COURT PROPERLY STRUCK A DEMAND FOR A JURY TRIAL IN AN ACTION FOR DAMAGES AND INJUNCTIVE RELIEF STEMMING FROM A NUCLEAR POWER PLANT ACCIDENT.

5. Point headings should be easily understood. Because so much information gets packed into point headings, you will have to work hard to make them intelligible. Two helpful suggestions are to keep the subject of your sentence near the predicate and to put the facts and reasoning at the end of the sentence. In the following heading, the author's reasoning intervenes between the subject and the predicate.

A PARENT-CHILD PRIVILEGE, LACKING CONFIDENTIALITY, AN ELEMENT CENTRAL TO ESTABLISHED PRIVILEGES, IS NOT JUDICIALLY RECOGNIZED, AND THE DISTRICT COURT, THEREFORE, PROPERLY DENIED THE DEFENDANT'S MOTION TO QUASH THE SUBPOENA.

The heading should be rewritten:

A PARENT-CHILD PRIVILEGE LACKS THE ELEMENT OF CONFIDENTIALITY CENTRAL TO ESTABLISHED PRIVILEGES, AND THUS, THE DISTRICT COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO QUASH THE SUBPOENA.

6. Whenever possible, headings should be written as positive statements, rather than as negative ones. The following is a negative heading:

PETITIONER MAY NOT SOLICIT CLIENTS BY MAIL UNDER THE GUISE OF EXERCISING HER FIRST AMENDMENT RIGHTS.

Instead, the respondent might have written:

BECAUSE SOLICITATION IS INHERENTLY COERCIVE, THE STATE PROPERLY PROSCRIBED PETITIONER'S SOLICITATION OF CLIENTS THROUGH DIRECT MAILINGS.

Affirmative sentences are clearer and more forceful than negative sentences.

7. You should use active instead of passive voice constructions, unless you want to dissociate the subject of the sentences from the action expressed by the verbs. In the following heading, there is no tactical reason for using the passive voice.

> THE PROSECUTORIAL MISCONDUCT WAS SO PREJUDICIAL THAT THE INHERENT SUPERVISORY POWERS OF THE COURT SHOULD BE INVOKED AND THE GRAND JURY INDICTMENT DISMISSED.

This heading could be rewritten in the active voice.

> THE COURT SHOULD INVOKE ITS INHERENT SUPERVISORY POWERS AND DISMISS THE GRAND JURY INDICTMENT BECAUSE THE PROSECUTORIAL MISCONDUCT WAS PREJUDICIAL.

If a party wants to emphasize prosecutorial misconduct by beginning the sentence with that language, the party could still end the sentence in the active voice.

> THE PROSECUTORIAL MISCONDUCT WAS SO PREJUDICIAL THAT THE COURT SHOULD INVOKE ITS INHERENT SUPERVISORY POWERS AND DISMISS THE GRAND JURY INDICTMENT.

The following point headings illustrate the petitioner's and respondent's arguments on Ms. Bell's claim against her husband for unauthorized eavesdropping and wiretapping of her telephone.

> PETITIONER'S POINT HEADINGS
>
> I. ALICE BELL STATES A CLAIM AGAINST HER HUSBAND UNDER 18 U.S.C. § 2510 BECAUSE HE EAVESDROPPED ON AND SECRETLY TAPE RECORDED HER TELEPHONE CONVERSATIONS FOR SIX MONTHS.

A. The respondent's secret tape recording of Ms. Bell's telephone conversations violated the plain language of 18 U.S.C. § 2510, which prohibits any person from intercepting any wire communication.

B. The legislative history of 18 U.S.C. § 2510 supports the plain meaning that Congress intended the statute to apply to private individuals and did not intend to exempt interspousal wire tapping.

II. ALICE BELL STATES A CLAIM UNDER 18 U.S.C. § 2510 BECAUSE THE RESPONDENT'S INTERCEPTION OF MS. BELL'S TELEPHONE CONVERSATIONS ON HER BUSINESS LINE DOES NOT FALL WITHIN ANY EXCEPTION TO THE STATUTE.

A. Because the respondent's eavesdropping and wiretapping were not conducted in the ordinary course of Ms. Bell's consulting business, they were not exempt under 18 U.S.C. § 2510(5)(a).

B. The respondent eavesdropped on his wife's private conversations without her consent.

RESPONDENT'S POINT HEADINGS

I. THE COURT PROPERLY DISMISSED PETITIONER'S COMPLAINT BECAUSE HER HUSBAND'S INTERCEPTION OF HER TELEPHONE CONVERSATIONS IS EXPLICITLY EXEMPTED FROM THE PROVISIONS OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT.

A. Mr. Bell used the business extension phone in the ordinary course of business when he overheard conversations establishing his wife's infidelity, and thus, his conduct is explicitly exempt from the statute's provisions.

B. Mr. Bell's original conduct was inadvertent and thus not willful interception as required by the statute.

II. THE PETITIONER'S COMPLAINT WAS PROPERLY DISMISSED BECAUSE HER HUSBAND'S INTERCEPTION OF TELEPHONE CALLS WAS WITHIN AN IMPLIED EXCEPTION FROM THE OMNIBUS

CRIME CONTROL AND SAFE STREETS ACT FOR INTERSPOUSAL WIRETAPS.

A. Congress did not intend that the Crime Control Act extend to disputes between spouses because domestic relations is an area traditionally reserved for state law.

B. The entire focus of the Omnibus Crime Control and Safe Streets Act is on law enforcement personnel and organized crime.

Exercise 18–E

1. These point headings were written for an appellant's brief arguing that a person who serves alcoholic beverages in his home (a social host) can be liable for serving a guest who the host knew was intoxicated when the guest later was injured. Which point heading is best for the plaintiff-appellant Joseph Nunn? What is wrong with the other headings?

   A. JOSEPH NUNN STATES A CLAIM AGAINST SAMUEL TANN FOR SERVING HIM ALCOHOLIC BEVERAGES UNDER *STATE V. SMALL.*

   B. DISMISSING JOSEPH NUNN'S CLAIM AGAINST THE DEFENDANT FOR SERVING HIM ALCOHOLIC BEVERAGES WHEN HE WAS ALREADY INTOXICATED WAS ERROR AND FAILED TO UPHOLD WELL-ESTABLISHED NEW HAMPSHIRE LAW PROVIDING PLAINTIFF WITH A CLAIM AGAINST THE DEFENDANT.

   C. THE COURT BELOW COMMITTED ERROR IN DISMISSING THIS SUIT BECAUSE UNDER NEW HAMPSHIRE LAW THE DEFENDANT VIOLATED HIS DUTY TO HIS GUEST NOT TO SERVE HIM ALCOHOLIC BEVERAGES WHEN THE GUEST WAS INTOXICATED, KNOWING THE GUEST WOULD SOON BE DRIVING HIS AUTOMOBILE.

2. Another issue in the social host problem is whether, if the social host is under a duty not to serve the intoxicated guest, the host may be liable to the guest for the guest's injuries as well as to a person whom the guest injured (the more typical claim). Which is the best heading

for the defendant-appellee (the social host)? What is wrong with the others?

A. EVEN IF THE DEFENDANT HAD A DUTY NOT TO SERVE THE INTOXICATED PLAINTIFF, THAT DUTY EXTENDS ONLY TO INNOCENT PARTIES WHOM THE PLAINTIFF FORESEEABLY INJURES, NOT TO THE PLAINTIFF FOR THE PLAINTIFF'S OWN INJURIES BECAUSE THE PLAINTIFF MUST BEAR RESPONSIBILITY FOR DRIVING WHILE UNDER THE INFLUENCE OF ALCOHOL.
B. THE DEFENDANT'S DUTY, IF ANY, ARISING FROM RSA § 175:6 EXTENDS ONLY TO INNOCENT THIRD PARTIES.
C. LEGISLATIVE POLICY AND SOCIAL WELFARE DICTATE THAT THE INTOXICANT HIMSELF CANNOT RECOVER FOR HIS INJURIES.
D. THE FACT THAT THE APPELLANT WAS HIMSELF THE INTOXICATED GUEST AT THE PARTY AND NOT A THIRD PERSON SHOULD BAR HIS RECOVERY FOR INJURIES RESULTING FROM BEING SERVED DRINKS, WHILE OBVIOUSLY INTOXICATED, BY HIS SOCIAL HOST.

3. The following headings were written by a criminal defendant-appellant whose request for an instruction to the jury on entrapment was denied. Which is best? Why?

A. THIS COURT SHOULD REVERSE THE DECISION OF THE COURT BELOW. ITS REFUSAL TO GRANT APPELLANT'S REQUEST FOR AN ENTRAPMENT INSTRUCTION TO THE JURY BECAUSE OF INCONSISTENT PLEADINGS CONSTITUTED REVERSIBLE ERROR.
B. THE LOWER COURT ERRED IN NOT INSTRUCTING THE JURY ON ENTRAPMENT BECAUSE, ALTHOUGH THE DEFENDANT PLEADED NOT GUILTY AND DENIED THE INTENT ELEMENT OF THE CRIME WITH WHICH HE WAS CHARGED, HIS PLEA IS NOT INCONSISTENT WITH A REQUEST FOR AN ENTRAPMENT INSTRUCTION.
C. THE DEFENDANT WAS ENTITLED TO AN ENTRAPMENT INSTRUCTION.

4. The following point headings involve a father (Kent Carr) who was driving his pregnant wife to a doctor's appointment when he was in an accident. The first issue is whether he is immune to suit brought on behalf of the child (Jason). The child was born with birth injuries from the accident. The appeal is to the Illinois Supreme Court. Some Illinois intermediate appellate courts had held that, in cases alleging parental negligence in operation of a motor vehicle, the parent is immune from suit only if the parent was driving the car for a family purpose.

These headings are taken from a good student brief. However, they can be even better. How can you improve them?

I. KENT IS IMMUNE FROM LIABILITY TO JASON BECAUSE PARENTAL IMMUNITY DOCTRINE BARS AN UNEMANCIPATED MINOR FROM RECOVERING DAMAGES IN AN ACTION BROUGHT AGAINST A PARENT FOR INJURIES CAUSED BY THE PARENT'S ALLEGED NEGLIGENCE IN THE OPERATION OF A MOTOR VEHICLE.

A. Holding Kent immune from liability to Jason for injuries caused by his alleged negligence is consistent with the overwhelming weight of authority in Illinois.

B. Jason is barred from suing Kent for injuries caused by Kent's alleged negligence because allowing such a suit would subvert this state's policy of promoting family harmony and preventing tortfeasors from benefitting by their own negligence.

C. Jason should not be allowed to sue Kent because parental immunity is the rule in a majority of jurisdictions, and any change in the doctrine on the basis of motor vehicle liability insurance should be made by the legislature.

VII. The Argument

A. Introduction

IN THE ARGUMENT SECTION OF YOUR BRIEF, you should develop the reasons why your client should prevail in order to convince the court to accept your conclusions. The Argument is divided into sections developing separate claims for relief. These main sections are introduced by dominant point headings, while the legal arguments supporting each claim are often introduced by subheadings when

there is more than one argument. Within each section of the Argument, as in the Discussion section of a memorandum, you must thoroughly analyze the legal points and facts relevant to your claim. A thorough analysis requires you to identify the issue, explain the relevant law, work with the decision from the court below and the most relevant authorities you can find, argue your facts and compare cases, rebut opposing argument, and conclude. A brief will not be persuasive if the arguments in it are unsupported and insufficiently explained. Nor will it be persuasive if you avoid the essential hard questions that the court will want answered.

You must also organize your analysis carefully. To ensure that the structure of your argument is always apparent, build your analysis in terms of the legal conclusions you want to prevail and announce those conclusions and your reasons for the court to adopt them in headings and subheadings. Begin each paragraph introducing a new topic with a topic sentence that refers to the proposition that paragraph is advancing rather than to the facts of a case.

An analysis in the Argument section of a brief differs from an analysis in the Discussion section of an office memorandum mainly in how you frame it. In an argument, your tone is assertive rather than evaluative. The order and focus of your analysis is controlled by your persuasive purpose. Your presentation should be responsive, therefore, to the opinion below, the kind of legal argument you are making, and the type of support that you have.

Determining the type of legal argument you are making is important in brief-writing because how you structure the argument and what you emphasize will vary with the point you are trying to establish. Some cases lend themselves to particular kinds of arguments. Some arguments may be fact-centered; the rule of law is well established and what alone is at issue is its application to the facts. In this situation, the discussion might focus immediately on the particular facts of the case, and the thesis paragraph might key in on the important facts in some detail. After discussing the rule of law, you might even decide to marshal your facts before comparing them with analogous precedents.

Other arguments are more doctrinal; the issue is primarily a question of law about which precedent controls the case or how a statute should be interpreted. Here, your thesis paragraph might well lead off with the law you think should control and your authority for so arguing.

Some arguments are more policy-centered; the contentions involve the purpose of the rule and desirability of its end. In contrast to a fact-centered or doctrinal argument, a policy-centered argument might well treat the facts of the case in a somewhat summary fashion but discuss jurisdictional trends and secondary authorities at length. Thus, the type of argument you are making should influence how much space and emphasis to give to the various steps in your analysis. Be aware, however, that many legal problems, especially those you receive as moot court assignments, may present you with several types of arguments that are not exclusive of each other.

B. Writing a Persuasive Thesis Paragraph

Because the initial paragraph or paragraphs after a point heading are crucial in a brief, they should not simply duplicate the Summary of the Argument. Although you want to forecast the factual and legal points you will be developing, your first task is to get the court's attention. Thus, you may find yourself writing more creative openings than you would in an office memorandum and using your thesis paragraph to introduce the theory of your case.

The thesis paragraph should also be assertive and informative. You want to explain to the court what your client wants and why. You want to tell the court what the controlling law is and how the court should conclude about the issues in the case. Moreover, you want your points to flow naturally, logically, and inescapably to your conclusion.

The following are thesis paragraphs that set out the theory of the case, first in a question of law, then in paragraphs that apply rules to facts.

Example of a Thesis Paragraph on a Question of Law

I. A PRO SE ATTORNEY IS NOT ELIGIBLE FOR AN AWARD OF ATTORNEY FEES UNDER THE FREEDOM OF INFORMATION ACT BECAUSE HE HAS NOT INCURRED LIABILITY FOR FEES.

Arnie Frank has come to this court seeking a windfall. He wants this court to award him attorney fees that he has not incurred. Mr. Frank is an attorney, but has no client. Instead, he wants to force the government to become his unwilling client,

subsidizing his pursuit of a matter of commercial interest to him. The court below correctly refused to allow him fees, holding that a pro se attorney is ineligible for an award of fees under the Freedom of Information Act (FOIA), section 552(a)(4)(E), which permits a court to award "reasonable attorney fees reasonably incurred" to a plaintiff who "substantially prevails" against the United States.

This court has already determined that a litigant who is not an attorney and who acts pro se is ineligible for attorney fees. *DeBold v. Stimson*, 735 F.2d 1037, 1043 n.4 (7th Cir. 1984); *Stein v. United States Dept. of Justice*, 662 F.2d 1245, 1263 n. 12 (7th Cir. 1981). It has not yet addressed whether a pro se litigant who is an attorney may be entitled to attorney fees under the FOIA. The reasoning of those cases, however, applies equally to Arnie Frank. The court below, moreover, properly followed the overwhelming weight of authority in determining that a pro se attorney could never recover attorney fees under the FOIA, since a litigant must actually incur responsibility for fees before the court may award them.

Many thesis paragraphs begin with a conclusion, as in this fact-based thesis paragraph concluding that a clothing store's dress code policy for female employees violates § 703(a)(1) of Title VII of the Civil Rights Act. This issue involves application of Title VII law to particular facts. Its theory is that the dress code violates Title VII because it requires a "uniform" and applies only to female employees.

Example of a Thesis Paragraph on Application of a Rule to Facts

Title VII of the Civil Rights Act of 1964 prohibits the dress code implemented by the petitioner because the petitioner forces its female sales clerks to wear an identifiable uniform, while it permits its male sales clerks to wear their own business clothing. Section 703(a)(1) of the Act declares that it is unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's ... sex...." 42 U.S.C. § 2000e-2(a)(1) (1998). A dress code that requires women to wear a uniform while men may wear ordinary business attire consti-

tutes discrimination in a term or condition of employment on the basis of sex. *Carroll v. Talman Fed. Sav. and Loan Assoc.*, 604 F.2d 1028 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980).

You may decide not to begin the thesis paragraph with a conclusion, however, if the facts of the case are particularly interesting or compelling. For example, as the prosecutor of a defendant charged with murder, you might want to emphasize the gruesome facts of the murder. Therefore, your thesis paragraph might begin with a parade of facts relevant to the legal issue and end by tying those facts both to the legal principle upon which you are relying and to your conclusion. Be careful that your thesis paragraph is not merely a narrative of background information, or maudlin, or overwrought. It must include assertions about the case. Because the rest of the argument is devoted to explaining the reasons for your assertions and conclusions, a narrative which is not tied to your conclusion is confusing.

Example of Thesis Paragraph Beginning with Facts

I. THE POLICE ACTED WITHOUT PROBABLE CAUSE AND VIOLATED THE FOURTH AMENDMENT WHEN THEY ARRESTED JOSEPH GOLD AND SEIZED HIS PROPERTY WHEN GOLD PULLED A SHOPPING CART WITH HOUSEHOLD ITEMS DOWN A CITY STREET AT MID-DAY AND REFUSED TO TELL POLICE WHERE THEY WERE OBTAINED.

When two New York police officers saw Joseph Gold pulling a shopping cart down a Brooklyn street at mid-day, they leapt from their car, grabbed him, and demanded to know where he had obtained the items in the cart. The officers' extraordinary behavior had apparently been precipitated by a report from two women that they had seen two suspicious men in the neighborhood, neither of whom fits Gold's description. When Gold's reaction to the police intrusion was to remain silent, the officers then compounded that intrusion with a full scale arrest—frisking, handcuffing, and placing him in the squad car for transportation to the precinct to await a report of a burglary. In

the incident just described, Gold's constitutional rights were violated. On the least possible evidence of crime, Gold was subjected to the greatest possible intrusion on his personal privacy even though such an intrusion can be justified by nothing short of probable cause to believe a crime has been committed. Accordingly, the evidence seized from him under these circumstances must be suppressed. U.S. Const. amends. IV, XIV; N.Y. Const. art. §§ 6, 12.

These examples of thesis paragraphs not only preview the writer's theory of the case, they all include the rules that control the litigated issue. The FOIA paragraph included the statutory language about attorney fees, the dress code paragraph included the relevant language of Title VII, and the fourth amendment paragraph included the probable cause requirement.

If your argument is broken into subissues introduced by subheadings, place the thesis paragraph after the roman numeral heading and before the first subheading. It should forecast the arguments to be made in each subdivision, and it should relate those arguments to your theory of the case. An argument that is not subdivided because there is only one basic assertion being made should begin with a thesis paragraph that summarizes the legal and factual contentions you wish to establish.

Example of a Thesis Paragraph Introducing Subpoints

THE SIOUX FALLS RULES REGULATING AND PERMITTING RELIGIOUS HOLIDAY OBSERVANCES IN PUBLIC SCHOOLS COMPLY WITH THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

The Sioux Falls Policy and Rules, which regulate permissible observance of religious holidays in the Sioux Falls public schools, are constitutional under the first amendment. The establishment clause of the first amendment has never been interpreted to mean that there can be no connection between government and religion. *See Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). Rather, the three-part test the Court has developed as the standard of analysis in establishment clause cases is intended to clarify the degree and type of connection that is permissible. To

satisfy that test, "the statute must [first] have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally the statute must not foster an excessive government entanglement with religion." *Id.*

The Sioux Falls Policy and Rules comply with each of these requirements. The purpose of the Rules is to advance secular educational objectives and to foster mutual understanding and respect. Moreover, the Rules have no direct immediate effect on religion. Rather than entangling the schools in religion, the Rules ensure that the schools stay clear of religious matters. Thus, the Policy and Rules are constitutional under the first amendment.

After this thesis paragraph, the writer should go to subheading A and focus on the first prong of the *Lemon* test, whether the statute has a secular purpose.

Exercise 18–F

1. The following thesis paragraphs introduce the State's arguments to the Second Circuit that there is no sixth amendment violation when a closure order enables a frightened witness to testify. Which example is better and why? What is wrong with the other example?

Example A

The sixth amendment provides an accused with the right to a speedy and public trial. Nonetheless, a court has the discretion to bar the public when it decides there is an interest sufficiently compelling to justify closure. *United States ex rel. Lloyd v. Vincent,* 520 F.2d 1272 (2d Cir.), *cert. denied,* 423 U.S. 937 (1975). Although closure is usually upheld only if the psychological well-being of a sex crime victim is at stake, *United States v. Hernandez,* 608 F.2d 741 (9th Cir. 1979), and Merta was only the victim of an assault, she is a minor. Moreover, Judiciary Law § 4, which gives a court the discretion to close the courtroom during specifically enumerated crimes (divorce, sex crimes), extends to any victim likely to be embarrassed or humiliated during testimony and Merta falls within that class of witnesses that the statute seeks to protect. Also the order was not too broad because it was the defendant's family who were the

source of Merta's embarrassment. Finally, the findings were adequate because the court identified the reason for closure and the interest served. *United States v. Brooklier,* 685 F.2d 1162 (9th Cir. 1982).

Example B

The trial court properly closed the courtroom during the testimony of Sheila Merta, a thirteen-year-old assault victim who said the spectators frightened her. While the sixth amendment provides that a defendant in a criminal prosecution has the right to a public trial, that right is not absolute when a court concludes that other interests override a defendant's right to an open courtroom. *United States ex rel. Lloyd v. Vincent,* 520 F.2d 1272 (2d Cir.), *cert. denied,* 423 U.S. 937 (1975). In reviewing whether closure was proper, a court must determine whether: 1) the party advancing closure established an overriding interest; 2) the closure order was no broader than necessary; 3) the court examined reasonable alternatives to closure; and 4) the trial court made adequate findings in the record to support closure. *Waller v. Georgia,* 467 U.S. 39 (1984). The trial court's order satisfied the *Waller* test in the case at bar: the psychological well being of a young victim of a brutal assault is an interest sufficiently compelling to justify closure; the closure was limited to Merta's testimony; there were no reasonable alternatives to closure; and the findings made during an *in camera* hearing were sufficient to support closure. Therefore, the appellate court's order upholding the defendant's conviction should be affirmed.

2. What follows is one short argument from an appellate brief in *People v. Nevin* that was submitted to one of New York's appellate courts (full citations are omitted). The thesis paragraph has been omitted. Read the argument carefully and critically. Then,
   1) determine what kind of argument it is—a question of law, or of law applied to facts;
   2) write the missing thesis paragraph;
   3) write a point heading.

The term "dangerous instrument" is defined by the Penal Law as "any instrument, article or substance ... which, under the circumstances in which it is used ... is readily capable of causing death or other serious physical injury." P.L. § 10.00(13). It is long settled that the relevant in-

quiry is not whether an object is inherently dangerous, but whether, as actually wielded by the defendant, it constituted a real threat of grave or even fatal injury. *See People v. Carter.* Thus, a knife—an inherently dangerous object—has been held not to be a dangerous instrument within the statute when the defendant merely carried it in his hand. *See People v. Hirniak.* On the other hand, a handkerchief has been held to be a dangerous instrument when used to gag an elderly man. *See People v. Ford.* Similarly, an ordinarily harmless object used to beat a victim can be a dangerous instrument, because such use created a substantial and obvious threat of grave injury. *See, e.g., People v. Carter* (rubber boot); *People v. Ozarowski* (baseball bat); *People v. O'Hara* (boots); *People v. Davis* (plaster cast).

However, when an object is put to a non-standard use that may cause serious physical injury, but is not very likely to do so, it is not a dangerous instrument—even if it does in fact cause injury. In *Matter of Taylor,* a teenager admitted throwing two rocks at a friend's head, one of which struck the friend, causing physical injury. However, the court dismissed a charge of assault with a dangerous instrument, stating

> [T]he criteria is the circumstance under which they were used. True, such a rock held in the hand and used to repeatedly pound a person on the head or vital organ could cause serious physical injury. Even a thrown rock coming in contact with some part of the body could cause such injury, but this is not to be considered "readily capable". The after effects of an act cannot be used to determine the legality or illegality of the act itself.

Id.

When the evidence at appellant's trial is viewed in the light most favorable to the People and measured against the statutory and case-law criteria detailed above, it is clear that no rational fact-finder could have concluded that the bar glass that injured bartender Bruce Flint was a dangerous instrument. First, the glass that injured Flint was small and thick rather than fragile. Further, the glass was not used as a bludgeon, nor was it broken and used to slash Flint—rather, the glass was aimed at Flint's back after Flint had turned away from Nevin. No one heard Nevin utter any threats, and when he threw the glass, he acted in an ill-conceived but purely impulsive effort to have the last word or to regain Flint's attention. Unfortunately, Flint turned back to face Nevin and the glass

struck Flint in the face. More unfortunately still, the glass broke and cut him.

Although the glass concededly caused physical injury, under the circumstances it was not readily capable of causing serious or fatal injury. Like the rock in *Taylor,* the glass could conceivably have caused grave or fatal injury—to a person with an "egg-shell" skull, for instance—but under the circumstances, it was far more likely to miss Flint entirely, to glance unbroken off his back and fall to the floor, or at most, to strike and bruise him. Although Nevin may have acted foolishly and immaturely by throwing a small bar glass at the bartender, he did not use the glass as a dangerous instrument. Accordingly, his conviction should be reversed.

C. Synthesizing the Law and Precedents From Your Client's Perspective

1. Applying Law to Fact

If you set out the controlling rules in the thesis paragraph you need not repeat them all to begin the next paragraph. Instead, begin by explaining the rule or by analyzing and arguing your case by applying the first rule. For example, the writer of the thesis paragraph about the Sioux Falls Rules included the Supreme Court's three-part *Lemon* test used to analyze a claim under the establishment clause. The writer then went on in the next paragraph under subhead A to analyze the first part of that test.

The topic sentence introducing the first issue often applies the rule to the facts of a case, or describes the rule by synthesizing the relevant cases to explain them in a way favorable to the client. Topic sentences are extremely important. They should not be written in the kind of objective, narrative, exploratory style you use in an office memorandum, but should synthesize cases favorably for your client. In addition to synthesizing cases by their facts, you may synthesize their policies. For example, a topic sentence in a brief opposing Freedom of Information Act (FOIA) attorney fees for pro se attorneys might be, "The same policies that have convinced this court to decline to award attorney fees to a pro se litigant who was not an attorney apply to an attorney who acts pro se." Then go on to explain the policies.

In the following (condensed) paragraphs on the first part of the *Lemon* test, the writer explained that the Supreme Court has almost always accepted the state's declared legislative purpose, and has not inquired further into purpose. The writer synthesized the cases to explain them favorably for the School Board client, and used that persuasive synthesis as the topic of these paragraphs. The paragraph begins with the writer's conclusion, and then summarizes the writer's interpretation of the important cases (the synthesis), before distinguishing the opposing cases.

> The purpose of the Sioux Falls Policy and Rules is a secular one: to foster understanding and mutual respect of different religions by exposing students to the various religious cultures and traditions in the world. The court need not inquire behind this statute's stated secular purpose and the lower courts correctly did not do so. Indeed, this Court has consistently accepted a state's avowed purpose. In *Wolman v. Walter,* 444 U.S. 801 (1979), the Court upheld provisions of an Ohio statute authorizing aid to non-public, primarily parochial schools. The Court's entire inquiry into legislative purpose consisted of a single reference to "Ohio's legitimate interest in protecting the health of its youth." *Id.* at 836.
>
> In the last twenty-five years, the Court has inquired beyond the stated legislative purpose only twice, for reasons that do not apply to the Sioux Falls Rules. In *Stone v. Graham,* 449 U.S. 39 (1980), the Court held that the state violated the establishment clause by requiring public schools to post the Ten Commandments in each classroom. And in *School District v. Schempp,* 374 U.S. 203 (1963), the Court held that the state violated the establishment clause by requiring Bible reading every morning in the public schools. The Court found that the purpose of these statutes was "plainly religious" even though each state had justified them on secular grounds. None of the factors that compelled the Court to look beyond the state legislative purpose in *Stone* and *Schempp* exists in the present case. There are four important distinctions. [analysis of the distinctions followed].

To summarize the second part of the *Lemon* test, the writer again synthesized the cases and concluded that in cases involving public rather than private schools, the courts analyze only the principal effect of a regulation, not every direct effect.

As long as the principal or primary effect of a regulation neither advances nor inhibits religion, then that regulation is valid under the second part of the *Lemon* test. In cases involving public schools, the Court has always looked to the primary effect of a regulation rather than to every effect. "The crucial question is not whether some benefit accrues to an institution as a consequence of the legislative program, but whether its principal or primary effect advances religion." *Tilton v. Richardson,* 403 U.S. at 679 (emphasis supplied). The primary effect of the Sioux Falls Policy and Rules neither advances nor inhibits religion. Rather its primary effect is to effectuate the school district's secular purpose.

The cases involving aid to parochial schools provide the exception to the general rule that the Court will invalidate a regulation only if its principal or primary effect advances religion. Because of the character of these institutions, the Court's analysis must be particularly intensive. In those cases only, the Court has invalidated statutes with "any direct and immediate effect of advancing religion," *Committee for Public Education v. Nyquist,* 413 U.S. at 783. Since the Sioux Falls District Public School has no religious mission, this type of inquiry is unnecessary.

This type of case explanation requires you to read carefully and to pay attention to the facts, so that you will be able to distinguish the unfavorable precedents and use favorable precedents to your advantage.

Remember strategic use of cases may require you to interpret a precedent narrowly or broadly. If you want to distinguish a case, interpret it narrowly, that is, limit the holding of the case to its particular facts. For example, in the Sioux Falls Rules case, the respondent School District distinguished several cases by interpreting them to apply only to parochial schools, not to public schools. The respondent limited the holdings by considering the contexts in which the cases arose. If you want to analogize a case, characterize the facts and holding more generally so that your case falls under it.

Remember to choose the cases you rely on carefully. Use the cases from the jurisdiction of the appeal, and the most relevant persuasive authorities. Tell the reader the holding in the case and its important facts. Then explain how it applies to your case. You will not be able to include every case you have found. Instead, decide which cases

require detailed analysis, which more cursory attention, and which you must omit.

If your case involves an unresolved issue, such as the FOIA issue above, or an application of law to an unusual set of facts, then identify the issue and, as did the writer of the FOIA issue, analogize to cases that have been resolved in a favorable way. The court will be concerned with how the reasoning of those decisions applies to your case. For example, a petitioner might pose an unresolved issue this way:

> Although this Court has not specifically considered whether a letter such as that written by Ms. Fox falls within the protection accorded newspaper advertisements in *Bates*, a situation similar to the present case came before the Court in *In re Primus*, 436 U.S. 412 (1978).

Exercise 18–G

A graduating high school student, Tim Jefferson, has sued in federal district court seeking to declare unconstitutional and to permanently enjoin the inclusion of prayer at graduation. The school board of Tim's school had authorized student elections to permit students to decide whether to include a voluntary, nonsectarian, student-led prayer in their graduation ceremony. By a majority of one, the students voted to have such a prayer.

The most recent decision on this issue is *Lee v. Weisman*, 505 U.S. 577 (1992). In *Lee*, a middle school principal had invited a member of the local clergy to offer a nonsectarian and nonproselytizing prayer at his school's graduation. The Court said that the principal's invitation represented governmental coercion to participate in religious activities, a form of establishment of religion barred by the first amendment.

1. Assume you are representing Tim Jefferson. Write a sentence or two interpreting *Lee* broadly so that it is analogous to your case.
2. Assume you are representing the school board. Interpret *Lee* narrowly to distinguish it from your case.

Exercise 18–H

The following paragraphs, which are addressed to the United States Supreme Court, argue that Fields Brothers' dress code requirements for

employees are illegal under Title VII with respect to the "terms and conditions" of employment because different standards apply to men and women employees. Which example uses case law better and why?

Example A

This Court has consistently held that, under Title VII, an employer cannot impose one requirement on male employees and a different requirement on female employees. *See, e.g., Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971). By imposing the requirement that female employees must wear a store uniform, but that male employees need not, Fields Brothers violates Title VII by discriminating against women in their "terms and conditions of employment." *See Carroll v. Talman Savings Ass'n*, 604 F.2d 1028 (7th Cir. 1979).

Dress codes that impose burdens on employees of only one sex are suspect because they can be based on offensive sexual stereotypes and thus violate Title VII. In *Carroll*, the employer had imposed its dress code because it had decided that women tended to follow fashion trends and dressed improperly for work. *Id.* at 1033. Thus, the employer in *Carroll* issued clothing to women employees consisting of a choice of five pieces. The court found the clothing constituted a uniform and held that the defendant's practice of requiring females to wear these uniforms was prohibited by Title VII. *Id.* at 1029. The court stated that the dress code was based on an improper stereotype that women exercised poor judgment in selecting work attire but men did not. *Id. See also EEOC v. Clayton Fed. Savings Ass'n*, 25 Fair Empl. Prac. Cas. (BNA) 841 (E.D. Mo. 1981) (requiring only female employees to contribute to and wear uniforms is prima facie evidence of actionable discrimination under § 2000e–2(a)).

Example B

In two cases on point to the case at bar, the courts held that employers who imposed a dress code requirement only on female employees violated Title VII. *Carroll v. Talman Savings Ass'n*, 604 F.2d 1028 (7th Cir. 1979); *EEOC v. Clayton Federal Savings Ass'n*, 25 Fair Empl. Prac. Cas. (BNA) 841 (E.D. Mo. 1981). The dress code in *Carroll* required women to wear a uniform that consisted of choices among five items: skirt or slacks, jacket, tunic or vest. Male employees were required to wear ordinary business attire. *Carroll*, 604 F.2d at 1029–30.

The United States Court of Appeals for the Seventh Circuit held that the employer's requirement that women but not men wear a uniform violated § 703(a)(1) with respect to "terms and conditions of employment." *Id.* The court remanded the case for the entry of summary judgment for the female employee plaintiffs. A district court has followed the Seventh Circuit and held that a dress code imposed on female employees only is prima facie evidence of discrimination under § 703(a)(1). *Clayton Federal,* 25 Fair Empl. Prac. Cas. at 843.

Exercise 18–I

Read these case summaries carefully and write a persuasive topic sentence that synthesizes the cases to explain how the cases apply to the facts. Write a topic sentence first for one party and then for the other.

Facts: A child, Bart was born in 1994 to Carole Darin who was married and lived with her husband, your client Gerald Darin. Gerald is listed as the father on the child's birth certificate. Carole and Michael Hahn had had an extramarital affair for some two years before Bart was born and blood tests show to 98.5% probability that Michael is the father.

When Bart was four months old, Gerald moved to New York from California for business. Carole remained in California and lived with Michael for five months, although she and Bart visited with Gerald a few times. Michael held Bart out as his child. Carole then returned to her own home, but when Bart was two she lived with Michael again for eight months. Carole has now reconciled with Gerald and they are living together again and have a child of their own. Michael has filed an action to be declared Bart's father and for visitation. California law imposes a presumption rebuttable only by the husband that a child born to a married woman is the child of the marriage. Michael claims that the presumption infringes his due process rights to establish paternity.

Case A

The state of Illinois brought a dependency proceeding on behalf of two minor children living with their father, Stanley. The mother and father had never married but had lived together with their two children for eighteen years. The mother died. The state declared the children wards of the state under an Illinois statute that provided that children

of unmarried fathers, upon the death of the mother, are declared dependents without a hearing as to the father's fitness as a parent.

The court held that Stanley was entitled under due process to a hearing as to his parental fitness before his biological children could be taken from him.

Case B

Ardell Thomas had a nonmarital child that she raised in her own home. Ardell never married the biological father Quinlen and never lived with him. The father visited the child from time to time and brought gifts. Ardell married, and when the child was eleven, her husband petitioned to adopt. Quinlen opposed the adoption. The state statute provides that only the mother's consent is required for adoption of a nonmarital child who has not been legitimated. Under the statute, the father has no standing to object.

The court held that Quinlen's rights under the due process clause had not been violated because he had never taken any responsibility for the child, never acknowledged her, and never lived with her in a family unit.

Case C

The unmarried mother and the natural father, Caban, of two children lived together for five years, representing themselves as husband and wife. Caban was named on the children's birth certificates as their father. He and the mother supported the children. The mother moved out with the children to live with another man, not telling Caban where they were. The mother married one year later, and after two years her husband petitioned to adopt the children. Caban learned of their whereabouts only one year after their marriage and visited them several times. State law permits an unwed mother, but not an unwed father, to block an adoption by withholding consent.

The court held that Caban was entitled to a hearing to determine parental unfitness before his rights as a parent could be terminated.

2. Questions of Law

If your case involves a question of law, then analyze using the strategies explained in Chapters 2, 3, and 11. The strategies of statutory interpretation, for example, include inquiring into the statute's plain meaning, legislative history, and policies. It also may require using

the canons of construction. As an advocate, marshal these arguments to interpret the language favorably for your client.

In the example that follows, the writer uses a plain meaning analysis, buttressed by the legislative purpose behind § 1963 of the Racketeer Influenced and Corrupt Organization Act (RICO). The example follows a thesis paragraph that concluded that the district court correctly denied appellant's pretrial motion for an order excluding the attorney's fees owed by appellant from forfeiture to the government under RICO. The RICO statute prevents an appellant from transferring criminally obtained assets to third parties in order to prevent forfeiture.

Example

The meaning of § 1963 of the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. §§ 1961–68 (1982 & Supp. II 1984), is unambiguous and does not exempt attorney's fees from forfeiture. Under § 1963(c), title vests in the government to forfeitable property at the time the criminal act was committed, rather than upon conviction of the defendant. Thus, the government may seek a special verdict of forfeiture of tainted assets that have been subsequently transferred to a third party. § 1963(c). The only way a third party may vacate or modify such an order is to show at a post-conviction hearing that he was "a bona fide purchaser for value" of such property "reasonably without cause to believe it was subject to forfeiture." *Id.*

Because under the plain meaning of the statute, Congress exempted only two groups of people from the reach of third-party forfeiture, tainted attorney fees are forfeitable. Parties who have acquired title to assets before the commission of a crime are exempt from forfeiture. This group would hardly encompass an attorney in the pretrial stage of a criminal proceeding. In addition, parties who are "bona fide purchasers for value reasonably without cause to believe that tainted assets are subject to forfeiture" are also exempt. § 1963(c). An attorney who "purchased" tainted proceeds in exchange for legal services could not be considered a bona fide purchaser under the statute. An attorney would necessarily be on notice of forfeiture after reading the client's indictment. *In re Grand Jury Subpoena Dated Jan. 2,*

1985, 605 F. Supp. 839, 849 n. 14 (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985).

The general legislative purpose behind RICO forfeiture also supports a plain meeting interpretation of § 1963. In *Russello v. United States*, 464 U.S. 16 (1983), the Court noted that the broad goal of RICO forfeiture provisions was to strip organized crime of its economic base and separate the racketeer from his illegally gotten gains. *Id.* at 26, 28. The relation-back provision of § 1963(c) furthers that goal by preventing pre-conviction transfers of forfeitable property. *See* Kathleen F. Bricket, "Forfeiture of Attorney's Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel," 72 Va. L. Rev. 493, 496 n. 14 (1986). A construction inconsistent with the plain meaning of the statute would undermine this goal by allowing a RICO defendant to utilize what may be the fruits of racketeering activity to finance his criminal defense. *See In re Grand Jury Subpoena*, 605 F. Supp. at 850 n. 14.

If the question of law is one that asks the court to adopt a new rule, then your strategies involve liberal use of analogy to existing rules and of policy. This example uses historical material and persuasive authorities.

A de facto spouse's right to sue for damages for loss of consortium is the next logical step in the evolution of the doctrine of consortium. Under the early common law, only the husband or father could sue for loss of services of a member of his family. Courts now recognize that wives as well as husbands may bring claims for loss of consortium. In permitting a wife to bring a loss of consortium claim, the New York Court of Appeals identified the wife's loss as arising out of the personal interest she has in the marital relationship. *Millington v. Southeastern Elevator Co.*, 239 N.E.2d 897, 899 (N.Y. 1968). The husband in *Millington* had been paralyzed from the waist down as a result of an elevator accident. The court reasoned that the woman's "loss of companionship, emotional support, love, felicity, and sexual relations are real injuries" that altered their relationship "in a tragic way." *Id.* In coming to a similar conclusion, the California Supreme Court focused on the shattering effect of a husband's disabling accident on the quality of his wife's life when her husband was transformed from

partner to invalid. *Rodriguez v. Bethlehem Steel Co.*, 525 P.2d 669, 670 (Cal. 1974).

Susan Webster has suffered damage identical to that suffered by a wife whose husband has been injured. Although she was never legally married to John Webster, the stability and significance of their relationship indicates that her emotional suffering will be as great as that of a married woman. Susan Webster's commitment to her relationship is apparent from its nine-year duration and shared parental obligations, and demonstrates that her loss was no less real than that of Mary Rodriguez, a bride of only sixteen months. Moreover, she has lived with and cared for John Webster since the accident and likely will continue to do so. The circumstances of Susan Webster's relationship compel a finding that she, like the plaintiff in *Millington*, has suffered in a "tragic way" as a direct result of the injury sustained by her de facto spouse. *See Millington*, 239 N.E.2d at 899. Accordingly, her consortium rights should be recognized and protected.

D. Arguing Your Facts

Your brief will not be convincing if you fail to argue your facts thoroughly. Regardless of whether you argue your facts before or after you analyze supporting authority, you should always paint your facts in such a way as to elicit a positive application of the law. Stress facts that align your case with favorable precedents. Stress facts that show injustices to your client. After you have dealt with your strong facts, work with damaging evidence. You should not ignore unfavorable evidence, as the opposing counsel will certainly present that evidence, and present it in a worse light. Instead, put that evidence forward, briefly and blandly, and provide an exculpatory explanation if possible. Emphasize both exonerating facts and mitigating facts. Downplay facts that distinguish your case from favorable precedents. Demonstrate the irrelevancy, if at all possible, of facts that may show your client as unworthy.

1. Emphasize Favorable Facts

Treat favorable evidence in depth. Do not describe supportive incidents in broad terms; parade each material detail.

Example (Citations to the record omitted)

The Supreme Court has said that, in the best of circumstances, "[t]he vagaries of eyewitness identification are well-known [and] the annals of criminal law are rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218, 228 (1967). In Moore's case, the conditions made an accurate identification impossible and the court's description of the identification testimony as "highly reliable" is simply unrealistic.

The robbery took place in a parking lot on a dark October night. The complainant never identified Derek Moore as one of the robbers. The most he could say was that Moore "would fit the description" of one of the tall youths. Indeed, the complainant previously testified that Moore was not one of the robbers. Thus, the People's contention that Moore was one of the youths who committed the robbery depended solely upon the testimony of the Smith brothers, Tom and John, who claimed to have seen him at the robbery scene.

Although John Smith asserted that he had seen Moore climb the parking lot fence, this witness admitted on cross-examination that he had been fifty to sixty feet away and had only seen half of the person's face. Tom's identification testimony is also questionable. From a distance of ten to fifteen feet, through the dark, he said he saw Moore's face for a "split second." Although he asserted that this brief view was sufficient for him to recognize Moore, whom he had never seen before, he could not see whether the hood of Moore's light-colored jacket was up or down. Nor was he able to see an identifying mark on Moore's forehead—a two inch keloid scar. In sum, it is hard to imagine a less reliable identification that would still result in a prosecution.

2. Minimize Unfavorable Facts

Learn to exploit paragraph structure so as to highlight favorable material and subordinate damaging material. Positive information should be advantageously located at the beginning and end of paragraphs. Damaging material should be buried in the middle of paragraphs—and sentences—and described generally. In this way, negative information is framed by the positive and is, to some degree, neutralized by the context.

Example (Citations to the record are omitted)

Upon seeing two white males round a corner armed with tire irons and chains, Derek Moore believed that he was about to become the victim of a racially-motivated assault. Because Derek knew nothing of the robbery these two youths had just witnessed, this assumption on his part was entirely reasonable. So was his decision to run in the opposite direction. The fact that the district court found the Smiths unassailably truthful in asserting that they had a different motive for chasing petitioner is irrelevant to Moore's belief. It is also believable that the Smiths might well have shouted racial epithets at someone they assumed had committed a robbery outside their very window. Thus, there is no significant conflict in these stories, although there is a plausible and exonerating explanation for why Moore took to his heels.

Exercise 18–J

1. The following paragraphs address the question of whether a trial court committed reversible error by failing to respond to the jury's request to have a portion of the testimony reread (Citations to the record are omitted). In which of the following examples are the facts used well? Why?

Example A

A question of fact existed as to whether the defendant and his friend were attempting to steal the complainant's wallet. The defendant testified that the intoxicated complainant initiated the altercation and that the complainant claims to have lost $80.00. Yet, the defendant and his friend did not have more than $20.00 at the time they were apprehended. The jury requested this testimony because it was in the process of determining whether the state had proved the elements of the crime charged. The court's failure to provide the jury with this testimony before it reached its verdict was extremely prejudicial. The defendant was denied a fair trial and impartial jury. The possibility that the jury may have returned a different verdict if it had been provided with a readback of all the requested testimony, and not solely that of the People's

witness, cannot be excluded. Thus, the court denied the defendant's right to a fair trial, and its error should be reviewed.

Example B

In the present case, there is neither compelling circumstantial evidence nor eyewitness testimony which discredits defendant's explanation of what happened. We have only the word of the complainant that he lost his wallet. He first testified that he had his wallet when he ran from the scene and later testified that it was returned to him by a police officer (that officer, however, did not testify). He also later testified that he did not know if the defendant took his wallet or if he lost it while he was running. The police officers who did testify did not hear defendant demand the complainant's money, nor did any of them see or retrieve complainant's wallet. In addition, the complainant was admittedly "high" on alcohol at the time.

In light of the questionable nature of the complainant's testimony, the weight of the evidence against the defendant is far from overwhelming. In combination with the taint to the proceedings created by the error of the court below, this court should reverse the judgment of the court below and remand this case for a new trial in the interest of justice.

Example C

The trial court's failure to provide the jury with the requested testimony did not prejudice the defendant's rights and, therefore, does not constitute reversible error. The information which the jury requested and which the court failed to provide did not pertain to a vital point. The jury requested a rereading of the defendant's testimony about what the complainant had said. This testimony amounted to three short lines. The defendant testified that "Hassler got very huffy, saying 'Who are you telling me where to walk?' and 'I'll walk where I damn please'". Later, the defendant testified that the complainant "started saying we'd tried to rob him and all that bull." The substance of this testimony was not vital to the defendant. The testimony revealed only that there was a heated exchange of words between the complainant and the defendant and his friend, that the defendant claimed the complainant was the aggressor, and that the defendant denied trying to rob the complainant. These factors were already known to the jury from other evidence and a

rereading of this testimony was not vital to the defendant. Therefore, the court's failure to reread it did not prejudice the defendant's rights.

2. Which example uses facts more persuasively as to whether an employer discriminates on the basis of sex when the store issues business suits to its women clerks only? (Citations to the record are omitted.)

Example A

Fields Brothers' dress regulations distinguish between the sexes but do not discriminate on the basis of sex because the distinctions are not based upon immutable sex characteristics nor do they impinge on a fundamental right. Summary judgment in favor of Fields is consistent with that two-prong test to determine sex discrimination in employment.

Fields Brothers' distinctions between male and female employees is not discriminatory as to conditions of employment because clothing styles are not immutable characteristics of a sex but can be changed at will like hair length. For that reason, a sex-differentiated hair length regulation was held not discriminatory. The employee was able to change his hair length in order to comply with his employer's regulations. The respondent in this case could easily have worn one of the suits issued to her and could have complied with the dress code. Her desire to wear her own choice of suit is not an immutable characteristic. Nor does Fields' code impinge upon an employee's fundamental rights such as marriage and child rearing. In cases in which regulations impinge on female employees' fundamental rights, the employers did not impose any restrictions on male employees. Fields, however, imposes dress regulations, albeit different ones, on its male sales clerks.

Example B

The Fields Brothers adopted a dress code policy for both male and female sales clerks in 1979. The store sells conservative business clothes and its customers are predominantly business people of both sexes. The store's president has explained in his affidavit that the store's management policy is to cater to its customers' preferences for conservatively dressed sales clerks. All members of the store's sales staff are therefore required to wear appropriate business attire.

The court below differentiated between the "uniforms" that the female clerks are required to wear and the "ordinary business" attire re-

quired of male clerks. In reality, there is no difference. The male clerks' suits are as much "uniforms" as the female clerks' suits. Male business attire has developed over the years into a recognized uniform of shirt, tie, suitcoat, and suit pants. A male clerk who deviated from this attire would not be appropriately dressed. Design of female business attire, on the other hand, is a relatively new industry, and the same similarity of appearance has not yet developed. The store's decision to supply its female clerks with suits was an attempt to solve the problem created by this difference.

The court also emphasized that female clerks must wear a patch with the store logo on their suits while the men are issued a pin. Yet no real difference exists between a patch and a pin. If a patch makes a business suit a uniform, then so does a pin. All sales clerks wear conservative business suits and the store logo; all are treated alike in the "terms and conditions of employment."

E. Rebutting Opposing Arguments and Authority

Establishing your own argument requires rebutting opposing argument. Yet you do not want to overemphasize those opposing arguments by setting them forth in all their untarnished glory and then scrambling to recoup your losses. Instead, address the argument opposing counsel is likely to make implicitly rather than explicitly, by answering it as you present it. In other words, make your counter-argument affirmatively and as an integral part of your case, rather than as a separate section devoted only to counter-argument.

When you rebut your adversary, avoid topic sentences that overemphasize the other party's arguments. Weak introductions frequently include statements like

- It is (has been) argued that ...
- Respondents assert ...
- The courts rejecting this claim have said ...

Such expressions highlight the opposing argument by opening the paragraph with it. For example,

It has been argued that awarding a child damages for loss of consortium would result in speculative and uncertain damages. However, damages for injuries sustained by the Jones children are no more dif-

> ficult to ascertain than they are in other classes of injury involving intangible losses where the courts have allowed recovery.

If the author of this example had simply omitted the first sentence, her topic sentence would have focused on the reason why the opposing argument is not sound. She would have suggested the avenue her opponent would take, without giving it undue emphasis.

> Damages for injuries sustained by the children in this case are no more speculative than they are in other classes of injury involving intangible losses where the courts have allowed recovery.

Or again, in arguing that the first amendment's guarantee of freedom of association protects not only activities of an organization but also the activities of attorneys who assist that organization, the petitioner should not say:

> One may argue that *Trainmen, Mine Workers,* and *United Transportation Workers* can be distinguished from petitioner's case since in those cases the union was the party charged with violating a statute, while in this case the party charged with violating the statute is the attorney. However, the Court has held that lawyers accepting employment under a constitutionally protected plan of referral have a constitutional protection like that of the union which the state cannot abridge. *Trainmen v. Virginia,* 377 U.S. at 8.

A more effective advocate might say:

> This Court has long recognized the right of an organization to request an attorney to assist its members in asserting their legal rights. In *United Mine Workers* and *Brotherhood of Railroad Trainmen,* the Court held that a state could not proscribe a range of solicitation activities by unions seeking to provide low cost, effective legal representation to their members. Lawyers who accepted employment or acted at the request of these unions were also protected because their actions helped the unions further their members' rights.

In addition, potential weaknesses in your theory of the case should not be discussed at the beginning of an issue or subissue or at the end of such a discussion. Deal with them in the middle of the argument concerning that point. The reader will tend to remember the beginning and ending of a section more than the middle.

Although you should deal with supporting authority first, you must disclose authority in the controlling jurisdiction that is directly adverse. This is an ethical responsibility imposed by the American Bar Association's Code of Professional Responsibility Disciplinary Rule 7–106(b). In addition, the newer Model Rules of Professional Responsibility, as adopted by each state, also require an attorney to disclose legal authority in the controlling jurisdiction known to be directly adverse to the position of the client if it is not disclosed by opposing counsel.[8] Although it is probable your opponent will find and include these contrary decisions, you should address them anyway. There are also strategic reasons to acknowledge unfavorable law. Your brief will be taken more seriously if you go below the surface to rebut adverse authority with reasonable arguments. By doing so, you show the strength of your client's position. If you are the appellant, you may "innoculate" the court to opposing counsel's argument by putting it in a context favorable to your client. In addition, you assist the court by setting out the conflict and in doing so, add to your credibility.

The easiest way to overcome contrary authority is to distinguish the cases on the facts. If you cannot distinguish the cases, however, there are a number of other ways to minimize the significance of an unfavorable precedent and to convince a court that a rule should not be extended to include the circumstances of your case. You could explain, for example, that the reasoning of an unfavorable decision does not apply to your facts and would, therefore, create an injustice unless an exception was made. Or you could ask a court to overturn a decision because it is no longer sound public policy. Here you might look at persuasive precedents from other jurisdictions that have rules you believe are more indicative of current public policy. You might examine developments in allied fields that support changes in the field of law with which you are concerned. You could also demonstrate that, as a practical matter, a rule is not working well—it is too difficult to administer or too vague.[9] Remember that you might also need to diminish the impact of an unfavorable statute. Here you

[8] Model Rules of Professional Conduct 3.3(a)(3) say, in pertinent part, that an attorney must not "fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."

[9] *See Board of Student Advisors Harvard Law School, Introduction to Advocacy*, 139–40 (4th ed. 1985).

might try to show that the statute does not control the subject matter of your case, that the language of the statute is ambiguous enough to permit a construction more favorable to your client, or that the statute is unconstitutional.[10] Chapter 11, on questions of law, explains these strategies of argument.

The following paragraphs are representative examples of arguments attempting to neutralize adverse decisions. The examples are based on the following problem.

Stone v. Eagle

The parents of Juliet Stone, an infant born with severe birth defects, brought a wrongful life action on behalf of the infant against an obstetrician. They allege he negligently failed to inform them that the mother's age made her fetus vulnerable to an increased risk of Down's Syndrome and that amniocentesis, a procedure by which the presence of Down's Syndrome in the fetus can be discovered, was available to her. John and Mary Stone allege that they were deprived of the choice of terminating the pregnancy and that they would have terminated the pregnancy if they had known their child, Juliet, would be born with Down's Syndrome. The suit is for damages to the child. (Wrongful life claims are distinguishable from wrongful birth claims. In a wrongful birth claim, the parents, on their own behalf, sue the physician whose alleged negligence resulted in the birth of an unwanted or deformed child.)

Defendant moved for summary judgment and dismissal of Juliet Stone's wrongful life action on the grounds that she failed to state a claim upon which relief can be granted. The court granted the motion on the grounds that Juliet Stone had not suffered a legally recognizable injury. It reasoned that no life could not be preferable to an impaired life, that neither the court nor a jury would be able to ascertain an appropriate measure of damages, and that defendant did not cause Juliet Stone's impairment. In fact, she could never have been born a healthy child.

In appealing the dismissal of her wrongful life claim, Juliet Stone must overcome the fact that most courts, like the district court in her case, have rejected actions on behalf of infants who have at-

[10] *See Handbook of Appellate Advocacy*, 44–45 (UCLA 2d ed. 1986).

tempted to sue for wrongful life. Recently, however, a few courts have permitted partial recovery in wrongful life claims, allowing the infant to recover as special damages the extraordinary medical expenses which the infant's condition would require. No court has as yet, however, granted recovery for general damages compensating the infant for being born with birth defects, for pain and suffering, or for an impaired childhood.

Example 1: Precedents are not followed universally

The California Supreme Court has recognized wrongful life as a new cause of action. *Turpin v. Sortini*, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982). The *Turpin* court held that a doctor was liable for negligently depriving expectant parents of information that they needed to determine whether birth would be in the best interest of a severely malformed fetus. *Id.* The court approved of a lower court decision, *Curlender v. Bio-Science Laboratories*, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980), recognizing the claim of an infant plaintiff afflicted with Tay–Sachs disease. This child suffered mental retardation, blindness, pseudobulper palsy, convulsions, muscle atrophy, susceptibility to other diseases, and gross physical deformity. The *Turpin* court recognized that the child in *Curlender* had a "very limited ability to perceive or enjoy the benefits of life, [and that] we cannot assert with confidence that in every situation there would be a societal consensus that life is preferable to never having been born at all." *Id.* at 229, 643 P.2d at 963, 182 Cal. Rptr. at 346.

Example 2: Precedents conflict with sound public policy

Two fundamental tenets of tort law are that there should be a remedy for every wrong committed and that future harmful conduct should be deterred. Both these goals are furthered by recognizing a claim for wrongful life. Social interests are advanced when a physician's duty to an unborn child extends to providing expectant parents with the genetic counseling and prenatal testing that enables them to make informed decisions about what is in the best interest of the fetus. The wrongful life claim complements professional practice by requiring all physicians to exercise proper diligence and skill in caring for patients both living and unborn.

Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d at 828, 165 Cal. Rptr. at 487. Because physicians have the medical expertise and knowledge to detect fetal abnormalities, they should be responsible for testing for them and counseling parents about them. Neither the state nor the parents should be burdened with the care and maintenance of children suffering from detectable genetic malformations while the physician who failed to exercise diligence and skill remains immune from liability.

Example 3: Precedents are inconsistent with trends in related fields

Many of the issues in a wrongful life action have been recognized in other medical malpractice actions. The prenatal injury cases have established an unborn child's right to sue. The wrongful birth action has found proximate cause and imposed liability on physicians for negligence in counseling and testing for genetic defects. The right to die cases have given the individual a right of self-determination which overrides social assumptions about the sanctity of life. These extensions in tort law reflect its responsiveness to changing social values and establish grounds for recognizing a wrongful life claim.

In a case of first impression or in a case where the application of existing law would produce substantial injustice, or where policy arguments, supported by secondary authorities and persuasive authority, make good sense, they should be pursued. There are and always will be circumstances in which the attorney argues that fairness demands that the court re-examine the law. Be aware, however, that many litigators discourage policy arguments at the intermediate level of the appellate court system. Intermediate court judges may see the highest court as the only policy-making court. In addition, since the courts are overburdened, the judges may prefer to decide cases on the basis of existing law.

Exercise 18–K
1. Identify these writers' techniques for minimizing unfavorable precedents or facts. Evaluate each writer's success.

Example 1 The court below relied heavily on *Carroll v. Talman Savings Ass'n,* 604 F.2d 1028 (7th Cir. 1979). Yet *Carroll* is the only decision from a court of appeals that has held a dress code discriminatory. Not only is the case ten years old, but it was decided only by a 2–1 vote over the vigorous dissent of the respected Judge Vest.

Example 2 In *Carroll,* the court overturned an employer's sex-based dress code policies which required its female employees to wear a uniform but permitted male employees to wear a wide variety of attire, including sport coats and leisure suits. The *Carroll* dress code is easily distinguishable from the one required by Fields, where both men and women must dress in conservative business suits. In fact, in *Carroll,* the court said that Title VII does not prohibit uniforms in the workplace but only requires that a "defendant's similarly situated employees be treated in an equal manner." Fields Brothers accomplishes the very thing that the court suggests: it treats its employees equally.

Example 3 Fields Brothers has urged that the proper comparison is to cases involving personal grooming regulations in which the courts have held that grooming standards, such as hair length regulations for male employees that differ from the permitted hair length for females, did not constitute sex discrimination under Title VII. In *Knott,* for example, the court permitted reasonable grooming standards for its employees that included minor differences for males and females that reflected customary grooming styles.

These grooming codes are markedly different, however, from Fields' dress codes. First, Fields' disparity of treatment between the sexes is more severe. Fields requires female clerks to wear a clearly identified uniform in a limited style and color range while permitting male clerks their own choices. In *Knott,* each sex was required only to meet a customary standard of good grooming. The limitations on their grooming were minor. Second, grooming regulations merely maintain a standard of conventional grooming for employees to follow. In *Knott,* men with long hair were unconventional and inappropriately groomed for their employer's business. Fields Brothers, however, fired the

plaintiff for wearing her own conventional and entirely appropriate business suit because it was in a different dark color from the one issued. Finally, some courts have justified grooming regulations because they are not based on immutable characteristics. This Court, however, has never limited the reach of Title VII to regulations based on immutable characteristics but has inquired more broadly as to whether the employer imposed disparate treatment on male and female employees.

Example 4 Although several courts have recognized an exception to Title III for interspousal wire tapping, some federal courts have held that a cause of action exists between spouses for violation of the Act. In *Jones v. Jones,* the court applied Title III to a husband who had tapped a telephone at his estranged wife's residence, and in *White v. White,* the court held that there is a cause of action for a wife whose husband had hired an investigator to tap her telephone. In these cases, however, the parties had gone beyond a domestic dispute. In *Jones,* the parties were already estranged. The telephone was located outside of the marital home. In *White,* a third party to the relationship was the agent of the intrusion. Neither of these cases involved the special nature of an ongoing domestic relationship within a marital home.

Example 5 Those courts that have decided that Title III does not apply to interspousal wiretapping have misinterpreted the policy behind the statute. As the legislative history shows, Congress repeatedly heard testimony about the frequent use of electronic surveillance between spouses in divorce cases. In fact, one committee witness, echoing the testimony of others, said that "private bugging can be divided into two categories: commercial espionage and marital litigation." Several Senators stated in the Congressional Record their understanding that the bill prohibited private surveillance.

2. Rewrite Example 2 so that the paragraph begins more persuasively.
3. Rewrite Example 3 so that the paragraph begins more persuasively.
4. Rewrite Example 4 so that the paragraph begins more persuasively.

VIII. Conclusion

THE CONCLUSION IS VERY BRIEF. It is not another summary of the arguments. Instead it specifies the relief which the party is seeking. It is followed by a closing, like "Respectfully Submitted," and then your name and address as attorney of record.

IX. The Appellee's Brief

MANY ATTORNEYS WHO REPRESENT appellees underestimate the importance of the appellee's brief. They reason that because they won in the court below, and because more cases are upheld on appeal than are reversed, all that remains to win again is to explain the lower court's decision to the reviewing court. Indeed, many attorneys believe that because the appellant often turns their arguments against them, the less said the better. Careful attorneys, however, never rest on their laurels. A good appellee's brief requires the same care and creativity as an appellant's brief.

The opinion below is, of course, strong authority in your favor. It is generally advantageous, therefore, to refer to that opinion and to choose quotes from it. Do not, however, rely upon it exclusively, especially if the opinion is poorly reasoned. Because lower court opinions, especially in a moot court problem assignment, often need bolstering, you should argue your case in the way that you think is most effective. You need not confine yourself to the structure of the decision used by the court below.

In appellate practice, you would always begin by reading the appellant's brief carefully and outlining the appellant's arguments. You would also read the cases that the appellant relies on if you are not already familiar with them and update those cases. Make sure that you meet each of the appellant's arguments in your own brief. If some of the points are frivolous, dispose of them quickly.

You need not confine yourself to the structure used in the appellant's brief. The appellee's Argument section may be organized completely differently from the one in the appellant's brief. If the appellee has stronger arguments for one issue than for another issue, the Argument section should begin with the appellee's strong issue, not the appellant's strong issue. Put your best argument in the most prominent position in the brief.

The Questions Presented, Statement of Facts, Summary of the Argument, and Point Headings should similarly reflect the appellee's orientation rather than the appellant's. As a general rule you should put your side's view of the case first in every section. It is usually more effective to state your view and then refute the appellant's view than it is to put the appellant's viewpoint first and leave your reader waiting to hear your client's arguments. You should also choose those arguments that will create sympathy for your client. While some student advocates are hesitant to do that when representing the government, the effective attorney will find ways to make sympathetic the point of view of her client, regardless of the particulars of the case. In other words, an appellee's brief should not be a negative document that merely argues against the appellant's brief, but should be an affirmative document.

Indeed, as counsel for the party that won below, your style should be positive and assertive. Emphasize your main points; do not be defensive. Nonetheless, be certain to answer every colorable argument that the appellant has raised. Except for clearly frivolous points, you cannot afford to ignore the appellant's weak or strong arguments. Give the judges your side of each point. Dispose of the appellant's weaker arguments quickly; label the frivolous arguments as such. (See section VII, E for suggestions on how to handle opposing arguments.) Be sure to cite to the appellant's brief if you refer to the appellant's argument.

There may be some significant differences between moot court programs and the situation you would face writing the appellee's brief in practice. In an actual appellate case, you would have the benefits of the appellant's brief, the briefs already written for lower courts, and the complete record when you write your own brief. Typically a case that reaches a supreme court has been briefed at least once before. The attorneys know their opponent's arguments and their own weaknesses well. You would know exactly which arguments your opponent relied upon and you could play off your opponent's choice of cases and words.

In moot court programs, however, the parties may not have briefs submitted to lower courts and the appellee may not have the appellant's brief. You may only have the opinion below, the references in that opinion to the arguments raised by each side in the lower courts, and an abbreviated record to help you frame your arguments. In that case, imagine an appellant's brief written by an opposing coun-

sel. Decide how you would write the appellant's brief, and, however hard it is to tear apart your own arguments, respond in a positive fashion by asserting the appellee's best arguments and rebuttals.

Finally, you should note that in a true case, the appellant may have a parting shot. After the appellee's brief has been filed, the appellant may file a reply brief. The appellee, then, must choose arguments as carefully as the appellant did to avoid giving the opposing counsel an opportunity to tear apart the appellee's arguments unanswered in writing. In moot court, however, the appellee's brief is usually the last written word.

Exercise 18–L

A. Read the following background materials so that you are able to edit the argument based on these materials that appears in part B of this exercise.

DEPARTMENT OF INSURANCE v. STALWART

Background

Simeon Stalwart is a partner in a well-known law firm. He is executor of the estate of Martin Met, a former client of the firm. Met died on April 3, 1977. He was president and controlling shareholder of a number of insurance brokerage companies.

Since Met's death, Stalwart has been deluged with suits based on Met's misappropriation of corporate funds. Neither Stalwart nor the other members of his firm knew about the transactions on which the lawsuits are based.

In August 1977, the Superintendent of the Department of Insurance began to investigate Met's affairs. On September 9, 1977, the Superintendent obtained an Order of Liquidation from the Surrogate's Court (i.e., he was to settle the affairs of Met's companies, and distribute whatever was left over to the remaining shareholders). As liquidator, the Superintendent took control of the books and records of Met's companies.

In February 1978, the Superintendent served a complaint on Stalwart, as executor of Met's estate. The complaint alleged that Met had plundered the assets of the companies, and defrauded the minority shareholders. It sought $2,684,935 in damages.

Stalwart had no idea what the Superintendent was talking about. So he served interrogatories[11] on the Superintendent. The interrogatories were 30 pages long, and contained 125 separate questions, of which many had several parts. They included numerous questions like the following:

> Identify the documents on the basis of which the Superintendent claims that Martin Met wrongfully appropriated $16,000 of the assets of National Insurance Company in June and July of 1974.

The Superintendent returned written answers in which he stated, in response to all questions concerning documents,

> The answers are contained in the books and records of the various companies involved. Inspection of such records will be available on request.

Stalwart sent his associate, Harry Hopeful, to inspect the documents. Harry was shown to a room with 30 carton boxes of files, and a pile of 17 books of receipts and disbursements from the different companies. No attempt had been made to show which portions of which documents related to which interrogatories.

Stalwart moved for an order to compel discovery. The Superintendent cross-moved for a protective order. The Supreme Court, N.Y. County (Anderson, J.) granted Stalwart's motion and denied the Superintendent's cross-motion. The Superintendent appeals.

Statutes

CPLR § 3124 ... motion to compel disclosure ...

If a person, without having made timely objection ... fails to answer ... interrogatories ... [the other party] may ... apply to the court to compel disclosure.

CPLR § 3103 Protective orders

(a) Prevention of abuse. The court may at any time ... make a protective order ... limiting ... the use of any disclosure device. Such order shall

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[11] Interrogatories are written questions which one party may serve on another. The party served must give written answers under oath.

be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

Cases

Schertzer v. Upjohn Co.,
42 A.D.2d 790, 346 N.Y.S.2d 565 (2d Dep't 1973)

The court granted the defendant the option of furnishing copies of relevant records instead of providing written answers to interrogatories, as long as the defendant (a) specified which interrogatories were being answered in this manner, and (b) identified each of the copies so supplied to show to which particular interrogatory it related.

Harlem River Consumers Cooperative, Inc. v. Associated Grocers of Harlem, Inc.,
64 F.R.D. 459 (S.D.N.Y.1974)

A party answering interrogatories could not refer to aggregations of material, but had to specify the portions on which he relied.

Blasi v. Marine Midland Bank,
59 A.D.2d 932, 399 N.Y.S.2d 445 (2d. Dep't 1977)

Motion to strike certain interrogatories granted: The interrogatories, consisting of 49 pages, are unduly prolix, vexatious, and unreasonably oppressive.

Commissioners of the State Insurance Fund v. News World Communication, Inc.,
74 A.D.2d 765, 425 N.Y.S.2d 595 (1st Dep't 1980)

Motion to strike interrogatories denied. While "detailed and exhaustive" interrogatories "at first blush" seemed "unduly burdensome and oppressive," they were necessary to a resolution of defendant's affirmative defense. Having raised this claim, the defendant could not complain because interrogatories were directed to explore the basis of the

claim. Merely because interrogatories were burdensome was no reason to strike them, although the court would find differently if "their use verges on harassment or seeks irrelevant information."

B. Edit the following argument. Consider whether it is persuasive. (Is the language persuasive? Are the cases arranged in the most helpful order? Are opposing arguments handled well?) Correct any spelling or grammar errors you find. Correct citation errors. If the correct form requires information you do not have, indicate the missing information with an underline. If there are places where citations are needed, indicate with an underline.

Superintendent v. Stalwart

Stalwart's Argument

Schertzer v. Upjohn Co., 42 A.D.2d 790 (2d. 1973) states that the Superintendent can furnish copies of relevant documents, rather than providing written answers to interrogatories. However, we must look further to determine whether the Superintendent has indeed complied with *Schertzer*. *Schertzer* sets forth requirements as to how the documents must be produced. In our case, the Superintendent failed to identify which interrogatory each document purported to answer. Therefore, he obviously did not comply with Schertzer, which requires him to a) specify which interrogatories are being answered by production of documents and b) identify each document to show to which particular interrogatory it related. *Supra.* This is also supported by *Harlem River.*

Although the Superintendent's answers are definitely inadequate, a motion to strike interrogatories may be granted if they are "unduly prolix, vexatious and unreasonably oppressive". *See Blasi,* (59 AD 932), in which the interrogatories consist of 49 pages. However, such a motion is clearly not justified in the case at bar, and is a blatant attempt by the Superintendent to avoid compliance with the requirements of the CPLR.

Defendants interrogatories, although 30 pages long and consisting of more than 100 questions, can be easily distinguished from the set of interrogatories referred to in *Blasi.* Plaintiff's complaint is 26 pages long and charges Martin Met with numerous types of misconduct, including conversion of corporate assets, fraud, and breach of fiduciary duty. Plaintiff seeks $2,684,935 in damages. The interrogatories do no more than

track plaintiff's complaint. Defendant is Executor of the Estate of Martin Met. He is therefore a defendant in this case only by virtue of his fiduciary capacity. He has no personal knowledge of the allegations contained in the complaint. Interrogatories seeking further information on each and every allegation in the complaint are therefore essential to allow defendant to defend himself in this case. *Compare Commissioner v. News World,* 74 A.D.2d 765, 425 N.Y.S.2d 595 (1st Dept.1980). The Court should have no difficulty in finding that the interrogatories are not unduly long; and that the Superintendent's answers were inadequate.

Editing Checklist: Brief

I. Questions Presented
   A. Do the questions combine the legal claim and the controlling legal principles with the key facts that raise the issues?
   B. Are the questions framed so as to suggest an affirmative answer?
   C. Are the questions persuasive without being conclusory?
   D. Do the questions read clearly and succinctly?

II. Point Headings
   A. Do the Point Headings provide a sound structure for the Argument section of the brief?
   B. Do the headings set out legal contentions favorable to your client and support those contentions with reasons and relevant facts?
   C. Do the headings have a conclusory tone favorable to your client?
   D. Are the headings clearly and concisely written?
   E. Is each heading a single sentence?

III. Statement of the Case
   A. Did you include the procedural history?
   B. Are the facts set forth in a narrative that will be easy for a reader unfamiliar with the case to follow?
   C. Is the statement complete, accurate, and affirmative?
      1. Are all essential facts included and irrelevant facts omitted?
      2. Are unfavorable facts included without being overemphasized?

3. Are favorable facts effectively placed in positions of emphasis?
4. Is the statement accurate?
5. Are record references included for all facts?

D. Does the statement include any legal conclusions or editorializing that properly belong in the Argument section?

IV. Summary of the Argument

A. Did you answer the Question Presented?
B. Did you summarize from the Argument the main reasons for your answer?
C. Can the Summary be understood on its own?

V. Argument

A. Organization
   1. The Thesis Paragraph
      a. Does each issue begin with a thesis paragraph setting forth in affirmative (and conclusory) terms the major contentions?
      b. Does the thesis paragraph present an integrated statement of the theory you are putting forth?
      c. Is its length proportionate to the argument?
   2. Large–Scale Organization
      a. Is each ground for relief a separate point heading?
      b. Is the Argument organized around issues and subissues?
      c. Wherever possible, is the first issue the one most likely to succeed? Are all points under it arranged in order of strength?
   3. Small–Scale Organization
      a. Is each issue or subissue introduced by a thesis paragraph or sentence?
      b. Is each issue or subissue developed clearly and logically?
      c. Is your argument made before the opposing argument is countered, i.e., do you make effective use of the positions of emphasis?
      d. If the topic sentences of each paragraph were arranged in an outline would a strong skeleton of the argument emerge?

e. Does each paragraph advance the argument?
f. Are there genuine transitions between paragraphs?
g. Do the sentences within a paragraph coherently relate to each other and the topic?

B. Analysis
1. Are the facts of the case argued effectively?
2. Are the authorities cited appropriately described, explained, and applied?
   a. Are the rules of law stated clearly, accurately, and affirmatively?
   b. Are the facts of cases which are helpful to your client presented as consistent with the facts of your client's case, insofar as this is possible?
   c. Are "harmful" cases adequately distinguished or explained?
   d. Is the decision appealed from either supported or criticized?
3. Are policy arguments effectively made?
4. How have the arguments of the opposition been answered?
   a. Have you made sure that opposing arguments are not treated defensively?
   b. Are affirmative counter-arguments made convincingly?
5. Is the argument logical, internally consistent, and thoroughly developed?

VI. **Language**
Is the language clear, concise, and chosen for persuasive impact?

VII. **Grammar, Spelling, and Citation Form**
Is an otherwise persuasive brief marred by technical errors?

19

Oral Argument

LIKE MOST STUDENTS, you may approach your Moot Court oral argument with some trepidation. For the first time in a short legal career, completely alone and in public, you must face an oral examination of your legal knowledge of a complex problem. However, if you come to the Moot Court well prepared, you will probably enjoy the argument and gain confidence from the experience. For practicing attorneys, oral argument is an opportunity to clarify their case, to clear up any misunderstandings or doubts on the part of the court, and to make an impression that cannot be accomplished through a brief.

I. Preparing the Argument

THERE IS NO SUBSTITUTE for solid preparation. You must thoroughly know the Record on Appeal, your arguments, and the facts and reasoning of the relevant cases. Since you have already written a brief on the topic, you will know the strengths and weaknesses of your case. Your aim should be to impress the strong arguments upon the court, to shore up the weak points, and to answer the questions that the court may have. You should not read your argument from notes, so try to prepare a short outline with clear headings that will jog your memory about the points you want to make. You may want to prepare the beginning of your argument in more detail to get you started at the time when you are likely to be the most nervous. Some people advise that you prepare two arguments. One is the outline of the crucial points you must include even if the judges give you little time to make your own presentation. The other is the longer talk to use if your judges ask few questions and you must fill your time with your own presentation.

Anticipate the questions that the court will ask and be prepared for them. The court will probably ask about obvious weaknesses in your case. Therefore, know how to meet those weaknesses. If there are adverse cases, decide in advance how you will distinguish them or diminish their importance. But avoid dropping case names. Concentrate, instead, on the reasoning and analysis which shows why your position is correct and just. Think through your case so that before you give your oral argument, you know which points, if any, you can safely concede and why these points are not dispositive. Finally, be prepared to deal with the implications of the result you seek.

II. Selecting the Arguments

ORAL ARGUMENT IS NOT A SPOKEN version of the written brief. You do not have the time, nor is this the place, to argue every point of your case. Instead, crystallize the issues. Select and make the arguments that you think will probably control the judge's decision for or against you and that will make the court want to rule in your favor.

Make clear the basic points that you want to establish. Do not try to make complex arguments. Oral argument is a poor time for explaining subtle intricacies of the law or of case analysis. Leave that for your brief. Arguments based on fairness, simplicity, and common sense are often more effective than those based on esoteric complexities.

Choose among the types of arguments you included in your brief, for example, policy arguments, doctrinal arguments, and arguments based on the equities of the facts of your case. Remember, though, that these arguments are not mutually exclusive. You can focus on doctrinal arguments and yet humanize the case by relating these arguments to your client's situation. You should also choose among consequential and persuasive arguments and decide which ones to stress.

Once you have selected your main points, decide which premises and authorities you need to establish those points. Then, plan your outline according to that structure. Present your strongest and most important argument first. Focus the court's attention on your most effective arguments. Attack your opponent's weak points, but do not be defensive and use up your time explaining why your opponent's position is wrong before you make clear why you believe your position is right.

III. Introduction and Argument

IN AN ORAL ARGUMENT, the appellant (or petitioner) argues first. Then the appellee (or respondent) argues. In many Moot Courts, the appellant may then have a short rebuttal.

A standard introduction which both appellant and appellee can use is, "Your Honors, my name is _____, counsel for the _____ (appellant/appellee or petitioner/respondent)." In some Moot Court programs, students are advised to preface this statement with "May it please the Court." If your Moot Court rules provide for rebuttal, the appellant should reserve time for rebuttal during this introduction.

After the introduction, the appellant should begin by setting out the context and issues for the court. For example, an appellant might begin, "The issue in this case is whether a clothing store that requires only its female sales employees to wear a prescribed uniform during work hours violates Title VII of the Civil Rights Act of 1964 by discriminating on the basis of sex in the terms and conditions of employment." The appellant might then briefly state the key facts of the case on which this issue of law revolves. Then the appellant could outline the main arguments. "Field Brothers does discriminate on the basis of sex for these three reasons." The brief outline of the argument will provide the judges with a "road map" that will help them follow the development of the argument. Moreover, the outline gives a framework within which to work and to which it is useful to return, especially in the face of interruptions by questioning from the judges. After giving the judges the legal context of the appeal and an outline of the main arguments, the appellant should present the first argument.

The appellee, on the other hand, need not be tied to the same format. The appellee has the opportunity to capture the court's attention with the opening, either by using vivid facts or a persuasive statement of the issues. If the appellee is the prosecutor in a particularly vivid criminal case, the appellee might follow the introduction by saying, "Your Honors, the defendant has been tried and convicted by a jury of the first degree murder of his wife of fifteen years who was pregnant with his third child at the time of her murder." In the Field Brothers case, the appellee might begin, "The Field Brothers Clothing Store requires all its sales personnel, men and women, to wear a business suit at work. The store requires all its sales personnel

to wear the store's logo on the suit. The store requires all its sales personnel to wear suits in a dark, conservative color. Thus, Field Brothers does not discriminate on the basis of sex because it treats all of its employees alike."

However, the appellee might also decide to begin as the appellant has by setting out the issues in the case and then outlining the arguments. For example, the appellee might begin, "Your Honors, the issue is whether a clothing store that requires all its sales personnel to wear a conservative business suit and the store's logo during working hours violates Title VII by discriminating on the basis of sex." If the appellant has misstated any facts of the case, the appellee will want to correct them if they are relevant to appellee's case.

In general, the appellee's argument should not be a point by point refutation of the appellant's argument. Instead, appellees should present their arguments in the order that the arguments seem most effective. However, an appellee must listen carefully to the appellant's argument and be ready to change the presentation to meet the appellant's points. Flexibility is essential. An appellee should also listen carefully to the questions that the judges ask the appellant. In this way the appellee may learn which aspects of the case particularly concern the court and speak to those issues.

The appellant's rebuttal is the last word in the oral argument. The appellant should not include new information not made during the main presentation. Nor should the appellant use the time to rehash what has been said. Instead, the appellant should use the time to answer important points, not the small details, that the appellee seems to have raised, or to correct significant errors in the appellee's presentation, or to shore up those arguments that were weakened by the appellee or the judges' questioning. In other words, use the time to go for the big points. For example, if the appellee based her argument on a theme that she repeated with persuasive effect, the appellant could begin by redefining that theme in order to negate, or at least weaken, its impact.

In sum, although oral argument can be quite stylized, there is still a good deal of room for varying the format of the presentation. Your main concern as an advocate should be that the court knows what the issues are and gets the important information it needs to understand your version of the case.