of the record. Indeed, summaries are preferable to frequent quotation because they promote continuity. Make sure, however, that your summaries are borne out by the record.[7] Remember, although you are trying to create a narrative, you are not creating fiction. You must be accurate: you cannot add to or change the record; your direct quotations must be meticulously correct; and you must support your assertions in the Statement of the Case with reference to the page or pages in the record (R.) where the supporting facts can be found, or to the page or pages in the opinion below from which the facts came.

One last technique for promoting narrative continuity and coherence is to supply visual details. Visual details help the reader to conceptualize the events. If you are trying to discredit an eyewitness's identification of a suspect, for example, you should describe how far away the witness was, the dim lighting conditions, the shadows cast by an adjacent scaffold, etc.

3. Persuasive Writing Techniques

Several writing techniques will help you to shape this section of the brief persuasively.

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[7] *The New York Bar Association, Practitioners Handbook for Appeals to the Court of Appeals* gives the following good advice on page 60:

If inference is relied on, a summary should make that clear and not simply cite a record page in the expectation that the reader will draw the same inference. Moreover, all of the record references supporting the inference should be cited so that a reader disagreeing with the inference from the first reference may nevertheless accept it because the other references bear it out.

a. If the record allows, include emotionally significant facts and significant background facts—even if they do not have any strict legal significance—since such information might influence a court to look favorably on your case by establishing a context for understanding the events, by personalizing your client, or both. (Defendant's Statement of the Case on page 380 makes use of significant background facts.)

b. Personalize your client. Even if the record for your class assignments does not reveal any personal information about your client, you can help the court view him or her as a person deserving of fair treatment by referring to the client in a dignified way, as, for example, "Mr. Gonzales" rather than "Gonzales" or "Petitioner." This sort of personalization was achieved in the following paragraphs:

> Ms. Maria Fox, the petitioner in this case, was charged by the Attorney Registration and Disciplinary Commission of the State of Illinois for "soliciting employment" in violation of Disciplinary Rule 2–103(A). (R.1).
>
> Ms. Fox has practiced law for ten years and has successfully resolved legal problems for the Northwest Community Women's Organization (NCWO) of which she is a member. (R.2). Ms. Fox followed up a request for business cards with personal letters to NCWO members who attended a counseling session at which Ms. Fox was asked to speak. (R.3).

c. Characterize facts favorably. In the following example, the writer suggests the possibility of police coercion by first characterizing the officer's words as a threat and then restating the exact words of the officer:

> Officer Brown wanted permission to enter and to search the apartment. When Mr. Gonzales refused, Officer Brown threatened to seek a warrant and to leave an officer outside the door until his return. He said, "I can always go ask for a warrant. I'll leave the other officer outside till I get back." (R.1.) Mr. Gonzales then acquiesced to the search.

d. De-emphasize unfavorable facts.

i. You may de-emphasize unfavorable facts about your client's activities by using the passive voice. Passive voice will create a distance

between your client and the activity described in the sentence. For example, instead of saying, "Ms. Fox mailed her letters to all the people who had signed the sheet," you would say, "The letters were mailed to the women whose names were on the sign-in sheet." By using passive voice, the writer avoids naming Ms. Fox as the person who mailed the letters.

ii. Another way to de-emphasize your client's conduct is to use the other parties involved as the subjects of the sentences. For example, instead of saying that Gonzales had the stolen bank money in his apartment where it was found, you can focus on the police activity and say, "The police seized crucial evidence, money stolen from a bank, without a warrant."

iii. You can also emphasize or de-emphasize a fact by using independent and subordinate clauses carefully. An independent clause is a sentence containing a complete thought, such as "Sam Paley is an excellent lawyer." That clause can be joined in a sentence with a subordinate or dependent clause which has a subject and verb but is an incomplete thought, such as "Although Paley's memory is poor." Because a subordinate clause depends on the independent clause for meaning, a reader's attention focuses on the independent clause. Therefore, it is helpful to put unfavorable facts into a dependent clause which is joined to a more favorable independent clause, such as "Although Paley's memory is poor, he is an excellent lawyer." This sentence leaves the impression of Paley's excellence as a lawyer. If you reverse the information in the clauses, "Although Paley is an excellent lawyer, his memory is poor," or "Even if Paley is an excellent lawyer, his memory is poor," you emphasize the negative information about Paley's memory.

e. Vary sentence length. After several long sentences, a short sentence can have a dramatic impact.

f. Choose your words to take advantage of their descriptive power. In a brief, you may describe events using loaded words that would not have been appropriate in a memorandum. It is legitimate, for example, to describe a boy as having applied "emotional blackmail" when he threatened to find a new girlfriend if his present one continued to resist his sexual advances, although such a description would be inappropriate in a memo.

You should also use vigorous verbs (smash rather than hit) and pointed adjectives and adverbs for facts you want to emphasize. On the other hand, use colorless verbs and few adjectives or adverbs for facts you wish to de-emphasize.

Do not interpret this advice to mean, however, that you should write in an openly partisan manner. The Statement of the Case should be written to appear neutral—even if it is not. Partisan characterizations and partisan choice of language must be subtle, or not attempted at all.

Other persuasive writing techniques are described in Chapter 16.

The following paragraphs show how the appellee and appellant might each have presented the facts of the case on appeal. In the initial suit, plaintiff had sued Gothic Memorial Chapel for the negligent infliction of emotional anguish and distress, claiming that the defendant's conduct was negligent, that the negligence was the cause-in-fact of her emotional anguish and distress, and that her anguish was severe and disabling. At trial, the court held that although the defendant had been negligent and Miss Morte had suffered severe emotional distress, her distress was not the result of defendant's actions but of her grief at the loss of her father. Defendant was held not liable. The issue on appeal is whether defendant's negligence was the cause-in-fact of plaintiff's distress. Each statement of facts illustrates the writer's theory of the case.

The plaintiff's lawyer might present the facts as follows. (Procedural paragraphs and citations to the record are omitted.)

> On the day of George Morte's funeral, in full view of the decedent's daughter, Maria Morte, the hired bearers of defendant undertaker dropped the coffin in which the body lay, causing the lid to spring open and the corpse to crash to the ground. With greater alacrity than diplomacy, the employees heaved the dead man's body up and swung it back into the coffin. In the process, they banged George Morte's head against the side of the coffin, smashing his nose and ripping open his right cheek as it caught on the lock mechanism.
>
> This disruption took place as the funeral party was watching the pall bearers load the coffin onto the hearse for the motorcar procession to the graveyard. At that time, Maria Morte was standing less

than four feet from the coffin and the hearse. Her horror at witnessing the defendant's employees manhandle her dead father's body was quickly apparent. She fell into hysterics and began to vomit convulsively. Among the assembled friends and mourners who immediately attempted to assist and soothe Miss Morte was a physician. He insisted on administering a strong tranquilizer to Miss Morte in order to calm her sufficiently to accompany her beloved father's body to his grave.

For several months after this incident, Miss Morte suffered from a dramatic loss of appetite and weight. She had trouble concentrating, wept easily, and seemed alternately depressed and anxious. She was frequently awakened by recurring nightmares about graveyards, mangled corpses, and open coffins.

The defendant's lawyer might present the facts as follows.

Plaintiff in this action is an unmarried woman of 58 who for the last several years of her 85-year-old and ailing father's life served as his constant companion and nurse. Her mother had died when she was a child and she had no other surviving relation. Miss Morte had never married and had always lived in her father's house. The relationship between this elderly, dying father and his aging, spinster daughter has been described as exceptionally close.

The accident which is the basis for this action took place as the funeral party for George Morte was preparing to leave for the cemetery. The employees of Gothic Memorial Chapel inadvertently dropped the casket in which the deceased lay as they were sliding it into the hearse, requiring them to recover his fallen body from the ground. In the process of lifting the body back into the casket, the decedent's face was disfigured.

After the accident occurred, plaintiff appeared shaken. Friends came to her assistance and one of them, a physician, gave her a tranquilizer. In a short while, she was able to accompany the deceased to his final resting place.

For several months after the accident, Miss Morte suffered from the symptoms of grief and mourning which are the natural aftermath of losing a beloved parent. She cried easily, felt depressed, and experienced nightmares and loss of appetite.

Although most cases will not offer you such dramatic and gruesome possibilities, these two versions of the facts illustrate the very different impressions you can convey even when working from the same transcript. Miss Morte's account portrays the employees of Gothic Memorial Chapel as crassly negligent and unfeeling. The narrative begins with a detailed description of the pall bearers' actions and the resulting disfigurement to her father. The verbs are evocative, the nouns blunt, the tone intentionally macabre. The last paragraph, which describes the rather ghoulish content of Miss Morte's nightmares, suggests that her distress is directly tied to the pall bearers' activities. In the middle is buried the somewhat unfavorable fact that Miss Morte was not so distraught as to be unable to proceed to the cemetery. By suggesting that it was only the doctor's administration of the tranquilizer which made it possible for Miss Morte to carry on, this fact is minimized.

Miss Morte's attorney does not dwell in the statement on the close relation of this father and daughter or on her subsequent solitariness because to do so would portray Miss Morte's distress as the natural mourning of an unmarried, middle-aged daughter. On the other hand, appellee's attorney begins with these emotionally significant background facts as a way of minimizing the impact the incident in question had on her mental state. The last paragraph reiterates the idea that Miss Morte experienced nothing more or less than the natural grief of a daughter upon the death of her sole parent. Buried in the middle is the incident itself, which is rather quickly summarized and neutrally reported. The nouns are euphemistic, the verbs colorless, the tone factual. Miss Morte's rather immediate reaction to the manhandling is minimized by the suggestion she recovered rather quickly.

C. The Closing Paragraph

You may end the Statement of the Case by relating the facts back to the legal issue before the court and by giving a short summary of the decision of the court below. The appellee will ordinarily want to place greater emphasis on the decision of the court below than the appellant would, since that decision was favorable to the appellee.

Contrast these examples from appellant's and appellee's briefs. Notice that the appellant summarizes the arguments made before the trial court while the appellee summarizes the trial court's reasons for its decision.

Appellant

The defendant appealed his conviction on two grounds. The first was that his consent to the search was not voluntarily given in that he "was coerced into agreement by the threat inherent in Brown's language that a future search was inevitable." (R.2.) The second was that the evidence was seized after he had clearly indicated a desire to terminate the search. Id. A divided court of appeals affirmed the conviction. Id. This Court granted certiorari on the question of whether the police officer's search violated the fourth amendment.

Appellee

The United States Court of Appeals for the Twelfth Circuit affirmed the defendant's conviction and rejected the defendant's claims that his consent was coerced. Instead, the court held that defendant's consent was freely and voluntarily given in an attempt to allay suspicion and on the assumption that nothing would be found. (R.2.) The court also found that the defendant's attempt to stop the search was an attempt to "obstruct the search" in the face of discovery of the evidence. Id.

Exercise 18–B

1. In the following examples, the defendant is appealing the trial court's decision granting closure of the courtroom during the testimony of a thirteen-year-old victim of a brutal assault on the ground that his sixth amendment right to a public trial had been violated. Which Statement for the defendant is more persuasive and why? Citations to the record are omitted.

Example A

Daniel McGee was indicted for Attempted Murder in the Second Degree and for Assault in the First Degree on June 15, 1986. Five days prior to the indictment, Mr. McGee allegedly assaulted thirteen-year-old Sheila Merta. Although only the defendant was apprehended, he acted in concert with others not apprehended.

The thirteen-year-old complaining witness, Sheila Merta, had testified before a Grand Jury and in two separate pretrial hearings, although

no spectators were then present. During her testimony at trial, Ms. Merta began to cry. The prosecutor suggested the courtroom be closed because Ms. Merta was afraid of the spectators and embarrassed about having to testify to the details of the assault.

The trial judge held an in camera hearing to determine if there were sufficient reasons for removing spectators from the courtroom. When the judge asked Ms. Merta if closure would make it easier for her to testify, she responded in the affirmative. Ms. Merta then stated that she knew that McGee's mother, who had been a family friend and was in the courtroom, hated her. The trial judge then closed the courtroom because Ms. Merta was fearful of testifying before the spectators. The judge concluded that closure would assure Ms. Merta's testimony. The trial court weighed the equities and decided that it would not be an injustice upon the defendant to have the testimony of Ms. Merta taken without spectators being present. Defendant took exception to the ruling.

On January 13, 1987, defendant was convicted of assault with a deadly weapon, but was acquitted on the attempted murder charge. On February 12, 1987, McGee was sentenced to a prison term of five to fifteen years for the assault.

The Intermediate Appellate Court affirmed the trial court's decision that the defendant suffered no sixth amendment violation. The defendant was then given leave to appeal to this court.

Example B

The Appellant, Daniel McGee, is a resident of York, who, with other unnamed males, allegedly assaulted Sheila Merta, a young girl from their neighborhood, on June 10, 1986. Only McGee was apprehended and charged with the assault.

On June 15, 1986, the Grand Jury of the County of Kings indicted McGee on two counts: Attempted Murder in the Second Degree and Assault in the First Degree. Prior to the indictment, Merta testified before the Grand Jury and at two pretrial hearings.

At trial, Merta began her testimony, but then paused and started to cry. The prosecutor asked to approach the bench where he suggested the court be closed during Merta's testimony because although she had not been threatened in any way, she was frightened about testifying. The court noted that Merta had already testified before the Grand Jury and at two separate pretrial hearings and indicated that Merta "should be an old pro at testifying."

The defense counsel immediately objected to closure, acknowledging that every witness experienced some fear at the prospect of giving testimony at trial but that this "mild anxiety" was not enough to justify closure of the courtroom.

The trial court held a brief in camera hearing with Merta to decide whether to close the courtroom to all spectators during her testimony. The judge asked Merta what was the problem, as she had been a very able witness so far. She answered that she did not know, but felt discomfort at the thought of Daniel's mother and neighbors looking at her as she testified. She did not indicate that she would not testify nor did she express a preference for the courtroom to be closed. The judge asked her if it would help her to testify if McGee's mother and other spectators were not in the courtroom. She replied: "I guess so." The judge then decided to close the courtroom. The defense counsel objected, but the judge interrupted, saying he had made his ruling. Defense counsel's exception was noted for the record, but counsel was not given the opportunity to be heard on the motion for closure. The judge then ordered the courtroom to be closed to all spectators, including defendant's relatives, friends, and the press.

McGee was convicted on the assault charge and acquitted on the murder charge. He was sentenced to an indeterminate sentence of five-to-fifteen years.

On Nov. 13, 1987, the Intermediate Appellate Court affirmed the trial court's decision in all respects and held that there was no sixth amendment violation.

Permission to appeal to this Court was granted to McGee on Dec. 1, 1987. Awaiting appeal, Daniel McGee remains incarcerated pursuant to that judgment of conviction.

2. In the following exercise, the legal question is whether the testimony of defendant's expert witness on the battered woman's syndrome should have been admitted into evidence because it satisfies the test for relevance in the jurisdiction. Read the excerpts. Then write a Statement of Facts first from the appellant's point of view (Joan Brown), then from the appellee's point of view (the State of Abbott). Assume the procedural history has already been written. Before you begin to write, consider these questions.
   a. Which facts would form the focus of a Statement of Facts written from the appellant's point of view? from the appellee's point of view?
   b. Which facts are legally relevant?

Excerpt of Testimony by Joan Brown

Q: (by Defense Counsel William Blake): Please give us your name and address.
A: My name is Joan Brown and I live at 600 Boston Place in Abbottsville.
Q: How old are you?
A: I'm 29 years old.
Q: Were you married to the deceased, John Brown?
A: Yes.
Q: How long were you married?
A: Nine years.
Q: Did you have any children?
A: Yes. We have a son who is 8 and a daughter who is 5.
Q: Do you have a job outside of the home?
A: No, I never finished high school, and since the kids were born, I stopped getting waitressing jobs.
Q: Did your husband ever strike you?
A.D.A. Robert Canon: Objection, your Honor. The deceased is not on trial in this case. I fail to see the relevance of this testimony.
Defense Counsel William Blake: Your Honor, the deceased's violence towards Mrs. Brown is highly relevant to her claim of self-defense.
The Court: Objection overruled. You may proceed, Mr. Blake.
Q: Mrs. Brown, did your husband ever strike you?
A: After my daughter was born, my husband started to beat me up a lot. Before then, he would push me around sometimes, but after Amanda was born, it got much worse and much more frequent.
Q: Can you be more specific?
A: Once John took me outside the house and beat my head against a tree. Another time he stabbed me in the foot with a pencil.
Q: Were there any other episodes?
A: John pushed me down a flight of stairs in the house and I broke my arm and had to go to the hospital to have it set and put in a cast.
Q: Did you go to a hospital on any other occasions?
A: Last February I went to the hospital because I kept vomiting and blacking out after he beat me. There were a lot of times that he would punch me and shove me around. Sometimes he would hit the kids, too. Then other times he would be peaceful for a while.
Q: Were there any other instances in which you went to see a doctor because of your husband's beating you?

A: Two years ago John hit me in the face with a bottle and I went to the doctor to have stitches because my face was all cut up.
Q: Did you ever leave your husband?
A: Yes, last March I left John after one bad night and took the kids to a Women's Shelter on Foster Street. The next day John came to see me and said that he wanted me to come home and that things would be different. I went back with him. He was nice for a week and then he started pushing me and the kids around again.
Q: What happened on the day of April 28?
A: In the morning on the way out the door, John said he had it with me and that when he got home he was going to really finish me off. He said I humiliated him by going to the shelter. I was petrified all day. I knew he meant it. Whenever he said he would do something to me, he would always do it. Just before I knew John was coming home at six-thirty, I went to the drawer in the bedroom where John kept a gun. I took the gun downstairs, and when John came through the door I shot him.
Q: (By A.D.A. Canon) Mrs. Brown, do you have any family in Abbottsville?
A: Well, my husband's sister lives in Abbottsville, but she and I were never really close.

Excerpt of Testimony of Dr. Susan Black

Q: (By Defense Counsel William Blake) Dr. Black, please tell us something about your background.
A: I am a certified psychoanalyst and have spent many years studying the battered woman's syndrome. I have....
A.D.A. Canon: Objection, your Honor. May we approach the bench?
The Court: Yes, you may. The jury is excused. (The members of the jury exit.) Mr. Blake, for what purpose do you intend to introduce expert testimony on the "battered woman's syndrome"?
Mr. Blake: Your Honor, we believe that expert testimony on the battered woman's syndrome is relevant to Joan Brown's claim of self-defense. The testimony would help the jury understand why she reasonably believed that she was in imminent danger on the day of the shooting and why deadly force was necessary to avoid this danger. In addition, this testimony would explain why she did not leave her husband, despite his brutality.

The Court: Mr. Canon?

A.D.A. Canon: I object to any testimony regarding a so-called "battered woman's syndrome." The testimony is irrelevant as it does not explain why, at the particular time that the shooting took place, Joan Brown reasonably believed that this force was necessary to prevent imminent death or great bodily harm to herself. In addition, the jury has already heard extensive testimony from both Joan Brown and her neighbor on the alleged violence of John Brown. I see no purpose in further discussion of this issue.

The Court: Mr. Blake, do you have a response?

Mr. Blake: Yes, your Honor. Dr. Black is a well-known authority on battered woman's syndrome. Her testimony will describe this syndrome and show how, in her opinion, Joan Brown displayed the classic signs of the syndrome. This testimony will explain Ms. Brown's state of mind and support her claim of self-defense.

The Court: Well, I would like to hear from Dr. Black and then I'll make a decision on whether her expert testimony will be admissible. Could you please describe the battered woman's syndrome?

A: Certainly. The battered woman's syndrome is a three stage form of family "disease". In stage 1, the battering male engages in minor physical abuse and verbal abuse. In this tension-building stage, the woman often attempts to placate the male to avoid more serious violence. Stage 2 is characterized by acute explosions of brutal violence by the battering male. In stage 3, the battering male expresses remorse for his behavior and asks for forgiveness, promising to change. The woman is hopeful during the third stage that her husband will indeed change. This is one reason why she stays with him despite the cycles of abuse. There are other reasons as well. One expert has described the demoralization experienced by some women because they cannot control the violence as "learned helplessness" or "psychological paralysis". They become incapable of taking action to change their situations. Of course, they may also be fearful of what will happen to their children, or fear that their husbands will find them and abuse them even more if they try to get away. And they may not have any money or way of earning a living.

Q: Dr. Black, have you interviewed the defendant, Joan Brown?

A: Yes, I have.

Q: Do you have an opinion on whether Joan Brown is subject to the battered woman's syndrome?

A: Yes, in my opinion, Joan Brown is subject to the battered woman's syndrome.
Q: As a battered woman, how did Joan Brown perceive her situation on the 28th day of April?
A: Joan Brown was terrified that her husband would kill her when he returned from work. He said he would, as he put it, "finish her off," and she believed, knowing him, that he would do it.
Q: I have no further questions. Thank you Dr. Black.
The Court: I have decided not to admit Dr. Black's expert testimony. I do not think it is relevant to the issue of self-defense in this case. In the state of Abbott, the jury applies an objective standard in evaluating a self-defense claim. According to the Abbott statute, which is not being challenged here, the jury must consider how an ordinary, intelligent, and prudent person would have acted under the circumstances existing at the time of the offense.
The jury may return.

V. Summary of the Argument

THE SUMMARY OF THE ARGUMENT is a short affirmative statement of the reasoning in the Argument that supports the advocate's view of the case. In this section, the neutral tone of the Statement of the Case gives way to open advocacy. You should set out your theory of the case, that is, you should explain the way you want the court to understand the case. In addition, present the law you want the court to apply and your interpretation of how that law applies to the facts. Include only the arguments favorable to your case.

The Summary can be your first opportunity to argue your case to the court. Many busy judges read only the Summary before they hear the case, so that the Summary makes an important impression.

Begin the Summary with an introduction that provides the context of the case and sets out the conclusion you want the court to accept, such as "the state may proscribe an attorney from soliciting clients by mail." Tell the court what the conflict is, and the decision of the lower court you are asking it to affirm or reverse. Then state the rule and apply it to the facts. Explain briefly the reasons for your conclusion and try to craft them into an argument that supports your theory of the case. Do not just put together a list of topics like "this court's decisions interpreting analogous issues, cases interpreting the statute, decisions in other jurisdictions, and social policy all support

recovery by the plaintiff." Instead, mention succinctly which analogies and policies support the claim.

Generally, you should write the Summary without reference to specific case names and without case citations, although sometimes it is necessary to name and cite to a crucial case if that decision controls the analysis of the problem. You should always include relevant statutory language and citations, however. In addition, you should always explain the controlling rules before you apply them. The Summary should be written so that it can be understood on its own. You should not refer to cases, rules, or theories that you do not explain. The Summary is not, however, an abstract discussion of the law. Unless you are dealing with a question of law, the Summary should be specific to the case, that is, you should relate the law to the facts of the case before the court.

Because this section is a summary of your Argument section, it should be conclusory and it should include only the very important points. As a rule of thumb, the Summary should not exceed two pages for a ten-to-fifteen page Argument; one page should be sufficient for most briefs. Finally, since this section summarizes your Argument, most attorneys write it only after they have completed the Argument section.

What follows are sample Summaries from briefs on the question of whether the Sioux Falls School District Rules on religious holiday observances comply with the establishment clause of the first amendment.

Petitioner's Summary of the Argument

The Sioux Falls School District violates the neutrality mandated by the establishment clause of the first amendment by adopting a Policy and Rules that permit the observation of religious holidays in public school assemblies. To test the constitutionality of state-authorized rules and statutes under the establishment clause, the Court has developed a three-part test. First, the rules must have a secular purpose. Second, their principal or primary effect can neither advance nor inhibit religion. Third, they must not give rise to excessive entanglement between government and religion. *Lemon*

v. Kurtzman, 403 U.S. 602, 612–13 (1971). The Policy and Rules violate all three parts of this test.

The Court has not hesitated, especially in cases concerning religious exercises in public schools, to look behind the purported purpose of a statute in order to discern the actual motivations giving rise to the enactment. Because the Rules allow the presentation of Christmas carols, religious skits, and nativity scenes, it becomes obvious that the respondent's purpose in adopting these Rules was not a secular one, but was to allow for the celebration of the religious aspects of Christmas and to advance sectarian ideals.

The Sioux Falls Rules also violate the second part of the *Lemon* test by having a principal effect that advances religion. Since devotional exercises, which the Rules permit, are inherently religious and their effect is to advance religion, they have no place in the public schools. Due to the devout nature of many Christmas carols, and the undeniably religious impact on a youngster from seeing a nativity scene on the public school stage, the direct and immediate effect of the Rules is the advancement of religion.

Finally, the Rules result in excessive entanglement between the schools and religion because they involve the secular authorities who execute the legislation in surveillance of religious activities. In addition, the Rules foster political divisiveness in the community along religious lines. For example, Assistant Superintendent Nicholas—assigned to monitor the implementation of the Rules—is on the public payroll. Also, both Nicholas and the school board must make discretionary judgments about the religious nature of particular activities. Finally, the amount of time and money devoted to the preparation and presentation of the annual Christmas programs is likely to give rise to divisive issues in local politics. Because the Policy and Rules violate all three parts of the *Lemon* test, they are unconstitutional.

Respondent's Summary of the Argument

The Sioux Falls School District adopted the Policy and Rules to assist teachers and administrators in fulfilling the duties imposed by the establishment clause to keep religious influences out of the public schools. To test the constitutionality of state-authorized

rules and regulations under the establishment clause, the Court has developed a three-part test. First, the rules must have a secular purpose. Then, their principal or primary effect can neither advance nor inhibit religion. Finally, they must not give rise to excessive entanglement between government and religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). The Policy and Rules comply with each part of the *Lemon* test and are constitutional.

The Court has consistently accepted the stated legislative purpose of enactments in evaluating the first part of the *Lemon* test. The stated legislative purpose of the school district—"to foster understanding and mutual respect"—is undoubtedly secular. The Policy and Rules serve no religious purpose. The function of the Rules is to provide guidelines for the school district's teachers in the execution of their constitutional duty to keep purely religious influences out of public schools.

Second, the principal or primary effect of the Policy and Rules neither advances nor inhibits religion. The primary effect is the advancement of a secular program of education. The schools seek to teach the students about the customs and cultural heritage of the world. Thus, there is no constitutional barrier to the inclusion of this material in the schools.

Finally, the Policy and Rules do not excessively entangle government and religion. On the contrary, the Rules seek to limit the introduction of religious material into the classroom. This case presents none of the entanglement concerns which the Court has expressed that arise from government aid to religious institutions. When government aids religious institutions, then the character and purpose of the institution, the form of aid, and the resulting relationship between government and religious authority may entangle the state with religion. These forms of entanglement do not apply to public school cases.

Nor do the Rules provide any potential for political divisiveness that may arise from religious-oriented legislation. The Rules provide no money for religious activity and require no on-going implementation. Thus, the Rules prevent ongoing political controversies on the subject and remove the religious issue from the local political sphere.

Exercise 18–C

1. Criticize this opening sentence of a Summary of the Argument.

> Since the circuit courts are split on the issue of whether a pro se attorney is eligible for an award of attorney fees under § 552(a)(4)(E), an analysis of that statute's language, legislative history, and policy objectives is necessary.

2. Father Molloy was convicted in April of willfully transporting firearms across state lines. Last week, he was sentenced to four years in prison. His sentence has been stayed pending his appeal. A summer associate in the firm representing Father Molloy has written the following Statement of Facts drawn from the trial transcript and a brief summary of the applicable law. Read these materials and then write a clear and persuasive Summary of the Argument. The only issue is whether Father Molloy was entrapped as a matter of law.

Statement of Facts

Father Molloy runs a soup kitchen and homeless shelter in the parish house of St. Bridget's Church in Brooklyn, New York. A dedicated and outspoken advocate of the poor and oppressed, Father Molloy is much in demand as a speaker at conferences and rallies all over the country. He first came to the attention of the F.B.I. last winter in connection with the arrest near St. Bridget's of suspected terrorist Seamus O'Rourke. No charges have been filed against Father Molloy in New York, but the investigation continues. When Father Molloy (a law school graduate) took a leave from St. Bridget's to teach a course at a law school in Washington ("Faith, Empowerment, and the Law"), he became a target of Prayscam, an F.B.I. "sting" operation.

Calling himself "Kieran Houlihan," Agent William Smith attended a "Housing Now" rally at which the priest spoke ("We cannot rest until all the oppressed are free—Blacks in South Africa, Catholics in Northern Ireland, the poor and homeless everywhere ...") and signed up to audit Father Molloy's course.

On February 14, 1990, "Houlihan" approached Father Molloy after class and asked whether he might speak with the priest privately. Smith

took Father Molloy to Casey's Pub, where he told Father Molloy that he needed help to save his family in Northern Ireland. Through security leaks, a Protestant terrorist organization had learned the names of all those suspected by British Intelligence of having IRA sympathies. The group was systematically executing everyone on the list. In the town where "Houlihan's" uncles and cousins lived, five people had already been killed, including one of his cousins. His family had begged him to help; the Catholic townspeople needed guns to protect themselves. At that point, Father Molloy said "I can't help you with guns, my son, but my prayers are with you and your people."

After the next class, on February 16, "Houlihan" again sought out Father Molloy. He told the priest that he had been able to obtain two dozen unregistered rifles and had been put in touch with an underground "expediter" who could smuggle them onto a flight from Kennedy Airport to Belfast, where his cousins would pick them up. Now, "Houlihan" said, his problem was to get the guns to New York; he was an illegal immigrant without a driver's license and couldn't take the chance of driving his car 300 miles. "I'm sorry, my son, but I can't drive your cargo to Kennedy for you," Father Molloy replied.

On February 21, "Houlihan" once more took Father Molloy to Casey's. "Houlihan" said he was close to solving his problem: he had arranged to ship the guns to New York on Amtrak, packed in a coffin. At Penn Station, a hearse would pick up the coffin and take it to the "expediter" at Kennedy. But Amtrak would not ship an unaccompanied coffin: would Father Molloy accompany the coffin and see that it was safely delivered to the "expediter"? "This is no easy matter, my son," began Father Molloy. "I know, Father, and I am ready to express my family's gratitude in meaningful terms. We will contribute $5,000 to St. Bridget's shelter if you will help us." Father Molloy stared into his glass without speaking. Finally, he said, "Very well, my son, I'll do it."

Father Molloy was arrested a week later on 33rd Street in Manhattan as he supervised the transfer of a coffin full of Remingtons into a hearse driven by Agent Robert Jones.

At trial, the court refused to find that Father Molloy was entrapped as a matter of law. The question thus became one for the jury. Molloy was convicted. On appeal, the only issue is whether the judge should have found there was entrapment as a matter of law.

Brief Summary of Applicable Law
(Full Citations are Omitted)

A court will find entrapment as a matter of law only when there was "some evidence" of government inducement to commit the crime charged, and the prosecution failed to prove beyond a reasonable doubt that defendant was predisposed to commit that crime. *United States v. Kelly.*

When the undisputed evidence, with all inferences drawn in favor of the government, indicates to any reasonable mind, "some evidence" of inducement, then the court can determine that there was inducement as a matter of law. *Id.* Inducement is an objective inquiry measuring whether the government's behavior was such that a law abiding citizen's will to obey the law could be overcome. *Id.* Although government agents may use "stealth and stratagem" to entrap criminals, they may not attempt to lure law-abiding citizens into the commission of crime. *See Sherman v. United States; Sorells v. United States; United States v. Kelly.*

Government agents do not entrap if they approach or solicit the defendant to engage in criminal activity. *United States v. Burkley.* Rather, there must be some undisputed evidence indicating that government agents employed "persuasion, fraudulent representations (beyond offering opportunities to one predisposed to commit a crime), threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy," or "friendship" in order to show inducement as a matter of law. *Id.* Thus, in *Sherman,* the Court held that there was inducement as a matter of law when the government informer sought to persuade the defendant to procure narcotics with three repeated pleas based on sympathy and mutual experience as drug addicts. Similarly, in *United States v. Owens,* because the government agent posed as a fellow drug user and resorted to friendship to convince the defendant to sell the drugs, the court found inducement as a matter of law.

However, the mere promise of money is insufficient to show inducement. In *Kelly,* the court did not find inducement as a matter of law even though government agents, posing as businessmen, offered Kelly an initial $25,000 to attend a meeting. It should be noted, however, that in *Kelly,* the defendant did not testify "that his will was overborne by any insistent importunings" by government agents. *Id.*

Once a defendant shows inducement, the prosecution must introduce evidence beyond a reasonable doubt of the defendant's predispo-

sition to commit the crime charged in order to defeat a claim of entrapment. *Burkley.* Thus, the prosecution must prove that the defendant had a "state of mind which readily respond[ed] to the opportunity furnished by the officer ... to commit the forbidden act for which the accused is charged." *Id.* The defendant's predisposition is determined from the entirety of the events leading up to the commission of the crime. *Kelly.*

When predisposition is at issue, the major inquiry is thus whether the defendant was "ready and willing to commit the crimes." *Kelly.* In *Kelly,* the predisposed defendant was aware of the purpose of the meeting and neither protested nor registered surprise at the initial bribe offer, "coolly" assuring the FBI agents that he would do their bidding, without repeated and insistent government pleas. *Id.*

Predisposition may also be proven by evidence of a defendant's bad reputation, previous criminal convictions, rumored activities, and response to the inducement. *Russell.* However, in *Owens,* although the defendant was a drug user and often in the company of drug sellers, the court found no predisposition to sell narcotics, as distinct from a predisposition to use narcotics. The court indicated that the facts that Owens had no prior record for selling drugs and did not show up the first time the agent requested the drugs tended to support its finding of no predisposition. *Id.*

VI. Point Headings

UNLIKE AN OFFICE MEMORANDUM, a brief requires headings that divide the Argument section into its main and subordinate components. These headings, called point headings, are more than just topical headings used for easy transition from one topic to another, such as "the first amendment and commercial speech" or "the consent exception." Instead, they are persuasive summaries of the main arguments of the brief arranged in logical order. A point heading should be a conclusory statement about the legal issue which is favorable to your client.

In addition to a heading for each main argument, many writers use subheadings to introduce the subordinate parts of that argument. When read together—as they appear under the Argument section in the Table of Contents, for example—the headings and subheadings should provide a meaningful outline and summary of the entire Argument section. Because the point headings appear in the Table of

Contents at the beginning of the brief, they are the reader's introduction to the substance of the Argument.

A. Organizing Headings in Outline Form

Point headings provide an outline of the Argument section of a brief. The main point headings should summarize independent, unrelated legal arguments, each of which is an independent ground for relief. These point headings need not be logically connected to each other, although they should be in the order you have determined is the best and most logical order for your issues. Subheadings, however, must relate to the main point heading in a logical and consistent way because they are the components of a single argument. An argument that is subdivided is almost always ordered from the general to the specific. The main heading should state your general contention. The subheadings should supply specific reasons supporting the general contention. Any additional divisions should focus on the specific facts supporting the contention of the sub-heading above it. Thus, the outline organizes all the parts of your argument by how they relate to each other.

You need not achieve symmetry of organization among the major headings of the argument. Even if Section I has two subdivisions, Section II may have three subdivisions, or none at all. Where you do have subdivisions, indent and underline the sub-headings and lay out the divisions in accordance with the established rules of outlining.

1. Main issues or grounds for relief are introduced by point headings which are preceded by roman numerals (e.g., I, II, III).
2. Subissues are introduced by subheadings which are preceded by capital letters (e.g., A, B, C).
3. Divisions of subissues are introduced by subheadings which are preceded by arabic numerals (e.g., 1, 2, 3) and then lower case letters (e.g., a, b, c).

You should not have single subdivisions, that is, a subissue A without a subissue B, or a subdivision 1 without a subdivision 2. Because a subdivision indicates that the main issue above it is divided into more than one point, you should not use a subheading unless you have at least two entries. If there is only one point to make about issue I,

then incorporate your subissue into your dominant point heading. This needs to be done in the following outline of a contempt problem.

I. Paley did not act willfully or intentionally.
   A. Paley did not realize that Spence's trial was scheduled that morning.
II. Paley did not act recklessly.
   A. Paley followed standard office practice.
   B. Paley inadvertently did not record the trial date.

The outline should be rewritten.

I. Paley did not act willfully or intentionally because he did not realize Spence's trial was scheduled that morning.
II. Paley did not act recklessly.
   A. Paley followed standard office practice.
   B. Paley inadvertently did not record the trial date.

When you use subheadings, be careful not to subdivide the arguments excessively. Too many subdivisions will break up the flow of an argument and result in a choppy product. Thus, when the subject matter is not too different, you should avoid using a new subheading for discussions running only one or two paragraphs in length. Instead, incorporate the material in those paragraphs into the text of the preceding or subsequent subheadings and write those subheadings to include the added material. On the other hand, do not be afraid to subdivide a complex argument that depends on several different types of legal support. Without subdivision, it might be difficult for the reader to understand and differentiate the multiple legal arguments being offered.

Exercise 18–D
Reorder these headings so that those which are logically subordinate to a dominant heading are arranged under that dominant point heading. Correct the outlining of these point headings so that the subordinate points are properly labelled, put in the lower case, underlined, and indented.

I. DR. PLATT'S TESTIMONY ON THE BATTERED WIFE SYNDROME WOULD AID THE JURY IN ITS SEARCH FOR TRUTH BECAUSE THE SYNDROME IS SO DISTINCTLY RELATED TO SCIENTIFIC AND MEDICAL KNOWLEDGE THAT IT IS BEYOND THE KEN OF THE AVERAGE JUROR.

II. THE TRIAL COURT ERRED IN EXCLUDING EXPERT TESTIMONY ON THE BATTERED WIFE SYNDROME BECAUSE THAT TESTIMONY SATISFIES THE THREE-PART TEST OF RULE 230 OF THE STATE OF KENT WHICH GOVERNS THE ADMISSIBILITY OF EXPERT TESTIMONY.

III. DR. PLATT IS A LEADING AUTHORITY ON THE BATTERED WIFE SYNDROME AND HER OPINIONS CAN THEREFORE AID THE TRIER OF FACT.

IV. THE PROBATIVE VALUE OF DR. PLATT'S TESTIMONY ON THE BATTERED WIFE SYNDROME SUBSTANTIALLY OUTWEIGHS THE DANGER OF UNFAIR PREJUDICE BECAUSE THE JURY NEEDS TO UNDERSTAND SUE GRANT'S MENTAL STATE AT THE TIME OF THE MURDER TO EVALUATE HER CLAIM OF SELF-DEFENSE.

V. THE BATTERED WIFE SYNDROME IS GENERALLY ACCEPTED IN THE SCIENTIFIC COMMUNITY AND HAS BEEN THE SUBJECT OF AN INCREASING AMOUNT OF RESEARCH AND PUBLICATION.

B. Writing Persuasive Headings

Since point headings provide your reader with an outline and summary of your argument, they should be coherent, logical, and persuasive thesis sentences. In order for them to exhibit these characteristics, you must provide the reader with several kinds of information: the issue, the pertinent rule of law, the legally significant facts, and your conclusion on the issue. When you are employing only a single main point heading, all this information must be included in a single, coherent sentence. When you use subheadings, however, the main point heading need only state your legal contention concerning the application of a rule. The subheadings will supply the reasons for that contention and show their relevance to your client's situation.

A point heading should be one sentence, not a string of sentences. To promote ease of comprehension, try to keep each heading and subheading to a readable length so as not to deter the reader from giving attention to its substance. This is especially important for dominant point headings because they are typed entirely in capital letters, which often make for difficult reading. Although subheadings are printed in ordinary type (and are often underlined), they too should be kept reasonably concise (no more than 25 words) so that their thesis can be easily absorbed. Other suggestions follow.

1. When dealing with a factual question, your headings should not be abstract statements of the law (unless clearly supported by subheadings that supply reasoning and relevant facts). Rather they should combine the law with the relevant facts of the case. For example, the following heading is only a statement of the law:

> THE FOURTH AMENDMENT GUARANTEES THE RIGHT OF ALL PEOPLE TO BE SECURE IN THEIR HOMES FROM UNREASONABLE SEARCHES AND SEIZURE.

The heading should demonstrate the law's application:

> THE POLICE VIOLATED MR. BAXTER'S FOURTH AMENDMENT RIGHT TO BE SECURE FROM UNREASONABLE SEARCHES AND SEIZURES BECAUSE THEY ENTERED AND SEARCHED HIS HOME WITHOUT A WARRANT AND WITH THE CONSENT ONLY OF MR. BAXTER'S HOUSEGUEST.

Remember, briefs are written to persuade a court to rule in a particular way, for a particular party, in a particular situation; they are not abstract discussions written for the general edification of a judge. If you have not related the law to the facts, your heading is unpersuasive.

2. Unless supported by sub-headings that supply your reasoning, headings should not merely state a legal conclusion favorable to your client but should supply supporting reasons. The following heading states a conclusion only:

> THE TRIAL COURT'S EXCLUSION OF SMITH'S POST-HYPNOTIC TESTIMONY DID NOT VIOLATE SMITH'S CONSTITUTIONAL RIGHT TO TESTIFY IN HER OWN BEHALF.

The writer should supply some support for this conclusion:

> THE TRIAL COURT DID NOT VIOLATE SMITH'S CONSTITUTIONAL RIGHT TO TESTIFY IN HER OWN BEHALF WHEN IT EXCLUDED HER POST-HYPNOTIC TESTIMONY BECAUSE THAT TESTIMONY WAS UNRELIABLE.

In other words, a heading should be an explanation, not merely an assertion. An assertion can be rejected as easily as it can be accepted; an explanation is more persuasive because it at least provides some basis for the assertion.

3. When dealing with a legal question, you do not need to include the facts of your case, but you do need to supply your reasons.

> THE GRANDPARENT VISITATION STATUTE IS CONSTITUTIONAL BECAUSE IT PROTECTS THE WELFARE OF CHILDREN WITHOUT UNDULY INTERFERING WITH PARENTS' FUNDAMENTAL RIGHT TO RAISE THEIR CHILDREN ACCORDING TO THEIR OWN BELIEFS.

4. Headings should clearly articulate relevant legal principles rather than cite cases or statutes. You must not assume your reader knows the rule of law established in a case or statute. For your thesis to be comprehensible, you must supply the rule. The following heading is uninformative:

> UNDER THE RULING OF *ROSS v. BERHARD*, 396 U.S. 531 (1970), THE FEDERAL DISTRICT COURT PROPERLY STRUCK A DEMAND FOR A JURY TRIAL IN AN ACTION FOR DAMAGES AND INJUNCTIVE RELIEF STEMMING FROM A NUCLEAR POWER PLANT ACCIDENT.

The heading should be rewritten so that the legal principle established in *Ross* is clear.

> BECAUSE A JURY DOES NOT PROVIDE AN ADEQUATE REMEDY FOR COMPLEX CASES THAT ARE BEYOND ITS PRACTICAL ABILITIES AND LIMITATIONS, THE DISTRICT