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Richard K. Neumann, Jr. • Ellie Margolis • Kathryn M. Stanchi

Legal Reasoning and Legal Writing

NINTH EDITION

Richard K. Neumann, Hofstra University
Ellie Margolis, Temple University
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Legal Reasoning and Legal Writing teaches students how to organize and incorporate a legal argument into strong and cogent writing for a variety of applications in legal practice. This clear and coherent text has been updated to address the new skills required for modern law practice. While the **Ninth Edition** still includes the fundamental tools that has made it one of the best-selling legal writing texts, it has been updated to incorporate current and more sophisticated material for students wishing to take their advocacy skills to the next level.

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For

Marjorie Batter Neumann
and in memory of Richard K. Neumann Sr.

— RKN Jr.

Adam, Isaac, and Naomi Guth

— EM

In memory of Jeanette M. Stanchi and
Edward J. Stanchi, Jr.

— KMS

The power of clear statement is the great power at the bar.

— Daniel Webster

(also attributed to Rufus Choate,
Judah P. Benjamin, and perhaps others)

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Preface

We created this book to help students learn how to make professional writing decisions — to think simultaneously as lawyers and writers. As we say on page 1, a lawyer's life is a writer's life.

Richard K. Neumann, Jr.
Ellie Margolis
Kathryn M. Stanchi

December 2020

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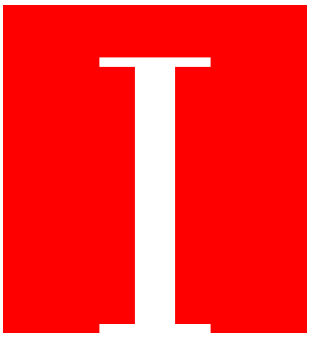
LEGAL REASONING AND LEGAL WRITING



INTRODUCTION TO LAW

1 Legal Writing and Law

§1.1 Legal Writing Is Decisional Writing

Before law school, you probably wrote primarily to communicate information that would satisfy the reader's curiosity. Lawyers write for a different reason — to guide decision-making.

A junior lawyer in a law firm might write an office memorandum to a senior lawyer explaining how the law affects a decision the senior lawyer must make. The memorandum's purpose is to help the senior lawyer make that decision. This is called *objective* or *predictive* writing.

In a courthouse, a lawyer might submit a motion memorandum or an appellate brief to persuade a judge or several judges to decide in favor of the lawyer's client. The document's purpose is to persuade each judge that the client's position is the legally preferrable one. This is called *persuasive* writing.

A lawyer's job is to get good results for clients. A lawyer does that by making the right decisions herself and by helping or persuading other people to make the right decisions. In legal writing, your reader — your audience — reads for the purpose of *deciding*.

§1.2 Writing Skills Can Profoundly Affect a Lawyer's Career

A lawyer's life is a writer's life.

To a lawyer, words are professional tools. Everything depends on how well the lawyer uses words — speaking them, interpreting them, and writing them.

Law is "one of the principal literary professions" because "the average lawyer in the course of a lifetime does more writing than a novelist."[1]

Good writing skills are essential to a young lawyer looking for a job. Employers will use your writing sample to confirm that you have those skills. A person who supervised 400 lawyers at a major corporation put it this way: "You are more likely to get good grades in law school if you write well. You are more likely to become a partner in your law firm, or receive comparable promotions in your law department or government law office."[2] It really is true that "good writing pays well and bad writing pays badly."[3] Now is the time to learn how to write professionally.

§1.3 Where Law Comes From

Law is primarily rules, which Chapters 2 and 3 explain in detail. Asking where law comes from is the same as asking who makes the rules.

Sources of law can be divided into two categories: one is statutes and statute-like provisions; the other is judge-made law.

Statutes and statute-like provisions. Legislatures create rules by enacting statutes. When we say, "There ought to be a law punishing people who text-message while driving," we vaguely imagine telling our state representative about the dangers of distraction behind the wheel and suggesting that she introduce a bill along these lines and persuade her colleagues in the legislature to enact it into law. If the legislature does that, and if the governor approves, the result is a statute. At the federal level, statutes are enacted by Congress. In the first-year of law school, the most statutory courses are Criminal Law (the Model Penal Code) and Contracts (the Uniform Commercial Code).

Statute-like provisions include constitutions, administrative regulations, and court rules. They are not enacted by legislatures, but in some — though not all — ways they are drafted like statutes. In your course on Constitutional Law, you will study the federal constitution. And in your course on Civil Procedure, you will study court rules called the Federal Rules of Civil Procedure.

Judge-made law. Courts record their decisions in judicial opinions, which establish precedents. Under the doctrine of *stare decisis*, those precedents can bind other courts in circumstances explained in Chapter 7. Lawyers

1. William L. Prosser, *English as She Is Wrote*, 7 J. Leg. Educ. 155, 156 (1954).
2. Richard S. Lombard (formerly general counsel at Exxon), remarks reprinted in *Lost Words: The Economical, Ethical and Professional Effects of Bad Legal Writing*, Occasional Paper 7 of the ABA Section of Legal Educ. Admissions to the Bar, at 54 (1993).
3. Donald N. McCloskey, *The Writing of Economics* 2 (1987).

use the words *cases*, *decisions*, and *opinions* interchangeably to refer to those precedents. Finding them is called *researching the case law*.

Courts make law in two ways. One is by interpreting statutes and statute-like provisions, which can be vague or ambiguous. Often we don't know what a statute means until the courts tell us through the judicial decisions that enforce it. When a court *interprets* the statute, it essentially finishes the legislature's job. The other method is by creating and changing the *common law*, which is entirely judge-made, for reasons explained in the next section of this chapter.

§1.4 The Common Law

> The past is never dead. It's not even past.
>
> — *William Faulkner*

Courts originally created the common law through precedent, and they have the power to change it through precedent. Before you arrived in law school, you may not have realized that courts are able to create their own body of law, separate from the law made in legislatures. The idea of law created without legislatures seems so counter-intuitive that it needs explanation.

The common law exists because of events that happened over 900 years ago, with consequences for law-making and legal vocabulary that lawyers still encounter daily. In the year 1066, a French duke named William of Normandy got together an army, crossed the English Channel in boats, invaded England, defeated an English army in the Battle of Hastings, terrorized the rest of the country, and had himself crowned king in London. He then expropriated nearly all the land in England and parceled it out among his Norman followers, who became a new aristocracy. And he set about systematically making English institutions, including law, subservient to his will.

Before the Norman Conquest, English law had differed from one place to another based on local custom. In a village, law had been whatever rules people had followed there for generations. In another village, law might be somewhat different because people there had been following somewhat different rules. Law amounted to traditions reflecting community views on what was right and wrong.

For two reasons, William's royal descendants would not allow this to continue. The political reason was that to complete the Conquest, the monarchy centralized power in itself and eventually created national courts with judges under royal control. The practical reason was that a judge of a national court cannot be expected to know the customary law of each locality. Law had to become uniform everywhere. It had to become *common* to the entire country. This common law could not come from a legislature. The modern concept of a legislature — one that could enact law — did not yet exist.

How was the common law created? The somewhat oversimplified answer is that the judges figured it out for themselves. They started with the few rules that plainly could not be missing from medieval society, and over centuries — faced with new conditions and reasoning by analogy — they discovered other rules of common law, as though each rule had been there from the beginning, but hidden.

Centuries later, British colonists in North America were being governed according to that common law. Their rebellion was not against common law, which they accepted as fair. Their quarrel was instead with the British government and its officeholders. During and after the Revolution, as each colony became a state, it adopted common law as state law. Today, state courts continue to evolve the common law. In your Torts and Contracts courses, you will see examples of this process at work.

Law-passing legislatures — the British Parliament, the U.S. Congress, and state legislatures — were all created centuries *after* the common law began. Today, however, legislatures have the superior law-making power. Common law is still judge-made law. But if a legislature enacts a statute that directly contradicts a common law rule, the statute prevails, and the common law rule ceases to exist. Common law reasoning, however, permeates the practice and study of law.

§1.5 Law's Vocabulary

To a lawyer, words are professional tools, and the law is full of specialized vocabulary, which you will learn to use. Many of law's technical terms aren't from the English language; they're from Latin or from an old dialect called Norman Law French — or just Law French.

Before the Norman Conquest, people in England all spoke a language called Old English. Almost everyone was illiterate. The few people who could read and write tended to do so in Latin because it was a uniform language not broken up into regional dialects. Law had been conducted partly in English but mostly in Latin, and many technical terms in our law are still in Latin. *Stare decisis*, for example, is Latin for "let stand that which has been decided" — in other words, follow earlier decisions, which are precedent.

After the Conquest, government was conducted in Norman French, and law was conducted both in Latin and in Norman Law French, which could still be heard in courtrooms many centuries later. Even today the bailiff's cry that still opens many American court sessions — "Oyez, oyez, oyez!" — is the Norman French equivalent of "Be quiet and listen."

Law is filled with terms of art that express technical and specialized meanings, and a large proportion of these terms survive from Norman Law French. Some of the more familiar examples include *allegation, appeal, arrest, assault,*

attorney, contract, counsel, court, crime, damages, defendant, evidence, felony, judge, jury, misdemeanor, plaintiff, slander, suit, tenant, tort, and *verdict.* In the next few months, you'll also encounter *battery, damages, demurrer, devise, easement, estoppel, indictment, lien, livery of seisin,* and *replevin*.

Some words entered the English language directly from the events of the Conquest itself. In the course on Property, you'll soon become familiar with various types of *fees: fee simple absolute, fee simple conditional, fee simple defeasible, fee tail*. These aren't money paid for services. They're forms of property rights, and they're descended directly from the feudal enfeoffments that William introduced into England in order to distribute the country's land among his followers. Even today, these terms appear in the French word order (noun first, modifiers afterward).

Law has a huge vocabulary of technical terms. It is derived from three languages: English, French, and Latin. And law is impossible without its specialized use of words. Medicine is applied biology, and engineering is physics and math. But in law the exact meaning of a word can make the difference between winning a case and losing it.

Use a legal dictionary — either a small book you can carry around with other books or an online legal dictionary if you'd rather work from your laptop. Look up every word that seems like lawyer-talk. But don't stop there. Look up every word or phrase that seems to be used in an unusual way. Some words or phrases obviously have a special meaning to lawyers, such as *parol evidence*, *habeas corpus*, and *res ipsa loquitur*. But others are deceptive. They might look like words you've seen many times before, but they mean something different in the law. Examples are *consideration*, *performance*, and *remedy*. Look up in a legal dictionary *every word or phrase that seems to be used in an unusual way*.

2 Rule-Based Reasoning

§2.1 The Inner Structure of a Rule

> At this moment the King, who had for some time been busily writing in his notebook, called out "Silence!" and read from his book, "Rule Forty-two. *All persons more than a mile high to leave the court.*"
> Everyone looked at Alice.
> "*I'm* not a mile high," said Alice.
> "You are," said the King.
> "Nearly *two* miles high," added the Queen.
>
> — *Lewis Carroll,*
> Alice in Wonderland

Law is made up of rules. A rule is a formula for making a decision.

Every rule has three components: (1) a set of *elements*, collectively called a test; (2) a result that occurs when all the elements are present (and the test is thus satisfied); and (3) a causal term that determines whether the result is mandatory, prohibitory, discretionary, or declaratory. (As you'll see in a moment, the result and the causal term are usually integrated into the same phrase or clause.) Additionally, many rules have (4) one or more exceptions that, if present, would defeat the result, even if all the elements are present.

Alice was confronted with a test of two elements. The first was the status of being a person, which mattered because at that moment she was in the company of a lot of animals — all of whom seem to have been exempt from any requirement to leave. The second element went to height — specifically

a height of more than a mile. The result would have been a duty to leave the court, because the causal term was mandatory ("*All* persons . . . *to* leave . . ."). No exceptions were provided for.

Alice has denied the second element (her height), impliedly conceding the first (her personhood). The Queen has offered to prove a height of nearly two miles. What would happen if the Queen were not able to make good on her promise and instead produced evidence showing only a height of 1.241 miles? (Read the rule.) What if the Queen were to produce no evidence and if Alice were to prove that her height was only 0.984 miles? (Read the rule.)

A causal term can be *mandatory*, *prohibitory*, *discretionary*, or *declaratory*. Because the causal term is the heart of the rule, if the causal term is, for example, mandatory, then the whole rule is, too.

A mandatory rule requires someone to act and is expressed in words like "shall" or "must" in the causal term. "Shall" means "has a legal duty to do something." "The court shall grant the motion" means the court has a legal duty to grant it.

A prohibitory rule is the opposite. It forbids someone to act and is expressed by "shall not," "may not," or "must not" in the causal term. "Shall not" means the person has a legal duty *not* to act.

A discretionary rule gives someone the power or authority to do something. That person has discretion to act but is not required to do so. It's expressed by words like "may" or "has the authority to" in the causal term.

A declaratory rule simply states (declares) that something is true. That might not seem like much of a rule, but you're already familiar with declaratory rules and their consequences. For example: "A person who drives faster than the posted speed limit is guilty of speeding." Because of that declaration, a police officer can give you a ticket if you speed, a court can sentence you to a fine, and your state's motor vehicle department can impose points on your driver's license. A declaratory rule places a label on a set of facts (the elements). Often the declaration is expressed by the word "is" in the causal term. But other words could be used there instead. And some rules with "is" in the causal term aren't declaratory. You have to look at what the rule *does*. If it simply states that something is true, it's declaratory. If it does more than that, it's something else.

Below are examples of all these types of rules. The examples come from the Federal Rules of Civil Procedure, and you'll study them later in the course on Civil Procedure. (Rules of law are found not just in places like the Federal Rules. In law, they are everywhere — in statutes, constitutions, regulations, and judicial precedents.)

If the rules below seem hard to understand at first, don't be discouraged. In a moment, you'll learn a method for taking rules like these apart to find their meaning. For now, just read them to get a sense of how the four kinds of rules

differ from each other. The key words in the causal terms have been italicized to highlight the differences.

mandatory: If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court *must* impose on the defendant (A) the expenses later incurred in making service and (B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.[1]

prohibitory: The court *must not* require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the United States, its officers, or its agencies, or on an appeal directed by a department of the federal government.[2]

discretionary: The court *may* assert jurisdiction over property if authorized by a federal statute.[3]

declaratory: A civil action *is* commenced by filing a complaint with the court.[4]

Here's a three-step method of figuring out what a rule means:

Step 1: Break the rule down into its parts. List and number the elements in the test. (An element in a test is something that must be present for the rule to operate.) Identify the causal term and the result. If there's an exception, identify it. If the exception has more than one element, list and number them as well. (Exceptions can have elements, too; an exception's element is something that must be present for the exception to operate.) In Step 1, *you don't care what the words mean*. You only want to know the *structure* of the rule. You're breaking the rule down into parts small enough to understand. Let's take the mandatory rule above and run it through Step 1. Here's the rule diagrammed:

1. Rule 4(d)(2) of the Federal Rules of Civil Procedure.
2. Rule 62(e) of the Federal Rules of Civil Procedure.
3. Rule 4(n)(1) of the Federal Rules of Civil Procedure.
4. Rule 3 of the Federal Rules of Civil Procedure.

elements in the test:

If

1. a defendant
2. located within the United States
3. fails to sign and return a waiver
4. requested by a plaintiff
5. located within the United States,

causal term:

the court must

result:

impose on the defendant (A) the expenses later incurred in making service and (B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses

exception:

unless the defendant has good cause for the failure.

You don't need to lay out the rule exactly this way—and you certainly don't need to use boxes. You can use any method of diagramming that breaks up the rule so you can understand it. The point is to break the rule up visually so that it's no longer a blur of words and so you can *see separately* the elements in the test, the causal term, the result, and any exception. When can you combine the causal term and the result? You can do it whenever doing so does not confuse you. If you can understand what's in the box below, you can combine, at least with this rule:

causal term and result:

the court must impose on the defendant (A) the expenses later incurred in making service and (B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses

Step 2: Look at each of those small parts separately. Figure out the meaning of each element, the causal term, the result, and any exception. Look up the words in a legal dictionary, and read other material your teacher has assigned until you know what each word means. You already know what a plaintiff and a defendant are. Find the word *service* in a legal dictionary and read the definition carefully. Do it now. After reading the definition, look again at the "result" box above. What does the phrase "the expenses later incurred in making service" mean there?

If you read other material surrounding this rule in Civil Procedure, you'll learn that a request for a waiver is a plaintiff's request that the defendant accept service by mail and *waive* (give up the right to) service by someone who personally brings the papers to the defendant. The surrounding materials also tell you that the expenses of service are whatever the plaintiff has to pay to have someone hired for the purpose of delivering the papers personally to the defendant.

Step 3: Put the rule back together in a way that helps you *use* it. Sometimes that means rearranging the rule so that it's easier to understand. If when you first read the rule, an exception came at the beginning and the elements came last, rearrange the rule so the elements come first and the exception last. It will be easier to understand that way. For many rules — though not all of them — the rule's inner logic works like this:

What events or circumstances set the rule into operation?
(*These are the test's elements.*)

When all the elements are present, what happens?
(*The causal term and the result tell us.*)

Even if all the elements are present, could anything prevent the result?
(*An exception, if the rule has any.*)

Usually, you can put the rule back together by creating a flowchart and trying out the rule on some hypothetical facts to see how the rule works. A flowchart

is essentially a list of questions. You'll be able to make a flowchart because of the diagramming you did earlier in Step 1. Diagramming the rule not only breaks it down so that it can be understood, but it also permits putting the rule back together so that it's easier to apply. The flowchart below comes straight out of the diagram in Step 1 above. (When you gain more experience at this, it will go so quickly and seamlessly that Steps 1, 2, and 3 *will seem to merge into a single step.*) Assume that Keisha wants Raymond to pay the costs of service.

elements:

1. Is Raymond a defendant?
2. Is Raymond located within the United States?
3. Did Raymond fail to comply with a request for waiver?
4. Is Keisha a plaintiff who made that request?
5. Is Keisha located within the United States?

If the answers to all these questions are yes, the court must impose the costs subsequently incurred in effecting service on Raymond — but only if the answer to the question below is no.

exception:

Does Raymond have good cause for his failure to comply?

Step 3 helps you add everything up to see what happens when the rule is applied to a given set of facts. If all the elements are present in the facts, the court must order the defendant to reimburse the plaintiff for whatever the plaintiff had to pay to have someone hired for the purpose of delivering the papers personally to the defendant — unless good cause is shown.

The elements don't have to come first. If you have a simple causal term and result, a long list of elements, and no exceptions, you can list the elements last. For example:

> Common law burglary is committed by breaking and entering the dwelling of another in the nighttime with intent to commit a felony inside.[5]

How do you determine how many elements are in a rule? Think of each element as an integral fact, the absence of which would prevent the rule's operation. Then explore the logic behind the rule's words. If you can think of a reasonably predictable scenario in which part of what you believe to be one element could be true but part not true, then you have inadvertently combined

5. This was the crime at common law. It does a good job of illustrating several different things about rule structure. But the definition of burglary in a modern criminal code will differ.

two or more elements. For example, is "the dwelling of another" one element or two? A person might be guilty of some other crime, but he is not guilty of common law burglary when he breaks and enters the *restaurant of another*, even in the nighttime and with intent to commit a felony inside. The same is true when he breaks and enters *his own* dwelling. In each instance, part of the element is present and part missing. "The dwelling of another" thus includes two factual integers — the nature of the building and the identity of its resident — and therefore two elements.

Often you cannot know the number of elements in a rule until you have consulted the precedents interpreting it. Is "breaking and entering" one element or two? The precedents define "breaking" in this sense as the creation of a gap in a building's protective enclosure, such as by opening a door, even where the door was left unlocked and the building is thus not damaged. The cases further define "entering" for this purpose as placing inside the dwelling any part of oneself or any object under one's control, such as a crowbar.

Can a person "break" without "entering"? A would-be burglar would seem to have done so where she has opened a window by pushing it up from the outside, and where, before proceeding further, she has been apprehended by an alert police officer — a moment before she can "enter." "Breaking" and "entering" are therefore two elements, but you could not know for sure without discovering precisely how the courts have defined the terms used.

Where the elements are complex or ambiguous, enumeration may add clarity to the list:

> Common law burglary is committed by (1) breaking and (2) entering (3) the dwelling (4) of another (5) in the nighttime (6) with intent to commit a felony inside.

Instead of elements, some rules have *factors*, which operate as criteria or guidelines. These tend to be rules empowering a court or other authority to make discretionary decisions, and the factors define the scope of the decision-maker's discretion. The criteria might be few ("a court may extend the time to answer for good cause shown"), or they might be many (like the following, from a typical statute providing for a court to terminate a parent's legal relationship with a child).

> In a hearing on a petition for termination of parental rights, the court shall consider the manifest best interests of the child. . . . For the purpose of determining the manifest best interests of the child, the court shall consider and evaluate all relevant factors, including, but not limited to:
>
> (1) Any suitable permanent custody arrangement with a relative of the child. . . .

(2) The ability and disposition of the parent or parents to provide the child with food, clothing, medical care or other remedial care recognized and permitted under state law instead of medical care, and other material needs of the child.

(3) The capacity of the parent or parents to care for the child to the extent that the child's safety, well-being, and physical, mental, and emotional health will not be endangered upon the child's return home.

(4) The present mental and physical health needs of the child and such future needs of the child to the extent that such future needs can be ascertained based on the present condition of the child.

(5) The love, affection, and other emotional ties existing between the child and the child's parent or parents, siblings, and other relatives, and the degree of harm to the child that would arise from the termination of parental rights and duties.

(6) The likelihood of an older child remaining in long-term foster care upon termination of parental rights, due to emotional or behavioral problems or any special needs of the child.

(7) The child's ability to form a significant relationship with a parental substitute and the likelihood that the child will enter into a more stable and permanent family relationship as a result of permanent termination of parental rights and duties.

(8) The length of time that the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.

(9) The depth of the relationship existing between the child and the present custodian.

(10) The reasonable preferences and wishes of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.

(11) The recommendations for the child provided by the child's guardian ad litem or legal representative.[6]

Only seldom would all of these factors tip in the same direction. With a rule like this, a judge does something of a balancing test, deciding according to the tilt of the factors as a whole, together with the angle of the tilt.

Factors rules are a relatively new development in the law and grow out of a recent tendency to define more precisely the discretion of judges and other officials. But the more common rule structure is still that of a set of elements, the presence of which leads to a particular result in the absence of an exception.

6. Fla. Stat. § 39.810 (2006).

§2.2 Organizing the Application of a Rule

> Welty and Lutz are students who have rented apartments on the same floor of the same building. At midnight, Welty is studying, while Lutz is listening to a Black Keys album with his new four-foot concert speakers. Welty has put up with this for two or three hours, and finally she pounds on Lutz's door. Lutz opens the door about six inches, and, when he realizes that he cannot hear what Welty is saying, he steps back into the room a few feet to turn the volume down, without opening the door further. Continuing to express outrage, Welty pushes the door completely open and strides into the room. Lutz turns on Welty and orders her to leave. Welty finds this to be too much and punches Lutz so hard that he suffers substantial injury. In this jurisdiction, the punch is a felonious assault. Is Welty also guilty of common law burglary?

You probably said "no," and your reasoning probably went something like this: "That's not burglary. Burglary happens when somebody gets into the house when you're not around and steals all the valuables. Maybe this will turn out to be some kind of trespass." But in law school a satisfactory answer is never merely "yes" or "no." An answer necessarily includes a sound *reason,* and, regardless of whether Welty is guilty of burglary, this answer is wrong because the reasoning is wrong. The answer can be determined only by applying a rule like the definition of common law burglary found earlier in this chapter. *Anything else is a guess.*

Where do you start? Remember that a rule is a structured idea: The presence of all the elements causes the result, and the absence of any of them causes the rule not to operate. Assume that in our jurisdiction the elements of burglary are what they were at common law:

1. a breaking
2. and an entry
3. of the dwelling
4. of another
5. in the nighttime
6. with intent to commit a felony inside

To discover whether each element is present in the facts, simply annotate the list:

1. *a breaking:* If a breaking can be the enlarging of an opening between the door and the jam without permission, and if Lutz's actions do not imply permission, there was a breaking.
2. *and an entry:* Welty "entered," for the purposes of the rule on burglary, by walking into the room, unless Lutz's actions implied permission to enter.
3. *of the dwelling:* Lutz's apartment is a dwelling.

4. *of another:* And it is not Welty's dwelling; she lives down the hall.
5. *in the nighttime:* Midnight is in the nighttime.
6. *with intent to commit a felony inside:* Did Welty intend to assault Lutz when she strode through the door? If not, this element is missing.

Now it's clear how much the first answer ("it doesn't sound like burglary") was a guess. By examining each element separately, you find that elements 3, 4, and 5 are present, but that you're not sure about the others without some hard thinking about the facts and without consulting the precedents in this jurisdiction that have interpreted elements 1, 2, and 6.

The case law might turn up a variety of results. Suppose that, although local precedent defines Welty's actions as a breaking and an entry, the cases on the sixth element strictly require corroborative evidence that a defendant had a fully formed felonious intent when entering the dwelling. That kind of evidence might be present, for example, where an accused was in possession of safecracking tools when he broke and entered, or where, before breaking and entering, the accused had told someone that he intended to murder the occupant. Against that background, the answer here might be something like the following: "Welty is not guilty of burglary because, although she broke and entered the dwelling of another in the nighttime, there's no evidence that she had a felonious intent when entering the dwelling."

Suppose, on the other hand, that under local case law Welty's actions again are a breaking and an entry; that the local cases don't require corroborative evidence of a felonious intent; and that local precedent defines a felonious intent for the purposes of burglary to be one that the defendant could have been forming — even if not yet consciously — when entering the dwelling. Under those sub-rules, if you believe that Welty had the requisite felonious intent, your answer would be something like this: "Welty is guilty of burglary because she broke and entered the dwelling of another in the nighttime with intent to commit a felony inside, thus meeting all the elements of common law burglary."

These are real answers to the question of whether Welty is guilty of burglary. They state not only the result, but also the reason why.

§2.3 Some Things to Be Careful About with Rules

A rule might be expressed in any of a number of ways. Where law is made through precedent — as much of our law is — different judges, writing in varying circumstances, may enunciate what seems like the same rule in a variety of distinct phrasings. At times, it can be hard to tell whether the judges have spoken of the same rule in different voices or instead have spoken of slightly

different rules. In either situation, it can be harder still to discover — because of the variety — exactly what the rule is or what the rules are.

Ambiguity and vagueness can obscure meaning unless the person stating the rule is particularly careful with language. The classic example asks whether a person riding a bicycle or a skateboard through a park violates a rule prohibiting the use there of "vehicles." What had the rule-maker intended? How could the intention have been made more clear?

A rule usually doesn't express its purpose — or, as lawyers say, the policy underlying the rule. A rule's policy or purpose is the key to unravelling ambiguities. Is a self-propelled lawn mower a prohibited "vehicle"? Try to imagine what the rule-makers were trying to accomplish. Why did they create this rule? What harm were they trying to prevent, or what good were they trying to promote?

Not only is it difficult to frame a rule so that it controls all that the rule-maker wishes to control, but once a rule has been framed, situations will inevitably crop up that the rule-maker didn't contemplate or couldn't have been expected to contemplate. Would a baby carriage powered by solar batteries be a "vehicle"?

Finally, the parts of a rule may be so complex that it may be hard to pin down exactly what the rule is and how it works. And this is compounded by interaction between and among rules. A word or phrase in one rule may be defined, for example, by another rule. Or the application of one rule may be governed by yet another rule — or even a whole body of rules.

Two skills will help you become agile in the lawyerly use of rules. The first is language mastery, including an "ability to spot ambiguities, to recognize vagueness, to identify the emotive pull of a word . . . and to analyze and elucidate class words and abstractions."[7]

The second is the capacity to *think structurally*. A rule is a structured idea, and the rule's structure is more like an algebraic formula than a value judgment. You need to be able to figure out an idea's structure and apply it to facts.

§2.4 Causes of Action and Affirmative Defenses

The law cannot remedy every wrong. Many problems are more effectively resolved through other means, such as the political process, mediation, bargaining, and economic and social pressure. Unless the legal system focuses its resources on resolving those problems it handles best, it would collapse under the weight of an unmanageable workload and would thus be prevented from attempting even the problem-solving it does well.

7. William L. Twining & David Miers, *How to Do Things with Rules* 120 (1976).

A harm the law will remedy is called a *cause of action* (or, in many courts, a *claim*). If a plaintiff proves a cause of action, a court will order a remedy unless the defendant proves an *affirmative defense.* If the defendant proves an affirmative defense, the plaintiff will get no remedy, even if that plaintiff has proved a cause of action. Causes of action and affirmative defenses (like other legal rules) are formulated as tests with elements and the other components, as explained in §2.1.

For example, where a plaintiff proves that a defendant intentionally confined him and that the defendant was not a law enforcement officer acting within the scope of an authority to arrest, the plaintiff has proved a cause of action called *false imprisonment.* The test is expressed as a list of elements: "False imprisonment consists of (1) a confinement (2) of the plaintiff (3) by the defendant (4) intentionally (5) where the defendant is not a sworn law enforcement officer acting within that authority." Proof of false imprisonment would customarily result in a court's awarding a remedy called *damages,* which obliges the defendant to compensate the plaintiff in money for the latter's injuries.

But that isn't always so: If the defendant can prove that she caught the plaintiff shoplifting in her store and restrained him only until the police arrived, she might have an affirmative defense that is sometimes called a *shopkeeper's privilege.* Where a defendant proves a shopkeeper's privilege, a court will not award the plaintiff damages, even if he has proved false imprisonment. The affirmative defense has its list of elements: "A shop-keeper's privilege exists where (1) a shopkeeper or shopkeeper's employee (2) has reasonable cause to believe that (3) the plaintiff (4) has shoplifted (5) in the shopkeeper's place of business and (6) the confinement occurs in a reasonable manner, for a reasonable time, and no more than needed to detain the plaintiff for law enforcement purposes."

Notice that some elements encompass *physical activity* ("a confinement"), while others specify *states of mind* ("intentionally") or address *status or condition* ("a shopkeeper or shopkeeper's employee") or require *abstract qualities* ("in a reasonable manner, for a reasonable time, and no more than needed to detain the plaintiff for law enforcement purposes"). State-of-mind and abstract-quality elements will probably puzzle you more than others will.

How will the plaintiff be able to prove that the defendant acted "intentionally," and how will the defendant be able to show that she confined the plaintiff "in a reasonable manner, for a reasonable time, and no more than needed to detain the plaintiff for law enforcement purposes"? Because thoughts and abstractions cannot be seen, heard, or felt, the law must judge an abstraction or a party's state of mind from the actions and other events surrounding it. If, for example, the plaintiff can prove that the defendant took him by the arm, pulled him into a room, and then locked the door

herself, he may be able — through inference — to carry his burden of showing that she acted "intentionally." And through other inferences, the defendant may be able to carry her burden of proving the confinement to have been reasonably carried out if she can show that when she took the defendant by the arm, he had been trying to run from the store; that she called the police immediately; and that she turned the defendant over to the police as soon as they arrived.

Exercise
Rule 11 of the Federal Rules of Civil Procedure

Provisions from Rule 11 appear below. For each provision, decide whether it is mandatory, prohibitory, discretionary, or declaratory. Then diagram it. Finally, create a flowchart showing the questions that would need to be answered to determine when a court must strike a paper.

Provision A The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

Provision B If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation.

Provision C Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

Provision D This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

3 Issues, Facts, Precedents, and Statutes

§3.1 A Precedents' Anatomy

An opinion announcing a court's decision — also called a *precedent* or, most commonly, a *case* — can include up to nine ingredients:

1. a description of procedural events (what lawyers and judges did before the decision was made)
2. a narrative of pleaded or evidentiary events (what the witnesses saw and the parties did *before* the lawsuit began)
3. a statement of the issue or issues to be decided by the court
4. a summary of the arguments made by each side
5. the court's holding on each issue
6. the rule or rules of law the court enforces through each holding
7. the court's reasoning
8. dicta
9. a statement of the relief granted or denied

Most opinions don't include all these things, although a typical opinion probably has most of them. Let's look at each.

Opinions often begin with (1) a recitation of *procedural events* during the litigation that have raised the issue decided by the court. Examples are motions, hearings, trial, judgment, and appeal. Although the court's description of these events may — because of unfamiliar terminology — seem at first confusing, you must be able to understand them because the manner in which an issue is raised determines the method a court will use to decide it. A court

decides a motion for a directed verdict, for example, very differently from the way it rules on a request for a jury instruction, even though both might require the court to consider the same point of law. The procedural events add up to the case's *procedural posture* at the time the decision was made.

Frequently, the court will next describe (2) the *pleaded events* or the *evidentiary events* on which the ruling is based. In litigation, parties allege facts in a pleading and then prove them with evidence. The court has no other way of knowing what transpired between the parties before the lawsuit began. A party's pleadings and evidence tell a story that favors that party. The other party's pleadings and evidence tell a different and contrary story.

As you read the court's description of the pleadings and evidence, you can often tell, even before reading the rest of the opinion, which party's story persuaded the court. Stories persuade. Usually the court tells you, the reader, the same story that the winning lawyer told the court. An effective lawyer can tell an effective story and tell it well through pleadings or evidence or both.

A court might also set out (3) a statement of the *issue or issues* before the court for decision and (4) a *summary of the arguments* made by each side, although either or both are often only implied. A court will further state, or at least imply, (5) the *holding* on each of the issues and (6) the *rule or rules of law* the court enforces in making each holding, together with (7) the *reasoning behind* — often called the *rationale for* — its decision. Somewhere in the opinion, the court might place some (8) *dicta.* You'll learn more about dicta in the next few months, but for the moment think of it as discussion unnecessary to support a holding and therefore not mandatory precedential authority.

An opinion usually ends with (9) a *statement of the relief granted or denied.* If the opinion is the decision of an appellate court, the relief may be an affirmance, a reversal, or a reversal combined with a direction to the trial court to proceed in a specified manner. If the opinion is from a trial court, the relief is most commonly the granting or denial of a motion.

An opinion announcing a court's decision is called *the court's opinion* or *the majority opinion.* If one or more of the judges involved in the decision don't agree with some aspect of the decision, the opinion might be accompanied by one or more *concurrences* or *dissents.* A concurring judge agrees with the result the majority reached but would have used different reasoning to justify that result. A dissenting judge disagrees with both the result and the reasoning.

Concurrences and dissents are themselves opinions, but they represent the views only of the judges who are concurring or dissenting. Because concurrences and dissents are opinions, they contain some of the elements of a court's opinion. A concurring or dissenting judge might, for example, describe procedural events, narrate pleaded or evidentiary events, state issues, summarize arguments, and explain reasoning.