Legal Drafting, Generally

Roadmap

- The key to good legal drafting is ensuring that the audience can easily understand and follow it.

- There are three key strategies for organizing legal drafting:
  (1) establishing context before details,
  (2) placing familiar information before new information, and
  (3) making your structure explicit.

- Paragraphs are essential building blocks of most legal drafting. Paragraphs begin with a topic sentence that identifies the subject or point of the paragraph. Then each sentence must be related to the topic sentence and to the sentences around it.

- Sentences in legal drafting should be as clear, direct, and concise as possible. The goal is for your readers to quickly and easily understand them.

- The drafting process is a multistep process involving:
  (1) organizing your preliminary materials into a workable outline,
  (2) writing the first draft,
  (3) revising and rewriting,
  (4) editing, and
  (5) proofreading.

- Do not expect to produce a quality document in one draft or the night before it is due.

A. Three Strategies for Organizing Legal Drafting

Your goal in legal drafting is to organize complex information so that your readers can understand it as easily and clearly as possible. Knowing the law and how it applies are not enough; you must make it easy for the reader to see and understand your analysis and agree with your conclusion. Most legal drafting has the following sections, in the following order, although they may be named differently depending upon the form of document being produced.

A. Introduction;
B. Issues;
C. Facts;
D. Law;
E. Analysis; and
F. Conclusion

Later chapters of this book explore the permutations of this structure in various specific forms of legal drafting.

There are three basic strategies for organizing complex information within this structure:

(1) Establish the context before adding the details,
(2) Place familiar information before new information, and
(3) Make your structure explicit.

1. Establish the Context before Adding the Details

Be sure to give readers enough context or background information to easily understand the various details you supply—including how those details fit and why they are important. By the time you are ready to draft a document you will have analyzed all of the facts and issues and become thoroughly familiar with them. Remember that your reader is not as familiar with these facts and issues. Thus, for example, before you discuss specific facts in a

memo, explain the client's problem or goals, and before you explain the specific prongs of a test, set out the basic law for which the test was designed. Otherwise, your reader will not easily understand the specifics and why you are discussing them.

To ensure your reader has enough background and context to understand the details remember these drafting principles:

(1) state the general before the specific;
(2) state the broad before the narrow; and
(3) state the rule before the exception.

Background or context begins with the title and the introduction or summary in a memo or brief, and the title and recitals in contracts and legislation. In the statement of facts section of a memo, the first paragraph should identify the parties, players, and general situation—the client's problems and goals. The same is true for contracts and the first sections of a statute or regulation. When discussing the applicable law, make sure the reader knows the broad legal principles first, and then give the rationale, elements, factors, tests, and other details. When applying the law, make sure the reader is already familiar with the rules, standards, and cases you use, and remind them as necessary.

When making or developing a point, make sure your readers know from the beginning what the point is, why it is important, and how it fits into the analysis. You are familiar with the material, but they are not. You know what points you are making; be sure your readers will also—without any work on their part. Using the IRAC or CRAC structure for memos and briefs will help you accomplish this. It is especially important to begin your application section with your overall conclusion on the issue or sub-issue and then explain or, tell why and show how, that conclusion is sound and well supported. "Tell" by making assertions or predictions supported by authority; and "show" by comparing and contrasting your facts with the facts of the cases you have used in the law section. Adhering to this method will help you ensure that the points you make are explicit to the reader.

Similarly, do not make or expect your readers to connect the dots, add 2 and 2 together, or complete the analysis for you. Many beginning drafters assume that if they "lay the information out there" it "will be obvious" or readers will "make the connection" or come to the

same conclusion as the drafter. Not so. Assume that your readers will not only be unfamiliar with what you are writing about, but also will be skimming the document. You need to clearly state the issue, give your conclusion, and do the analysis—telling and showing them why and how your conclusion is sound and well supported. Imagine yourself holding a mallet when you draft and revise—you should be hammering points home for the readers.

2. Place Familiar Information before New Information

Placing familiar information before new information is similar in purpose to providing context before details—ensuring easy comprehension by the reader.

The first step is to first make sure you familiarize your reader with important information you will use and build on later in the document. Thus, in drafting memos and briefs, adhere to the IRAC or CRAC structure. Any law, law-explanation, or case you use or refer to in the application section must first be set forth in the rule/law section. Similarly, any fact you use or refer to an application section should first be set forth in the statements of facts. If a law, law-explanation, case, or fact is important enough to use in your analysis, the reader should already be familiar with it. Also, do not allude to a law, rule, or standard that you have not yet addressed. The English literature practice of foreshadowing has no place in legal drafting.

Second, make sure the reader understands how a piece of new information—be it a fact, a law, a standard, an element, a factor, an explanation, a reason, or a policy—emerges from and connects with the information the reader has already consumed. You may assume it is obvious or that the reader will see the connection or relationship. Do not. Show the reader how the new information connects with the old. Use transition words, *e.g.,* “similarly,” “moreover,” “conversely,” as well as sentences that explicitly guide the reader: “Even if Mary ran the stop sign, this did not cause the accident.”

Some useful transitional words:

To add or build on material:

Moreover
Furthermore
Also
In addition
Similarly
Likewise

To indicate or introduce alternatives or differences:
Conversely
On the other hand
However
But
Yet
Still
Although
Though

To indicate a result:
Thus
Therefore
Hence
Accordingly
As a result

3. Make the Structure Explicit

An explicit, easy-to-follow structure is essential in legal drafting. This is why you should learn and embrace the IRAC and CRAC structures from the beginning. Do not organize as you go. Have a clear idea of how you need to deliver the information so that the reader can easily understand it. Make sure your thoughts and points do not appear scattered or random. *Do not just retrace the path you took when you were initially thinking about or analyzing the issue.* Often in these initial stages you will begin with the details and experiment and fit them together to build to a conclusion. In preparing or revising your first draft of a legal document, however, put your

conclusion first and then explain why and how that conclusion is sound and well supported. In other words, “turn your analysis on its head.” Also be sure to eliminate stray wanderings, recursive loops, and paths that resulted in dead ends. Readers are not interested in the writer’s musings on the issue or the amount of thought the writer put into producing the document. They want conclusions or predictions, set forth explicitly, then well explained and supported.

In memos and briefs, the statement of facts might be logically organized chronologically, by issue or subject, or by witness. Rule sections should be organized from general to specific laws, from broad to narrow laws. Application sections should begin with a topic sentence stating the overall conclusion, followed by supporting reasons in order of strongest to weakest. Avoid producing work product that makes your analysis sound like: “and another thing, and another, one more, oh here’s another point….” This may be difficult in the beginning because you may not be sure which of your reasons are strongest, or which points are most important, but it is important that you make a concerted effort to order your analysis.

Chapter 8 regarding transaction documents contains suggested formats and organizing tips for transactional documents.

Finally, in all legal drafting make your organization explicit by making good use of clear and informative titles, headings, topic and transitional sentences.

B. Paragraphs

The well-written and organized paragraph is key to legal drafting of all sorts. Paragraphs are the essential building blocks of legal writing. Think back to what you learned in grade school and middle school about paragraphs—and what you may have forgotten or underutilized since then.

Paragraphs have three essential requirements:

1. Paragraphs must begin with a topic or transitional sentence that clearly identifies the point, the main idea, the subject of the paragraph.

The paragraph's first sentence must clearly inform the reader what that paragraph is about. In memos and briefs the topic sentences of paragraphs in the statement of facts should indicate the type of facts addressed, *e.g.*, "Mr. Jones suffered serious injuries in the accident." Paragraphs regarding the law should begin with the basic law regarding the issue or sub-issue, *e.g.*, "Generally, minors' contracts are voidable at the election of the minor." In applying the law, the topic sentence should contain your overall conclusion on the issue or sub-issue, *e.g.*, "Steven probably will be able to void the contract he entered into when he was fifteen." Many times writers will build up to a conclusion that they put at the end of the paragraph. This is backwards. Do not bury your lead. Make the conclusion your topic sentence and then show why and how it is correct and well supported. The same is true in transactional drafting: sections and subsections should be arranged in a self-supporting hierarchy. See Chapter 8.

2. Every sentence in the paragraph must relate to the topic or transitional sentence—to the subject or point you identified there.

In reviewing your paragraphs, check each sentence against your topic sentence. If you have written sentences that do not relate to the topic or transitional sentence, it may be that you should break the paragraph up into two or more paragraphs, or perhaps you should revise your topic or transitional sentence. The same is true in transactional drafting. Beware of the section that tries to do too much—break it up with subsections, defined terms, information schedules, and the like.

3. Every sentence in the paragraph must relate to the sentences around it.

This is accomplished by (1) arranging the sentences in a logical sequence, for example chronological order; general to specific; broad to narrow; order of importance—most important, to supporting, to "also-rans"; and (2) using transition words that signal how the sentence relates, *e.g.*, similarly, likewise, moreover, conversely, however, on the other hand.

Finally, check your paragraphs for length. Save the one or two sentence paragraph for the rare occasion when it can be used for effect or flourish. Check to see if the sentences should be combined with or folded into other paragraphs, or if the very short paragraph should be developed more. Also check for paragraphs that are longer than ¾ of a page. Ask if these should be broken into more than one paragraph connected by transitional sentences. As with sections in transactional documents, beware of the paragraph that tries to do too much or contains more information than the reader can easily assimilate.

C. Sentences and Word Choice

Sentences in legal writing should be as clear, direct, and concise as possible. Always look for ways to use fewer words and to eliminate unnecessary words. The following are tools to accomplish this goal:

1. *Make the Subject Concrete and Put the Action in the Predicate.* Where possible, always make your subject a person or entity—something that acts—rather than a concept. For example "The jury [entity as subject] is not likely to convict Ms. Philips" rather than "The possibility of the jury's convicting Ms. Philips [concept as subject] is remote. Beginning legal drafters must make a conscious effort to do this—because the law, especially in law school, is often discussed in terms of concepts. However, at the root of these concepts are people. For example, adverse possession is a legal concept, but in order to acquire title by adverse possession a person must *do* certain things and *act* in certain ways. Negligence is a legal concept, but in order to be liable for negligence a person must *act* or *fail to act* in particular circumstances.

Generally, avoid the passive voice as it obscures the action and sounds weak and uncertain. The exception to this rule is when one is seeking to conceal an actor's identity or it is unknown.

> Generally yes: *Officer Pitcain made mistakes while investigating the crime by ___.*

Generally no: *Mistakes were made in the investigation.*

On the other hand, if you are representing Officer Pitcain, you would likely want to obscure the subject and would use passive voice. Thus, if you use the passive voice, make it a conscious choice.

2. *Stamp Out Narration.* Eliminate any words or sentences that simply narrate the process of your analysis, *e.g.*, "This issue was addressed by the Illinois Supreme Court" or "Guidance is found in the case law." Instead, state the rule, requirement, test or standard and cite the case(s). The citation supports—or holds up—the preceding statement.

3. *Avoid Nominalizations.* Unbury your verbs. For example: "We represented Ms. Philips" rather than "We provided representation to Ms. Philips." "I fixed the flat tire and flushed the radiator" rather than "I performed repair services on the vehicle."

4. *Use Plain Language.* Avoid legalese—lawyer sounds—and words or phrases you would normally not use. This sounds easy enough, but beginning legal drafters have a tendency to use words that they think sound "legal" or sophisticated but merely sound pompous or obtuse. Also, if you use a word you would not use normally, you run the risk of misusing it or getting it wrong—even slightly—which will make you look like a fool. Even if you have a large, sophisticated vocabulary, resist the urge to use an uncommon or complicated word if simpler word will do. A primary goal in legal drafting is to ensure that readers easily understand the words. On the other hand, do use legal terms of art—those that communicate a concept particular to the law—where appropriate. For example "The defendant moved for *summary judgment*" versus "The defendant opposed the lawsuit." In avoiding legalese, be sure not to use slang or overly casual terms, *e.g.* "Bob slapped a lawsuit on him." Finally, you should not use contractions, *e.g.*, write "you are" instead of "you're." Some readers will think contractions are fine, but others will see them as errors and a sign of poor drafting. You are drafting to please a wide audience.

5. *Use Fewer Words.* In legal drafting, you are competing for the reader's time and attention; therefore, do not use more words than necessary to clearly and accurately communicate the information. The first four tools listed above, will help you to use fewer words. In addition, you should check your sentences specifically for unnecessary words or "chaff" and delete them. For example, "in the event that" should be replaced with "if; " "for the reason that" should be replaced with "because."

6. *Avoid Intrusive Phrases or Clauses*. Do not interrupt yourself with subordinate dependent clauses (the descriptions that are set off by commas in the middle of the sentence). Either make them into their own sentence, move them to the beginning or end of the sentence, or eliminate them entirely. In other words, subjects should be close to verbs, and verbs close to objects.

7. *Choose the Right Word.* Make sure you use the right word. For instance, courts *rule, hold,* or *conclude*, but they do not *feel* or *argue*. Also make sure the word you use is a word, *e.g.*, "irregardless" is not a word. If you are unsure if you are using the correct word in the correct way, *look it up*.

8. *Put yourself in the position of the distracted, unfamiliar reader.* Are any of your sentences too long or hard to follow? Three lines on the page is stretching the limit. Take a hard look at sentences over two and a half lines, and sentences under two-thirds of a line (for choppiness). In reviewing long sentences, ask if you can use fewer words and clearly communicate the same idea; if you can, do so. If not it is likely you have packed too much content into one sentence and should break it up into more than one sentence. Also, use enumeration—(1), (2), (3) for example—to aid the reader in keeping track of requirements in a legal rule, even if you do not use fully tabulated (exploded) format to present it. In reviewing short sentences check for tone—do they appear abrupt or choppy?—and see if they should be combined with sentences around them. If you think a reader might have to read a sentence more than once to fully understand what it means, the sentence should be revised.

Sometimes beginning drafters resist these tools because they think they should not have to “dumb down” their writing for the reader. They need to abandon this attitude at the outset. Legal drafters should do everything needed to make their documents easy to follow and readily accessible to readers.

9. *Use the past tense when describing events that have already occurred.* This includes underlying facts and facts and rulings in cases: In *Smith v. Jones* the court *held* …” Mr. Black *stated* in his interview…. Use the present tense, however, for events or circumstances that are ongoing “He exercises five times a week.”

10. *Remember to Keep it Simple.* Use short words found in everyday speech (but avoid slang) that best express your intended meaning. Avoid Latin and other forms of legalese, which are opaque and pompous. Some key rules about word choice are listed below:

- Avoid elegant variation—using a word and its synonyms—use one word for each concept and use the same word each and every time you refer to that concept.

- Beware of pronouns. Use them only if their antecedent (the thing they refer to) is unmistakable. Cure unclear pronoun references by using the noun itself.

- Do not use “aforesaid,” “hereinabove,” and similar ancient-sounding words.

- As much as possible, use “the,” “this,” or “that” rather than “said” or “such.”

- Do not use “he/she.” Rather, attempt to use gender-neutral terms.

D. The Drafting Process

Legal drafting is a multistep process: (1) organizing your preliminary materials into a workable outline; (2) writing the first draft, (3) revising and rewriting, (4) editing, and (5) proofreading. You will need to build in time for each step as well as time away from the document. The days of waiting until the night before the due date and spinning straw into gold are over.

1. Organizing Preliminary Materials into an Outline—Creating an Explicit Structure

Before you begin drafting any legal document, you must organize your materials into a workable outline. The form and complexity of the outline will depend on the document and your working, thinking, and drafting styles. In all cases, though, you should put your preliminary materials in order and create an explicit structure for the document. The structure may change as you draft and revise, but you should begin with one. Once you have organized your thoughts and created a structure—the framework for your document—you need to start drafting. Do not get bogged down in the organizing step of the process or use it to put off actually writing.

2. The First Draft

The first draft is where you get your thoughts and ideas down and where you test them. In the first draft a significant amount of legal analysis occurs as you write and think through the issues. Writing forces you to think critically. Conclusions or assumptions you may have made in the research or preparation stage may not write up when it comes time to explaining or defending them, or in drafting you may come to different conclusions. You may also discover gaps in

your preparation or analysis. Thus it is important to begin the first draft early in the process and well before the document's due date. The most important part of the process of the first draft is to get it done. The first draft will not be a masterpiece and you should not try to make it one. At this stage do not overly concern yourself with sentence structure, word choice, or even paragraph structure, all of which you can fix later. Just write.

You do not need to start with the beginning of a document. You might start with a section or issue that seems easiest, then, as you get warmed up, you can tackle other sections. If you find yourself getting bogged down or frustrated with a section, step back and examine why. It could be that some of your preliminary analysis or conclusions are faulty or do not make good sense when put down on paper. You may need to think through issues again. That is part of the first draft process. If you have tested your assumptions and analysis, but are still bogged down in a section, move to another part of the document. Sometimes all you need is time away to regain perspective. Remember, your goal with the first draft is not perfection; it is getting it done so that you can start revising and rewriting, the most critical stage of the process.

3. Revising and Rewriting

After you finish your first draft, put it away for at least a day if possible. Although you will have revised and rewritten as you produced the first draft, you did so from the perspective of the writer organizing and putting thoughts down on the page. You need fresh eyes for the revising and rewriting stage of the drafting process, which is where you turn your draft into a quality document. A mistake made by beginning drafters is becoming attached to their drafts. In the revising and rewriting stage you must detach yourself and approach the document from the perspective of the reader—the client, a court, the assigning attorney, etc.

First assess the document's structure and content—does it address all issues and sub-issues involved in a logical way? A good way of testing this in memos and briefs is to create a heading and

topic sentence outline, explained in Chapter 5, section D (memos) and Chapter 6, section G (trial briefs). After you have made any revisions needed to ensure that the document logically addresses all issues and sub-issues, set it aside for a day, if possible. The next step is assessing how *well* they are addressed. At this stage, test paragraphs and individual provisions: are they logically arranged and easy to follow? Do they follow the three requirements discussed above for effective paragraphs? After paragraphs, move to sentence structure and word choice; use the 10 tools described in section C to test and revise your sentences so they are clear, direct, and easy to understand. Revising and rewriting is a critical multi-step process. It will take longer than you think to be thorough and objective, especially in the beginning. That is why you should start the first draft as early as possible, and block out more time than you think you will need to revise and rewrite.

4. Editing

After you are satisfied with your revisions of the document, set it aside again. The next step is editing—reviewing the documents from the reader's perspective for flow and easy understanding. Revising and rewriting can be an arduous process; editing should not be. Think of it as touching-up versus making full scale repairs. Check your sentences and words to make sure they are as clear and concise as possible and that they are logically arranged. Ask yourself, "Can I say this in fewer words?" A good technique is to read the documents aloud, which forces you to put yourself in the place of the reader. Poor phrasing or confusing sentences that seem fine on screen or paper often reveal themselves when read aloud. Editing is an important stage in making sure the document is easily accessible to the reader. However, be sure not to get bogged down in this stage, *e.g.*, rewriting the same sentence over and over, changing a word, then changing it back, and so on. It is possible to overwork a document and lose perspective.

5. Proofreading

When you are satisfied you have a high quality, thorough, and easy to follow document, put it away for at least a day. In the final proofing stage, *print out the document* and examine it strictly for errors—punctuation, grammar, capitalization, missing words that were dropped in the revising or editing process, incorrect words that spell check did not recognize, *e.g.,* "trial" versus "trail." Proofreading and editing should be kept as separate steps. While editing you will miss proofing errors or even create them, because your focus is different. Some proofreading techniques are reading the document aloud, reading with a straightedge so that you only see one line at a time, and reading the document backwards, from the end to the beginning. Beginning drafters may underestimate the importance of the proofreading stage and not leave enough time to do a thorough job. This is a big mistake. Documents with proofing errors look shoddy and tell the reader that you do not care, even if you do.

Checkpoints

- The key to good legal drafting is ensuring that the audience can easily understand and follow it.

- The three key strategies to organizing legal drafting are:
    - establish the context before discussing the details;
    - place familiar information before new information and show how new information emerges from or relates to familiar information;
    - make the structure explicit.

- The well-written and organized paragraph is the building block of all good writing, legal or otherwise.

- Paragraphs have three essential requirements:
    - Paragraphs begin with a topic or transition sentence that identifies the point, main idea or subject of the paragraph.

    - Every sentence in the paragraph must relate to the topic or transitional sentence.

    - Every sentence in the paragraph must relate to the sentences around it. This is accomplished by arranging the sentences in a logical sequence, and by using transition words that signal how the sentences relate, *e.g.*, similarly, moreover, however.

- Sentences in legal drafting should be clear, direct, and concise, and quick and easy to understand. Some tools for accomplishing this:
    - Make the subject concrete and put the action in the predicate. Where possible, always make your subject a person or entity that can *act* rather than a concept.

    - Stamp out narration—eliminate words or sentences that narrate the process of your analysis, *e.g.* “Guidance is found in several cases.”

- Avoid nominalizations—unbury your verbs, *e.g.*, write “We represented Ms. Jones” rather than “We provided representation to Ms. Jones.”

- Use plain language—avoid legalese and words that might not be quickly and easily understood by the average reader.

- Use fewer words—no more than necessary to clearly and accurately deliver the information or convey your point.

- Avoid intrusive phrases or clauses—do not interrupt the main point of your sentences. Subjects should go close to verbs and verbs close to objects.

- Chose the right word—the one that is correct and most accurate.

- Put yourself in the position of the distracted, unfamiliar reader and check if any of your sentences are too long or not easy to follow. Ideally sentences should be between three quarters of a line and two and a half lines.

- Use the past tense for events that have already occurred.

- Keep it as simple as possible.

- Legal drafting is a multi step process involving these steps:
  - Organizing your materials into and outline. Before beginning to draft, organize your thoughts and materials into an explicit

structure. The structure may change as you draft and revise the document, but it is important to begin with one.

- Writing the first draft. The first draft is where you get your thoughts and ideas down and where you test them. Writing forces you to think critically. The most important things about the first draft are to just write and get it done.

- Revising and rewriting. This stage involves distancing yourself from the draft and approaching it as a *reader.* Assess the document's structure and content—does it address all issues and sub issues in a logical way? Then assess how *well* you have addressed the issues and sub issues. This involves critically reviewing any IRACs, CRACs, paragraphs, clauses, provisions, or sentences and rewriting them as necessary, with the unfamiliar reader in mind.

- Editing. After your have revised your draft, the editing process involves fine tuning the document for flow and ease of understanding so that it is easily accessible to readers.

- Proofreading. Once you are satisfied that you have a high quality documents, put it aside. Then print it a go over it with a fine tooth comb ensuring that there *no errors*. Do not combine the editing and proofing steps. Suggested techniques are reading the document aloud and reading with straight edge so that you see only one line at a time. Proofing errors make a document look shoddy and the drafter look bad.

Chapter 3

Citation and Quotation: Why, When, and How

Roadmap

- Citations in legal documents are used to identify and attribute the sources used by drafters in preparing the document and show those readers where to find those sources.

- Quotations are used when communicating the exact words of the original source, should be accompanied by a citation, and should be used sparingly.

- Every statement, explanation, and illustration of the law in a memorandum or brief should be accompanied by a citation to the statute, case, or other legal authority on which it is based.

- Every statement of fact, description of fact, or allusion to fact in a brief or memorandum to the court should be accompanied by a record citation to evidence that establishes that fact.

- Whenever you use a source's exact words, you must put quotations marks around those words and provide a citation to that source.

- Your legal drafting and analysis will be judged in part by the quality and correctness of your citation form.

A. Purpose, Audience, and Goals

The purposes of citations in legal documents are to:

(1) identify and attribute the sources used by drafters in preparing the documents, and

(2) show readers where to find those sources.

Quotations are used when communicating the exact words of original sources, and are accompanied by citations to those sources. The audience for citations includes lawyers in the same firm as the drafter, opposing counsel, judges, law clerks, and court attorneys.

1. Citations to Legal Authority

Citations to legal authority are used to support statements, explanations, and illustrations of the law and to identify the sources from which they come so that the readers can find and review that authority for themselves. Citations to legal authority are also used in the application sections of the IRAC and CRAC formats in supporting predictions and assertions and in comparing and contrasting the facts in the client's case with those in the cases used in describing the law. Your goal is to show readers that your legal analyses and discussions are sound and well supported.

Legal authority includes primary authority such as constitutions, statutes, cases, rules of procedure, administrative regulations, and ordinances. Primary authority are *sources* of law. Legal authority also includes secondary authority such as treatises, legal periodicals, encyclopedias, and dictionaries, law review articles, and websites containing reports and statistical data. Secondary authority comments on the law, but is not a source of the law. Sometimes considered "in between" these primary and secondary sources is legislative history, including legislative counsel' digests, legislative committee reports, and statements of legislator's comments in the legislative record. Remember that legislative history is not dispositive as to the meaning of legislation—legislative history is what was *not* enacted, after all, and due to legislative rules allowing after-the-fact augmentation of the

record, the statements of legislators in the legislative history may not have even been made or heard prior to enactment of the statutes themselves.

Thus, legal authority is not created equally. There is a *hierarchy*. Within primary authority, there is *binding* (also called mandatory) authority and *optional* (also called persuasive) authority. Binding authority must be followed by the court hearing your case.

Binding primary authority includes the United States Constitution, the constitution and statutes of the state or jurisdiction in which court is situated, and case law rendered by the United States Supreme Court, and higher courts in that state or jurisdiction than the court at issue. For example, a state trial court in California would be bound by cases decided by the United State Supreme Court, the California Supreme Court and California appellate courts. A federal district (trial) court in California would be bound by cases decided by the United State Supreme Court, the United States Court of Appeals for the Ninth Circuit, and for questions of state law, by the California Supreme Court.

Optional primary authority is just that—optional. A court may choose to consider it, or not. Optional primary authority comes from a state or jurisdiction other than one in which the court is situated, *i.e.*, constitutions, statutes or and cases from another state or, on the federal side, cases law from another circuit. Additionally, cases from courts of the same or a lower level within the jurisdiction are optional authority. For example an intermediate appellate court in one part of the state is usually not bound by a decision of an intermediate appellate court in another part of the state. Such decisions by equal level courts are likely to be quite persuasive, however.

Secondary authority such as legal treatises and law review articles is optional. Its persuasiveness depends on the quality and reputation of the sources and their authors or editors. When a secondary authority is relied on in a judicial opinion, its status is elevated. For example, if a court defines a term in a case using a quotation from Black's law Dictionary, that particular definition, as incorporated into the judicial opinion, become primary authority on that matter.

Legislative History is secondary authority in that it is not a source of the law. However it often does more than comment on the law—it can provide insight and evidence regarding what the law means, its purpose, how it should be interpreted and the like. Thus, although it is optional authority, courts can be persuaded highly by legislative history. See Chapter 1, section B(5) for further discussion regarding legislative history.

Primary Authority

(Sources of Law)

Binding Primary Authority	*Optional Primary Authority*
• Constitution	• Constitutions
• Statutes	• Statutes
• Regulations	• Regulations, rules
• Court rules	
• Case law from a higher court	• Case law
In the state or jurisdiction in which the court as issue is situated.	*In a state or jurisdiction other than the one in which the court at issue is situated, or* *Case law from an equivalent level or lower court in the same jurisdiction as the court at issue.*

Secondary Authority—Always Optional

- Legal Treatises,
- Legal Encyclopedias,

- Legal Dictionaries,

- Law review Articles and the like.

Legislative History—Optional but Often Persuasive

Documents and records created by the various parts the legislature that enacted the statute, including:

- Statements of legislators regarding why they were in favor of a bill or why they opposed it;

- Different versions of a bill as it progressed through the legislative process; or

- Reports and analyses by committees and staff members such a legislative counsel.

---

2. Citations to the Record and to Exhibits

Citations to the record and exhibits are used to support statements of procedural history and statements of fact in memoranda to the trial court and appellate briefs. These record citations allow readers to review and verify the facts that are stated. Your goal is to show that your description of procedure and description of the facts are accurate and found either in the trial court record, exhibits provided to the trial court, or the record on appeal.

Factual sources include trial and depositions transcripts containing testimony, as well as contracts, letters, and other

statements memorialized in documents that have been authenticated and provided to the court. Procedural sources include pleadings, motion papers, court orders, and minute orders setting hearings, case management conferences, and the like.

3. Quotations

Quotations are used when it is important to communicate the exact words of a source. For example, the particular wording of a statute, or a controlling standard or definition set forth in a case, or the exact statement of a party or witness if it is important to your position or analysis. Quotations are always accompanied by a citation to their source—whether legal authority, or factual authority found in the record or an exhibit.

B. When to Cite or Quote

1. Legal Authority

Beginning drafters often feel like they are citing all the time and that the flow of the legal discussion and analysis is being constantly interrupted by cites. Experienced readers, however, expect citation to legal authorities in memoranda and briefs and for drafters to identify, with particularity, the legal authority on which their positions and analyses are based. These readers skip over the citations when verification of the statement is not important to them and hone in on them when it is. A missing citation makes these readers wonder if there is any support for the proposition stated other than the author's voice. In other words, beginning drafters should become comfortable with citation—or citing—as soon as possible.

Every statement, explanation, and illustration of the law should be accompanied by a citation to the statute, case, or other legal authority on which it is based. Beginning drafters usually have little difficulty with this concept in when dealing with statements of the law

that are expressly articulated in a particular statute or case. For example, when drafters state a definition or a particular test that has been clearly set forth in a case, they will cite that case. Similarly, when using the facts and holding of a case to illustrate the law, drafters will provide a citation to that case.

But when beginning drafters have synthesized cases and developed a statement or explanation of the law, they may leave out citation to the legal authority on which the statement or explanation of the law is based, thinking "I came up with that on my own." The reality is, no, they did not—not entirely. Rather, their statement or explanation was based on legal authority they read and analyzed and the reader needs to be told what legal authority it was. Similarly, when beginning drafters read a convoluted or complicated case and then come up with a way to explain a law in their own words that is easier to understand, they must be sure to cite the case on which their explanation is based. Readers of memoranda and briefs are usually not interested in a drafter's own ideas independent of legal authority, so be sure to show what authority supports your statements and explanations.

Also cite to legal authority to support any predictions, assertions, or conclusions you make in memoranda or briefs. This includes the application/analysis portions of any IRAC or CRAC used the discussion, as well as in any executive summaries, preliminary statements, statements of the case, or final conclusions. These citations show that any prediction, assertion, or conclusion you make is legally supported and identify the authority so the readers can locate and review it themselves.

Many beginning drafters resist citing to legal authority in the application/analysis portion of an IRAC or CRAC because they have recently cited the same authority in the rule/law portion. However, if drafters do include cites to support their predictions, assertions, or conclusions in the application/analysis, readers are forced to refer back and attempt to find the supporting authority themselves.

Finally, when discussing the facts of your case in the application/analysis portion of any IRAC or CRAC, link these facts specifically with the facts of the cases you have used in the rule/law portion to illustrate the law. Thus, you compare and contrast the facts

of your case with the facts in those cases and cite to those cases. This shows the readers how and why the particular client facts are legally significant. For example:

> Mr. Smith's use of the southwest portion of his neighbor's property was open and notorious, satisfying the first requirement for acquiring a prescriptive easement. *Tanner*, 131 N.E.2d at 52. A reasonable landowner would have been put on notice of Mr. Smith's use. *Machnicki*, 148 N.E.2d at 4. Similar to the claimant in *Machnicki*, Mr. Smith planted a vegetable garden, installed a fountain, and built a gazebo—all extending onto his neighbor's property. *Id.* at 3.

In the above paragraph the reader is not forced to go back to the rule/law section to figure out which authority supports the drafter's two assertions. The reader also does not have to go back to remind herself what happened in the *Machnicki* case to understand why the facts discussed by the drafter are legally significant.

2. Cites to the Record and to Exhibits

a. Memoranda to the Trial Court

Cite to the record in describing the relevant prior procedure and the relevant facts in support of or opposition to motions to the trial court. Thus, when describing the procedural history leading up to the motion, provide a record cite for every pleading, order, or other document in the trial court's file that you refer to or that reflects the actions you describe. This demonstrates that your description of the proceedings is accurate and supported by the particular documents in the trial court's file, and allows the judges, law clerks, or court attorneys to locate and review those documents for themselves. Documents in the court's file will usually be numbered consecutively and, increasingly, a list of the documents in the file and the number assigned to them found on line through PACER and other services.

Moreover, unless the record cites are voluminous, it is usually a good idea to attach the documents cited as exhibits in support of your memorandum. This makes it easy for the judge or court attorney working on the motion to be able to review those documents.

In the statement of facts drafters need to identify the source for any fact that is set forth, described or alluded to, and provide a document supporting that fact if a supporting document is not already in the court's file. Drafters provide these documents by attaching them as exhibits to their memoranda. Examples of sources for facts in the statement of facts are (1) witness testimony contained in prior hearings or in depositions, (2) pleadings containing allegations alleged by plaintiffs and denials and defenses asserted by defendants, (3) contracts or other documents evidencing agreements between the parties, (4) discovery such as answers to interrogatories, (5) letters between parties, counsel or other relevant persons. In other words drafters must cite to *evidence* that supports the facts described in the statement of facts, and provide that evidence if it is not already in the court's file. For the sake of the reader's convenience, drafters may choose to also attach documents in the court's file as exhibits.

b. Appellate Briefs

The record on appeal consists of the documents from the proceedings below that the parties have designated to be in the record—that they consider relevant for deciding the issues on appeal. Procedures for designating the record are described in Chapter 7, section F(3)(b). Citations to the record are contained in both the statement of the case and the statement of facts section of an appellate brief.

An appeal's pertinent procedural history is generally set forth in the Statement of the Case—the purpose of which is to tell the appellate court what is being appealed and to describe the nature of the action, the parties, and how and why the matter has come before the court. Thus, every procedural act and document described should be followed by a cite to the appellate record so that the judge, law clerk, or court attorney working up the case can easily locate the

pleading or other document detailing the action. For an example of a statement of the case with citations to the record see Chapter 7, section F(2).

Absent exceptional circumstances, the statement of facts in an appellate brief may contain only the facts and evidence that were presented to the court or jury below. Thus, any fact set forth or described must be accompanied by citations to the appellate record that enable the persons working up the appeal to look up and review the original the source. Citations to the record enable the reader to confirm that the facts described were actually presented to the trial court or jury, and to verify the drafter's accuracy in describing those facts.

3. Quotations

Drafters should use quotations sparingly to communicate a source's exact words. It is often important to quote the exact words of the controlling statute or, if a particular test or standard is described clearly and concisely in a case, it is a good idea to quote that specific test or standard. The same holds true with clear definitions articulated by courts. Also, there will be times when it is best to quote a person's specific words in the statement of facts if they are important in your analysis, for example whether a person's statements amounted to an offer or an acceptance. Also, at times a person's exact words will create a more powerful impression than a paraphrase. For example:

> *The defendant told police "Yeah, I shot him—right between the eyes. So what?"*
>
> as opposed to
>
> *The defendant acknowledged shooting the victim.*

Drafters should avoid drafting statements of facts that are a series of quotes because this often leads to long, repetitive text that readers will tend to skim or skip over. Drafters should also avoid discussions of the law that are essentially a series of quotes from the

cases strung together. This is often an indication that the drafter has not done sufficient synthesis and analysis. Also, long strings of quotes often appear disjointed and are cumbersome for readers to wade through.

If you have tried to paraphrase a source but your words are still quite close to the original, you should instead quote the source's words and note any omissions or changes you have made using ellipses and brackets (described below). A very close paraphrase erroneously implies that another person's words are yours and is misleading.

Beginning drafters will sometimes repeat verbatim the words used in a headnote that are not actually found in the case itself. Headnotes, however, are not part of the opinion and should not be quoted. Doing so followed by a citation to the case containing the headnote implies these are words of the court, which is inaccurate. On the other hand, it is also misleading to repeat the exact words of a headnote without quotation marks and thus pass the words off as yours. The solution is to come up with different and ideally, better, words to use.

Some beginning drafters also put quotation marks around their own words in an attempt to emphasize them. This stems in part from the spoken practice of pantomiming quotation marks when making a sarcastic or euphemistic reference. Do not do this in legal drafting. When you feel that you must emphasize a word for this or another purpose, use italics; and, above all, resist the urge to over emphasize —effective prose communicates its message well without the technique.

Finally, use quotation marks to define terms that you will use throughout your document and for which you want a short, standardized term, *i.e.*, the defendant, Peter Jones ("Jones") or the Asset Purchase Agreement between Melody Partners LLC and Roncho Promotions, Inc. dated June 7, 2010 (the "APA").

C. How to Cite

1. Legal Authority

In most jurisdictions court rules specify acceptable cite forms for memoranda and briefs—usually *The Bluebook: A Uniform System of Citation* and occasionally a style manual particular to the state, *e.g.*, the *California Style Manual.* In law school you will probably be assigned the *Bluebook* or the *Association of Legal Writing Directors (ALWD) Citation Manual* through which to learn the most common rules of citation. Following either will result in citations that look substantially the same. Learning proper citation form and the rules of citation is like learning a new language—it takes practice and the more you use it, the easier it becomes. In the beginning, drafters will need to use the index of the *Bluebook* or *ALWD Citation Manual* often to find out how to cite a particular source.

Two things to keep in mind as you work on mastering citation: (1) your legal drafting and analysis will be judged in part by the quality and correctness of your cite form, and (2) the goal in citation to legal authority is to clearly convey enough information concisely so that readers can easily identify the source and look it up themselves.

Some of the basic rules in citing legal authority, particularly cases, are discussed below.

a. Information Contained in a Case Citation

A case citation contains a number of components that convey information to the reader, primarily:

1. the case name;

2. the reporter(s) containing the case and well as the reporter's volume number, the first page of the case, and the particular page(s) that contain the information the drafter has referred to (often call a "pin cite" or "pinpoint citation").

3. The court that decided the case; and

4. The year of the decision.

For example:

1 2 3 4
Siedle v. Putnam Invs. Inc., 147 F.3d 7, 10 (1st Cir. 1998).

The reporter is the Federal Reporter, Third Series, volume 147. The case begins on page 7 and page 10 contains the pertinent information referred to by the drafter, *e.g.*, the holding, a test, or a set of facts. This information allows the reader to look up the case either in hard copy or on-line. The deciding court was the United States Court of Appeals for the First Circuit, and the year the case was decided was 1998. This information tells the reader about the weight of authority—the level of the deciding court, its geographic jurisdiction, and how recent the case is.

Readers will know the citation language shorthand and will grasp all this information quickly. For example, readers will know that the numbers 7 and 10 refer to page numbers, thus it is not necessary and, indeed, incorrect to write "p. 7." Beginning drafters will need to look up the rules regarding abbreviation of case names, which reporters to cite and their abbreviations, the abbreviations for courts, etc., in the index of the *Bluebook* or the *ALWD Citation Manual*. The *Bluebook* has tables and the *ALWD Citation Manual* has appendices that explain how to abbreviate and that contain various abbreviations to use.

Note: The case name is set forth in italics. Although the examples from the *Bluebook's* "blue pages"—also called "practitioner style pages"—underline case names, drafters in the 21st century, armed with a personal computer, laser printer, and a word processor, should use italics. Previously, case names were underlined in memoranda and briefs because most typewriters could not produce italics. That is not the case now with computers. Also, using italics makes for a cleaner, more professional looking document.

b. Citation Sentences and Clauses

Generally, a citation or citations are set forth in a separate citation sentence following the sentence of text. For example:

> Adequate notice lies at the heart of due process. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L.Ed. 865 (1950).

There is a period after the word “process” and then two spaces and a new sentence containing the citation to *Mullane*.

Sometimes citations are contained in clauses that are inserted in to the textual sentence. For example, if a sentence contains two propositions and one case supports one proposition and a different case supports the other:

> This motion is made on the grounds that (1) the Asset Purchase Agreement between the Debtor and the Successor, by its terms, does not apply to products liability claims arising after the sale, *In re Eagle-Pitcher Indus., Inc.*, 255 B.R. 700, 704 (Bankr. S.D. Ohio 2000), and (2) as a matter of law, sales under section 363(f) of the Bankruptcy Code do not extinguish causes of action for personal injuries that occur after the sale, *Hexcel Corporation v. Stepman Co*., 239 B.R. 564, 570 (N.D. Cal. 1999).

In the above example, each citation clause is inserted right after the portion of the text it supports, preceded by a comma. The problem with using citations clauses like this is that is often results on long and cluttered sentence. It would be best to break up this example into two sentences, each supported by separate citation sentence:

> This motion is made on two grounds. First, the Asset Purchase Agreement between the Debtor and the Successor, by its terms, does not apply to products liability claims arising after the sale. *In re Eagle-Pitcher Indus., Inc.*, 255 BR 700, 704 (Bankr. S.D. Ohio 2000). Second, as a matter of law, sales under section 363(f) of the Bankruptcy Code do not extinguish causes of action for personal injuries that occur after the sale. *In re Hexcel Corp*., 239 B.R. 564, 570 (N.D. Cal. 1999).

c. The Sequence of Multiple Cases in One Citation Sentence

At times the drafter will want to show that more than one case supports the proposition or other information contained in the textual sentence. The rules regarding the order in which to list those cases reflect the hierarchy of authority discussed in section 1, supra, and in Chapter 1, section D. This order is based on the court that decided the case and the date of the decision. Cases from the pertinent jurisdiction come before cases from outside the jurisdiction and secondary authorities (law review articles, etc.). Then, within the pertinent jurisdiction, cases from courts of last resort come before cases from intermediate appellate courts, which come before cases from trial courts. Within each court level, cases are arranged from newest to oldest.

Thus, the most recent case from the highest court would come first in the citation sentence. An older Supreme Court case would come before a more recent appellate court case:

> *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 70 S. Ct. 652, 94 L.Ed. 865 (1950); *Jones v. Chemetron Corp.,* 212 F.3d 199, 209–210 (3rd Cir. 2000).

Sometimes drafters will have good reason to list multiple cases in a different order than called for in the *Bluebook*. This would be so, for example, if an appellate court case is more on point, while the cases from the court of last resort supports the more general proposition. They may do this, but they must insert the signal *"see also"* before the higher ranked case in order to continue to comply with the rules of citation:

> *Jones v. Chemetron Corp.,* 212 F.3d 199, 209–210 (3rd Cir. 2000); *see also Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L.Ed. 865 (1950).

Note: Multiple authorities within citation sentences are separated by semi colons as if they were closely-related independent clauses.

d. Short Citation Forms

Beginning drafters should become familiar with the basic short forms of citations. Short form citations are not required, but they save space in the document. For example:

Full citation:

Siedle v. Putnam Invs., Inc., 147 F.3d 7, 10 (1st Cir. 1998).

Partial case name and reporter short form:

Siedle, 147 F.3d at 10.

A textual reference using the partial case name and reporter short form:

In *Siedle,* the court rejected this argument. 147 F.3d at 10.

When citing to the same case previously cited with no intervening cites:

Id.—When citing to the same page as that pin cited in the previous cite.

Id. at 11.—When citing to a different page than the one pin cited in the previous cite.

The period in "*Id."* is italicized.

The full cite contains the most information, followed by the partial name and reporter short form. Each of these cite forms gives the reader the information needed to look up the case. Using the short form *Id.* requires the reader to refer back in the document to find this information. This is not a problem if they do not have to look to very long or hard. However, if the readers would have to go back to another section or turn the page to find the information necessary to look up the case, it is best to use the partial name and reporter short form.

There must be no ambiguity regarding which case *Id.* refers to. For example, if the previous citation sentence contains more than one case, many readers will not be sure which case the drafter meant in using the *Id.* short form.

Finally using a partial name followed by just a page number, *e.g., Siedle* at 11, is not a proper short form citation, and, for many readers, this will mark the drafter as a hack.

When drafting, never convert citations to short forms until the last draft. The danger in doing so is that the authorities may be deleted or reordered during the revision process and what was once a perfectly proper short form is now inappropriate in that no earlier full citation is present or a lonely *Id.* remains referring back to where a primary authority is no longer present.

e. Citations to Other Sources

The *Bluebook* and the *ALWD Citation Manual* also contain detailed rules and explanations regarding citations to myriad other sources including constitutions, statutes, federal rules, legislative history, treatises, law review articles, and electronic databases. Drafters should consult the index of either of these manuals before citing to any of these sources. The indexes are detailed and may contain the exact source you intend to cite.

2. Cites to the Record and to Exhibits

There are not uniform detailed rules for citing to the record and to exhibits. The local rules of court in various jurisdictions may state requirements regarding citing to the record and exhibits, and counsel should always check these rules before preparing memoranda to the trial court or appellate briefs. What is key is for drafters to clearly (1) identify the source supporting each procedural act or fact they describe, (2) show where to locate that source, and (3) adopt a consistent citation form throughout the document. Often this means longer descriptions in the beginning followed by abbreviations and defined terms.

An example from a motion to a bankruptcy court:

GWII was incorporated on September 12, 2001. Two days later, on September 14, GWII and the Debtor entered into an Asset Purchase Agreement (the "APA") whereby GWII agreed to purchase substantially all of the Debtor's assets. (A true and accurate copy of the APA is attached hereto as Exhibit "A", APA, at p. 1). Three days later, on September 17, 2001, the Debtor instituted voluntary Chapter 11 proceedings in this Court. The sale of Debtor's assets to GWII was approved by this Court on November 14, 2001, with the Order approving same being filed on November 15. (A true and accurate copy of the Sale Order is attached hereto as Exhibit "B", Sale Order at pp. 1–3, 10).

The Sale Order's list of interested parties did not include persons or entities who might possess claims in the future, nor did the Sale Order note any attempt by the Debtor to notice them. (Exhibit B, Sale Order, at p. 5.) Nowhere did the Sale Order provide that GWII not be deemed to be a successor to the Debtor, to have merged with or into the Debtor, or to be a continuation or substantial continuation of the Debtor or the Debtor's enterprise—even though these findings were a condition to closing in the Sale Order. (See Exhibit "A", APA at p. 43).

Notice that, unlike citations to legal authorities, the citations to the documents and exhibits are set off in parenthesis. A reason for this is to clearly distinguish cites to exhibits from the text. Since citations to legal authorities often include italics, this rather than parentheses distinguishes them from the text. Also, the abbreviation "p." is used to denote page numbers in the documents. Often cites to documents in the record or attached as exhibits will include abbreviations for pages "p.", clauses "cl.", paragraphs "¶" to clearly identify portions of the document cited.

An example from an appellate brief:

Kuney served the motions to intervene and dissolve or modify the Stipulated Protective Order on all parties to *Baystate Technologies, Inc. v. Bowers*, No. 91-40079, and the appeal, *Bowers v. Baystate Tech., Inc.,* 320 F.3d 1317 (Fed. Cir. 2003), as well their successors and all attorneys involved. (Docket No.

551, Notice of Motion and Motion filed February 21, 2007, Appendix, Tab 2, p. 10.) Robert Bean (Bean), who is not party to the stipulated protective order, filed the only opposition to the motion. (Docket No. 555, Bean's Opposition filed March 21, 2007, Appendix, Tab 8, p. 129.) Thereafter, Kuney and Bean entered into a settlement providing that Kuney could use the jury exhibits and the confidential and nonconfidential appeal appendixes filed in *Bowers v. Baystate Tech., Inc.*, 320 F.3d 1317 (Fed. Cir. 2003), Case No. 01-1108-11109. (Docket No. 557, proposed stipulated order signed by Kuney and Bean's counsel, Appendix, Tab 10, p. 140.) The terms of this settlement are set forth in a proposed stipulated order filed with the District Court on April 2, 2007. (Docket No. 557, Appendix, Tab 10, p. 140.) No action was taken by the District Court regarding Kuney and Bean's settlement and the proposed stipulated order, however.

For more examples of citing to the record and to exhibits see Chapter 6, section C(2)(d), and Chapter 7, sections F(2), (3)(b).

D. How to Quote

The *Bluebook* and the *ALWD Citation Manual* also contain rules regarding quotations. We have included some of the basics.

1. Using Quotation Marks

In general, when you use the exact words of another source, put quotation marks " " around those words and put punctuation marks inside the quotation marks:

> "Under fundamental notions of procedural due process, a claimant who has no appropriate notice of a bankruptcy reorganization cannot have his claim extinguished in a settlement pursuant thereto." *Chemetron II*, 212 F.3d at 209–10.

If you need to quote within a quote, put single quotation marks around the internal quote:

> "The purpose behind requiring notice to creditors is to provide them the 'opportunity to be heard' which is 'the fundamental requisite of due process of law.'" *In re Chance Indus., Inc.*, 367 B.R. 689, 708 (Bankr. D. Kan. 2006) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L.Ed. 865 (1950)).

However, if the quote is fifty words or more, the words are set out in a single spaced, indented block quotation, and quotation marks are omitted:

> The court in *Chance Indus., Inc.* further explained the constitutional inadequacy of notice by publication to potential future claimants:
>
> Some of the future claimants may not be living persons at the time the notice is given, so they are not necessarily capable of seeing it. If they are alive and actually see the notice, they could not recognize themselves as affected in any way by the bankruptcy case and will, therefore, take no action to ensure their interests are represented. The purpose behind requiring notice to creditors is to provide them the 'opportunity to be heard' which is 'the fundamental requisite of due process of law.' Such a notice by publication is an exercise in futility as applied to creditors who are not only unknown to the debtor, but are also unknown to themselves. It cannot possibly define the requirements of the Due Process Clause.
>
> 367 B.R. at 708 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L.Ed. 865 (1950)).

Use block quotes sparingly, since many readers tend to skip or skip over them. If you do block quote, introduce or follow it with a sentence that explains the point or substance of the quote.

2. Indicating Omissions or Alterations in a Quote: Ellipses and Brackets

If you alter a quote from what appears exactly in the source document, you need to indicate omissions with ellipses and any changes to words or letters with brackets.

Three ellipses (dots) separated by a space in between each indicate that you have omitted a word or words from the quote ("…"). There should be a space before the first ellipses and after the third: "The defendant shot … him in the hip." If you omit the last words of a sentence you need four dots—three represent the ellipses, and the fourth is the period at the end of the sentence: "But Franklin, the defendant, shot James Cook in the hip…."

If you omit an entire paragraph, indicate this omission by putting a three dot ellipses centered on a separate line in between the quoted paragraphs.

When you make changes to words of a quote, by adding or changing words, letters, or case (*e.g.*, upper case to lower case) you indicate those changes by putting your version inside brackets. Examples:

"[T]he defendant shot [the victim] in the hip."

This indicates that the drafter left out the first part of the sentence in the original quote and thus had to capitalize the "T" in "the." Also, the drafter changed the original sentence to replace "James Cook" (see above) with "the victim."

3. Citing Original Sources and Indicating Emphasis

Every quotation must be followed by a pin citation to its source. If the quote contains an internal quotation, the source for that quotation must also be pin cited in an explanatory parenthetical:

> *In re Chance Indus., Inc.*, 367 B.R. 689, 708 (Bankr. D. Kan. 2006) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339

U.S. 306, 314, 70 S. Ct. 652, 94 L.Ed. 865 (1950)).

You would not need an explanatory parenthetical if the court in *Chance* had merely cited to *Mullane* as opposed to having quoted language from that case.

You may emphasize words in quotations that were not emphasized in the original source, but you must note this added emphasis in an explanatory parenthetical:

> "Under fundamental notions of procedural due process, a claimant who has no appropriate notice of a bankruptcy reorganization *cannot* have his claim extinguished in a settlement pursuant thereto." *Chemetron II*, 212 F.3d at 209–10 (emphasis added).

If the original source has emphasized words in a sentence or sentences that you quote, you do not have to explain that the emphasis was in the original source, but many drafters often do to make this clear—adding the explanatory parenthetical: "(emphasis in original)."

E. Conclusion

This chapter has summarized the basics of why, when, and how to cite to the record and to authorities. These rules may seem technical and small minded, but they are fundamental to legal drafting. Failure to follow them will mark you as a disorganized novice and will increase the workload of those reviewing your documents, never a good thing whether the reviewing party is your employer, the court, or a decision maker to whom you are appealing. Your practice should be to cite, correctly, as you draft. Leaving citation or *Bluebook*ing to the last minute means creation of extra work and a frantic attempt to complete the task before a deadline. Citing correctly as you go provides an audit trail for your work and analysis and produces better documents in less time (and, thus, for less money). For beginning drafters, this may mean *Bluebook*ing the cases they intend to use in correct form *before* they start to draft.

Checkpoints

- Citations in legal documents are used to:
    - identify and attribute the sources used by drafters in preparing the document, and
    - show those readers where to find those sources.
- Quotations are:
    - used when communicating the exact words of the original source,
    - should be accompanied by a citation, and
    - should be used sparingly.
- Citations to legal authority are used to support all statements, explanations, and illustrations of the law and to identify the sources from which they come so that readers can look up those sources for themselves.
- Citations to legal authority are also used in the application portion of the IRAC and CRAC formats in:
    - supporting any predictions or assertions, and

    - comparing and contrasting facts in the client's case with those in the cases used in describing the law.

- A key goal in citing legal authority is to show that your legal analyses, discussions, predictions, and assertions are sound and well supported.

- Legal authority is not created equally. There is a hierarchy.

- First there is primary authority, such as constitutions, statutes and cases. Primary authorities are sources of law.

- Within primary authority there is:

    - Binding (sometimes called mandatory) primary authority, which must be followed by the court your case is in. Binding primary authority includes the United State's Constitution, the constitution and statutes of the jurisdiction or state in which the court is situated, and case law rendered by the United State Supreme Court, and higher courts in that state or jurisdiction.

    - Optional (sometimes called persuasive) primary authority, which the court may chose to consider or not. Optional primary authority comes from a state or jurisdiction other than the one in which the court at issue is situated. It also includes cases law within the same jurisdiction or state rendered from a courts on the same or a lower level as the court at issue.

- Then there is secondary authority—authorities that are not a source of the law but which comment on and/or describe the law. Secondary authority is always optional, and its persuasiveness depends on the quality and reputation of the source.

- Secondary authority includes:
    - Treatises, legal periodicals, encyclopedias, and dictionaries, and law reviews.
    - Legislative history.

- In most jurisdictions court rules will specify acceptable cite forms legal authority; often the default format is the *Bluebook*.

- Learning citation form is like learning a new language. It may be slow going in the beginning, and drafters will need to resort often to index of the *Bluebook*, or the *ALWD citation Manual*. The goal in citation to legal authority is to clearly and concisely provide enough information so that readers can easily identify and look up the source.

- Citations to the record and exhibits are used to support statements of procedural history and statements of fact in trial and appellate court briefs.

- Record and exhibit citations allow readers to identify, review and verify any procedural or factual event described in the brief.

- In trial briefs, drafters should cite to documents in the court's file that support any description of procedural or underlying facts. If the documents supporting a stated fact is not in the court's file,

the drafter should identify the document and provide it as an exhibit attached to the brief.

- The record on appeal consists of documents from the proceedings below that the parties have designated to be in the record, including transcripts from hearings and trial.

- Absent exceptional circumstances, the statement of facts in an appellate brief may contain only facts and evidence that were presented to the court or jury below.

- When using another source's words, put quotation marks around those words.

- If you have tried to paraphrase a source, but your words are very close to the original, you should quote the source's words and put any changes in brackets, and note omitted words with ellipses.

- Do not put quotation marks around your own words.

- Your legal drafting and analysis will be judged in part by the quality and correctness of your citation form.
