Chapter 3: The Foundations of Legal Writing

Chapter Outline:

§ 3.1 THE UNIFIED THEORY OF LEGAL WRITING

No matter what legal document the writer is preparing, the theory of writing remains unchanged.

Use existing material and authority to create new documents.

This concept is very important for two reasons.

Use forms or templates
The document being created has most likely been created before. By using a previously existing form or template, the paralegal not only increases the likelihood of producing a quality document, but also produces it in a more efficient manner saving the client money.

This applies even in the creation of such mundane documents as a client retainer agreement letter, or a request to a hospital to provide records. Use existing documents, such as forms, form books, and templates, to create new, modified documents. Don't reinvent the wheel.

Precedence
Second, by using existing authority as a basis for legal analysis or argument, the document gains weight in terms of its legal reasoning. That is because what the court cares about when making ruling is the law, and only the law. What the lawyer or paralegal thinks is irrelevant. All that matters is the law.

The advantage to the paralegal is that the use of reasoning from existing law takes the pressure off the paralegal to create that reasoning for him or herself. It makes the process of legal analysis easier to accomplish, and results in a more authoritative document. In other words, you don't have to create the law; you simply find and apply it.

§ 3.2 FORMS OF LEGAL WRITING

Each type of legal writing has a specific function. This chapter will concentrate on the preparation of a legal memorandum, but it is helpful to be able to distinguish the functions of different legal documents.

correspondence
Letters and email between attorneys or paralegals and clients make up the bulk of correspondence. There may also be correspondence with witnesses, businesses or agencies, or even potential adversaries.

pleadings
These documents are generally fact-based, not law-based. The writer prepares documents that lay out specific facts that support his or her position in litigation or criminal proceedings. It is in motions and at trial that the law is applied to the facts in the pleadings.

discovery
These documents are also fact-based, not law-based. The primary purpose of discovery is to expose facts relevant to litigation, such as what really happened, or what witnesses the opposition intends to call during trial. There may be requests, however, for the law that the opposing party intends to argue at trial.

motions
Motions, such a motion for a summary judgment, seek to have the court address a procedural issue.

briefs and memoranda
These documents argue legal issues and are, therefore, law-based. Internal memoranda (such as an Interoffice Memorandum) are objective, looking at both sides of the legal question. External memoranda (such as trial briefs) attempt to persuade the reader and only argue law that is favorable to the client.

§ 3.3 CORRESPONDENCE

The initial correspondence with either a client or the opposing party establishes a tone of professional communication. The initial correspondence with the opposing party is often a demand letter. The initial written correspondence with the client is some form of update regarding initial steps being taken by the law firm in the client's case.

The Demand Letter
There is no single correct form for a demand letter and no statutory requirements that must be followed. Some states have specific rules covering demand letters in collection cases, but a demand letter should always inform the recipient of the matter in controversy and the sum of money demanded.

A demand letter is part of the concept called "exhaustion of remedies." This means that at all stages of a given dispute, every reasonable solution or remedy has been tried. A good demand letter can fulfill this obligation. Basically, the person who eventually files suit with the court wants to be able to say, "Your Honor, I tried to ask for my money without involving the court. Here's the demand letter to prove it."

In some jurisdictions, but not all, adherence to this concept can go a long way toward establishing an argument for the award of attorney's fees. If the amount of money won at trial exceeds the amount requested in the demand letter, the argument for attorney's fees is much more likely to be successful.

The elements of a successful demand letter are:

1. *Be clear and straightforward.*
2. *Do not argue your client's case in the letter.*
3. *Provide documentation to establish the claim.*
4. *Provide documentation to establish damages.*

1. *Be clear and straightforward.*
   Sometimes, less is more. Don't get bogged down in details. The paralegal does not have to provide exact details and facts. Most importantly, never make up numbers or facts, and never embellish information. Doing so will almost certainly come back to haunt you.

   For example, if the matter being litigated is a car accident, don't provide the estimated speeds, the models of the cars, the time and weather conditions, or the names of witnesses who viewed the event. Simply set forth the claim: *On January 17, 2005, Mr. Hayes ran a red light at the intersection of Main Street and Second Street, causing a collision with Mr. Jones.*

   Don't explain why a specific request for damages is being made. Simply itemize the amounts and add up the total. A dispute about a specific damage belongs in the courtroom, not in the demand letter.

   Upon the reading of the document, the recipient should be able to clearly identify two things: what allegation is being made (the claim), and how much money is being demanded (damages). If the reader can't remember those two things after reading the letter once or twice, the letter should be rewritten.

2. *Don't argue your client's case in the demand letter.*
   In other words, don't feel as if you have to prove your case in the demand letter, because you don't. Argument involves explanation, reasoning, and conclusion. Not only is arguing not required in a demand letter, providing argument on your client's behalf might give away strategy the attorney intends to use at trial.

3. *Provide documentation to establish the claim*
   The claim is the reason for the controversy. While not required in a demand letter, documentation can act as a "shot across the bow," making the opposing party aware that the matter is serious and provable.

   - If an escalator malfunctions in a department store injuring the rider, the claim is the failure to properly maintain the escalator. Documentation of the claim might include a witness statement.

- If a passerby is injured when he steps on a rollerblade left on a sidewalk in front of a house, the claim is the negligence of the homeowner. Documentation might be a picture of the scene, including the rollerblade.

- A store sells a defective product and refuses to provide a refund or replacement. The claim is defective merchandise. Documentation might include the sales receipt.

Documentation's only role at this point is to establish that the event occurred. Don't try to prove your case in the demand letter. If there is extensive documentation available, don't feel like all of it must be disclosed at this stage. Be minimalist. Only provide enough to establish the basic claim.

4. *Provide documentation to establish damages*
   Documents to establish damages in a demand letter are more important than those establishing the claim. No money will be granted at a trial unless damages can be established. If the documentation provided in the demand letter is clear and reasonable under the circumstances, the other party may choose to pay the damages without a lawsuit. Receipts, invoices, bills, accounting statements and hospital records provide excellent documentation.

Assignment § 3.3(a) | The Demand Letter

Review the following example of a demand letter. If this assignment is relevant to your client's legal matter, prepare a demand letter on your client's behalf giving the defendant an opportunity to remedy the matter without going to trial. You may either assume the attorney has provided the amounts or ask your instructor to set damages.

For this assignment (and for all written assignments on behalf of your client), you are required to attach your time sheet.

Example § 3.3(a) | Demand Letter

July 16, 2011

Dear Mr. Smith:

This is a demand for payment for injuries suffered by John Doe. Enclosed are the following:

1. Mercy Ambulance Billing, transport report
2. Rose Medical Admit/Discharge Summary
3. Dr. Henry Morpheus Billing/Office Notes
4. Emergency Medical Services Billing
5. ABC Radiologists Billing

You will recall that John Doe was the driver in a vehicle going west on Main Street when Mr. Smith failed to yield the right of way at a stop sign and struck the vehicle driven by Mr. Doe, causing the injury and damages indicated.

As indicated by the records, there are no preexisting conditions for which Mr. Doe was being treated, nor did he have any restrictions in his day-to-day activities at home or at his employment at Mail Boxes Etc. prior to this event.

Enclosed are copies of photographs depicting the property damage to the automobile associated with this matter. Mr. Doe is not making any lost-wage claim at this time. Inasmuch as documented care has plateaued as indicated, and insofar as there is no other contributory cause, demand for resolution of this claim is made in the sum of $3,833.79. Please review the materials enclosed and respond in writing to this demand within 20 days.

Very Truly Yours,

_____

Bryson Justice, Attorney at Law
Bar No. 98-354
3482 Heartbreak Drive
Memphis, TN 37544

The Client Letter

When a client has complaints regarding legal representation, the dissatisfaction often cites the lack of communication between the attorney and the client. A paralegal can assist in maintaining frequent and clear client communications.

As a general rule, when a paralegal communicates with the court (such as when filing legal documents), the opposing counsel, or witnesses regarding the case, at some point he or she should notify the client of this communication, preferably in writing. A copy of the correspondence should be included in the letter to the client. Some firms ask the paralegal to give monthly updates to the client, which serves the same purpose.

Consistent communication will help prevent misunderstandings, help the client understand the representative process, and encourage him or her to feel more involved. The letter should not be long and it does not need to explain the reasoning behind every action taken on behalf of the client.

It is important to be professional at all times. Attempts to be humorous or "buddy-buddy" can be misinterpreted and may appear unprofessional. Even if the relationship with the client is relaxed and good-natured, in your written correspondence you should impart the persona of a legal professional.

Example § 3.3(b) | Client Letter

July 17, 2011

Dear Mr. Doe,

Attached please find a copy of the demand letter sent to Mr. Smith. If we have not received payment from Mr. Smith within twenty days, Ms. Wallace will contact you to discuss your options.

Please feel free to contact me if you have any questions regarding this matter.

Respectfully,

Terry Smith
Paralegal for Jeanne Wallace

Assignment § 3.3(b) | Client Letter

Prepare a letter informing your client that the demand letter has been sent to the defendant. Keep track of your billable hours. You may use one time sheet for both this client letter and the previous demand letter.

Attach your time sheet to your finished assignment.

§ 3.4 EMAIL COMMUNICATION

Every law firm now communicates with clients, witnesses, opposing counsel, and employees via email. Since the invention of the telephone, it is arguable that no other tool has so altered the way people communicate with each other.

It is, therefore, disturbing that so little attention has been paid to proper methods of communication and modes of conduct in the electronic domain. While every firm will have its own personality and policies, the following is presented as advice on how to be professional in your email correspondence. Also, just because others in a firm correspond in a casual, less than professional manner does not mean that you are required to mimic that behavior. Follow these rules of *email etiquette*.

1. *Identify the subject matter*

Never send an email without the subject matter provided. To fail to do so makes it difficult for the recipient to know whether to open the email, and makes searching for the email at a later time more difficult.

2. *Identify yourself*

There are few things more frustrating than receiving an email from someone whom you don't know, who then does not identify him or herself by name. Even for those with whom you correspond on a regular basis, sign your name, or at least initials. Think of it this way. If you wrote a letter to your boss, or a coworker, you would still sign it, wouldn't you? An email is the electronic equivalent of a mailed letter.

3. *Keep your email format simple*

Adding flowery or colored wallpaper and a bright pink font to your emails will not only make the document more difficult to read, it will be viewed as unprofessional.

4. *Use appropriate capitalization and punctuation*
It is often easier, or even considered "cool," to leave out capital letters at the beginning of sentences when text messaging over a cell phone. Unfortunately, this habit has now spilled over into the emailing techniques of many individuals. It is, quite simply, annoying, and exposes you to the possibly unfair judgment of the recipients of your emails.

5. *Keep messages short*
Due to the amount of emails many individuals receive in a given day, you will be noticed and appreciated if you keep your emails brief and to the point.

6. *Limit use of abbreviations*
Some people overuse abbreviations, or even make up their own. Don't.

7. *Avoid using emoticons* :'(
Sometimes using a "smiley face," or other emoticon, can help clarify when something you've written is in jest. As a rule, though, emoticons are not considered an appropriate means of communication within a professional setting. If you feel a "smiley face" is needed, consider rewriting the passage to better convey your intentions.

8. *Never YELL in your email*
Some email users attempt to demonstrate frustration or urgency by placing entire sentences or paragraphs all in capital letters. This not only makes the email harder to read, it is every bit as rude as raising your voice to someone in public.

9. *Be polite, patient, and appropriate*
Whether you are aware of it or not, you will develop a reputation through the tone and professionalism of your emails. This is true, of course, in all areas of communication. As the saying goes, you catch more flies with honey than vinegar. So be courteous and polite. Be patient in terms of your expectations for response. The person on the other end is not required to be on your schedule. If something is urgent, make sure you indicate as much in your communications. In addition, even if you become frustrated, keep the level of your anger in context and at an appropriate level. Ask yourself whether an email with an angry tone will get any more results than a more urgent sounding, yet polite, reminder that a response is urgently needed.

10. *You may be called to account for your emails*
There is an old legal tenet that is often forgotten, even by some lawyers: *Never, ever, put something in writing that you don't have to*. Keep this in mind every time you create an email. While email may be used to help you document certain actions and communication, remember that whatever you write may also be used against you.

An Email is Forever
If you want to permanently erase an email, follow these steps:

1. Go into your *email folder* and select the email to be erased
2. *Right click* on the email in question
3. Click on *Delete*
4. Go into your *Recycle Bin*
5. Select *Delete all Files*
6. Detach the *casing* from the back of your computer
7. Remove the *hard drive*
8. Strike the hard drive a *minimum of 30 times* with a hammer
9. Place the battered hard drive in an *incinerator*
10. *Bury* the charred remains
11. *Repeat steps 1-10* on the computers of each recipient of the email as well as any servers through which the email passed.

In other words, it is virtually impossible to get rid of an email, or any other computer file, for that matter. Many legal cases and investigations are now focused on computer forensics, including emails. Thus, anything you put in an email, or a file, may be used against you not only in terms of your office etiquette, but your legal liability as well.

Privileged matters
There is little precedent indicating whether emails between a law firm and client are considered privileged. It is assumed that emails would be protected from disclosure, but only if the emails are between the attorney, paralegal, and the client without copying any other individuals. Make sure to check the firm policy on email communication with clients.

Provide the context of the content
To avoid misunderstandings or misinterpretations, when responding to an email, don't respond without either referring to the context or, alternatively, including the content of the email to which you are responding. For example, consider the following email response:

> *We are fine with your recommendation. Thanks.*

Without context, there is no way to know what it is that is being agreed to. Be specific as to what is being approved, agreed to, disagreed to, or commented upon. A better response would have been:

> *Regarding your suggestion that the deposition now scheduled for 10:00 am, on December 19, 2010 be changed to 4:00 pm, December 22, 2010, we are fine with that recommendation.*

Email disclaimers

Many firms use disclaimers on the bottom of faxes and emails, declaring that if the email is received in error, the recipient is to destroy it and not read or use the contents of the document.

The problem is that the disclaimer is virtually useless legally. If an opposing lawyer or party accidentally sees such a document, it is most likely fair game. In addition, it may void any privilege regarding that document. A perfect example is what occurred about three weeks prior to the start of the O.J. Simpson criminal trial. An attorney accidentally sent a trial strategy memo to one of the defense attorneys. (The number was on the speed dial of the fax machine. Bad idea.) The court ruled that the defense had every right to use the document and view its contents since it had been voluntarily disclosed. In a civil case, such an error could result in a malpractice suit. Do not rely on disclaimers to protect the contents of an important or privileged document.

Someone is watching you

A law firm has the right to review any emails you send or receive. You should assume they are watching. Such communications are not private. Don't get too comfortable with your communications from work. The same rule applies to instant messaging. In fact, the content of any electronic communication from your work (or when using firm-supplied cell phones) may be scrutinized by the firm. In addition, your Internet browsing habits can be scrutinized at any time by the firm. Be sure to check law firm policies on these topics.

§ 3.5 INTRODUCTION TO LEGAL ANALYSIS

A legal memorandum, or brief, is a tool paralegals and lawyers use to relate the applicability of specific authorities to a client's facts. The heart of any memorandum or brief is the analysis, the application of *law to fact*. There is a specific structure to legal analysis, often referred to as the IRAC method. The method presented here is a modification of the IRAC method.

Issue introduction
Rule
Application
Conclusion

Every analysis is based on an issue. An issue is a question that the court must answer. The issue should usually be provided by the attorney. A single issue may be analyzed by one authority or by many authorities. If multiple authorities are analyzed within an issue, the writer should follow the IRAC method for each, analyzing and applying each law separately, not collectively. You do not need to tie every case and statute together. Simply go through the IRAC method for each authority.

The most common methods of analyzing authorities involve comparing cases (your client's case and the case being cited), and distinguishing cases (explaining why the case being cited does *not* apply).

Comparing Cases
Comparing a case you have found to a client's facts is the most common form of legal analysis.

Assume you are working on a case involving assault with a deadly weapon and that the client is charged with hitting a man with a baseball bat. You find a case in the law library in which a man attacked his brother-in-law with a walking cane. You want to compare those facts with your client's.

Comparing a case in which the deadly weapon was a shotgun (instead of some sort of stick) would not be nearly as relevant. The fact that in the case of the walking cane, the defendant was also charged with theft would also be irrelevant. Discuss only the relevant facts. After addressing the similarities and differences, you must discuss how the court held and how that decision might influence the court in your client's case.

It is tempting to start the analysis by citing the case being relied upon, saying something like "In *Smith v. Jones*, the court held...." However, the case being cited needs to be put into context so the reader will understand not just the reasoning of the court (the part that is being cited) but also the facts that led to that reasoning. Using the IRAC method will allow the analysis to flow and to be consistent.

When comparing cases, the IRAC method would be used as follows:

Issue Introduction
Provide a statement introducing the issue, or how courts have generally dealt with the issue.

Rule
The rule is the law or authority being cited. If the authority is a case, the writer must inform the reader of the *facts* of the case, then *quote* the case. If the authority is a statute or regulation, the relevant portion of the rule should be quoted. The quotation should provide some insight into the legal logic of the court, often called the court's reasoning.

Application
The most important part of the analysis. Apply the law to your client's facts, comparing the two.

Conclusion
Determine the answer to the issue being analyzed.

Be disciplined. Use each of these steps for each authority analyzed. This not only makes the process easier, the result is a final product that is more powerful. The result is a product that an attorney will respect.

Structural Considerations in Legal Documents

Quotations
Quotes of 50 words or more should be indented on both sides and single-spaced *without* quotation marks. Quotes of less than 50 words should remain in the paragraph *with* quotation marks.

When Adding Emphasis
When the author adds emphasis to part of a quote by use of italics, underlining, or bold-face font, he or she must place *Emphasis Added* or *Emphasis Supplied* in parenthesis at the end of the paragraph.

Ellipsis

If you start in the middle of a sentence (or statute), begin with an ellipsis:

> . . . only the defendant can file such a motion at this time.

If you leave something out of the middle of a sentence or paragraph, tell the reader by using the ellipsis in place of the missing material:

> The court ruled that the defendant . . .did not act in good faith.

If you leave something out at the end of a quotation, inform the reader by using an ellipsis *and* a period:

> The court ruled in favor of the plaintiff . . . .

Example § 3.5(a) | Analysis (Comparing Cases)

ISSUE

Can a baseball bat be considered a deadly weapon?

In cases involving assault with a deadly weapon, courts have held that even objects not designed for assault can be considered deadly weapons. In the case *State v. Hayden*, 134 S.W.2d 442 (Tenn. 1977), the defendant was charged with attacking a waiter with a walking cane after the waiter insulted the defendant's tipping habits. The defendant was convicted and the Supreme Court of Tennessee affirmed the lower court's decision. The Supreme Court held that:

Issue Introduction

Rule (Facts of Rule)

> . . . it is not the intended design of the object that determines liability but the potential the object has to inflict serious bodily harm. By way of example, an assault with an automobile may result in attempted murder charges being filed despite the fact that an automobile is certainly not designed for murderous acts.

Rule (Quote the Rule)

In the instant case, the defendant attacked with a baseball bat. Although not designed with that intent, a baseball bat has even more "potential . . . to inflict serious bodily harm" than does a walking cane. It would therefore appear that our client committed an assault with a deadly weapon.

Application

Conclusion

Distinguishing Cases

When comparing a case, one tends to concentrate on the similarities. When distinguishing a case, highlight why the differences in a case (1) may be relevant, or (2) make the case inapplicable. Assume a case is found in which a man was determined not guilty of assault with a deadly weapon after shooting his girlfriend with a pistol. Does this case mean your client will be found not guilty, since his weapon was even less deadly? Not necessarily. You must determine whether there were any distinguishable facts.

Example § 3.5(b) | Analysis (Distinguishing Cases)

ISSUE

Can a baseball bat be considered a deadly weapon?

Issue Introduction

Circumstances dictate whether an event was actually assault.

Rule (Facts of Rule)

In *State v. Bird*, 250 S.W.2d 382 (Tenn. Ct. App. 1980), the defendant was attacked by his girlfriend with a heated curling iron. He was unable to escape. In self-defense, he picked up a loaded revolver and shot the woman in the right leg. In that case, the court ruled that the attack by the defendant did not constitute assault with a deadly weapon. The court of appeals upheld the trial court's decision, and reasoned that, "The court must consider whether defendants, in situations that could result in severe physical injury, intend every act they engage in to be deadly."

Rule (Quote the Rule)

Application

Bird is distinguishable from the instant case in that there is no claim of self-defense in our client's case. He picked up the baseball bat and approached the victim from behind before hitting him in the leg.

Conclusion

Therefore, *State v. Bird* should not be relied upon in our client's case.

Exercise § 3.5(a) | Legal Analysis

HELPFUL HINTS
In the foldout in the back of the manuals you will find ***Helpful Hints in Legal Writing*** *to help you get started with each stage of the IRAC analytical process.*

Your client, Melissa, is suing her doctor, Mel Practice, for negligence. The doctor failed to make sure his nurse had removed a sponge from Melissa's abdomen during surgery. Melissa is claiming that Dr. Practice is responsible for the nurse's error. Dr. Practice is claiming he is not responsible. Analyzing the case *French v. Fischer* (found in Appendix C), address the following issue:

Is the doctor liable for the negligent acts of the nurse?

Analyzing Statutes and Rules

As discussed earlier, in legal analysis, the facts of each case are compared to the issue at hand. Each comparison is followed by the application of the law (case) to the client's facts. When researching a statute or rule in which there are no facts to compare, break the rule or statute into elements and apply each element to your client's facts. If even one of the elements does not apply, the entire statute or rule does not apply.

Your Client's Facts

Bob is married to Keri. In an elevator, Bob told Keri that he had "two joints" in his pocket and asked whether she wanted to smoke one. Unfortunately for Bob, a plainclothes police officer was also in the elevator and overheard the conversation. He arrested Bob for possession of a controlled substance. The D.A. wants Keri to testify. Does Keri have to testify?

Authority: Haw. Rev. Stat. § 645.120

Any private verbal or written communication between a husband and wife is privileged, and a party possessing the privilege (the accused) may not be required to testify, and may prevent the spouse from testifying.

Breaking Statutes and Rules into Elements

An attorney does not speed read when reviewing statutes and cases. Instead, the attorney reads very slowly, breaking the law into elements. Do not underestimate the importance of this technique. It will set you apart from other paralegals.

'And & Or' Rule

When the word *and* appears, the paralegal should separate the sections of the rule into different elements. When the word *or* appears, keep those sections together, since the element will apply if either part applies.

We must now break the rule into elements. Do all of the elements apply?

1. *Any private*
2. *verbal or written communication*
3. *between a husband*
4. *and wife*
5. *is privileged,*
6. *and a party possessing the privilege (the accused) may not be required to testify, and may prevent the spouse from testifying.*

Each of the first four elements is a requirement to the applicability of the rule. They are called active elements. The last two elements, however, are more instructional. They inform what will happen if the previous active elements apply. They are called inactive elements, or passive elements. Passive elements automatically apply. Let's see how each element applies:

1. Any private
   This element does not apply, since the communication was in an elevator with others present.

2. verbal or written communication
   This element applies because there was such communication.

3. between a husband
   This element applies because the husband was involved.

4. and wife
   This element applies since the wife was involved.

5. is privileged,
   This applies as a passive element.

6. and a party possessing the privilege (the accused) may not be required to testify, and may prevent the spouse from testifying.
   This applies as a passive element.

Application

Remember, if any element fails to apply, the entire statute does not apply. Since the first element above does not apply, the statute does not apply. The wife must testify.

We now know that the statute does not apply. To analyze the statute within a memorandum or brief, the author should use the same analytical system as with case law, although there are no "facts" to the statute. In applying the statute, the author should focus on any element that does not apply. If all elements apply, discuss in detail how they apply. The following is an example of statutory analysis.

Example § 3.5(c) | Analyzing Statutes

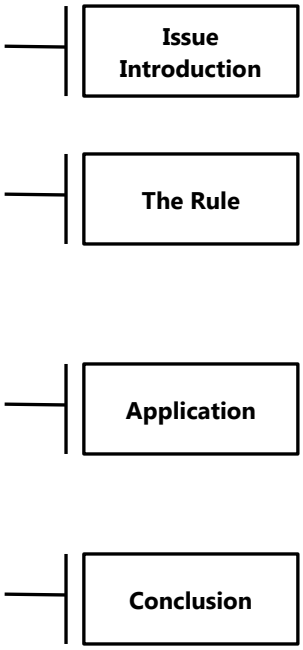
Issue

Can a wife be forced to testify against her husband?

Statutory authority addresses the issue of spousal communications and subsequent testimony. Haw. Rev. Stat. § 645.120 states:

> Any private verbal or written communication between a husband and wife is privileged, and a party possessing the privilege (the accused) may not be required to testify, and may prevent the spouse from testifying.

The authority above does not apply to our client's situation. Although the communication in question was indeed "verbal communication" between a "husband and wife," the statute requires that the communication be "private." In our client's case, the discussion took place in a crowded elevator. It is doubtful that a court would consider private any communication taking place in such a confined place. There can be little expectation of privacy under such conditions. Therefore, the wife in the matter above will most likely have to testify regarding the conversation.



Exercise § 3.5(b) | Analyzing Statutes

Break the following rules into elements, and then determine how they apply.

Exercise A

Colo. Rev. Stat. § 29-10-220
When presenting evidence to the court, the original document shall be presented, unless the original document is no longer available through no fault of the party moving to have the evidence admitted.

Facts
Your client wants to have a birth certificate admitted into evidence. He was born in Italy. The original birth certificate was destroyed by a flood. Can he introduce a copy into evidence?

Exercise B

O.R.C. § 331.93
If parties are from different states or countries, and if the amount of damages requested exceeds seventy-five thousand dollars, either party may move to have the matter transferred to federal court.

Facts
Your client is from Oregon, and got into a car accident in Portland with a man from New Mexico. The plaintiff is suing for $75,000, and has moved to have the matter heard in federal court. Will his motion be approved?

Exercise C

Statute: Haw. Rev. Stat. § 645.120
Any private verbal or written communication between a husband and wife is privileged, and a party possessing the privilege (the accused) may not be forced to testify, and may prevent his or her spouse from testifying.

Facts
Your client has been separated from his wife for more than a year. During the separation, he told his wife that he had robbed a bank. His wife called the police and reported him. The prosecutor wants to call the estranged wife to testify. Will she be allowed to take the witness stand?

The Ten Commandments of Legal Writing
When preparing documents that interpret or relate legal authority, such as a legal memorandum or trial brief, always adhere to the following rules:

1. Never rely on your own opinion.
2. Always rely on authority, preferably primary.
3. Avoid *I* or *my*. Instead, state "We should argue . . ." or "Our position should be . . ."
4. Use complete sentences.
5. As a rule, create short, clear sentences.
6. Write in plain English. Don't try to "sound like a lawyer."
7. Never use an unfamiliar term. If you use a term incorrectly, you will look foolish.
8. Unless you tell the reader that you have altered an authority, quote word-for-word.
9. If you emphasize a quote by bold, italics, or underlining, tell the reader. Place (emphasis added) at the end of the quote.
10. Reread, checking for spelling and/or grammatical errors.

§ 3.6 INTEROFFICE MEMORANDUM FORM

There are many forms of interoffice memos, but all include the following in one form or another:

1. caption
2. assignment
3. facts
4. issues
5. analysis
6. conclusion
7. recommendation

The following is a simplified example of a legal memorandum.

Example § 3.6(a) | Interoffice Memorandum

MEMORANDUM

TO: Supervising Attorney
FROM: Lucy Prosser, Paralegal
DATE: 01/25/11
RE: Sam Slime

Caption
Basic information about who the memo is to and from.

ASSIGNMENT

You asked me to review cases and statutes provided to determine the strength of our client's case.

Assignment
Restate the attorney's instructions regarding the assigned task.

FACTS

Our client, Sam Slime, is being sued for breach of marriage promise by Paula King. Sam and Paula met in October, 2009. After they dated for some time, Paula proposed and Sam agreed to marry her. Sam claims that he was broke at the time, and therefore, was under duress when he agreed to the engagement. They set the wedding date for November, 2011.

Facts
Facts about your client's case

Six months later, Sam won the state lottery. With his financial problems alleviated, Sam could see that he did not want to marry Paula and soon broke off the engagement. Paula has filed suit in Denver District court.

Our client claims that he had every right to break off the engagement. It seems that Sam had always believed that a couple should wait until married to engage in sexual intercourse. Sam claims that shortly after they became engaged, Paula seduced him not just once, but several times. Our client says he could never marry a woman with such a lack of morals.

Issues
Questions that will be answered by the court. The attorney should determine the issues.

ISSUES

1. Is the fact that the parties engaged in sexual intercourse after their engagement relevant to this case?

2. Did our client violate Colo. Rev. Stat. 19-22-302?

ANALYSIS

1. *Is the fact that the parties engaged in sexual intercourse after their engagement relevant to this case?*

Analysis
The application of the law to your client's facts.

Courts generally have held that sexual intercourse between an engaged couple does not bar suit on grounds of breach of promise. In *Fleetwood v. Barnett*, 11 Colo. App. 77, 52 P. 293 (1898), the defendant asked the plaintiff to marry him and the plaintiff agreed. The wedding date was to be two years following the engagement. Soon after the engagement, the couple was unable to resist the "temptations of the flesh." The next day, the defendant informed the plaintiff that he no longer considered himself bound by his promise to marry her, especially considering the unethical behavior by the plaintiff the previous night in allowing the defendant to take advantage of her. The court held:

> This court recognizes that relationships between individuals are complex, and often defy simple analysis. After reviewing the facts presented in this matter, we determine that illicit intercourse between the parties after promise of marriage *shall not bar recovery* for breach of that promise.
>
> *Id*. at 11 Colo. App. 80, 52 P. 296 (emphasis added)

This case applies because in both cases sexual intercourse following promise of marriage is the primary issue. The apparent differences between *Fleetwood* and the instant case are that *Fleetwood* occurred in 1898, when a promise of marriage was taken more seriously, and that the defendant proposed to the plaintiff in *Fleetwood*, whereas the plaintiff proposed to the defendant in our client's case. However, while the date would certainly encourage research for more recent rulings, neither of these differences would, in and of themselves, render *Fleetwood* irrelevant. It would therefore appear that our client should not rely on his sexual activity with the plaintiff after his engagement to her as a defense.

2. *Did our client violate Colo. Rev. Stat. § 19-22-302?*

While case law appears to work against our client, statutory authority is not so clear. Colo. Rev. Stat. 19-22-302 is relevant. It states:

> Any person who proposes marriage to another is deemed to have entered into a valid contract and, therefore, is bound by that agreement as to any lawful commitment.

This statute is only binding upon the "person who proposes marriage." Since it was the plaintiff in the instant case who proposed marriage, it is she who is bound by that proposal, not our client. Therefore, our client did not violate Colo. Rev. Stat. § 19-22-302.

Analytical Process

1. Issue Introduction
2. Rule
3. Application
4. Conclusion

CONCLUSION

1. In this case, our client accepted a proposal of marriage, then claimed that sexual intercourse following the proposal caused him to reconsider. *Fleetwood v. Barnett* establishes that post-engagement intercourse does not prevent a plaintiff from recovering for breach of that promise. Therefore, sexual intercourse following promise of marriage should not be relied upon as a defense to breach of that promise.

2. Our client accepted a proposal of marriage from the plaintiff. The statute cited applies only to the person who proposes marriage. Thus, our client did not violate the statute in question.

RECOMMENDATION

While my instructions were to limit myself to the authority provided, further research on these issues before trial would certainly be advisable. Although our client was not in direct violation of the statute cited, it is doubtful that our client would succeed in a jury trial, since case law would hold against our client. All efforts should therefore be made to settle this case out of court.

Assignment § 3.6 | Interoffice Memorandum

Using only the authority provided in Appendix B, prepare an interoffice memorandum analyzing the issues listed below. If you were actually researching these issues, you would want to rely heavily on authority from your state. However, since this assignment is of limited scope, you may use cases from any jurisdiction. Refer to "How to Write a Legal Memorandum" and "Example of a Legal Memo." Do not feel you must create the perfect memo the first time. An educational experience is progressive and this is your first effort in legal writing. In addition to the cases provided, you may use a legal dictionary.

HELPFUL HINTS
In the foldout in the back of the manuals you will find ***Helpful Hints in Legal Writing*** *to help you get started with each stage of the IRAC analytical process.*

Your Client's Facts

Three months ago your attorney hired you as her first paralegal. She is concerned, however, about what tasks and duties she may have you perform. You have already engaged in a couple of activities that she thinks, in hindsight, may have been inappropriate. When a client first came to the firm, your attorney asked that you handle the initial interview. She told you to hear all the facts, then convey to the client the attorney's interest in handling the case. She also told you the specific fees that would be charged, including the paralegal's and attorney's hourly rates. You shared this information with the client at that initial meeting. Your attorney wants you to review some authorities to make a determination.

She also wants to know whether she can ask you to attend a settlement conference without her being present and whether you would be allowed to accept or reject certain proposals. She has always planned to use you for this sort of activity, but now wants to make sure there is nothing unethical about such delegation of responsibilities.

Your Client's Issues

1. *Can a paralegal interview clients for the purpose of providing the client with fee and representative information?*
2. *Under what circumstances may a paralegal conduct a settlement conference?*

Under the facts portion of the memorandum, provide a brief description of the reason your firm is representing your client, followed by an explanation of your attorney's concerns regarding the scope of your duties. Using the authorities provided, analyze the above issues.

Authorities to be Relied Upon

Locate the following authorities using *Westlaw*, *Lexis*, in the law library, or in Appendix B of this volume.

In re Morin, 319 Or. 547, 878 P.2d 393 (1994)
Attorney Griev. Comm. v. Hallmon, 343 Md. 390, 681 A.2d 510 (1996)
People v. Milner, 35 P.3d 670 (Colo. 2001)

Your Billable Hours

Keep track of your billable hours. Attach a copy of your time sheet to the last page of the memorandum. After your memorandum has been graded and returned, place the document in the Work Product section of your client's file.

Example § 3.6(b) | Interoffice Memorandum

MEMORANDUM

TO: Jeanne Wilkins, Esq.
FROM: Joanne Fielder, Paralegal
DATE: March 19, 2011
RE: The right of Tom Sayers to have his name placed on Jenny Saunders' birth certificate as the natural father.

ASSIGNMENT

Research case law and review statutes to determine whether our client has the right to have his name placed on the birth certificate of his two-year-old daughter, Jenny Anne Saunders.

FACTS

Our client, Tom Sayers, is an eighteen-year-old high school senior. Tom and his mother have asked that we review Tom's parental status. Two years ago, Tom became sexually involved with a classmate, Heather Saunders. Heather was sixteen at the time, and Tom was fifteen. Heather became pregnant by Tom and on September 3 of last year Heather gave birth to a healthy girl. However, Heather and Tom had broken up shortly after Heather became pregnant. Tom saw very little of Heather during this time.

When Heather gave birth, Tom was not informed. Heather filled out the birth certificate, naming herself as the mother and "unknown" as the father. The child's name was listed as Jenny Anne Saunders. When Tom found out three days later that Heather had given birth, he went to see Heather and the baby at her house. Subsequently, Heather and Tom came to an informal agreement for Tom to see Jenny one weekday per week and every other weekend. In addition, Tom would pay Heather fifty-dollars per week in child support while he was still in high school. So far, the informal agreement has worked very well.

Two weeks ago, Tom was informed that Heather plans to get married in November. While there is no indication of hostile feelings or plans on Heather's part to change the arrangement at this time, Tom and his mother are concerned that Heather's husband may want to adopt Jenny. Tom wants to know what his rights are.

ISSUES

1. *Is it possible to have a new birth certificate issued with our client named as father?*
2. *Are there any guidelines for establishing paternity two years after the fact?*

ANALYSIS

1. *Is it possible to have a new birth certificate issued with our client named as father?*

According to both case law and statutory authority, it appears that Tom will be declared Jenny's natural father on her birth certificate. C.R.S. 13-21-201 states as follows:

> In the event that the name of the natural father of a child is
>
> (a) not listed on the birth certificate, or
> (b) incorrect on the birth certificate due to error, or
> (c) incorrect on the birth certificate due to fraud,
>
> the court, in its discretion, may order that a new birth certificate be issued providing the correct name of the natural father once the natural father's identity has been determined. The new certificate shall replace the original, nunc pro tunc.

Subsection (a) applies to our client. No name for the natural father was listed on the original birth certificate. This statute provides for the issuance of a new certificate "once the natural father's identity has been determined."

In addition, courts have held that it is in the interest of the child that the natural father's identity be listed on the birth certificate when it is known.

In the U.S. Supreme Court case of *Jacobs v. Livingston,* 143 U.S. 679 (1970), a mother tried to prevent the listing of the natural father on the birth certificate of their newborn son. The couple was not married and the father had been convicted of second-degree murder just prior to the boy's birth. He was sentenced to life in prison with the possibility of parole.

The mother asserted that it would be detrimental for the child to be labeled and stigmatized by having a convicted murderer listed on his birth certificate as his natural father. The court disagreed. In ordering the natural father's name placed on a new birth certificate, the court reasoned:

> ...while the court must pursue the best interests of the child, the court cannot expect to shelter him from all mishaps or unjust treatments life will present. None of us choose our parents. Denying them does not change the fact that they bore us. This child must have the opportunity to choose his relationship with his father at some point in the future. The fact is that the identity of the natural father is known . . . and must be provided for in the appropriate records.
>
> *Id*. at 683

Jacobs applies to our client's case because not only the natural father, but the child, has the right to have accurate and complete information regarding parenthood provided in "appropriate records." However, while the case and statute above give the court the authority to replace the original birth certificate with one bearing the father's name, our client will have to prove, to the court's satisfaction, that he is, indeed, Jenny's father.

2. Are there any guidelines for establishing paternity two years after the fact?

Courts have provided guidelines for determining paternity when paternity is in dispute. In *Henry v. Lowell*, 335 U.S. 281 (1972), the United States Supreme Court upheld the Supreme Court of Hawaii in naming the plaintiff as father of a child, despite the defendant mother's objection.

In that case, James Henry filed a suit with the District Court of Hawaii to be named father of a little girl. James' position was that, despite the fact that paternity tests were "inconclusive," he should be declared the child's father because of previous behavior by the mother, Karen. James asserted that Karen encouraged the child to refer to him as "Daddy." The court held:

> Determination of the paternity of a child may be achieved in a number of ways... First, the admission by both parents as to paternity. Second, medical or scientific tests deemed accurate and reliable by the court. Third, that a male individual is, over an extended period of time, held out by the child's mother as the father and treated with an attitude consistent with the manner in which a natural father would be treated....
>
> *Id*. at 284

In our client's case, Heather may now admit that Tom is Jenny's father and be willing to have Tom listed as Jenny's father on a new birth certificate. If she resists, we should suggest a medical paternity test which would most likely prove that our client is Jenny's father. In addition, Heather Saunders has certainly "held out" Tom as the father of her child, as provided for in the Henry case. Heather has never denied Tom's paternity. Therefore, it appears that Tom will be able to have a new birth certificate issued naming him as Jenny's natural father.

CONCLUSION

1. The court, at its discretion, may order a new birth certificate issued with the natural father's identity provided.

2. Due to Heather's consistent recognition of Tom as Jenny's father, it appears that establishing paternity will not be a problem.

RECOMMENDATION

We should advise our client to approach Heather in an amicable atmosphere and ask whether she would be willing to have a new certificate issued.

CHAPTER 3 WRAP-UP

WHAT YOU SHOULD KNOW…

After reading this chapter you should know the following:

- The *Unified Theory of Legal Writing*
- The various forms of legal writing
- The elements of a demand letter
- How to draft a letter to your client
- Proper etiquette for email communication
- The IRAC method of legal analysis
- The elements of an interoffice memorandum
- How to draft an interoffice memorandum

ASSIGNMENTS

For this chapter you will be required to complete the following (unless otherwise instructed):

☐ **Assignment § 3.3(a)** Due Date: / /

Draft a demand letter to the opposing party. (If this assignment does not fit your client scenario, choose another client just for this assignment.)

☐ **Assignment § 3.3(b)** Due Date: / /

Draft a letter to be sent to your client.

☐ **Assignment § 3.6** Due Date: / /

Draft an interoffice memorandum using only the authorities suggested. Note that you are not required to research any additional authority.