

*WIDENER UNIVERSITY*  
**DELAWARE LAW SCHOOL**

**ORIENTATION 2017**

*Readings Supplement*

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**SECTION I**  
**INTRODUCTION**

Law school likely will be a new and unique experience in professional education for you. You may not have heard of some of the subject matters you will address, and the vocabulary you will be asked to use may seem alien. For example, what is a *tort* if not a dessert? Or, what is *offensive, non-mutual collateral estoppel*, and -- more importantly -- why would anyone care about it? In addition, the workload in law school is heavy. A common assumption is a student should spend at least two to three hours preparing for each hour of class time. Even the testing and grading processes in law school are often different from such processes in other schools.

Given the singular aspects of a law school education, the Orientation program will do more than help you meet your colleagues, find important locations on campus, and learn how the school runs. Rather, a key objective of the Orientation program is to begin your development of the skills necessary to address the unique features of a law school education. The Orientation program provides a common body of knowledge for all students in the first semester. The program also provides opportunities to discuss and practice some of the skills essential to success as a law student and as a member of the legal profession.

You may get confused, frustrated, and intimidated in developing your understanding of the law. Don't give up! In fact you are not permitted to give up, and here is the reason why. Every state has a professional code of ethics governing those admitted to the legal profession in the state. Those codes identify *diligence* and *competence* as fundamental traits of the profession.<sup>1</sup> Professional diligence requires a lawyer "to pursue a matter . . . despite opposition, obstruction, or personal inconvenience . . ."<sup>2</sup> Competence requires knowledge of the law and skill in using that knowledge. Orientation is your first step toward professional competence and diligence. You can do this. Here we go!

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<sup>1</sup> 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.

<sup>2</sup> Model Rule of Prof'l Conduct R. 1.3, Comment 1 (2015).

## SECTION II

### CHARACTER & FITNESS REQUIREMENTS OF THE PROFESSION

#### **a. Before Admission to the Bar**

While you now 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. Your conduct before law school and while in law school is subject to scrutiny by the profession. For example, you may recall the application for admission to Delaware Law includes these 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 discrepancy 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 (in *italics*) you will find excerpts from the website of The Pennsylvania Board of Law Examiners that exemplify common concerns and objectives.

***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.*

[The website for the Pennsylvania Board of Law Examiners contains the following examples of deficient conduct that will lead the Board to investigate an applicant before recommending an applicant's admission]:

- *unlawful conduct*
- *academic misconduct*
- *employment misconduct*
- *making false statement(s), including the omission of relevant facts*
- *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 dependency on a substance such as alcohol, a narcotic, an illicit drug, or a mood altering substance, or evidence of current or recent abuse of such a substance or a prescription drug*
- *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.*

**b. After Admission to the Bar**

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 [to Model Rule of Professional Conduct 8.4]**

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*[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. It is useful 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.<sup>3</sup>

**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 reasonably 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.

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<sup>3</sup> In your Civil Procedure course you will discuss in greater detail how a civil lawsuit begins and may progress.

## **b. Choice of Forum Limits**

Although there are numerous trial courts throughout the United States from which a plaintiff might pick,<sup>4</sup> 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 which 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 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.<sup>5</sup>

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

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<sup>4</sup> 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).

<sup>5</sup> 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).

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 dispositive pretrial motions resolve most lawsuits. A motion for *summary judgment* is one such pretrial motion. The party making the motion asserts that 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.<sup>6</sup> 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 described above 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

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<sup>6</sup> 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).



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.

## **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.<sup>7</sup>

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<sup>7</sup> 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
<b>Action by Plaintiff (Π)</b>	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.
<b>Action by Defendant (Δ)</b>	[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
<b>Action by Plaintiff (Π)</b>	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.
<b>Action by Defendant (Δ)</b>	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.<sup>8</sup> 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 few cases and some notes addressing issues in Torts.<sup>9</sup> 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.<sup>10</sup>

##### **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 case<sup>11</sup> in a course text as context clues for prediction. For example, one might predict that a case assigned under the following syllabus

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<sup>8</sup> See, e.g., Leah M. Christensen, Legal Reading and Success in Law School: An Empirical Study, 30 Seattle U. L. Rev 603 (2007)

<sup>9</sup> Torts 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.

<sup>10</sup> 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).

<sup>11</sup> 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.

heading:

## ***I. Intentional Torts***

### ***a. False Imprisonment***

will set forth the elements of the intentional tort of false imprisonment as distinguished from other intentional torts addressed during the semester. 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 a goal for the reading based on the predictions made. For example, “When I am finished reading this case, I will know all of the elements of a claim of false imprisonment and have a better understanding of the element of confinement.” Or, “When I am finished reading this case, I will have constructed a case brief to understand the meaning and precedential value of this case.”

## **2. Strategies While Reading**

While reading a court’s opinion, you should read 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, you are looking for the court’s words describing the necessary elements of the tort of false imprisonment. You should look up vocabulary that is new to you. You should work to understand parts of the opinion you initially find confusing before continuing with your reading. 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 a the difficult part fits.<sup>12</sup>

Briefing a court opinion also is a critical active reading strategy for new law students. Creating a written “brief” of a court opinion provides a framework for understanding the new information in an opinion by helping to sort the information into categories useful to a competent lawyer. The sorting will not only 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.

## **3. Post-Reading Assessment**

When you finish reading a court opinion, you should assess whether your predictions for the case were correct and whether you accomplished your purposes for the reading. For example, did the

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<sup>12</sup> For additional means 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).

second opinion provide new factual examples of false imprisonment? Am I able to set forth accurate and complete statements of the elements of the tort of false imprisonment? Am I able to identify the material facts the court identified in its opinion for purposes of assessing the precedential value of the opinion?

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

### **b. Implementing Active Reading Strategies in Analyzing Precedent**

In reading the court opinions that follow, you will engage in one of the essential skills of a competent lawyer, i.e. "the analysis of precedent."<sup>13</sup> Use the active reading strategies described above, including the creation of case briefs for each opinion. Your professors will ask you in class to explain your use of active reading strategies and the contents of your case briefs. Please remember that thorough preparation and diligence are hallmarks of competent lawyers.

The following three pages contain an annotated template for constructing a case brief.

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<sup>13</sup> Model Rule of Prof'l Conduct R. 1.1, Comment 2 (2014).

**COURT OPINION (AND POSSIBLE BRIEF) COMPONENTS**

<b>CASE COMPONENT</b>	<b>DESCRIPTION</b>	<b>SAMPLE BRIEF FOR (E. G. <u>McCann v. Wal-Mart Stores, Inc.</u>)</b>
<b>1. <u>Case</u> Title, Court &amp; Year</b>	Title of the case, court and date	[Fill in]
<b>2. <u>Parties</u> Names, Procedural Designation</b>	Brief description of who is suing whom and role of each in the litigation	
<b>3. <u>Procedural History</u> a.k.a. Procedural Facts (includes Procedural Posture)</b>	<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 in the litigation process, e.g., on appeal.</p>	
<b>4. <u>Facts</u></b>	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.)	
<b>5. <u>Issue(s)</u></b>	The legal question or questions the court must decide. Typically includes substantive facts <i>plus</i> reference to a rule of law. There will always be at least one issue, and often there are multiple issues in a case.	

CASE COMPONENT	DESCRIPTION	SAMPLE BRIEF FOR (E. G. <u>McCann v. Wal-Mart Stores, Inc.</u> )
<p><b>6. <u>Holding &amp; Disposition</u></b></p>	<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>	
<p><b>7. <u>Rules (a.k.a. the law)</u></b></p> <p><b>8. <u>Arguments</u></b> (Made to the court by each party in the case.)</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>Not always easily discernible; the arguments often merge with or form the basis for the court’s reasoning (see #9 below).</p> <p>Arguments are generally an optional component. Include arguments if your professor likes to discuss them in class.</p>	



CASE COMPONENT	DESCRIPTION	SAMPLE BRIEF FOR (E. G. <u>McCann v. Wal-Mart Stores, Inc.</u> )
<p><b>9. Reasoning</b></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><b>10. Miscellaneous</b></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>	

**United States Court of Appeals  
First Circuit**

**Debra McCANN, Personally, and as Mother and Next Friend of Jillian McCann and  
Jonathan McCann, Plaintiffs, Appellees/Cross-Appellants,**

**v.**

**WAL-MART STORES, INC., Defendant, Appellant/Cross-Appellee,**

**210 F.3d 51 (2000)**

Before Boudin, Circuit Judge, Bowens, Senior Circuit Judge, and Lynch, Circuit Judge.

BOUDIN, Circuit Judge.

This case involves a claim for false imprisonment. On December 11, 1996, Debra McCann and two of her children—Jillian, then 16, and Jonathan, then 12—were shopping at the Wal-Mart store in Bangor, Maine. After they returned a Christmas tree and exchanged a CD player, Jonathan went to the toy section and Jillian and Debra McCann went to shop in other areas of the store. After approximately an hour and a half, the McCanns went to a register and paid for their purchases. One of their receipts was time stamped at 10:10 p.m.

As the McCanns were leaving the store, two Wal-Mart employees, Jean Taylor and Karla Hughes, stepped out in front of the McCanns' shopping cart, blocking their path to the exit. Taylor may have actually put her hand on the cart. The employees told Debra McCann that the children were not allowed in the store because they had been caught stealing on a prior occasion. In fact, the employees were mistaken; the son of a *different* family had been caught shoplifting in the store about two weeks before, and Taylor and Hughes confused the two families.

Despite Debra McCann's protestations, Taylor said that they had the records, that the police were being called, and that the McCanns "had to go with her." Debra McCann testified that she did not resist Taylor's direction because she believed that she had to go with Taylor and that the police were coming. Taylor and Hughes then brought the McCanns past the registers in the store to an area near the store exit. Taylor stood near the McCanns while Hughes purportedly went to call the police. During this time, Debra McCann tried to show Taylor her identification, but Taylor refused to look at it.

After a few minutes, Hughes returned and switched places with Taylor. Debra McCann told Hughes that she had proof of her identity and that there must be some proof about the identity of the children who had been caught stealing. Hughes then went up to Jonathan, pointed her finger at him, and said that he had been caught stealing two weeks earlier. Jonathan began to cry and denied the accusation. At some point around this time Jonathan said that he needed to use the bathroom and Hughes told him he could not go. At no time

during this initial hour or so did the Wal-Mart employees tell the McCanns that they could leave.

Although Wal-Mart's employees had said they were calling the police, they actually called a store security officer who would be able to identify the earlier shoplifter. Eventually, the security officer, Rhonda Bickmore, arrived at the store and informed Hughes that the McCanns were not the family whose son had been caught shoplifting. Hughes then acknowledged her mistake to the McCanns, and the McCanns left the store at approximately 11:15 p.m. In due course, the McCanns brought suit against Wal-Mart for false imprisonment . . . .

The jury awarded the McCanns \$20,000 in compensatory damages on their claim that they were falsely imprisoned in the Wal-Mart store by Wal-Mart employees. Wal-Mart has now appealed the district court's denial of its post-judgment motions for judgment as a matter of law and for a new trial pursuant to Fed.R.Civ.P. 50(b) and 59, respectively, arguing that the McCanns did not prove false imprisonment under Maine law and that the court's jury instructions on false imprisonment were in error. \* \* \*

Both of Wal-Mart's claims of error depend on the proper elements of the tort of false imprisonment. Although nuances vary from state to state, the gist of the common law tort is conduct by the actor which is intended to, and does in fact, "confine" another "within boundaries fixed by the actor" where, in addition, the victim is either "conscious of the confinement or is harmed by it." Restatement (Second), Torts § 35 (1965). The few Maine cases on point contain no comprehensive definition, *see Knowlton v. Ross*, 114 Me. 18, 95 A. 281 (1915); *Whittaker v. Sandford*, 110 Me. 77, 85 A. 399 (1912), and the district court's instructions (to which we will return) seem to have been drawn from the *Restatement*.

While "confinement" can be imposed by physical barriers or physical force, much less will do-although how much less becomes cloudy at the margins. It is generally settled that mere threats of physical force can suffice, Restatement, *supra*, § 40; and it is also settled-although there is no Maine case on point-that the threats may be implicit as well as explicit, *see id.* cmt. a; 32 Am.Jur.2d *False Imprisonment* § 18 (1995) (collecting cases), and that confinement can also be based on a false assertion of legal authority to confine. Restatement, *supra*, §41. Indeed, the *Restatement* provides that confinement may occur by other unspecified means of "duress." *Id.* § 40A.

Against this background, we examine Wal-Mart's claim that the evidence was insufficient. [W]e think that a reasonable jury could conclude that Wal-Mart's employees intended to "confine" the McCanns "within boundaries fixed by" Wal-Mart, that the employees' acts did result in such a confinement, and that the McCanns were conscious of the confinement.

The evidence, taken favorably to the McCanns, showed that Wal-Mart employees stopped the McCanns as they were seeking to exit the store, said that the children were not allowed

in the store, told the McCanns that they had to come with the Wal-Mart employees and that Wal-Mart was calling the police, and then stood guard over the McCanns while waiting for a security guard to arrive. The direction to the McCanns, the reference to the police, and the continued presence of the Wal-Mart employees (who at one point told Jonathan McCann that he could not leave to go to the bathroom) were enough to induce reasonable people to believe either that they would be restrained physically if they sought to leave, or that the store was claiming lawful authority to confine them until the police arrived, or both.

Wal-Mart asserts that under Maine law, the jury had to find “actual, physical restraint,” a phrase it takes from Knowlton, 95 A. at 283; *see also* Whittaker, 85 A. at 402. While there is no complete definition of false imprisonment by Maine’s highest court, this is a good example of taking language out of context. In Knowlton, the wife of a man who owed a hotel for past bills entered the hotel office and was allegedly told that she would go to jail if she did not pay the bill; after discussion, she gave the hotel a diamond ring as security for the bill. She later won a verdict for false imprisonment against the hotel, which the Maine Supreme Judicial Court then overturned on the ground that the evidence was insufficient. While a police officer was in the room and Mrs. Knowlton said she thought that the door was locked, the SJC found that the plaintiff had not been confined by the defendants. The court noted that the defendants did not ask Mrs. Knowlton into the room (another guest had sent for her), did not touch her, and did not tell her she could not leave. The court also said that any threat of jail to Mrs. Knowlton was only “evidence of an intention to imprison at some future time.” Knowlton, 95 A. at 283.<sup>14</sup> In context, the reference to the necessity of “actual, physical restraint” is best understood as a reminder that a plaintiff must be actually confined—which Mrs. Knowlton was not.

Taking too literally the phrase “actual, physical restraint” would put Maine law broadly at odds with not only the Restatement but with a practically uniform body of common law in other states that accepts the mere threat of physical force, or a claim of lawful authority to restrain, as enough to satisfy the confinement requirement for false imprisonment (assuming always that the victim submits). It is true that in a diversity case, we are bound by Maine law, as Wal-Mart reminds us; but we are not required to treat a descriptive phrase as a general rule or attribute to elderly Maine cases an entirely improbable breadth.

\* \* \*

*Affirmed.*

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<sup>14</sup> Although the distinction may seem a fine one, it is well settled that a threat to confine at a future time, even if one to extract payment, is not itself false imprisonment. *See* Restatement, *supra*, § 41 cmt. e.

**United States Court of Appeals  
Third Circuit**

**Victor ZAVALA, et al**

**v.**

**WAL-MART STORES INC.,**

**691 F.3d 527 (2012)**

Before: FUENTES, SMITH, and JORDAN,

**OPINION**

SMITH, Circuit Judge.

**I. Introduction**

This suit was brought in the U.S. District Court for the District of New Jersey by Wal-Mart cleaning crew members who are seeking compensation for unpaid overtime and certification of a collective action under the Fair Labor Standards Act (FLSA), civil damages under RICO, and damages for false imprisonment. [*Editor's Note: As demonstrated by this opinion, complaints in both federal and state courts often contain multiple claims under more than one law. We will focus only on the false imprisonment claim here.*]

The workers—illegal immigrants who took jobs with contractors and subcontractors Wal-Mart engaged to clean its stores—allege: (1) Wal-Mart had hiring and firing authority over them and closely directed their actions such that Wal-Mart was their employer under the FLSA; (2) Wal-Mart took part in a RICO enterprise with predicate acts of transporting illegal immigrants, harboring illegal immigrants, encouraging illegal immigration, conspiracy to commit money laundering, and involuntary servitude; (3) Wal-Mart's practice of locking some stores at night and on weekends—without always having a manager available with a key—constituted false imprisonment.

\* \* \*

**II. Facts**

\* \* \*

***C. False Imprisonment***

In support of their false imprisonment claims, Plaintiffs allege that they often worked at stores that were shut down at night and on weekends, during which time the exits were

locked. At these stores, they needed to seek out managers to open the doors. Managers were often unavailable and were sometimes not even in the store. However, Plaintiffs' deposition testimony shows that they could and sometimes did leave for breaks. Testimony also shows that they occasionally left for work-related tasks like retrieving propane (necessary for the buffing equipment).

Plaintiffs cite two specific instances in which they wanted to leave but were unable to do so: (1) Plaintiff Petr Zednek had a toothache and wanted to leave early, but his manager, Steve, refused to permit him to leave; (2) Plaintiff Teresa Jaros had abdominal pain and bleeding and wanted to leave, but no managers were in the store. In Zednek's case, he further asserts that "Steve is a muscular man (with blond hair), and I knew that he would assault me if I tried to escape through any door that would let me out[.]"

In response, Wal-Mart provides two declarations from store managers. The declarations attest that managers were available to unlock doors "when necessary"; that the stores had properly-marked emergency exits; and that—to the managers' knowledge—the emergency exits were neither concealed nor obstructed at any time and were always in proper working order.

In reply to these declarations, Plaintiffs assert that managers were often unavailable. They also assert that they did not know how to leave. Plaintiffs claim that they were never informed of the location of emergency exits. Plaintiffs also speculate that Wal-Mart had motive to conceal these exits.

\* \* \* \*

Plaintiffs challenge the District Court's . . . grant of summary judgment for Wal-Mart on Plaintiffs' false imprisonment claims. The District Court had jurisdiction under 28 U.S.C. § 1331, 29 U.S.C. § 216(b), 18 U.S.C. § 1964(c), and 28 U.S.C. § 1367(a). We have appellate jurisdiction under 28 U.S.C. § 1291.

\* \* \* \*

### ***C. False Imprisonment***

\* \* \* \* Wal-Mart . . . offered affidavits asserting that it locked its doors at night to provide security for its staff and merchandise, that managers were often available to open locked doors, and that Wal-Mart had accessible emergency exits, as required by state and federal law. Wal-Mart also argued that Plaintiffs' repeated return to stores where they were "imprisoned" constituted consent.

In response, Plaintiffs: (1) cited specific instances where they wanted to leave and managers were unavailable or refused to let them leave; (2) noted that no one ever showed them the location of emergency exits and their minimal proficiency in English would make it difficult or impossible to find them on their own; and (3) argued that Wal-Mart had an

interest in concealing emergency exits to prevent theft of merchandise and discovery of the illegal workers by federal agents.

On summary judgment, the District Court found Wal-Mart's assertions regarding the presence of emergency exits dispositive, as false imprisonment cannot occur where there is a safe alternative exit. We agree with the District Court's conclusion, though we will expand on the District Court's analysis.

Federal Rule of Civil Procedure 56 requires the court to render summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (a). This standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." An issue of material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. We exercise plenary review over a District Court's grant of summary judgment and review the facts in the light most favorable to the party against whom summary judgment was entered.

As this is a state law claim, the first question to be resolved is: what state law should be applied? After performing a choice-of-law analysis, the District Court applied New Jersey law. We believe the District Court was correct in its choice of New Jersey law, and Plaintiffs do not dispute its application.

The majority of Plaintiffs' false imprisonment claims fail because Plaintiffs impliedly consented to their "imprisonment." Apparently from the very beginning of their employment, Plaintiffs were aware that Wal-Mart's policy was to close and lock the main doors of its stores when they are not open for business. Plaintiffs nevertheless chose to continue coming to work. They do not allege that they objected to the locked-door policy, nor do they allege that they requested a manager be available during their shift to open the doors. Continuing to come to work under these conditions is "conduct . . . reasonably understood by another to be intended as consent" and is therefore "as effective as consent in fact." Restatement (Second) of Torts § 892. As such, Plaintiffs "cannot recover in an action of tort for the conduct or for harm resulting from it." *Id.* at § 892A.

But consent can be withdrawn, and Plaintiffs allege two instances when they wanted to leave but were unable to do so. Teresa Jaros alleges that she was sick and wanted to leave, but no manager was available to open the door. Petr Zednek alleges that he had a toothache, asked to leave, and was told he could not. He also alleges that he believed his manager, a "muscular" "blond" man, would assault him if he attempted to leave.

Jaros' consent likely encompasses the incident she alleges. By the time of her illness, she knew that she must work in a locked store for the duration of the shift. She knew that a manager would often be absent and therefore unable to open the door should a problem

arise. Her consent arguably includes that aspect of her work. Consent only terminates “when the actor knows or has reason to know that the other is no longer willing for him to continue the particular conduct.” Restatement (Second) of Torts § 892A, cmt. h. Since Wal-Mart was unaware that Jaros wanted to leave (because no manager was there), Jaros could not terminate her consent.

Regardless, Jaros’ complaint and Zednek’s complaint are resolved by the availability of emergency exits. “To make the actor liable for false imprisonment, the other’s confinement within the boundaries fixed by the actor must be complete . . . . The confinement is complete although there is a reasonable means of escape, unless the other knows of it.” Restatement (Second) of Torts § 36. While both Jaros and Zednek disclaim knowledge of the emergency exits, such knowledge is properly imputed to them, even over their proclaimed ignorance and even on summary judgment. Federal Rule of Evidence 201 permits judicial notice of facts “generally known within the trial court’s territorial jurisdiction” and we have noted that this includes “matters of common knowledge.” See Gov’t of Virgin Islands v. Gereau, 523 F.2d 140, 147 (3d Cir.1975). Courts have used judicial notice to establish facts in similar situations. See Williams v. Kerr Glass Mfg. Corp., 630 F. Supp. 266, 270 (E.D.N.Y.1986) (taking judicial notice of the distance between federal courts in New York and Pennsylvania and the numerous means of transportation between them); Penthouse Int’l, Ltd. v. Koch, 599 F. Supp. 1338, 1346 (S.D.N.Y.1984) (taking judicial notice of the “layout and physical characteristics” of the New York City subway system, which the judge rode daily to work).

Emergency exits are by regulation a common feature of commercial buildings in the United States. We agree with the District Court that “it appears ... indisputable that these emergency exits are required by law to be clearly marked, easily accessible, and unobstructed.” We conclude that Jaros and Zednek must have been aware of the existence of emergency exits as a general feature of buildings, and therefore they must have been aware that emergency exits were likely to exist in the stores in which they worked. A reasonable jury could not conclude otherwise.

The question remaining is whether emergency exits were in fact available and unobstructed at the Wal-Mart stores in question. Wal-Mart has offered evidence of the availability and unobstructed nature of emergency exits in its stores. Plaintiffs have not directly rebutted this evidence. They have merely offered speculation that Wal-Mart had motive to conceal any emergency exits. But Plaintiffs do not actually demonstrate that the exits were absent or obstructed in any way. Judgment in favor of Wal-Mart is appropriate.

Plaintiffs cannot succeed by advancing a defense that leaving through the emergency exit would trigger an alarm or potentially result in the loss of their jobs. Regarding the alarm, “it is unreasonable for one whom the actor intends to imprison to refuse to utilize a means of escape of which he is himself aware merely because it entails a slight inconvenience [.]” Restatement (Second) of Torts § 36 cmt. a; Richardson v. Costco Wholesale Corp., 169 F.Supp.2d 56, 61 (D.Conn.2001) (“The fact that opening the employee exit door would



result in an alarm sounding and possible employee discipline does not give rise to an inference that actual confinement or threatening conduct took place.”). Nor is potential loss of employment a sufficient threat to constitute false imprisonment. See Maietta v. United Parcel Serv., Inc., 749 F.Supp. 1344, 1367 (D.N.J.1990) (concluding an employee’s concern that he would lose his job if he exited an interview with company investigators was insufficient to support a claim for false imprisonment under New Jersey law), *aff’d* 932 F.2d 960 (3d Cir.1991); Richardson, 169 F.Supp.2d at 61–62 (“Moral pressure or threat of losing one’s job does not constitute a threat of force sufficient to establish that plaintiffs were involuntarily restrained.”).

The only remaining issue is Zednek’s claim that when he approached his manager and was denied permission to leave, he “knew that [the manager] would assault [him] if [Zednek] tried to escape through any door that would let [him] out.” Zednek asserts that the manager wanted the store clean for the impending visit of a Wal-Mart executive. But Zednek’s sole evidence of the manager’s supposed violent tendencies is that the manager “is a muscular man (with blond hair)[.]” We need not credit this statement in any way.

In an earlier declaration, Zednek relates the toothache story and the request made to and denied by his manager, but curiously omits any belief that his manager would assault him. It is only in his third supplemental declaration—filed only a few weeks *after* Wal-Mart moved for summary judgment—that Zednek mentions the prospect that his manager might randomly assault him. Even on summary judgment, we need not credit a declaration contradicting a witness’ prior sworn statements. While not precisely contradictory, Zednek’s omission of such a crucial fact is highly questionable.

But even absent these suspicious circumstances, we conclude that no reasonable jury could credit Zednek’s speculative statement that his manager would assault him had he tried to leave. Zednek offers no evidence in support of the statement. He does not allege that the manager had a propensity for violence. And he does not allege that the manager overtly or impliedly threatened him. Thus, summary judgment was appropriate.

## **V. Conclusion**

Over the course of eight years and a minimum of four opinions, the District Court rejected final certification of an FLSA class, rejected the RICO claim on several grounds, and rejected the false imprisonment claim on the merits. We will affirm.

### ***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? Consider the following. The United States Court of Appeals for the First Circuit issued the opinion in McCann in 2000 and The United States Court of Appeals for

the Third Circuit issued the opinion in Zavala in 2012. Both Courts are intermediate appellate courts in the federal court system. Is the opinion in Zavala binding precedent within the First Circuit?

2. What are the rules of law regarding a claim for false imprisonment described and applied by the courts in McCann and Zavala? Where would you describe those rules of law in your case briefs? Did the opinion in Zavala expand the understanding of false imprisonment you had after reading McCann?

3. What are the sources of the laws of false imprisonment described and applied by the courts in McCann and Zavala? What is the *common law*? What is the Restatement (Second) of Torts?

4. Do the courts in McCann and Zavala discuss each subpart (element) of the rules of law regarding false imprisonment in the same degree of detail?

5. The court in Zavala chose to apply the substantive law of New Jersey in ruling on the claim of false imprisonment. Does that make Zavala binding precedent for state courts in New Jersey?

6. False imprisonment is an *intentional* tort – one of many intentional torts you will discuss in your Torts course. The word *intent* is used throughout the Restatement (Second) of Torts “to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.” Restatement (Second) Torts § 8(A) (1965).

The Comments to Section 8(A) of the Restatement provide the following explanation of intent:

*a. “Intent,” as it is used throughout the Restatement of Torts, has reference to the consequences of an act rather than the act itself. When an actor fires a gun in the midst of the Mojave Desert, he intends to pull the trigger; but when the bullet hits a person who is present in the desert without the actor's knowledge, he does not intend that result. “Intent” is limited, wherever it is used, to the consequences of the act.*

*b. All consequences which the actor desires to bring about are intended, as the word is used in this Restatement. Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. \* \* \**

**Illustrations:**

*1. A throws a bomb into B's office for the purpose of killing B. A knows that C, B's*

*stenographer, is in the office. A has no desire to injure C, but knows that his act is substantially certain to do so. C is injured by the explosion. A is subject to liability to C for an intentional tort.*

7. Should the owner of a store, such as the defendant in McCann, have a right to detain someone the owner suspects of shoplifting without being liable for false imprisonment? Consider Section 10 of the Restatement (Second) of Torts which provides:

*10. Privilege*

*(1) The word "privilege" is used throughout the Restatement of this Subject to denote the fact that the conduct which, under ordinary circumstances, would subject the actor to liability, under particular circumstances does not subject him to liability.*

*(2) A privilege may be based upon*

*(a) the consent of the other affected by the actor's conduct, or*

*(b) the fact that its exercise is necessary for the protection of some interest of the actor or of the public which is of such importance as to justify the harm caused or threatened by its exercise, or*

*(c) the fact that the actor is performing a function for the proper performance of which freedom of action is essential.*

8. Section 892A of the Restatement (Second) of Torts provides:

*Effect of Consent*

*(1) One who effectively consents to conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or for harm resulting from it.*

*(2) To be effective, consent must be*

*(a) by one who has the capacity to consent or by a person empowered to consent for him, and*

*(b) to the particular conduct, or to substantially the same conduct.*

*(3) Conditional consent or consent restricted as to time, area or in other respects is effective only within the limits of the condition or restriction.*

Did the court in Zavala use Section 892A in reaching its decision?

9. Which facts would you include in the Facts section of your case briefs? For example, would you include the fact the McCanns had returned a CD player and a Christmas tree to the store before the false imprisonment? Would you include the facts that the registrar receipt generated before the false imprisonment had a time stamp of 10:10 PM and the

McCanns left the store at 11:15 PM? Given that the Third Circuit in Zavala mentions Steve's blond hair more than once, would you note Steve's blond hair in your brief for Zavala?

10. Do the courts in McCann and Zavala link specific facts to particular subparts (elements) of the rules of law regarding false imprisonment? If so, which facts are linked with which elements?

11. The court in McCann describes the facts and holding in the Knowlton opinion? Why did the McCann court do so? Would you use the discussion of Knowlton in your case brief for McCann? If you would, where would you place the discussion of Knowlton in the brief?

12. The court in Zavala states that it is "review[ing] the facts in the light most favorable to the party [the plaintiffs] against whom summary judgment was entered." As you will later learn in your Civil Procedure course, reviewing facts in the light most favorable to a party against whom summary judgment is sought [the non-moving party] is part of the common rule explanation for Fed. R. Civ. P. 56 governing summary judgment in federal courts. Do you think the court in Zavala actually viewed the facts in the light most favorable to the plaintiffs, the non-moving party?

13. How would you describe the type of reasoning used by the courts in McCann and Zavala? Review pages 45-52 in What Every Law Student Really Needs to Know.

**Court of Civil Appeals of Texas,  
Waco**

**BIG TOWN NURSING HOME, INC., Appellant,  
v.  
Howard Terry NEWMAN, Appellee.**

**461 S.W.2d 195 (1970)**

OPINION

McDONALD, Chief Justice.

This is an appeal by defendant nursing home from a judgment for plaintiff Newman for actual and exemplary damages in a false imprisonment case.

Plaintiff Newman sued defendant nursing home for actual and exemplary damages for falsely and wrongfully imprisoning him against his will.

\* \* \*

The trial court entered judgment on the verdict for plaintiff for \$25,000.

\* \* \*

Plaintiff is a retired printer 67 years of age, and lives on his social security and a retirement pension from his brother's printing company. He has not worked since 1959, is single, has Parkinson's disease, arthritis, heart trouble, a voice impediment, and a hiatal hernia. He has served in the army attaining the rank of Sergeant. He has never been in a mental hospital or treated by a psychiatrist. Plaintiff was taken to defendant nursing home on September 19, 1968 by his nephew who signed the admission papers and paid one month's care in advance. Plaintiff had been arrested for drunkenness and drunk driving in times past (the last time in 1966) and had been treated twice for alcoholism. Plaintiff testified he was not intoxicated and had nothing to drink during the week prior to admission to the nursing home. The admission papers provided that patient 'will not be forced to remain in the nursing home against his will for any length of time.' Plaintiff was not advised he would be kept at the nursing home against his will.

On September 22, 1968 plaintiff decided he wanted to leave and tried to telephone for a taxi. Defendant's employees advised plaintiff he could not use the phone, or have any visitors unless the manager knew them, and locked plaintiff's grip and clothes up. Plaintiff walked out of the home, but was caught by employees of defendant and brought back forceably, and thereafter placed in Wing 3 and locked up. Defendant's Administrator testified Wing 3 contained senile patients, drug addicts, alcoholics, mentally disturbed, incorrigibles and uncontrollables, and that 'they were all in the same kettle of fish.' Plaintiff tried to escape from the nursing home five or six times but was caught and brought back each time against his will. He was carried back to Wing 3 and locked and taped in a 'restraint chair', for more than five hours. He was put back in the chair on subsequent occasions. He was not seen by the home doctor for some 10 days after he was admitted, and for 7 days after being placed in Wing 3. The doctor wrote the social security office to change payment of plaintiff's social security checks without plaintiff's authorization. Plaintiff made every effort to leave and repeatedly asked the manager and assistant manager to be permitted to leave. The home doctor is actually a resident studying pathology and has no patients other than those in two nursing homes. Finally on November 11, 1968 plaintiff escaped and caught a ride into Dallas, where he called a taxi and was taken to the home of a friend. During plaintiff's ordeal he lost 30 pounds. There was never any court proceeding to confine plaintiff. Defendant's assistant manager testified that plaintiff attempted to leave the home five or six times, and on each occasion was brought back against his will.

False imprisonment is the direct restraint of one person of the physical liberty of another without adequate legal justification. There is ample evidence to sustain [the] jury findings.

\* \* \*

[The Court affirmed a "reformed" judgment for plaintiff, reducing damages from \$25,000 to \$13,000.]

## ***Notes & Questions***

1. Which facts are the determinative facts in Big Town Nursing Home?

### **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, and
- C. be visually accessible so that units of information are easily discernible.

Your class on outlining during Orientation 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 courses during full semesters 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 our first outlining class during Orientation, we will not yet have an overall structure because we are focusing on only one discrete tort. With that said, false imprisonment would likely be found in a Torts outline under the main heading of “Intentional Torts.”

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 would not use “McCann v. Wal-Mart” as a subheading in and outline of the material. 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 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. (False imprisonment 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**

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 Torts 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, multiple legal theories often support claims for relief from the same set of facts. A fact pattern could support a claim of false imprisonment as well as a claim of negligence. If your Torts professor’s directions on the exam asked you to discuss all reasonable claims and defenses presented by the fact pattern, then you would create two “issue statements,” one for the claim of negligence and one for the claim of false imprisonment. If, however, your professor’s directions asked you only to discuss liability for false imprisonment, you would create only one issue statement.

Let’s assume your professor directed you to discuss only a claim of false imprisonment. 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 defendant, X, is liable to plaintiff, Z, for false imprisonment.” Instead, your issue statement should reflect that you have spotted key facts and

their significance. Accordingly, a better issue statement would read: “Is the defendant, X, civilly liable to plaintiff, Z for false imprisonment when [fill in the material facts from the fact pattern.]”

Professors differ on the amount of detail they want to see in an issue statement. Do not hesitate, therefore, 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 statement. 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 liability for false imprisonment. Some professors may award points for citing to the source of the rule, e.g., citation of court case or Restatement section. 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 necessary preparation for providing accurate rule statements during an exam.<sup>15</sup> A vague paraphrase of the law is not a sufficient substitute for an accurate rule statement.

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)<sup>16</sup>**

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 a cause of action for false imprisonment. And, to maximize the award of points, identify and explain how other facts in the fact pattern could reasonably be used to defeat such a claim (counter-analysis or counter-argument). An argument need not be 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 look for reasonable counter-arguments.<sup>17</sup>

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.

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<sup>15</sup> 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 to review exam the materials you are permitted to bring with you and use during the exam.

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

<sup>17</sup> 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, and/or may not contain facts sufficient to support analysis *and* counter-analysis of the facts.

What will not suffice for analysis is to state the applicable rules and then simply list a bunch of facts from the fact pattern that are relevant to the rules. Instead, you should craft paragraphs in which you *explicitly link* specific facts with particular parts of a rule (sub-issues). For example, assume you had *not* read the Zavala opinion for Torts class but had read other court opinions addressing false imprisonment. Also assume your professor used the facts like those in Zavala for an essay fact pattern on the final exam. In writing an essay answer using IRAC, which specific facts in Zavala should a student explicitly link to the particular parts of the rule explanation for confinement in arguing the defendants had confined the plaintiffs (or the contrary)? Which specific facts should a student explicitly link to the particular parts of the rule explanation for consent in arguing the plaintiffs had consented to their confinement (or the contrary)?

Many students in their first semester fail to appreciate the importance of the “A” in IRAC. That is a *costly mistake*. The “A” is what differentiates 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 (“A”) for each part of each rule statement (“R”) 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. Do not, however, expect points for a conclusion that does not follow from “R” and “A” preceding the conclusion.

### **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.

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.

Below you will find a sample essay question from a Torts exam. This question gives you the opportunity to practice writing a response to an essay question. Please prepare to discuss in class your responses.

### **Sample Torts Question**

Frank's Ultimate Nursing home [FUN] located in Small Village, state of Widener, is an assisted care facility for senior citizens and others who need full-time care. Over the past few months, the following events have taken place at FUN.

On June 18, Betty Banana was taken by family members to Local Hospital because she collapsed and could not walk. The doctor on duty determined that Betty needed knee replacement surgery and this surgery was scheduled for June 22. Betty was told by the doctor that she could stay at Frank's Ultimate Nursing Home until her scheduled surgery date. Because she was unable to walk, Betty went to FUN on June 18. After one night of FUN, Betty decided that she would rather wait at home until the surgery date. Betty told Nurse Nancy that she wanted to go home and would call her daughter to pick her up. Nurse Nancy said that Betty could go home, but if she did she would lose her surgery date of June 22. Betty asked for the next available date for knee replacement surgery and was told that it was August 3. Betty said she wanted to leave FUN, but that she could not wait until August 3 to have the surgery. Nurse Nancy said, "Oh well, what can I say? Knee surgery is very popular. Guess you'll just have to deal with it." Betty stayed at FUN and had her surgery on June 22.

Calvin, Debra, and Emerson are custodial workers at Frank's Ultimate Nursing Home. One day in July, as they were mopping the cafeteria floor, the three of them began clowning around. Debra and Emerson were teasing Calvin about his severe fear of enclosed spaces. "Calvin, you old claustrophobic, bet you can't mop out the pantry all by yourself," Debra said. Calvin replied, "Oh, yes I can. Bet you can't make me." At that, Debra and Emerson started throwing cleaning supplies at Calvin. The three of them were laughing as Debra and Emerson pushed Calvin into the pantry in the kitchen. The pantry is a small room, no bigger than a small closet. Calvin started yelling, "Hey! Cut it out, you guys. I was just joking." They laughed and pushed him into the pantry, turned out the lights, and pulled the door shut. Calvin began screaming for them to let him out. He eventually had a panic attack and passed out. Debra and Emerson opened the door and found Calvin unconscious on the floor. He had been locked in the pantry for five minutes.

**Please analyze any false imprisonment claims and defenses for each potential party.**