

WIDENER UNIVERSITY
DELAWARE LAW SCHOOL

ORIENTATION 2016

*Introduction to Professional Skills
Course Materials Supplement*

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SECTION I

INTRODUCTION

a. The Introduction to Professional Skills Program

Many students find law school very different from other school experiences. The subject matters may be new, the workload is heavy, and the vocabulary used in law school seems alien. Even the testing and grading processes in law school are often different from processes employed in other education settings.

The Introduction to Professional Skills program (IPS) helps prepare students for some of the unique features of a law school education. The program provides a common body of knowledge for all students in the first semester. In addition, the IPS classes provide opportunities to discuss and practice skills essential to a successful performance as a law student and as a member of the legal profession. You will continue to address essential skills during portions of the Applied Learning Labs throughout the first semester.

b. Professional Duties of Competence and Diligence

Every state has a professional code of ethics governing those admitted to the legal profession in the state. Those codes recognize *competence* and *diligence* as fundamental characteristics of the profession.¹ Competence requires knowledge of the law and skill in using that knowledge. You and the faculty for IPS will use the information in this Supplement to develop your skills of acquiring and using the requisite knowledge of the law.

You may initially get confused, frustrated, and intimidated in developing your understanding of the law, but remember you are required to be *diligent* as a lawyer. Professional diligence requires a lawyer “to pursue a matter . . . despite opposition, obstruction, or personal inconvenience . . .”² You can do this! Consider how many others have done so.

¹ For example, Rule 1.1 of the American Bar Association’s Model Rules of Professional Conduct provides: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Model Rule 1.3 provides: “A lawyer shall act with reasonable diligence and promptness in representing a client.” Most States have used the ABA’s Model Rules as a template.

² Model Rule of Prof’l Conduct R. 1.3, Comment 1 (2015).

SECTION II

CHARACTER & FITNESS REQUIREMENTS OF THE PROFESSION

While you know that professional codes of ethics regulate the professional conduct of lawyers, it may surprise you to learn that conduct when you are not acting as a lawyer also will be subject to professional regulation. In other words, one does not stop being a member of the legal profession simply because one is not acting in the role of a lawyer.

Your conduct before law school and while in law school is subject to scrutiny by the profession. For example, the application for admission to Delaware Law includes the following questions:

13. Character & Fitness

1. Have you ever received an academic warning, been placed on probation, disciplined, suspended or dismissed by any learning institution or licensing board for any reason? If "Yes," you must use an electronic attachment to provide your detailed explanation. Your explanation must include the nature of the event/offense, the underlying facts and all relevant dates. Without this information, your application will remain incomplete and ineligible for review and decision. Note: You have a continuing duty to update the information you provided in response to this question. You must notify Delaware Law of any academic or disciplinary actions occurring after submission of this application.

2. Have you ever been arrested, taken into custody, or accused formally or informally of the violation of a law for any offense other than a minor traffic violation? If "Yes," you must use an electronic attachment to provide your detailed explanation. Your explanation must include the nature of the offense, the facts surrounding the offense, all relevant dates, dispositions and sanctions. If currently on probation or parole, you must provide all terms and conditions. Please note any instance of driving under the influence, and offenses which have been expunged or occurred while a juvenile, including disorderly persons' offenses. Note: You have a continuing duty to update the information you provided in response to this question. You must notify Delaware Law of any legal violations occurring after submission of this application.

The application also provides:

Any false or misleading statement, incomplete or inaccurate information, omissions of required information or failure to update changes in information in this application may cause you to be denied admission; OR, if admitted, to be dismissed from the School of Law or cause your degree to be revoked by the dean, and may jeopardize licensure with the Boards of Bar Examiners.

Law schools inquire about "character and fitness," in part, to prepare you for the review of your character and fitness that will occur again upon your successful completion of law school and before admission to practice. Not only must an applicant to a state bar pass a multi-day bar

examination, the applicant also must pass a review by the board of bar examiners of the applicant's character and fitness. You also should note that boards of bar examiners often compare the responses a bar applicant gave to the character and fitness questions on law school applications with responses to similar questions on applications for admission to the bar. Any discrepancies in the two sets of responses may adversely affect an applicant's admission to practice.

The boards of bar examiners in most states have web sites with information about the requirements for admission to the profession in the particular state. We encourage you to familiarize yourself now with the standards for character and fitness published by the examiners of the states in which you may seek admission to practice. Please also note the scope of the inquiry by a board of bar examiners may be broader than the inquiries about character and fitness on a law school application.

You will find that many states use similar language to describe the requirements of character and fitness. Below you will find excerpts from the web site of The Pennsylvania Board of Law Examiners that exemplify common concerns and objectives.

Frequently Asked Questions Regarding Character and Fitness Determinations

What are the character and fitness standards?

The character and fitness standards require that an applicant to the bar be one whose record of conduct justifies the trust of clients, adversaries, courts and others. The hallmark of such a person is honesty, especially in connection with the application for admission to the bar. Persons with a record showing a deficiency in honesty, trustworthiness, diligence or reliability may not be recommended for admission.

What is conduct showing a potential deficiency in the necessary qualities of honesty, trustworthiness, diligences or reliability?

Any of the following will be considered by the Board to be a basis for further inquiry before recommending admission:

- *unlawful conduct*
- *academic misconduct*
- *making false statement(s), including the omission of relevant facts*
- *misconduct in employment*
- *acts involving dishonesty, fraud, deceit or misrepresentation*
- *abuse of the legal process*
- *neglect of financial responsibilities, especially failure to repay student loans*
- *neglect of professional obligations*
- *violation of an order of a court*

- *evidence of mental or emotional instability, as it relates to the ability to practice law*
- *evidence of current or recent drug or alcohol dependency*
- *denial of admission to the bar in another jurisdiction on character and fitness grounds*
- *disciplinary action by a lawyer disciplinary agency or other professional disciplinary agency*

What is the most common reason for denial of a bar applicant?

A pattern of dishonesty in dealings with employers, schools, and authorities, including the Board is a common reason for denial of bar applicants. Giving false information on the application or failing to be completely candid in the application process is a serious issue, which will have negative consequences for an applicant. The failure to be fully responsive to application questions, or any other lack of candor in an application, involves unsworn statements made to an agency of the Supreme Court. Since this dishonesty would be both current and ongoing, the applicant charged would have a difficult time demonstrating rehabilitation.

Do I have to disclose [criminal] incidents from when I was a juvenile or those that were expunged?

You must disclose each criminal incident where you were arrested, charged, cited, accused or prosecuted for any crime, even if: the charges were dismissed; or you were acquitted or pardoned; or adjudication was withheld; or a conviction was reversed, set aside or vacated; or the record was sealed or expunged; or you entered some type of diversionary program, such as A.R.D. You must disclose each incident, regardless of whether you believe or were told that you need not disclose it.

Why does the Board inquire about misdemeanor or felony arrests which did not result in convictions?

There are many reasons why arrests do not result in convictions, many of which have no bearing on guilt or innocence. Applicants are required to report all incidents, and to provide evidence of rehabilitation and current good character. The occurrence of an acquittal or dismissal is relevant but not dispositive of the issue. This is not to suggest that the Board will assume that any arrest was due to guilty conduct on the part of the applicant. The applicant's obligation is to be completely candid regarding all matters about which the Board inquires.

Even after admission to a bar, certain rules of professional ethics apply to a lawyer's personal life. So, for example, Rule 8.4 of the Rules of Professional Conduct adopted by the Delaware Supreme Court provides, in part:

Maintaining the Integrity of the Profession

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

* * *

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

* * *

COMMENT

* * *

[2] [With regard to (b) above] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. . . . Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

*[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). * * **

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

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SECTION III

COMMON ELEMENTS OF A CIVIL LAWSUIT

Much of the assigned reading in your first semester will describe issues arising in the context of civil litigation. In your Civil Procedure course you will discuss in great detail how a civil lawsuit begins and may progress. It is useful, however, to have a basic understanding now of common elements of a civil lawsuit. Below are brief descriptions of those elements and a summary in two charts.

a. Investigation

Courts seek to provide just resolutions of disputes, but courts do not want to waste resources on frivolous litigation. More than a good story is necessary to begin a lawsuit. There must be a factual basis for the story and the facts must be relevant to a right or obligation arising from some law. Lawyers representing potential claimants must investigate the facts and the law before filing suit on behalf of a client. The same practical duties of investigation apply to defendants before responding to a claim.

b. Choice of Forum Limits

Although there are numerous trial courts throughout the United States from which a plaintiff might pick,³ the authority of a particular court to render a valid judgment depends on whether the court has *jurisdiction over the subject matter* and *jurisdiction over the defendant*. Even if those two requirements of jurisdiction are satisfied, a particular court may not be considered an appropriate *venue* within a State containing multiple courts in the same court system. As you will learn, the issues of jurisdiction and venue are complicated topics. It suffices for now that you understand there are multiple factors affecting a plaintiff's choice of a court (forum) capable of rendering a valid judgment.

c. Pleadings

To begin a civil lawsuit in federal court and in many state courts, the *plaintiff* files a document called a *complaint* with the court and *serves* a copy of the complaint on the person or entity against whom the plaintiff is making the claim – the *defendant*. The complaint sets forth the bases for subject matter jurisdiction, describes the plaintiff's loss, explains how the defendant caused the

³ For a general description of federal and state court systems, see Tracey E. George & Suzanna Sherry, What Every Law Student Really Needs to Know: An Introduction to the Study of Law, 86-95 (2016).

loss, and asks the court to order a *remedy*. A plaintiff may ask a court to order a variety of remedies, such as money from the defendant to compensate for the plaintiff's loss or a prohibition on the defendant's conduct causing the plaintiff's loss. The court also may also order other types of relief, such as a declaration of the legal rights of the plaintiff in a particular situation.⁴

After being served with the complaint, a defendant has an opportunity to respond to the complaint. A defendant can file a *motion* (a request for a court to issue an order) asking the court to dismiss the plaintiff's claims for a variety of reasons, such as lack of jurisdiction over the defendant or over the subject matter. A defendant also may choose to respond directly to the specific allegations in the complaint by filing a pleading in which the defendant admits or denies the plaintiff's allegations and asserts other reasons for which the plaintiff would not recover under the applicable law. If a defendant fails to respond to the complaint – or responds in a manner deemed inadequate by the court – a *default judgment* can be entered in favor of the plaintiff.

d. Case Management

Judges seldom follow the tradition of acting merely as neutral referees in the pretrial portions of civil litigation. Rather, judges often foster efficient management of the dispute resolution process by conferring with the parties shortly after the pleading stage to formulate a plan and a timeline for subsequent parts of the pretrial process. A judge also can use case management conferences to foster settlement discussions among the parties to a lawsuit. If a trial will be necessary to resolve a dispute, case management frequently includes a conference of the judge and the parties to set a plan for the trial.

e. Discovery

Discovery is an opportunity for parties to a lawsuit to collect from each other and from non-parties information relevant to the claims and defenses raised in the suit. Rules of procedure provide a number of different methods for collecting the information, such as depositions, document requests, interrogatories, physical examinations and requests for admissions. Courts have authority to sanction parties and non-parties who fail to comply with proper discovery requests.

f. Dispositive Motions Later in the Pretrial Process

Trials do not occur in most civil litigation, because settlements negotiated by the parties or

⁴ For a summary of damages and injunctions as remedies a court might order, see Tracey E. George & Suzanna Sherry, What Every Law Student Really Needs to Know: An Introduction to the Study of Law, 97-99 (2016).

dispositive pretrial motions resolve most lawsuits. A motion for *summary judgment* is one such pretrial motion. The party making the motion asserts the court has enough information to conclude there cannot be a rational dispute about the facts giving rise to a claim (or defense) in the lawsuit and the applicable law entitles the moving party (the party making the motion) to a judgment in its favor given those facts. The moving party seeks to convince the court there is no need to proceed further with a claim.

g. Trial

If a trial is necessary to resolve civil litigation, constitutions and statutes may afford the right to a jury trial for some claims. At trial the parties must address the *burden(s) of proof* applicable at trial.⁵ The plaintiff presents evidence of its version of the facts supporting its claims, and the defendant presents evidence rebutting the plaintiff's evidence or supporting its own version of the facts. From the evidence presented, the jury must decide what happened (the underlying facts) and render a verdict after applying to the facts the applicable law as described by the judge. The judge will enter a judgment after the jury's verdict. If there is no right to a jury trial for a particular claim or if a party waives its right to a jury trial, then the judge becomes the fact finder and applies the applicable law to the facts.

During trial and after entry of judgment, a party may make a motion for a judgment as a matter of law. The motion for a judgment as a matter of law and the pretrial motion for summary judgment are similar in that the party making the motion asserts a rational decision maker must find in the moving party's favor based on the information available to the court at the time of the motion. The motion for judgment as a matter of law and the motion for summary judgment differ, however, in two significant ways. First, a motion for judgment as a matter of law can be made only after the non-moving party has had its opportunity to be heard at trial. Second, the motion for judgment as a matter of law focuses on what a rational decision maker could conclude from the information admitted into evidence at trial before a party makes the motion.

A party dissatisfied with a trial judgment also can make a motion in the trial court for a new trial. There are a variety of reasons for which a trial court could grant a new trial. What is important to understand at this point is how a motion for a new trial differs from a motion for judgment as a matter of law. The latter motion requests the court to enter judgment in favor of the moving party, i.e., to pick a winner. The motion for a new trial requests only another chance at a trial.

⁵ For a summary of the burden(s) of proof at trial, see Tracey E. George & Suzanna Sherry, What Every Law Student Really Needs to Know: An Introduction to the Study of Law, 116-118 (2016).

h. Appeal

A party that is dissatisfied with an outcome in the court in which a suit commences -- often called the *trial court* or *court of original jurisdiction* -- may ask a *court of appeals* to review trial court proceedings for errors. An appellate court may be an *intermediate appellate court* with the authority to review trial court proceedings but which also is subject to review by a *final or highest* appellate court in the particular court system. The jurisdiction of appellate courts to review the proceedings in the lower courts of a court system may be either mandatory or discretionary. Appellate courts apply different *standards of review* in determining how closely to scrutinize the proceedings in a lower court in the particular court system.⁶

⁶ You can find a summary of the role of appellate courts in Tracey E. George & Suzanna Sherry, What Every Law Student Really Needs to Know: An Introduction to the Study of Law, 89-92 and 118-121 (2016).

OVERVIEW OF CIVIL LITIGATION - PRETRIAL

EVENT	INVESTIGATION	CHOICE OF FORUM	PLEADINGS & INITIAL MOTIONS	CASE MANAGEMENT	DISCOVERY OF INFORMATION RELEVANT TO CLAIM OR DEFENSE	LATER DISPOSITIVE PRETRIAL MOTIONS	CASE MANAGEMENT
Action by Plaintiff (Π)	1. Find reasonable (objective) bases in fact and law for legal remedy	2. (a) Jurisdiction over subject matter 2. (b) Jurisdiction over defendant (Δ) 2. (c) Venue	3. Complaint (Petition) Π files with court and has complaint served on Δ.	5. (a) Confer with Judge and Δ to plan a just and efficient conduct of pre-trial processes, such as discovery, dispositive motions, and voluntary settlements.	6. (a) Use of Interrogatories, Requests for Documents (Data sets), Requests for Admission, Witness Interviews, and Witness Depositions	7. (a) Motion for Summary Judgment	8. (a) Confer with Judge and Δ to plan a just and efficient conduct of trial.
Action by Defendant (Δ)	[Before step 4. →, Δ must find reasonable (objective) bases in fact and law for defenses, counterclaims and crossclaims.	Despite Π 's initial choice of forum, Δ may be able (after step 3 above) to “remove” the suit from state court to federal court or may request a change of venue within the original court system.	4. (a) Motions (e.g. to dismiss for lack of jurisdiction or failure to state a claim upon which relief can be granted) 4. (b) Answer 4. (c) Default	5. (a) Confer with Judge and Π to plan a just and efficient conduct of pre-trial processes, such as discovery, dispositive motions, and voluntary settlements.	6. (b) Use of Interrogatories, Requests for Documents (Data sets), Requests for Admission, Witness Interviews, and Witness Depositions	7. (b) Motion for Summary Judgment	8. (b) Confer with Judge and Π to plan a just and efficient conduct of trial.

OVERVIEW OF CIVIL LITIGATION – TRIAL AND POST TRIAL

EVENT	TRIAL	DISPOSITIVE TRIAL MOTIONS	VERDICT & ENTRY OF JUDGMENT	POST-TRIAL MOTIONS	APPEAL
Action by Plaintiff (Π)	9. Π's Case in Chief (Plaintiff's direct evidence presented through witnesses and exhibits. Defendant cross-examines.)	12. (a) Motion for Judgment as a Matter of Law (Directed Verdict)	13. Verdict rendered by jury if jury trial has been appropriately requested, or Verdict rendered by trial judge if a non-Jury Trial ("Bench Trial.") and then Entry of Judgment	14. (a) Options Motion for Judgment as a Matter of Law (Judgment Not Withstanding the Verdict) Motion for a New Trial Petition to Open the judgment	15. (a) File Notice of Appeal addressing errors in trial court. Submit briefs arguing merits of appeal. Oral argument before court of appeals might occur.
Action by Defendant (Δ)	10. Motion for Judgment as a Matter of Law (Directed Verdict) 11. Δ's Case in Chief (Defendant's direct evidence presented through witnesses and exhibits. Plaintiff cross-examines.)	12. (b) Motion for Judgment as a Matter of Law (Directed Verdict)	(See 13 above)	14. (b) Options Motion for Judgment as a Matter of Law (Judgment Not Withstanding the Verdict) Motion for a New Trial Petition to Open the judgment	15. (b) File Notice of Appeal addressing errors in trial court. Submit briefs arguing merits of appeal. Oral argument before court of appeals might occur.

SECTION IV

EXPERT LEARNING IN LAW SCHOOL: ACTIVE READING (CASE BRIEFING AND ANALYSIS)

Many new law students approach reading in law school as they have approached reading all of their lives – as if reading a narrative -- which is to say passively. *Active reading* skills, however, are necessary for successful performance in law school. Studies have shown that active reading strategies correlate to better grades in law school.⁷ In a variety of ways, active readers engage with readings more deeply than passive readers.

Because many law school subjects are taught through reading and discussing judicial opinions (“cases”), we will introduce you to active reading strategies and techniques as means for reading cases effectively. To begin to develop your competence in analyzing cases for meaning and utility, we will apply active reading skills to a case and some notes addressing issues in Civil Procedure⁸ In particular, we will highlight the process of creating a *case brief*, an active reading process students will continue to hone throughout the first year of law school.

a. Active Reading Strategies

A basic process for active reading includes: (1) pre-reading strategies, (2) strategies while reading, and (3) post-reading strategies. Each step is summarized below.⁹

1. Pre-Reading Strategies

First, before reading a text, an active reader has a *purpose* for the reading. To set a purpose active readers use *prediction* and *goal setting*.

An active reader takes a moment to predict what the reader might get from reading certain materials. You can use *context clues* such as headings on a course syllabus, a book’s table of contents, or notes and questions preceding or following a case¹⁰ in a course text as context clues

⁷ See, e.g., Leah M. Christensen, Legal Reading and Success in Law School: An Empirical Study, 30 Seattle U. L. Rev 603 (2007)

⁸ Civil Procedure is one of the courses you will take during your first semester. Pages 3 to 5 in What Every Law Student Really Needs to Know contain a brief description of topics likely to be covered in first year courses.

⁹ For more detailed descriptions and analyses of expert learning strategies summarized in this text, see Michael Hunter Schwartz, Expert Learning for Law Students 29-123 (2008).

for prediction. Or, if more than one case is assigned on a single topic, one might predict that the second case provides a different explanation of the law than the first case provides or the second case provides a new example of a relevant set of facts. Given context clues, you should try to predict what a case is about and why your professor has assigned the reading. During the semester you also might consider how a new reading fits with material previously assigned and discussed.

Before reading, you also should set *goals* for the reading based on the predictions you make. For example, with respect to the case and notes below addressing joinder of parties in a single law suit, you might articulate the following goals: “When I am finished reading this case, I will know all of the elements necessary for the permissive joinder of multiple plaintiffs or multiple defendants in a single lawsuit.” Or, “When I am finished reading this case, I will have constructed a case brief sufficient to understand the meaning and precedential value of the case.”

2. Strategies While Reading

You should read a case with your “purpose(s)” in mind. You are not just reading the court’s words; you are searching for certain types of information to fulfill your purposes. For example, when reading the case below, you will be looking for the court’s words describing the necessary elements of permissive party joinder. You also should research vocabulary that is new to you. Finally, you should work to understand parts of the opinion you initially find confusing before continuing with your reading of the remaining parts of the opinion. If a particular part of an opinion remains indecipherable on first reading, you could try reading the remainder of the opinion to see if the context of the whole helps to understand how the difficult part fits.¹¹

Briefing a case is a critical active reading strategy for new law students. Creating a written *brief* of a court opinion provides a framework for understanding new information available in an opinion by helping to sort the information into categories useful to a competent lawyer. The sorting not only will help you absorb and recall new information, it also will help you understand how you might competently use the new information. Much of class time during the first year will be devoted to refining your ability to construct such frameworks necessary for professional competence. The habits developed in creating case briefs are vital for class preparation, exam preparation, and for much of the legal analysis lawyers do.

¹⁰ In many law school text books, a judicial opinion often is followed by notes and questions providing additional information about the issues addressed in the opinion and raising concerns about the opinion. No rule of law, physics or good nutrition prohibits you from scanning the notes and questions before reading the court opinion.

¹¹ For additional discussions of active reading, see Tracey E. George & Suzanna Sherry, What Every Law Student Really Needs to Know: An Introduction to the Study of Law, 25-52 (2016).

3. Post-Reading Assessment

When you finish reading an assignment, you should assess whether your predictions for the reading were correct and whether you accomplished your goals for the assignment. For example, do the notes following the case below provide new factual examples for the concept of “the same transaction or occurrence,” a key concept in the permissive joinder of parties under the Federal Rules of Civil Procedure? Are you able to set forth accurate and complete explanations of the criteria for permissive party joinder? Are you able to identify the material facts the court identified in its opinion for purposes of assessing the precedential value of the opinion in the future?

Experts also recommend *evaluating* a court’s decision as a means of engaging actively in the reading of the opinion. Here are a couple of questions you might use for such an evaluation. “If one of the material facts in the opinion were changed from X to Y, how would that have affected the court’s decision?” “Do I agree with the court’s decision?”

b. Practicing Active Reading Strategies in Analyzing Precedent

For the case that follows, we are asking you to engage in one of the essential skills of a competent lawyer, i.e. “the analysis of precedent.”¹² Use the active reading strategies described above, including the creation of a case brief.

We appreciate that active reading strategies such as prediction, goal setting and case briefing may be new to you. You will get better at such activities over time. To help with your efforts at briefing a case now, the next three pages contain an annotated template for constructing a case brief. The case you should brief is after the template.

¹² Model Rule of Prof'l Conduct R. 1.1, Comment 2 (2015).

COURT OPINION (AND POSSIBLE BRIEF) COMPONENTS

CASE COMPONENT	DESCRIPTION	SAMPLE BRIEF FOR (E. G. <u>Jacques v. Hyatt, Corp.</u>)
1. <u>Case</u> Title, Court & Year	Title of the case, court and date	[Fill in]
2. <u>Parties</u> Names, Procedural Designation	Brief description of who is suing whom and role of each in the litigation	
3. <u>Procedural History</u> a.k.a. Procedural Facts (includes Procedural Posture)	<p>Brief description of what has happened in the case <i>since the lawsuit was filed</i>; should be distinguished from the substantive facts of the case (see #4 below).</p> <p>Procedural posture: where the case is now, e.g., on appeal.</p>	
4. <u>Facts</u>	Brief description of what happened to cause one party to sue the other and the facts affecting the court's decision. Sometimes these are called the <i>substantive</i> facts or <i>determinative</i> facts (as distinguished from the <i>procedural</i> facts). (As with all components of a brief, you also should be guided by what your professor likes to discuss in class.)	.
6. <u>Holding & Disposition</u>	<p>Holding is the answer to the issue and primary legal conclusion in the case.</p> <p>Disposition is the legal result for the particular case, e.g., "Affirmed" or "Granted." Often found at the end of the opinion.</p>	

CASE COMPONENT	DESCRIPTION	SAMPLE BRIEF FOR (E. G. <u>Jacques v. Hyatt, Corp.</u>)
<p>7. <u>Rules (a.k.a. the law)</u></p>	<p>Rules or laws existing prior to the case at hand and which are used to decide the case can include statutes, regulations, rules of procedure, common law, etc. The law existing prior to the instant case being decided is referred to as “precedent.”</p> <p>Courts also will often announce new rules or interpretations of precedent.</p> <p>The holding(s) in a case are also a form of law or rule upon which future litigants can rely.</p> <p>Some professors consider the rules discussed in a case to be part of the court’s reasoning (see #9 below).</p>	
<p>8. <u>Arguments</u> (Made to the court by each party in the case.)</p>	<p>Not always easily discernible; the arguments often merge with or form the bases for the court’s reasoning (see #9 below).</p> <p>Arguments are generally an optional component. Include arguments if you learn your professor likes to discuss them in class.</p>	

CASE COMPONENT	DESCRIPTION	SAMPLE BRIEF FOR (E. G. <u>Jacques v. Hyatt, Corp.</u>)
<p>9. Reasoning</p>	<p>Description of <i>why</i> the court ruled as it did. Can include precedent (see #7 above), policy considerations, etc.</p> <p>The court's reasoning is not always apparent.</p>	
<p>10. Miscellaneous</p> <p>a. Concurring and dissenting opinions, if any.</p> <p>b. Dictum</p> <p>c. Your own comments, questions, etc.</p>	<p>a. Concurring and dissenting opinions are not law but they are often the subject of class discussions and can help you understand the main opinion.</p> <p>b. Dictum likewise is not law but may be useful to include in a brief for the same reasons you might include concurring and dissenting opinions.</p> <p>c. You might include in your briefs your own questions and comments to focus your class participation and case understanding.</p>	

c. A Context for the Civil Procedure Case and Notes

You will spend much of your time in the Civil Procedure course addressing how the Federal Rules of Civil Procedure govern the process of civil litigation in federal courts. The Rules are an example of one type – or source -- of law.¹³ The materials below introduce you to several Federal Rules of Civil Procedure and how federal courts interpret and apply the Rules.

The case below introduces you to the concept of claims arising out of the “same transaction or occurrence.” This concept is a key component of a number of topics covered in Civil Procedure courses, including modern claim preclusion, counterclaims, cross-claims and party joinder.¹⁴ The court opinion below focuses on the “same transaction or occurrence” as used in the context of permissive party joinder because it is very common for lawsuits to involve multiple plaintiffs and multiple defendants. As you will see, the concept as addressed in the following opinion also reflects an attempt to balance policies favoring consistency and efficiency in adjudication with concerns about the burdens of complexity.

Finally, the case provides the opportunity to practice an active reading technique particularly applicable to readings in Civil Procedure. When evaluating the case below, ask yourself what practical advantage in the litigation a party anticipates if the court adopts the party’s arguments on the issue of procedure in dispute.

The next page contains the text of several Federal Rules of Civil Procedure to set a context for the case that follows.

¹³ For a summary of different types of laws, see Tracey E. George & Suzanna Sherry, What Every Law Student Really Needs to Know: An Introduction to the Study of Law, 67-73 (2016).

¹⁴ A similar concept also forms part of the analysis for supplemental subject matter jurisdiction.

Fed. R. Civ. P. 1 - Scope and Purpose

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

Fed. R. Civ. P. 3 - Commencing an Action

A civil action is commenced by filing a complaint with the court.

Fed. R. Civ. P. 20 - Permissive Joinder of Parties

(a) Persons Who May Join or Be Joined.

(1) *Plaintiffs.* Persons may join in one action as plaintiffs if:

(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all plaintiffs will arise in the action.

(2) *Defendants.* Persons--as well as a vessel, cargo, or other property subject to admiralty process in rem--may be joined in one action as defendants if:

(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all defendants will arise in the action.

(3) *Extent of Relief.* Neither a plaintiff nor a defendant need be interested in obtaining or defending against all the relief demanded. The court may grant judgment to one or more plaintiffs according to their rights, and against one or more defendants according to their liabilities.

(b) *Protective Measures.* The court may issue orders--including an order for separate trials--to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party.

Fed. R. Civ. P. 21 - Misjoinder and Nonjoinder of Parties

Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.

**United States District Court
N.D. California**

Paul A. JACQUES and Jean L. Jacques, Plaintiffs

v.

HYATT Corporation, Medical Technology, Inc., et al., Defendants

2012 WL 3010969 (2012)

WILLIAM ALSUP, District Judge

* * *

[In this personal-injury action] Hyatt Corporation moves to sever the claims against Hyatt Corporation from the claim against defendant Medical Technology, Inc. for misjoinder of parties pursuant to FRCP 21 The motion to sever is **DENIED** because the claims arise out of a series of related occurrences, involve common questions of law and fact, and Hyatt has not demonstrated it will be prejudiced by maintaining the claims in a single action. * * *

Plaintiffs brought this action as a result of personal injuries suffered by Mr. Jacques during plaintiffs' honeymoon in Hawaii and a subsequent incident in plaintiffs' backyard in California. The following facts are taken from the complaint. In July 2009, plaintiffs visited the Hyatt Regency Maui Resort & Spa in Maui, Hawaii. While descending stairs outdoors near the pool area, Mr. Jacques slipped and fell, hitting his right knee on a lava boulder lining the staircase. The flagstone steps were very wet, and although the first and second sets of stairs had handrails, the third set—where Mr. Jacques fell—did not. Mr. Jacques suffered a ruptured patella tendon and was non-ambulatory and in extreme pain for the remaining four days of his honeymoon. Upon return to California, the tendon was surgically repaired at the orthopedic Kaiser clinic in South San Francisco.

The second incident occurred two months later, while Mr. Jacques was wearing Medical Technology's orthopedic knee brace to stabilize his knee after the above-described injury. "While descending some stairs in his back yard, he at one point partially shifted his weight to the injured knee, causing the metal strap which holds the top and bottom portions of the knee brace together to bend, which in turn caused him to fall." His patella tendon re-ruptured and required another surgery.

Plaintiffs assert three claims for relief: (1) general negligence against Hyatt, (2) premises liability

against Hyatt, and (3) products liability against Medical Technology. Mr. Jacques seeks damages for the physical injury, pain and suffering, emotional distress, anxiety, and wage loss; Mrs. Jacques seeks damages for loss of consortium. Plaintiffs' complaint was first filed in San Mateo County Superior Court in June 2011, and an amended complaint was filed in September 2011 to add the products liability claim against Medical Technology.

* * *

1. MOTION TO SEVER.

Hyatt moves to sever the claims against Hyatt and Medical Technology because it contends that the claims did not arise out of the same transaction, occurrence, or series of transactions or occurrences. Medical Technology and plaintiffs oppose the motion.

As set forth in FRCP 20(a)(2), multiple defendants may be joined together in one action if "(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action." "Although the specific requirements of Rule 20 . . . may be satisfied, a trial court must also examine the other relevant factors in a case in order to determine whether the permissive joinder of a party will comport with the principles of fundamental fairness." [*Citation omitted.*] Such factors may include judicial economy, prejudice, and whether separate claims require different witnesses and documentary proof. *SEC v. Leslie*, No. C 07-3444, 2010 WL 2991038, at *4 (N.D. Cal. July 29, 2010) (Fogel, J.). The FRCP 20(a) requirements and additional fundamental fairness factors will be considered in turn as follows.

A. Same Transaction or Occurrence.

"The Ninth Circuit has interpreted the phrase 'same transaction, occurrence, or series of transactions or occurrences' to require a degree of factual commonality underlying the claims." Typically, this means that a party "must assert rights ... that arise from related activities—a transaction or an occurrence or a series thereof." *Bravado Int'l Grp. Merch. Servs. v. Cha*, 2010 WL 2650432, at *4 (C.D. Cal. June 30, 2010) (citing *Coughlin v. Rogers*, 130 F.3d 1348, 1350 (9th Cir.1997)). District courts have reached different conclusions regarding whether overlapping liability alone is sufficient to satisfy FRCP 20, and our court of appeals has not yet decided this issue. See *Oda v. United States*, No. CV 11-04514-PSG, 2012 WL 692409, at *1-2 (N.D. Cal. Mar.2, 2012) (Grewal, Mag. J.) (describing two lines of cases).

Hyatt argues that the claims against Hyatt and Medical Technology do not arise out of the same transaction, occurrence, or series of transactions or occurrences because the only thing they have

in common is the location of the injury—Mr. Jacques’s knee. The first injury was on Hyatt’s property in Maui while the second was in California two months later, and the injuries allegedly occurred in a different manner.

In contrast, plaintiffs contend that the claims arise out of the same “series of occurrences” because the injuries and damages overlap, and the evidence submitted will be relevant to both. Plaintiffs also anticipate that if this motion to sever is granted, defendants will employ an empty-chair defense “because this case involves injury, then re-injury, to the same body part in exactly the same way, and because the second injury would not have occurred but for the first” . Plaintiffs argue that these two injuries to Mr. Jacques’s knee are causally related, not coincidental . Medical Technology puts forth similar arguments, pointing to the facts that the injuries occurred close in time, to the same plaintiff and part of his knee, and that Mr. Jacques would not have been wearing the knee brace in the second incident, but for the accident involving Hyatt.

Hyatt oversimplifies the issue by arguing that the only thing the claims have in common is an injury to Mr. Jacques’s knee. The rule simply requires “related activities” and “similarity in the factual background of a claim.” *See Bravado*, 2010 WL 2650432, at *4. Plaintiffs have set forth several relationships between the accidents and factual similarities underlying the claims, specifically: that the injury and re-injury occurred to the same body part in exactly the same way, the second accident would not have occurred but for the first, and there are overlapping damages. Plaintiffs’ allegations therefore meet the threshold requirement.

The instant action is distinguishable from *Oda*, where although the two vehicular accidents “allegedly contribute[d] to [plaintiff]’s current injuries,” the events were “wholly distinct” and were not causally related. *See Oda*, 2012 WL 692409, at *2. Here, Mr. Jacques’s current injuries allegedly stem from two accidents that are alleged to be causally related. Unlike in *Oda*, Mr. Jacques’s second accident allegedly would not have occurred but for the first accident, at least in part because he would not have been wearing the knee brace at issue.

The instant action is more analogous to *Wilson*, where the plaintiff sued for products liability and subsequent medical malpractice after an accident involving a dyeing machine:

Although Dr. Schoenbach’s treatment of [plaintiff]’s finger is a separate proposition from the injury of his finger in the machine, the two incidents are part of a series of occurrences which have allegedly contributed to the current condition of [plaintiff]’s finger. Common questions of law and overlapping questions of fact will arise both with regard to the cause of [plaintiff]’s disability and the extent of his damages.

Wilson v. Famatex GmbH Fabrik Fuer Textilausruestungsmaschinen, 726 F.Supp. 950, 951–52 (S.D.N.Y.1989). So too here. Because the injuries occurred only two months apart, the first accident was allegedly a causal factor in the second, and both incidents allegedly contributed to the current condition of Mr. Jacques’s knee, this order finds the threshold “series of occurrences” requirement has been met.

B. Common Questions of Law or Fact.

Hyatt argues that in addition to the claims stemming from different incidents, the claims against Hyatt are based on [different legal theories]. Medical Technology counters by pointing to . . . common questions of fact [,such as]:

Mr. Jacques’ preexisting medical, mental, emotional and physical conditions that may have contributed to the incidents and/or his claimed damages; the circumstances surrounding Mr. Jacques’ alleged initial injury and the circumstances surrounding his subsequent re-injury; the nature and extent of Mr. Jacques’ alleged injuries and damages; the nature and extent of Mr. Jacques’ injuries that could have continued on even had no second accident occurred and the extent of an exacerbation of those claimed injuries by the second accident; the circumstances involved in the initial surgery and pre and post-surgical treatment; the alleged mental and emotional injuries and potential contributing factors, if any such injuries exist; and facts relating to the alleged damages claims, including the purported wage loss claim and pre-existing contributing factors.

(Medical Technology Opp. 7). Medical Technologies also puts forth the argument that Hyatt may be liable for injuries and damages arising from the second accident caused or contributed to by the first accident, and analogizes to cases where medical malpractice during subsequent treatment was a reasonably foreseeable result of an original tortfeasor’s act.

FRCP 20 requires at least one common question of law or fact. At a minimum, preexisting conditions, contributing factors, and the nature and extent of Mr. Jacques’s injuries are a common questions of fact for both claims. Each of the defendants, moreover, will surely be pointing to the other as the primary cause of the ultimate injuries. Accordingly, plaintiffs’ complaint meets the second threshold requirement under FRCP 20.

C. Fundamental Fairness.

The remaining factors to be discussed pertain to the fundamental fairness analysis and require the defendant to show that joinder, despite satisfying the textual requirements of FRCP 20, should nevertheless be denied.

(1) Facilitation of Settlement or Judicial Economy.

Hyatt believes settlement and judicial economy will not be facilitated by keeping the claims joined because the length of time between the incidents—a mere two months—and existence of separate medical records pertaining to each incident would effectively result in two trials, one for each defendant. Hyatt contends that having defendants participate in one long trial would not make settlement any more likely.

Plaintiffs, on the other hand, argue that holding two separate trials will be inefficient because it will require physicians to testify twice, and Hyatt and Medical Technology will each likely have to testify at both trials. Medical Technology similarly argues that there will be duplication of witnesses, and also that potentially different schedules for separate trials would hinder settlement.

Largely as a result of the overlapping evidentiary matter discussed in greater detail below, this order finds that efficiency concerns weigh in favor of maintaining the claims in one action. Contrary to Hyatt’s assertion, it has not shown that two separate trials will be shorter or less burdensome to the Court, parties, and witnesses; thus, this factor does not support severance.

(2) Prejudice.

Hyatt argues it will be prejudiced if severance is not granted, because of the possibility it will be found liable for incidents after the original accident, over which Hyatt had no control . * * *

Plaintiffs argue they will be prejudiced because * * * with separate trials, each defendant may try to blame the absent defendant for all or part of the damages Medical Technology adds that mechanisms such as jury instructions, bifurcation of issues, and other protective measures under FRCP 20(b) can prevent prejudice.

With regard to Hyatt’s concern that it may erroneously be found liable for incidents after the original accident, protective measures such as careful jury instructions will be sufficient to separate the allegations and evidence relevant to each claim, to the extent this is necessary. Hyatt has not offered any rationale for why such safeguards will not be feasible or effective.

* * *

[P]laintiffs would be subjected to prejudice if severance is granted. Each defendant is likely to argue that the other is responsible for Mr. Jacques’s injuries. Additionally, plaintiffs have limited financial resources. Duplicative litigation in Hawaii would be unaffordable . Whereas protective measures may be employed to prevent prejudice to Hyatt if necessary, the Court would be unable

to construct similarly effective safeguards for plaintiffs.

Hyatt has failed to show it will suffer unavoidable prejudice if the instant action proceeds as a single lawsuit; therefore, this factor weighs against severance.

(3) Witnesses and Documentary Proof.

The parties disagree over the extent to which the claims will rely on overlapping documentary proof and witnesses. Hyatt argues that because the injury occurred in Hawaii, many of the witnesses are based in Hawaii, and that furthermore, Medical Technology will use entirely different expert testimony for its products liability claims than Hyatt will use for its personal injury claim. Joining the claims in a lengthy trial would burden both witnesses and the court due to travel and scheduling.

Mr. Jacques has submitted a declaration that Drs. Fang, Atkinson, and Richard, the doctors responsible for his orthopedic surgeries, primary care, and psychiatric care, are all located in Northern California, and that only emergency care was provided in Hawaii. Furthermore, plaintiffs have photographs of the Maui accident site, and Hyatt has since remediated the site such that it is no longer in the same condition as when the accident occurred. Mr. Jacques also alleges that he and his wife are the only known, direct witnesses to the slip and fall. Medical Technology reiterates the common medical witnesses and adds that witnesses to support Mr. Jacques's wage loss and pain and suffering claims will likely be located in California. Overlapping documentary evidence includes medical, insurance, and employment records.

Although it is possible that witnesses from Hawaii will be called to testify, the majority of potential witnesses identified thus far, particularly the medical personnel responsible for treating Mr. Jacques in California after each injury, are overlapping in both claims. While Hyatt has argued that the medical records for each incident are separate, it is likely that both claims will rely on overlapping documentary evidence as to the common questions of fact discussed above, such as preexisting conditions, contributing factors, and the extent of injuries—the date of the second injury does not function as a bright line dividing the documentary evidence each claim may involve. The substantial evidentiary overlap weighs against severing the claims.

* * *

In sum, plaintiffs' complaint meets the two required elements of FRCP 20, and Hyatt fails to show that joinder does not comport with principles of fundamental fairness.

Accordingly, Hyatt's motion to sever **DENIED**.

Notes & Questions

1. The case brief template begins with the title of the case, a description of the court issuing the opinion, and the date of the opinion. Of what practical value is such information for a competent lawyer?
2. Which facts would you include in the Facts section of your case briefs? For example, would you include the fact the Jacques were on their honeymoon in Hawaii in your brief for the case?
3. How many issues did you set forth in your case brief?
4. What are the rules of law regarding permissive joinder of parties described and applied by the court in Jacques? Where would you describe those rules of law in your case brief?
5. With respect to the “principles of fundamental fairness” to which the court in Jacques refers, what is the source of those principles? Does the court derive the principles from the words in Rule 20 or Rule 21?
6. How is Fed. R. Civ. P. 21 related to Fed. R. Civ. P. 20(a)?
7. Does the court in Jacques discuss each subpart (element) of Fed. R. Civ. P. 20 in the same degree of detail? If not, why not?
8. Does the court in Jacques link specific facts to particular subparts (elements) of Fed. R. Civ. P. 20? If so, which facts are linked with which subparts?
9. In contrast to the decision in Jacques consider the decision in Bradley, et al. v. Choicepoint Services, Inc., 2007 WL 2844825 (E.D. Pa) (2007). In Bradley, six co-plaintiffs sued a credit reporting agency for violations of the Fair Credit Reporting Act, a federal statute governing credit reporting bureaus. The plaintiffs alleged the defendant had reported inaccurate credit information about each plaintiff, failed to investigate and fix the errors when any of the plaintiffs complained, and thereby caused each plaintiff to be denied loans and consumer credit. In determining whether the plaintiffs’ multiple claims arose from the same transaction or occurrence under Rule 20, the court looked to whether a “logical relationship” existed among the claims. The court described a logical relationship as existing “when the central facts of each plaintiff’s claim arise on a somewhat individualized basis out of the same set of circumstances.” The plaintiffs argued their claims were logically related for the following reasons: every plaintiff had a major public record error placed on his or her credit report by the defendant; every plaintiff disputed the error (some more than once); and the computer systems, policies and practices of the defendant that led to failure after failure were the same with respect to each plaintiff. Despite the plaintiffs’ arguments, the United States District Court for the Eastern District of Pennsylvania found the plaintiffs’ claims to be “misjoined” and severed the suit into six individual suits. The court described each of the plaintiffs’

claims as factually unique in that each plaintiff would have to present individual proof of the defendant's specific errors regarding the individual plaintiff and the particular effects of an error on the individual plaintiff.

a. Does note 9 regarding Bradley add to your understanding of the concept of "same transaction, occurrence, or series of transactions or occurrences?"

b. Also consider that a U.S. District Court for the Eastern District of Pennsylvania issued the opinion in Bradley in 2007, and a U.S. District Court for the Northern District of California issued the opinion in Jacques in 2012. Both Courts are trial courts in the federal court system. Is the opinion in Jacques binding precedent within the federal judicial district of the Eastern District of Pennsylvania?

10. The United States Court of Appeals for the Federal Circuit has provided the following explanation of Rule 20(a) in a suit by a patent holder alleging that the eighteen defendants offered services infringing the plaintiff's patent rights.

Thus, independent defendants satisfy the transaction or occurrence test of Rule 20 when there is a logical relationship between the separate causes of action. The logical relationship test is satisfied if there is substantial evidentiary overlap in the facts giving rise to the cause of action against each defendant

* * *

In addition to finding that the same product or process is involved, to determine whether the joinder test is satisfied, pertinent factual considerations include whether the alleged acts of infringement occurred during the same time period, . . . the use of identically sourced components, . . . and whether the case involves a claim for lost profits. The district court enjoys considerable discretion in weighing the relevant factors.

In re EMC Corp., 677 F.3d 1351, 1358-1359 (Fed. Cir 2012). Do you understand how the "pertinent factual considerations" identified by the court are pertinent to the application of Rule 20?

11. In Mosley v. General Motors, Inc., 497 F.2d. 1330 (8th Cir. 1974), eight plaintiffs made claims against the Chevrolet Division of General Motors for a variety of circumstances, including discrimination in hiring on the basis of race and gender, discharging on the basis of race and gender, and discrimination based on race and gender in the granting of relief time. The plaintiffs alleged the individual acts of discrimination each suffered at different times were pursuant to company-wide policies. Do you think the claims of the eight plaintiffs are part of the "same transaction, occurrence, or series of transactions or occurrences" under Fed. R. Civ. P. 20?

12. While the court in Jacques addresses the phrase "arising out of the same transaction, occurrence, or series of transactions or occurrences" found in Rule 20(a)(1)(A) and 20(a)(2)(A), the court does not address the preceding phrase in each of those subsections, i.e., rights to relief asserted [for or against] "jointly, severally, or in the alternative." The latter phrase was included in Rule 20(a) to expand joinder of parties in federal courts beyond the scope of joinder permitted

prior to the adoption of the Federal Rules of Civil Procedure in 1938. Before that time, plaintiff joinder was limited to plaintiff's asserting a jointly held right. Now, however, plaintiffs asserting individually held ("several") rights might bring claims in the same suit. A leading treatise on the Federal Rules of Civil Procedure gives the following example:

[S]uppose a bus collides with an automobile. All of the bus passengers who suffered personal injuries or property damage may join as plaintiffs in a single action against defendant under Rule 20(a), even though their respective claims are several rather than joint. Under earlier plaintiff-joinder practice each plaintiff would have been forced to institute a separate action against defendant.

Charles Alan Wright & Arthur R. Miller, 7 Fed. Prac. & Proc. Civ. § 1654 (3d ed.).

An example of joinder of parties in the *alternative* to which Rule 20(a) also refers would be the following. Plaintiff is certain plaintiff was assaulted by either D1 or D2, but plaintiff is not certain which of the two committed the assault due to problems of identification outside of plaintiff's control. Rule 20(a) permits plaintiff to join D1 and D2 as defendants even though only one may be held liable.

SECTION V

Outlining Basics

The *process* of outlining the rules (law) covered in your courses helps you to understand and retain the material that you need to know and use on your law school exams.

Generally, an effective outline will:

- A. have an organizational framework based on rules rather than cases, and will clearly depict the relationships between the rules.
- B. present the rules accurately and thoroughly.
- C. be visually accessible so that units of information are easily discernible.

Your class on outlining during Introduction to Professional Skills will help you understand the process more, and as your first year progresses you will become more adept at this important skill. To get you started, the following is a simple step-by-step approach to use when outlining your courses.

Step 1: Gather Materials.

Begin by gathering your class notes, case briefs, and any supplemental materials you may have (such as hornbooks, dictionaries, etc.). For your courses this semester you also will want to have your text book and course syllabus with you.

Step 2: Create the Framework.

The next step will be to create the overall organizational framework for your outline. To complete this step, for most courses you will consult your course syllabus and your text book's table of contents.

The overall organizational framework for a course outline usually should be based on rules and concepts, and categories of rules and concepts. For example, a Criminal Law outline might be organized around main categories such as "Theories of Punishment," "Theft Offenses," "Homicide Offenses," and the like.

Under the main headings and categories, you will include subheadings based on material covered in class. Thus under the topic of "Theft Offenses," your subheadings likely will be the individual theft offenses covered in your class, such as "Theft," "Burglary," and "Extortion," like this:

- I. Theft Offenses
 - A. Theft
 - B. Burglary
 - C. Extortion

For your first outlining class, you will not yet have an overall structure because we are focusing on only a few of the Federal Rules of Civil Procedure. With that said, permissive party joinder would likely be found in a Civil Procedure outline under the main heading of "Basic Joinder of Parties and Claims."

An important thing to note is that except in rare instances – such as when you are studying important Supreme Court cases – you will not use case names as headings or subheadings. Therefore, for example, you should not use "Jacques v. Hyatt, Corp." as a subheading in the outline for this class. The reason for this is that you generally do not need to know individual cases for your exams. You only need to know the rules and factual examples from those cases. Your headings, subheadings, and sub-subheadings should be brief words or phrases that accurately summarize the information indented under them.

Step 3: Flesh it Out.

Using your notes and other materials, fill in more details about each of your topics and subtopics. As you flesh out an outline, keep in mind the following:

- **Divide main rules into their component parts.** Oftentimes the component parts of a rule are referred to as “elements,” though not every rule has elements. (Fed. R. Civ. P. 20 is an example of a rule that does have elements.) Within your outline, each part (element) of the rule would be its own sub-subheading. For example, under the subheading of “Burglary,” you would include each separate element as described by your professor or course materials, perhaps like this:

A. Burglary:

1. Breaking
2. and entering
3. the dwelling
4. of another
5. at nighttime,
6. with the intent to commit a felony therein

Complete this step carefully, so that you don’t break the rule up too much; be sure that you know exactly what each component or element is. If you are not sure, seek assistance from professors, reliable supplemental materials, and your peers.

- **Indent similar sub-concepts in a consistent manner**, using a simple hierarchical structure to accurately represent the relationship of the concepts. Note in the burglary example that the six elements of burglary are indented together – they are equivalent in importance, so their positioning in the outline structure reflects that equivalence. Among other things, this helps you see at a glance that burglary has six elements that you need to memorize.
- Under each component part or element of the rule, further indent and include what is referred to as “**Rule Explanation**,” or helpful information about the element. This may include definitions of the element (what is a “dwelling?”), exceptions, etc. Rule explanation also includes examples of the element being met or not being met (e.g., can a car sometimes be a “dwelling?”) The examples come from the cases and notes in your text books, as well as sample fact patterns or “hypotheticals” that your professor may discuss in class. The

examples, definitions, and other types of rule explanation are essential to your full understanding of a rule and how it needs to be applied to an exam fact pattern.

- **Other items** you will want to put in your outlines include exceptions to rules, policy considerations, minority and majority rules, and the like. *Be sure to place these pieces of information at the appropriate locations within your outline's framework.*
- Strive for **accuracy and thoroughness** in your presentation of the rules in your outlines. Keep in mind that on your exams, part of what you will need to be able to do will be to state relevant rules. Points will be awarded for how well you do this. You must be able to state the rule accurately, including key language and terms of art. Synonyms and paraphrasing should be used sparingly, if at all. Referring back to our burglary example, a student who defines burglary on an exam as "breaking into someone's house at night with the intent to steal" will get fewer points than a student who defines it more precisely. You will increase your chances of getting full credit for a rule statement on an exam if the rule is stated accurately and thoroughly in your outline.

Step 4: Edit for Visual Accessibility.

- The most effective outlines present information in smaller chunks that are easier to remember; for example, listing out the elements of a rule separately often will be easier to remember than stating the elements in a sentence or paragraph form.
- Many students find it helpful to leave plenty of white space on the page, with good-sized margins and breaks between concepts.
- And finally, use highlighting techniques such as **bolding** for key terms to help with memorization. Do not overuse highlighting techniques, though – they lose their effectiveness if overused, or if too many different techniques are used.

SECTION VI

SUCCESS ON LAW SCHOOL EXAMINATIONS

Final examinations in law school and state bar examinations include questions in multiple-choice and essay formats. While you can find many books and articles about how to take law school exams, the following pages describe some strategies commonly identified for success on all exams and for essay questions in particular. At the end of this section we have included a sample essay question raising issues addressed by the Civil Procedure readings in Section IV.

I. For All Examinations

a. Exam Structure

Law school exams often consist of multiple parts with questions in different formats, e.g., sections with essay questions and sections with multiple-choice questions. It may be helpful to review the entire exam briefly when you first have the opportunity to do so. Unless your professor requires you to address the sections of the exam in a particular order, knowing the overall structure of an exam gives you the opportunity to build some confidence by addressing first a format or issues with which you feel most comfortable.

b. Directions

Carefully read the professor's directions for the exam. There may be directions applicable to multiple sections of the exam and there may be directions applicable only to a particular part of the exam. As an example of the first type of direction, you may be instructed to write answers to essay questions throughout the exam in double-space format if typing or on every other line if handwriting. As an example of the second type of direction, an essay question may have directions requiring you to address specific issues for that question and informing you not to address other issues. You do not want to lose points or adversely affect your professor's perception of your abilities by failing to follow directions.

c. Time Management

Law students frequently wish they had more time to complete an exam. And so, if you believe you have completed the exam with time remaining in the exam period, then you may be a 1L genius but it is more likely you could have done more with the exam.

With respect to time dedicated to different sections of an exam, a professor may designate on the exam a recommended amount of time for a section, e.g., "Section A – Recommended Time: 40 Minutes." Follow your professor's recommendation until you become more familiar with law

school exams. Even if your professor does not specifically recommend an amount of time for an exam section, there may be other guides for time management. For example, if your professor tells you that the entire exam is worth 100 points and Section A of the exam is worth 40 out of the 100 points, it is reasonable to spend 40% of the exam period on section A. Ask your professor during the semester whether she or he will be recommending an amount of time or designating a relative weight for the sections of an exam.

II. Essay Questions - IRAC

What are commonly called “essay questions” require students to provide a written analysis of a fact pattern (story) through the lens of the law covered in the course. A successful analysis of the fact pattern demonstrates more than a student’s ability to recite accurately the rules of law learned during a semester. Instead, a successful analysis demonstrates that a student *understands* the law so well that the student can explain how the law learned during the semester could reasonably be applied to a fact pattern different – at least in part -- than the fact patterns of the cases the student prepared for or discussed in class during the semester.

A traditional format for responding to essay questions is known by the abbreviation “IRAC.” As explained below, each letter of the abbreviation stands for a part of the response to an essay question. Professors typically award points for each element of the IRAC framework.

a. “I” (Issue)

Begin by identifying and stating the issue(s) to be addressed (sometimes referred to as issue spotting). Issue statements often take the form of a question as a matter of custom. An issue statement involves consideration of the professor’s directions for the question as well as facts in the fact pattern relevant to those directions.

For example, a fact pattern requiring an essay response in a Civil Procedure exam might include facts you thought were relevant to a defense of lack of jurisdiction as well as facts relevant to a motion to sever due to misjoinder of parties. Both are procedural responses to a claim you are likely to address in Civil Procedure during the semester. If your professor’s directions on the exam asked you to discuss all reasonable responses by a defendant presented by the fact pattern, then you would create multiple “issue statements,” one for lack of jurisdiction and one for misjoinder. If, however, your professor’s directions asked you only to discuss the likelihood of severance of claims due to misjoinder of parties, then you would create only one issue statement.

Let’s assume your professor gave you a fact pattern in which co-plaintiffs (P1 and P2) filed suit against a defendant (D), and your professor directed you to discuss only severance of claims due to misjoinder of parties. Your issue statement should do more than merely repeat your professor’s

directions. That is to say, you must do more than state: “The issue is whether the court should sever co-plaintiffs claims due to misjoinder of parties.” Instead, your issue statement should reflect that you have spotted key facts and their significance under the relevant parts of the Rule of Civil Procedure. Accordingly, a better issue statement would read: “Whether the claims of P1 and P2 against D arise out of the same transaction, occurrence or series of transactions or occurrences and whether a common question of law or fact common to both plaintiffs will arise in the action, when P1 and P2 seek to recover against D for [provide a short summary of the material facts.]”

Professors often differ on the amount of detail they want to see in an issue statement and the number of points they will award for an issue statement. Do not hesitate to ask your professors about their preferences.

b. “R” (Rule)

Accurately recite the rules of law you learned during the semester that correspond to your issue statements. For example, in the exam scenario described above, your rule statement would describe the legal standards and policies you synthesized from class during orientation week regarding the severance due to misjoinder of parties under Rules 20(a) and 21. Some professors may award points for citing to the source of the rule, e.g., citation of court case. Other professors may award points only for an accurate statement of the applicable rule, and so citing to the source would be a waste of time. Also please note that memorization of accurate rule statements before an exam is often necessary preparation for making accurate rule statements during an exam.¹⁵ Vague paraphrases of the law, case names, and references to Rule numbers are not sufficient substitutes for accurate rule statements.

You should provide a rule statement for each issue presented by a fact pattern in light of your professor’s directions regarding the fact pattern.

c. “A” (Analysis/Application/Argument)¹⁶

After accurately stating a rule, explain how the rule might reasonably be applied to the facts in the fact pattern. For example, identify and explain how specific facts could reasonably support each element of Federal Rule of Civil Procedure 20(a). And, to maximize the award of points, identify and explain how other facts in the fact pattern could reasonably be used to demonstrate failure to fulfill each element of the Rule (counter-analysis or counter-argument). An argument need not be

¹⁵ Memorization of key words and phrases is helpful even for “open book” exams. Please do not assume you will have much time during an open book exam for reviewing the materials you are permitted to bring with you and use during the exam.

¹⁶ Some descriptions of “IRAC” describe the “A” as standing for “analysis” while others describe it as standing for “application” or “argument.”

a certain winner to be a reasonable part of your analysis. Also note that most of us tend to favor one side of an argument or party the first time we read through a fact pattern, and so you must plan to make an extra effort to look for reasonable counter-arguments.¹⁷

Another way of thinking about the “A” in IRAC is to consider it a necessary step in explaining to the reader of your answer the logic of how you went from the Rule stated before the “A” to the conclusion (“C”) stated after the “A.” Some have likened the “A” section to showing all of the steps in solving a math problem, such as a proof in geometry.

What will not suffice for analysis is to recite all of the applicable law in one paragraph and then simply list a bunch of facts from the fact pattern in another paragraph. Instead, you should craft paragraphs in which you *explicitly link* specific facts with particular parts of a rule (sub-issues). For example, from which facts regarding the claims of P1 and P2 above could a reasonable person conclude that the claims arise out of the same transaction (and the contrary)?

Many students in their first semester fail to appreciate the importance of the “A” in IRAC. That can be a costly mistake. The “A” is what differentiates in large part the mere *memorization* of the law from a demonstrated *understanding* of the law. Accordingly, some professors award more points for the “A” than for other components of the IRAC framework.

You should provide analysis for each part of each rule statement contained in your essay answer.

d. “C” (Conclusion)

Many professors will award points for stating a conclusion as to which of the reasonable arguments presented in the “A” section is most likely to prevail.

III. Essay Questions – Additional Practical Strategies

Read the fact pattern and directions more than once. Use the first reading to get a basic understanding of the story and the objectives of your professor. On the second – or third – reading, underline or mark in the margin of the exam where facts are described that you can use in the IRAC structure.

¹⁷ During your first semester you may hear about “short answer” and “long answer” essay questions. The former may be contrasted with the latter in that “short answer” fact patterns may focus on a single issue, simple rules, or may not contain facts sufficient to support analysis *and* counter-analysis of the facts.

Plan your response to an essay question before you write it. It would be reasonable to spend 20% of the time allotted to a question to plan your response. You can create an IRAC chart to create an outline for your answer and to use as a checklist as you complete your answer.

Cross off the facts in the fact pattern as you use them in issue spotting and analysis. If you find there is a fact that you have not used, consider again whether that fact gives rise to another issue or affects an issue you have already identified. While a professor may include some facts solely to make the story in the fact pattern flow better, it is safer to assume that the vast majority of the facts are relevant to some issue the professor wants you to address.

Do not introduce new facts into the fact pattern. Address the fact pattern your professor has created and not one you would rather address. If, however, you conclude a critical fact is missing from the fact pattern your professor wrote for the exam, then identify the missing fact and explain why it is critical.

Sample Civil Procedure Question

On June 1, 2016, PJ purchased a “Super TreadLyptical” (TL) exercise machine from Dude Buff Equipment, Inc. (DBE) in Pennsylvania. The advertising for the TL described it as combining the best elements of a treadmill and an elliptical exercise machine. DBE had designed and manufactured the TL in California and was the sole retailer of the machine nationwide. On June 2, 2016, at PJ’s home in Pennsylvania, PJ was using the TL according to the instructions that came with the TL when suddenly the speed at which the TL was running increased dramatically. Given PJ’s age and physical condition, PJ was unable to keep up with the speed of the TL. PJ frantically tried to turn off the TL by pushing a button labeled “Emergency Stop” on the TL, but that seemed only to increase the speed of the TL. PJ was thrown from the TL, hit the floor, and fractured a hip.

On June 2, 2016, PJ had surgery at Disrecordia Hospital (DH) in Pennsylvania to repair the fractured hip. The surgeon who operated on PJ was an employee/agent of DH and DH would be liable for any negligence of the surgeon in treating PJ. To repair the hip, the surgeon chose three hip screws designed, manufactured and sold by Dynamic Surgical Products, Inc. (DSP). The surgeon based the choice of screws on information DSP had provided to DH about the design and manufacture of the screws. The DSP screws failed to hold PJ together, necessitating a second surgery on PJ’s hip to replace the DSP screws with surgical screws of another manufacturer. The failure of the DSP screws caused PJ to be hospitalized for two weeks at DH when the typical hospital stay for hip surgery is three days.

On July 13, 2016, PJ sued DBE, DH and DSP in a United States District Court in Pennsylvania, alleging that the defendants are jointly and severally liable for out of pocket expenses and for pain and suffering PJ incurred as a result of the circumstances described above. In Count I of the complaint, PJ alleges that DBE is liable for DBE’s negligent design, manufacture and marketing of the TL. In Count II, PJ alleges that DH is liable for medical negligence as a result of the surgeon’s choice to use the DSP screws, the surgeon’s acts during the first surgery, and DH’s care of PJ before and after the surgeries. In Count III, PJ alleges that DSP is liable for negligent design, manufacture, and marketing of the screws.

DIRECTIONS: Discuss whether the Federal Rules of Civil Procedure authorizing the permissive joinder of parties permit PJ to bring the claims described above against DBE, DH, and DSP in the same lawsuit.