Dear students,

Welcome to the UW School of Law’s Academic Support Program! I serve as the program’s director, and I look forward to helping you do your personal best during your time here. Unlike at many other law schools, our Academic Support Program is for everyone—not just for students who are struggling. Each year, a wide variety of students take advantage of the different opportunities (study skills workshops and individual advising) we offer.

You may have already purchased one of the many available "how to succeed in law school" books, or perhaps you’ve seen them on the bookstore shelves and wondered if they were worth the cost. I created this guide to synthesize and consolidate the most important information from the best of those books, along with information drawn from legal journal articles and even empirical research studies that explore how law students learn. Each section of this guide has one or more narrative sections that explain some basic concepts, followed by examples, forms, and a list of additional resources.

If you’ve downloaded this guide in Microsoft OneNote format, you'll find suggestions in each section for ways to personalize these materials with your own notes and information. We hope you find this guide useful, and we appreciate your feedback so we can improve it for future students in years to come.

Sincerely,

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(last updated September 10, 2012)
What is a learning style?

The term "learning style" refers to your preferred way of learning and processing information. Knowing which types of learning methods may work best for you could be helpful as you adjust to the demands of law school. When you are aware of your personal preferences and strengths, you can choose study strategies that align with those preferences as a way to enhance your learning.

Two popular questionnaires can help you identify your learning preferences. The Visual, Aural, Reading/writing, and Kinesthetic Learning Styles Questionnaire (VARK) was designed to help you understand how you prefer to absorb new information. The Index of Learning Styles Questionnaire (ILS) was designed to help you understand how you prefer to organize and process new information while learning.

VARK: Visual, Aural, Reading/writing, Kinesthetic Learning Styles Questionnaire

The VARK: Visual, Aural, Reading/writing, Kinesthetic Learning Styles Questionnaire is a free online questionnaire that takes only a few minutes to complete (there are also printable versions in English and many other languages, if you prefer to take the questionnaire and calculate your scores in paper form or in another language). Click the second link in the online menu, labeled "Questionnaire." You will answer sixteen questions and receive your numerical scores in four categories: Visual, Aural, Reading/writing, and Kinesthetic. Roughly speaking, here's what those categories mean:

- **Visual** learners learn best through seeing. They like to see and create colorful diagrams, charts, graphs, and pictures.
  
  Example: a law student with a strong visual learning style may learn best about the progression of a civil lawsuit by drawing a chronological flowchart that shows each step of the process and how those steps relate to one another, or by looking at example documents or photographs. Visual learners may also prefer to see their professors' body language and facial expressions while listening, so they should sit near the front of the classroom where they can easily see the professor and any presentation materials.

- **Aural** (auditory) learners learn best through speaking and listening. They like to discuss information and talk through new concepts.
  
  Example: a law student with a strong aural learning style may learn best about the progression of a civil lawsuit by listening to a lecture and discussing concepts with classmates or professors. These students should sit in the classroom where they can easily hear the professor and fellow students during discussions (perhaps close to the center of the room). These students may also enjoy reviewing lecture podcasts, which are posted on course websites.

- **Reading/writing** learners learn best through the written word. They like writing about information and reading what they and others have written.
  
  Example: a law student with a strong reading/writing learning style may learn best about the progression of a civil lawsuit by reading course materials that describe the process and writing down notes while reading, taking lots of notes while in class, and revising notes or doing additional reading after class.

- **Kinesthetic** learners learn by doing. They like to physically move or learn through simulated exercises and real-world examples.
  
  Example: a law student with a strong kinesthetic learning style may learn best about the progression of a civil lawsuit by looking through a real case file to see which documents were filed at each step of the process, by imagining the work a lawyer might do at each stage of the case, by watching a trial or appeal, or by participating in a moot court exercise. Kinesthetic learners may appreciate the study supplements called Law Stories (e.g., Torts Stories, Contracts Stories, Civil Procedure Stories, Property Stories, Constitutional Law Stories, and many others related to 2L/3L courses), which provide real-world social and historical context about many of the landmark cases that may appear in your case books.

- **Multimodal** learners have two or three strong preferences, or have relatively similar scores across all categories.

Note that the page on which your scores are reported has links where you can purchase a personalized report, but that's not necessary; you can learn a lot of useful information for free. Write down your scores or print them out. Next, look on the VARK website below those scores to see if you have a predominant learning preference or if you have a "multimodal" learning preference (two or three strong preferences, or similar scores across all categories). Below that notation will be a set of links to "helpsheets" or additional webpages that describe study strategies that may work well for each of your particular learning preferences. If you are a
multimodal learner, review the helpsheets that relate to your predominant learning preferences. You can pick and choose learning methods to suit your needs in any given situation.

**Index of Learning Styles questionnaire**

The [Index of Learning Styles Questionnaire](#) consists of 44 questions that you can take and score online. You'll receive a score report that shows how your scores across four dimensions fit onto a continuum. Write down your scores or print them out. Next, click on the link for [Learning Styles Descriptions](#), which explains the four learning styles evaluated in this questionnaire and suggests learning strategies that may work well for students who have a strong affinity for a particular style (the descriptions of each style are quite good, so I won't supplement them with additional explanations here). The four learning and information-processing styles assessed in this questionnaire are:

- Active v. Reflective Learners
- Sensing v. Intuitive Learners
- Visual v. Verbal Learners
- Sequential v. Global Learners

**Note about how to use information about your learning style**

Knowing your predominant learning styles may allow you to tailor your study methods to suit the way your brain tends to learn best. Be aware, though, that each of your professors may use different teaching methods that may or may not match your learning preferences. It's your responsibility to use your study time in a way that allows you to compensate for such differences (e.g., if you gravitate toward information that is presented in a visual manner but your professor sticks to lecture and class discussion without writing information on the board, create charts or diagrams on your own). There is little empirical research suggesting that educational outcomes depend on having a teacher match his or her teaching methods to a particular student's learning style (much less a class full of several students' different learning styles). It's also important for you to develop flexible metacognitive skills (that is, the ability to know when, why, and how to use a particular learning strategy) so you can handle any educational or professional challenges that come your way.
My Learning Styles Questionnaire Results

If you take the VARK or the ILS, you can copy your scores here and note the date when you took these assessments. It is interesting to see whether your preferences may change over time, so you might consider completing these questionnaires at the start of each school year.

You can also use this space to copy the questionnaires' suggestions tailored to your specific learning style(s).
Additional Resources

**VARK: Visual, Aural, Reading/writing, Kinesthetic Learning Styles Questionnaire**

- [VARK: Visual, Aural, Reading/writing, Kinesthetic Learning Styles Questionnaire](#)
- [Printable versions in multiple languages](#)
- [Visual Learner Helpsheet](#)
- [Aural Learner Helpsheet](#)
- [Reading/writing Learner Helpsheet](#)
- [Kinesthetic Learner Helpsheet](#)
- [Multimodal Learner Helpsheet](#)

The [Law School Academic Success Project - Student Resources](#) website contains an e-learning module (podcast accompanying a slideshow) that addresses the so-called "absorption learning styles" evaluated by instruments like the VARK. It was created by Amy Jarmon of Texas Tech University School of Law:
- [Learning Styles: Absorption](#) (20 minutes)

**ILS: Index of Learning Styles**

- [Index of Learning Styles Questionnaire](#)
- [Description of learning styles and study advice for each style](#)

The [Law School Academic Success Project - Student Resources](#) website contains an e-learning module (podcast accompanying a slideshow) that addresses the so-called "processing learning styles" evaluated by instruments like the ILS. It was created by Amy Jarmon of Texas Tech University School of Law:
- [Learning Styles: Processing](#) (20 minutes)

**Research references**


Aïda M. Alaka, *Learning Styles: What Difference do the Differences Make?*, 5 Charleston L. Rev. 133 (2011) (addressing criticism of learning styles theories, and concluding that the best use of learning styles assessments may be to simply help students become aware of their own learning and studying practices, as I recommend here)


If you find a link that doesn't work or you want to suggest a resource to add here, please email Prof. Sarah Kaltsounis at sarahfk@uw.edu.
Expert Reading Techniques for Law Students

Before you can begin briefing cases and taking notes effectively in law school, you must make sure you are reading effectively. Law students make several common mistakes when they first crack open their case books and start to read, including simply skimming the material, reading passively, or over-reading (that is, reading the same passage repeatedly in hopes of enlightenment that rarely comes). This portion of the guide will help you identify and discard ineffective reading habits so you can become an expert legal reader.

Basic reading skills

Decoding (and reading speed)

Think back to some of your earliest reading experiences in elementary school, and you’ll probably remember how you learned the first skill of reading: decoding the symbols on the paper. Our ability to decode written language depends on several fundamental cognitive skills, including awareness that spoken words are made up of discrete sounds, familiarity with the letters of the alphabet, knowledge that letters and combinations of letters in a written word represent sounds, and, finally, the ability to bring these skills together to decipher written words. In addition, lots of exposure to reading and written language will gradually improve one’s ability to decipher irregular or unfamiliar words.

For most adult readers, decoding happens quickly and automatically, like breathing. See for yourself – look at a page of written text and try not to read it! Decoding can nevertheless be a problem for certain law students, like those who have learning disabilities. A learning disability has nothing to do with basic intelligence (in fact, most people with learning disabilities have average or above-average intelligence), but is instead a neurological difference that may cause problems with the psychological processes involved in understanding or using spoken or written language. Students who speak and read English as a foreign language may also, understandably, have difficulty decoding written English texts. Finally, another group of students who may struggle with decoding are those who did not have much practice or exposure to reading in childhood or early adulthood, due to lack of opportunity.

A very slow reading speed can be a symptom of basic decoding problems. Slow reading can be especially troublesome in law school due to the sheer volume of materials you must process each day. The average college student with good reading skills reads at a rate of about 250 words per minute. Those who are especially fast can cover more material in the same time. If you read significantly slower than 250 words per minute and do not have a diagnosed learning disability, you might consider investing in one of the many good reading speed improvement books or software programs on the market. Most high-quality books and software contain sets of exercises or drills, plus advice on different problematic reading habits that may be slowing you down. Improving your reading speed takes time and practice, but it can be done.

Use our reading speed diagnostic test (file attached below) to determine whether your reading speed may pose an obstacle to successful legal study. If you discover that your reading speed is much slower than you would like, there are some suggested resources on the Additional Resources page of this section of guide.

In general, though, don’t worry too much about your reading speed if it’s near the normal range. Researchers have found that while very expert legal readers (judges and lawyers) may read much faster than law students, the reading speeds of high-performing and low-performing law students do not show dramatic differences. When it comes to the study of law, what really matters more than speed is the process: how you comprehend and make sense of what you read.

Language comprehension

Decoding is necessary, but not sufficient, for successful reading. Reading well also requires you to comprehend the text once you have decoded it. Language comprehension, like decoding, is the product of interrelated cognitive skills such as knowledge of syntax (the structure of sentences) and semantics (the meanings of individual words and groups of words). For legal language comprehension, you also need some higher-order comprehension skills. You must understand the basic structure of legal texts, and, perhaps most importantly, must approach the task of reading with a flexible set of reading strategies designed to achieve a specific purpose: to gain deep understanding of the materials so you can do well in class and become a competent lawyer in the future.

When you consider the texts that await beginning legal readers (dense judicial opinions, often written long ago), it’s no wonder many law
students worry about their ability to survive their daily reading assignments. Judicial opinions—especially older ones—present major challenges in the areas of both syntax and semantics. You may find sentences impenetrable because of their convoluted and outdated grammar, and you may find every other word or concept to be unfamiliar. Even the structure and organization of legal documents may be strange to you, and different from humanities, social science, and natural science writings that you may have encountered in your undergraduate education.

Most new legal readers will discover that time and practice are the great cures for initial difficulties with legal language comprehension. As you learn more about the legal system and the unique terminology employed by lawyers and judges, you will be better able to understand the challenging vocabulary and concepts embedded in every judicial opinion, and you will pick up on the unspoken assumptions that many legal writers make about their audiences’ levels of understanding.

**Research findings about law students’ reading strategies**

Time and practice may eventually turn you into an expert legal reader, but there are specific reading strategies you can use today that will help speed that transformation along. Recent empirical studies have shed new light on the different reading strategies used by highly successful and less successful law students.

Researchers typically characterize reading strategies—the things students actually do in their heads or with their bodies while reading legal materials—into three main categories:

<table>
<thead>
<tr>
<th>Default reading strategies</th>
<th>highlighting, underlining, taking margin notes, paraphrasing</th>
</tr>
</thead>
<tbody>
<tr>
<td>Problematizing reading strategies</td>
<td>hypothesizing, posing problems, synthesizing, questioning</td>
</tr>
<tr>
<td>Rhetorical reading strategies</td>
<td>connecting to a purpose, connecting to prior knowledge, evaluating</td>
</tr>
</tbody>
</table>

A study by Prof. Leah Christensen of the University of St. Thomas School of Law found that higher-performing students (top half of the class) spent about 21% of their reading time engaged in default strategies, 45% of their time engaged in problematizing strategies, and about 34% of their time engaged in rhetorical strategies. In a rather dramatic contrast, the lower-performing students (bottom half of the class) spent a whopping 77% of their time engaged in default strategies like highlighting or underlining, and only a little over 12% and 9% engaged in problematizing and rhetorical strategies, respectively.

What this means in practical terms is that the lower-performing students spent most of their time simply trying to decode and comprehend the text—to figure out what it said. They had little time left over to actually interact with the materials in a higher-level way: to think deeply about how the case connected with what had already been covered in class, whether the case was correctly decided, and how the case might have come out differently if the facts had been different. In essence, the high-performing students were spending more of their reading time practicing the skills on which they would actually be tested at the end of the quarter.

Prof. Christensen found no relationship between undergraduate GPA or LSAT scores and a student’s use of any particular reading strategy, but she did discover a statistically significant correlation between the way students read (their use of reading strategies) and their law school GPA. Other studies have reported very similar findings (references are included on the "Additional Resources" page of this section of the guide, if you’re interested).

**Reading strategies employed by high-performing law students**

So, what ARE those reading strategies used by high-performing law students, and how can you begin to incorporate them into your studying? Below are some techniques to try. Experiment and find the methods that work for you and your personal learning style.

These techniques have been categorized or described in various ways by different writers. Three books that I recommend to students each have sections about reading strategies, and each author provides a different mnemonic device or framework to help you remember these skills. For example, I highly recommend the superb book on legal reading by Ruth Ann McKinney, who directed the legal writing and academic support programs at the University of North Carolina School of Law for many years: *Reading Like a Lawyer: Time-Saving Strategies for Reading Law Like an Expert* (2005). McKinney uses the acronym “EMPOWER” as a way to highlight the different strategies she recommends (e.g., Engage with energy, Monitor your reading and read for the main idea, read with a clear Purpose, etc.).

Dennis Tonsing, who formerly directed the academic support program at Roger Williams University, uses the well-known "SQ3R" method to describe successful reading strategies (e.g., Survey, Question, Read, Recite, Review) in his excellent book, *1000 Days to the Bar: But the Practice of Law Begins Now!* (2d ed. 2010).

I think the easiest way to remember these techniques is the framework offered by Michael Hunter Schwartz, director of the Ex-L program...
at Charleston School of Law, in his book *Expert Learning for Law Students*. His chapter on reading skills simply breaks down the reading process into three phases: pre-reading, reading, and briefing. Other authors’ techniques easily fit into these three broad categories as well. In this page of the guide, we’ll focus on the pre-reading and reading strategies you can begin to use in your daily studying; you can learn more about case briefing on a different page in this section of the guide.

**Pre-reading**

Use of pre-reading strategies ensures that your actual reading time goes as smoothly and easily as possible. Here are a few techniques to try:

1. **Remember that judicial opinions do not state absolute truths.** Keep this in mind before you even start reading: you’re not reading words inscribed in stone by a thunderbolt from the heavens! Every judicial opinion is the work product of a real human being who was undoubtedly influenced by his or her upbringing, social status, historical context, etc. Judicial opinions can be wrong about the facts or the law or both. They can be racist or sexist. They can be woefully unenlightened compared to today’s standards. Remember that you don’t leave your common sense and your pre-law-school experiences at the doorstep of Gates Hall every morning, and you should pay attention to your gut reactions as you read. A judicial opinion, like every other piece of legal writing, is an attempt to convince the reader that the writer’s analysis is correct. Notice the language the court uses, the way the facts or issue are framed, and the effect that has on you as the reader. It’s okay to have a negative reaction to the cases you read!

2. **Develop knowledge about the subject matter of the case before you read it.** Reading a bare judicial opinion, stripped of its context, is difficult. But if you know a bit about the legal principles the opinion is likely to address, and how those principles fit in to what you’ve already learned in class, you will have an easier time reading and making sense of the opinion. Cognitive psychologists refer to this pre-existing knowledge as a schema into which you can place new information in its proper context. You can quickly gain that basic context by reviewing your syllabus and your casebook before you begin to read. Look to see how your professor has divided up the main topics of study. Look at your casebook’s table of contents. Where does today’s reading fit into that framework? Skim the notes and questions at the end of a case before you read it; they can give you valuable clues about what the case will be about. (See the Appendix for examples — assume you are assigned to read pages 287–293 of the casebook excerpted in the Appendix for class. What topics do you expect that reading will cover, and how will they relate to what you’ve already learned?). If necessary, skim over the relevant portion of a commercial outline or hornbook if you feel you need more context before starting a new topic of study.

3. **Preview the case.** Before you begin reading in earnest, take a moment to skim quickly over the case’s structure and organization. Does it have headings or other divisions? Now quickly skim the first sentences of each paragraph, which will give you a general sense of the key facts and points of argument.

4. **Note details.** Successful law students gain critical cues about the meaning of a case from small details like the jurisdiction, level of the court, year of decision, name of the judge, and names of the parties. Skim these elements before reading and try to put the case in its geographical and historical context. Is it a very old case from England? A case from the time of the nation’s founders? Civil War? Depression? East Coast or West Coast? Do you recognize the name of the judge (a famous one like Cardozo, Hand, Traynor, Scalia, Posner…)? Who are the parties — a little guy up against a big corporation? Two small businesses fighting over a contract? Two neighbors fighting about property?

5. **Generate questions and hypotheses.** Taking just a few moments to engage in the strategies outlined above will give you enough context to begin to generate some questions for yourself. For example, take a look again at the syllabus and casebook table of contents in the Appendix at the end of this section. Some questions that might come to mind for an expert reader are: “How is the ‘modern’ approach to comparative fault different from the ‘traditional’ common law approach we studied last week?” “I see some statutes in our reading — that’s definitely a departure from the old common law (judge-made law) approach. I wonder why some jurisdictions decided to enact statutes to establish how this aspect of tort law would work?” “This reading is at the start of a chapter about defenses. I wonder how a defendant raises this defense procedurally — does it have to be pled early on in the answer, or does it come up later at trial?” Now look at the casebook author’s notes and questions that follow the first case, *McIntyre v. Balentine*. Some questions that might come to mind are: “I see a lot of numbers there . . . 49%, 75%, 66 1/3% . . . I wonder how courts or legislatures decide where to draw these lines. There might be some math involved in this part of the course.” “I wonder how these rules work with multiple parties in one lawsuit — does everyone’s fault have to add up to 100%?” “Are just the defendants counted here? What if the plaintiff shares some of the fault for the accident?”

Other questions you might generate will deal more concretely with the particular case: “What are the important facts?” “What issue is the court trying to decide?” “What result does the court reach?” “What reasons does the court give to justify its decision?”
If you try some of these pre-reading strategies, you will be well positioned to dive into actually reading a case, to be able to pick out its important aspects, to understand how the case fits in to the overall framework of your course’s area of law, and to be able to think deeply about the legal principles involved and how they might apply to new situations. As you read...

1. **Read with enthusiasm.** Pick a time of day to read when your energy is at its peak (are you an early bird or a night owl?). Alternatively, try **not** to read when you are feeling worn out, tired, frustrated, or distracted, if possible.

2. **Read with a purpose in mind.** Reading with a purpose in mind is one of the most important strategies employed by expert readers. They actively search for the main idea in their materials. This is easy to do if you’re a real attorney with a real client, because you’re reading to figure out if the case will help or harm your client’s position. As a student, you have to create your own reasons for reading. If you’ve generated some questions in your mind before you begin reading, like the ones above, you will have a specific purpose—to read to find out the answers to those questions. Try to view reading as a means to an end, a way to find out something you’re interested in. Reading law is not an end in itself; nobody does it just for fun. Don’t just go through the motions—read for a reason, the way practicing attorneys do.

3. **Visualize what’s going on.** Legal writing can be abstract. You can make it more concrete by attempting to visualize the parties. What do they look like? Who did what to whom? Was there a trial? What must it have been like? Who testified on the witness stand? Picture the oral arguments to the court of appeals. What did each side argue? Think like a journalist—Who, What, When, Where, Why, How. You may find it helpful to sketch a little chart or diagram to depict the relationships between multiple parties, or the path or timeline of a lawsuit through several procedural steps.

4. **Evaluate what you read.** As I mentioned above, lawyers do not read cases passively, receiving pearls of wisdom from infallible judges. As you read, pay attention to your own reaction to the materials. Draw inferences and form an opinion about whether the result and reasoning persuade you. “Talk back” to the judge if you think a statement in a case is offensive, misleading, or incorrect.

Also, use your reading time to practice the skills you’ll be tested on at the end of the year: applying the legal rule in this case to a new case with different facts. Mentally alter one or more facts of the case, and consider how the analysis might proceed differently. You will gain more practice doing this during class discussions with your professor, as well.

5. **“Loop” through the text.** One interesting characteristic of expert legal readers is that they do not plod straight through a case from start to finish. Instead, they “loop” through the text as they read, frequently reviewing and skipping forward as they develop a working hypothesis about the main idea of their reading. This characteristic is more pronounced in truly expert readers—judges and practicing lawyers—who tend to read cases in a non-linear, jumping-around fashion. An expert reader is self-aware and recognizes feelings of confusion. Unlike a less-successful reader who feels confused, however, an expert reader will pause, reread a troubling section, maybe go back further in the opinion to double-check a fact or point of argument, perhaps look up a vocabulary word, and try to figure out the paragraph before moving on, rather than skipping over the difficult parts. Expert readers monitor their own reading and change or adapt strategies as needed.

6. **Take some very basic notes.** A final technique used by expert readers is to take a few basic notes while reading to memorialize what they were thinking about and to focus their attention. Be cautious about highlighters. They provide the illusion that you’ve read and understood the main points, but reading with a highlighter is essentially a passive activity—you’re simply drawing a line over someone else’s words, rather than really engaging with the text and trying to create your own meaning, form your own opinion, or answer your own questions (though they could be useful to visual learners who like lots of color). Many expert readers read with a pen or pencil in hand, and will make very brief margin notes as they read. Margin notes can make it much easier when you begin to engage in more thorough note-taking later on (creating case briefs or adding information to a course outline). Develop your own abbreviations to speed up this process; you can find a list of abbreviations commonly used by lawyers on a different page in this section of the manual.
How to Read and Brief a Case

For most of you, the law school experience will be more demanding than any previous academic experience you’ve had. Perhaps the most difficult adjustment to make as you transition to law school from undergraduate studies, a graduate program, or work, is to understand the subtle ways in which the purpose of law school differs from your past “school” environments. By learning about those unspoken differences that make legal education unique, you will then better understand what you are expected to “get” from your readings and classes, and how to get it!

What your professors want you to learn (and how they’ll test it)

Before we discuss different ways to take notes while reading class materials or while participating in class discussions, it helps to keep in mind why you are reading these materials and going to class. Long-term, you want to pass the bar exam and you want to be a competent professional advocate for your clients. In the short term, you want to do well on your exams. If you focus on doing your personal best during law school (including doing well on exams), the efforts you put forth during the next three years will make it much easier for you to reach your longer-term goals.

So, let’s start with the attainable short-term goal of doing your personal best on your exams. Take a quick look at the UW School of Law’s exam archive (you will need your UW NetID and password to log in). As you peruse past exams from the 1L courses—Torts, Contracts, Civil Procedure I, Property, Constitutional Law I, and Criminal Law—you’ll see that there are very few multiple choice, true/false, or fill-in-the-blank questions. Instead, most law professors use a combination of short answer and longer essay questions to evaluate students’ learning at the end of the quarter. You’ll also see that most exams present you with new factual situations you haven’t covered in class before, and ask you to analyze those situations using the skills and knowledge you did learn in class.

To do well on this type of very challenging exam, you must have attained a very deep and comprehensive understanding of the legal principles in a particular field, AND you must have developed high-level analytic problem-solving skills, AND you have to be able to demonstrate your knowledge and skills in a practical performance-type test under very strict time constraints. (Thanks to Dennis J. Tonsing, 1000 Days to the Bar But the Practice of Law Begins Now: How to Achieve Your Personal Best in Law School 27 (2003), for this excellent characterization of what skills a law school exam requires.)

This will require a lot more than the “memorize—cram—regurgitate” model of studying common to undergraduate students. In fact, most law school exams are open-book, and you will be allowed to refer to your case book, class notes, and outline. Most professors don’t care if you memorized a legal principle or if you need to look it up—all they care about is whether you can understand it and apply it correctly.

Keeping that in mind as the ultimate goal, let’s work backwards and figure out what you need to do in next few months to get yourself ready to perform at that high level on your exams.

Taking effective reading notes before class

Regardless of your professors’ in-class teaching styles, they all provide you with the same basic course material: a case book. On the Expert Reading Techniques for Law Students page of this section of the guide, you can learn more about strategies for reading your case books and other legal materials. That page explains that the process successful legal readers engage in can be broken down into three steps: (1) pre-reading strategies, (2) reading strategies, and (3) post-reading strategies, and that page covers steps one and two. Now we must think about step three: what to do after you’ve read your class assignment but before you set foot into the classroom.

What is case briefing?

A “case brief” is the method by which most lawyers and law students take notes about the judicial opinions they read. The structure of case briefs mirrors the structure of judicial opinions, so a case brief allows you to quickly locate your notes about different aspects of a case. The specific format is irrelevant because these are your own personal notes, for your eyes only. Organize this information in any form that works best for you (most students fill in simple headings in a document).

Why case briefing is so important (especially for 1Ls)

Why do your professors encourage you to take notes on your reading in the form of case briefs? Why does every single “how to succeed in law school” book contain a section (often the very first chapter) explaining how to brief a case? Case briefing is an extremely valuable learning tool for several reasons. First and foremost, it provides you with a schema for case analysis. Cognitive psychologists who study
human learning define a schema as a cluster or framework of information that we hold in our minds about a subject. Reading comprehension occurs much more successfully if we can match up new incoming information in a text with our pre-existing schema, because that helps us categorize and remember what we’ve read more efficiently.

As a novice in the field of law, you probably don’t have a strong legal schema yet. But you do know some information about the law from movies, TV, past jobs, Foundations for Legal Study or other orientation programs you may have attended, etc., and that forms a good start for your mental framework about the law. You will spend the next three years expanding, modifying, and refining that framework until you are a master (at a doctoral J.D. level) of the thought patterns required for successful practice of law.

So what does all this have to do with case briefing? Case briefing is so powerful because it helps you develop your schema for the legal system and the conventions of legal discourse, which will then help you analyze legal problems more efficiently. Basically, a case brief is a schema—it’s nothing more than a framework for chunking and organizing information common to the practice of law. Briefing cases will, over time, help you internalize that framework; the neural network of brain cells that store this knowledge will develop stronger, more automatic connections. This, in turn, will free up more of your short-term memory so you can spend more time thinking creatively and critically about what the case means. Doing the active, hard work of case briefing in your own words, rather than passively highlighting the words the judge wrote, is the way for you to jump-start that crucial mental activity. And remember, the critical thinking skills you develop through repeated case briefing are what you’ll eventually be tested on.

So look at your case briefs as a tool—a means to an end, and not an end unto themselves. Plugging in the basic structural components of a judicial opinion into a pre-fab case brief format is only the beginning; ideally, you should move beyond using a case brief to simply figure out what the case says, and move towards using it as a tool to figure out what the case means. As explained in the Expert Reading Techniques for Law Students page of this section, the most successful law students (and lawyers) are those who have opinions about the law, who evaluate cases critically, and who consider the possible implications of what they are reading. Case briefing is at its most helpful when you use it as a way to prompt or encourage yourself to think actively and creatively about your reading. (For more information about the cognitive basis for case briefing, see Prof. Leah Christensen's excellent article, The Psychology Behind Case Briefing: A Powerful Cognitive Schema, 29 Campbell L. Rev. 5 (2006). Much of the information in this section is drawn from her article.)

How to brief a case—the basics

Before you try to write a case brief, read the opinion once through to get the gist of the legal issues and their resolution. Don’t try to brief while you are reading – at least not while you are a novice law student. After you have completed your first pass through the opinion, you will be better able to take notes for specific parts of your brief, such as what facts the court considered legally significant. A brief should include most or all of the following categories of information, typically in this order:

Case identification

Record identifying information like the case name (also called the caption or the title), the court, and year of decision. The citation, if you want to note that too, indicates the volume, abbreviated name of the case reporter where the opinion was published, and page where the case can be found in that reporter. It’s a jumble of letters and numbers that 1Ls soon learn to decipher:

Hickman v. Taylor
U.S. Supreme Court,
329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947)

For courses such as Torts, you might include only the case name, court, year, and perhaps the page in your casebook where the opinion is found. The citations to reporters will not typically be important for class discussions or exams. In your Legal Analysis, Research, and Writing class and in practice, however, you will want to record the citations to reporters where the case can be found. This is practice for taking good research notes and providing proper citations in the legal documents you'll draft later in that course.

Most law students do not routinely take notes about an opinion's author unless the jurist’s identity is interesting for some reason; very soon you’ll be on a last-name basis with famous judges like Hand, Cardozo, and Traynor, who all shaped the development of the tort and contract law that 1Ls study in their first months of law school.

Legally significant facts

Determining which facts are important or significant is often difficult, especially at first. You will not know which facts are significant until you know something about which rules of law are relevant. You are likely, at first, to write down all the facts the opinion gives. This is inefficient, but with time and practice you will eventually be able to prune the facts down to their essence. That’s why you should skim the case at least once to determine what the judges thought the issues and relevant rules/facts were. Start with those; you can always add to your brief later in class or afterward if you missed something.
At a minimum, the facts in your brief should be sufficient to allow you to recall who did what to whom. Students often use bullet points or abbreviations to describe the key facts; a list of common legal note-taking abbreviations is included at the end of this handout.

Jurisdiction (the court’s power to hear disputes about a certain subject matter or between certain parties) will be an important topic in Civil Procedure, but may usually be assumed in Torts and Contracts cases. As a result, the amount of detail here will vary depending on the course.

**Procedural history**

Beyond the basic facts about who did what to whom, your brief should also note who sued whom (which party is plaintiff, defendant, petitioner/appellant, respondent/appellee?), what type of legal claim is involved, and how the dispute worked its way through the judicial system to reach the court writing the opinion. If you’re briefing a decision from a court of appeals, who won and who lost at the lower trial court level? Did the party win or lose after a full trial, or did the trial court simply decide a pre-trial motion (e.g. motion to dismiss or motion for summary judgment) disposing of the case early in the proceedings? Who appealed? If you’re briefing a trial court decision, is the court deciding a motion? What is the motion about?

**Issue(s) presented**

Understanding what courts and lawyers mean by “issues” is a central lesson of your 1L year. The issue is the question of law (incorporating some key facts) answered by the court. Basically, a legal issue is present when reasonable people who are knowledgeable about a legal rule (or a category or element of that rule) might disagree about whether the facts of a case satisfy that rule. (For more explanation about how to break down legal rules into categories, how to spot issues, and how to construct arguments about those issues, see the excellent book by Albert Moore & David Binder, *Demystifying the First Year: A Guide to the 1L Experience* (2009).)

Try to identify and rewrite the issue in your own words in the form of a question that ties together the key facts with the legal problem to be solved. What did the appellant (or petitioner) claim that the trial or lower appellate court did wrong? What must the appellate court decide in order to affirm, reverse, or remand (send back to a lower court with instructions) the lower court’s decision? Modern cases may state the issue(s) explicitly. Older cases are often more oblique. One could say that she who defines the issue (i.e. the judge or a skillful advocate) wins the argument! You or your professors may critique the court’s characterization of the issue.

**Rules of law**

Generally a court will articulate the rules of law it thinks relevant to resolving the issues in the case. Rules of law may come from constitutions, statutes, rules of procedure, administrative regulations, and previously decided cases, or a judge may create a novel rule of law if no existing authority governs. Legal rules are important in your studies because you are generally expected to know them and to understand the range of disputes to which they apply. When you see how many rules are contained in a typical opinion, you’ll understand the need to be very selective when identifying the key rules in your case briefs, and very adept at paraphrasing them.

You may be exposed to cases that create broadly applicable new legal rules that seem to go beyond the facts of the case before the court (rather than simply determining whether existing rules apply to the new set of facts in the case). In such cases, pay attention to whether a new legal rule or category is being created, whether existing rules are being changed, or whether a higher court is resolving conflicting rules developed in lower courts. (For more information on different ways to read and analyze “rule application” and “rule creation” judicial opinions, see Moore & Binder, *supra*.)

**Reasoning or rationale**

Pay attention to the types of arguments judges employ and find persuasive. Courts are often called upon to make very difficult decisions in gray areas of the law, where there are plausible arguments on both sides. When they explain why they're choosing one result over another, judges may allude to various policies they hope their decision will foster (e.g., stability and predictability for litigants, or economic efficiency). Identifying these “policy” reasons will give you important information about what values “count” in our legal system, and give you a basis for critiquing those values during class discussions. Remember that it is fine to disagree with a judge’s reasoning! That’s what makes class discussions interesting. Just remember to think carefully about why you disagree, or how and why you’d decide the case differently if you were the judge, so you can move beyond your personal gut reactions and begin to practice persuading others (classmates and professors) to agree with you.

**Holding(s)**
A judicial opinion’s discussion of the law takes two basic forms. The first is embodied in the two parts of a case brief listed above: the opinion’s presentation of the existing rules a judge relies upon or the new rules a judge adopts, and its articulation of the reasons why the judge employs those rules. The second type of legal discussion is the judge’s application of those rules to the particular facts of the parties’ case.

Lawyers use the term “holding” to generally refer to this second aspect of a judicial opinion’s legal discussion. There is no generally accepted and precise definition of the term “holding,” but a good basic definition is this: the holding is a statement of the court’s decision or conclusion regarding the issue in the case. A holding is typically stated in the form of a single sentence that answers the issue question. You will learn to choose your words carefully because they determine the “scope” of the holding (meaning the range of future lawsuits that will be governed by the rule the court adopts in this case).

Here is an example from a torts case called Robinson v. Lindsay, the subject of the example brief included in this guide. The issue the court had to decide was what standard of care a 13-year-old snowmobile operator should be held to, when a jury evaluated whether he would be held liable for harm to a person he injured. You can state a holding in a narrow way by tying it to the specific facts of that case: “A 13-year-old boy operating a snowmobile is held to an adult standard of care.” But a holding framed that way would not be very useful to lawyers or judges; what are the chances that this exact set of facts—same age, same gender, same vehicle as this defendant—will come before the court again in the future? Instead, you might state the holding a bit more broadly, taking cues from the reasoning the court employed in that case and using more general language: “Minors engaging in inherently dangerous activities are held to an adult standard of care.” This is a good, basic holding, reflecting the way most lawyers and judges would characterize the new rule this case has come to stand for. By way of further contrast, a holding stated much too broadly might be: “Minors who injure others are held to an adult standard of care.” That latter formulation is also not useful because it could extend this case’s rule to a much larger range of situations than the judge who wrote the opinion likely anticipated. Imagine placing a case’s holding along a spectrum ranging from narrow to broad; your professors will help you explore the many useful variations in the middle of that spectrum and will steer you away from the extreme ends. It won’t take long before you learn why the scope of a holding is so important: the rule in each case becomes part of a jurisdiction’s law, and it binds litigants in similar future cases. The lawyer’s job is to argue why his or her client’s situation is either similar to or different from the facts of past cases. We do that by articulating the holdings of those past cases and debating whose formulation is more appropriate.

Judgment

Note the procedural result or outcome of the case. Did the court affirm or reverse the lower court, or did the court remand (send back) the case to the trial court with instructions on how to do something differently next time?

How to brief a case—the advanced version

Now it’s time to think beyond those basic structural components. In the Example Case Briefs page of this section of the guide are a few sample case briefing forms, one by Prof. Leah Christensen (which works especially well if you are reading and briefing real, unedited cases for your Legal Analysis course or for a summer job), and one that I (Prof. Kaltsounis) used when I was a 1L (including a filled-out example). You’ll see that both forms prompt you to jot down a few brief notes about the higher cases for your Legal Analysis course or for a summer job), and one that I (Prof. Kaltsounis) used when I was a 1L (including a filled-out example). You’ll see that both forms prompt you to jot down a few brief notes about the higher

Judgment

Note the procedural result or outcome of the case. Did the court affirm or reverse the lower court, or did the court remand (send back) the case to the trial court with instructions on how to do something differently next time?

How to brief a case—the advanced version

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It’s okay if you generate more questions than answers as a 1L – being able to figure out what questions to even ask in the first place is important! Maybe your professor will present similar questions for class discussion, which will let you know you’re on the right track.

Remember, case briefs are your own personal notes. No one will look at them (some professors may ask you to turn one in early in your 1L year, just to check that you’re on the right track). You can experiment with different formats or writing prompts until you come up with a method that works well for your own unique learning style.

Making case briefing manageable

If you type your case briefs, consider printing them out each day and taking them to class. Sometimes it’s faster to take notes or make corrections directly on a paper copy of the brief as the professor is discussing the case, rather than typing on the computer screen. Some students find it helpful to leave room at the bottom of the page or on the back page of their briefs, so they have a place to add notes or corrections in class.
You may also find it efficient to photocopy a stack of blank case briefing forms, and then fill them out for each of the major cases you read for class. You can put the day’s case briefs (with corrections from class) behind each day’s class notes when you write or print them out, so everything will be kept neatly together. Or you might try purchasing special "law-ruled" paper, which has a dividing line about 1/3 of the way across the left side of the page. You can write your brief in the larger column, and add notes from class in the smaller column on the side. Some students use various computer programs to assist with case briefing, such as making a spreadsheet or database with different categories of information to fill in.
So you’ve used your expert reading techniques to make it through your reading assignment, and you briefed all the main cases. Now it’s time to walk into the classroom and come away with a useful record of the discussion that took place with your professor and classmates.

Preparing right before class

If you have a few minutes before class, skim your briefs or notes to remind yourself what you will be covering in class that day. If you have a choice of where to sit in the classroom, try sitting near the front/middle of the room because you can see and hear better there. Also, if you sit in the back row, there’s no one to watch over your shoulder to see when you start playing Angry Birds, checking your email, posting on Facebook, or bidding for Hello Kitty collectibles on eBay. Students often find that sitting up front helps them feel more alert and engaged, and discourages distracting behaviors.

Taking notes during class

Laptops v. handwritten notes

Your laptop can be both a blessing and a curse. It turns into a curse when you morph into a stenographer or court reporter during class, diligently typing a complete transcript of what was said. It may feel like you’re expending a lot of effort and taking good notes when you do this, and you may feel productive because you’re whipping through reams of paper, but this style of note-taking is essentially passive; if you’re a relatively fast typist, you can get down almost everything that’s said and you don’t have to exercise much discretion to decide what’s important and what’s not.

Writing notes by hand slows you down physically and forces you to make that critical judgment—is what was just said worth writing down or not? Also, writing notes by hand allows you more flexibility to structure your notes visually in a logical manner (see below), to jot down any diagrams the professor draws on the board, and to quickly mark up your case briefs. It helps you lift your eyes away from your work more frequently than you would with a computer screen, so you can make eye contact with the professor and your classmates. You may find yourself participating more actively in class if you leave your laptop at home. Be brave and experiment, and you might just find that this technique works for you! If it doesn’t, keep using your laptop in class but try to incorporate some of the beneficial qualities of handwriting your notes (don’t write down everything, make eye contact with your professor and fellow students, don’t fall into court-reporter mode, etc.).

And you shouldn’t worry about not being able to write fast enough to keep up. If you create useful case briefs before you go to class, you will have much less writing to do during class: you will have already written down the opinion’s key information in your brief, so there’s no need to rewrite or re-type it when the professor asks a classmate to “give us the facts.” Instead, you will save time because you can simply annotate or correct your pre-existing notes if you notice that you misstated or misunderstood something about the case while reading it the day before.

Speaking as a former law student here at the UW, I want to share my personal experience with you. I exclusively handwrote my notes during my 1L year, and out of my three years here it was the year I earned my best grades. We didn’t have wireless internet in our classrooms back then after I bought a laptop during my 2L year, so I didn’t have any online distractions, but now I hear complaints from current students that they are distracted by watching classmates surf the web during class. You should be aware that many of your classmates and nearly all of your professors will consider it inappropriate and disrespectful if you use your laptop for non-class-related purposes during class time. So, if you choose to take notes on a laptop, develop the discipline to stay away from distracting websites. This practice will serve you well in the future when you begin your legal career.

Formatting your notes

You may also find it helpful to consider how your notes look on the page, and to make good use of white space and formatting to indicate the hierarchy of how different topics fit together. Look at the examples below; Example #1 reflects the style of note-taking I often see in students who have lapsed into court-reporter mode, while Example #2 illustrates the types of notes I often see from students who hand-write or take notes on their computers thoughtfully. Can you see how the second style of note-taking might require more active thought during class, and would be much easier to read and navigate while studying the information weeks or months later?

Example #1
Law courts—First to be established in England
Pleading called a complaint, jury gives a judgment
Three types: King’s Bench, Court of the Exchequer, Court of Common Pleas
Tried actions at law (damages as a remedy, fact finding by jury)
American system also based on early English law (e.g., 7th Am gives rt to jury trial in fed cts)

Equity courts—Started in 15th Century
Chancellor issued writs to overturn law court judgments
After a turf battle w/ law courts, now equity courts can give only certain remedies (injunctions, specific performance, not monetary damages)
Trial by judge—Pleading called a “bill,” judgment called a “decree”

Example #2

• Law courts
  • History
    o First types of courts to be established in England
    o Three types:
      o King’s Bench
      o Court of the Exchequer
      o Court of Common Pleas
  • Features
    o Tried actions at law
    o Remedy: damages
    o Fact-finding: by jury
    o Pleading called “complaint,” jury gives a “judgment”
  • American system based on this early English law (e.g., 7th Am gives rt to jury trial in fed cts)

• Equity courts
  • History
    o Started in 15th century
    o Chancellors issued writs to overturn law court judgments
    o Turf battle with law courts; now limited to certain remedies
  • Features
    o Remedies
      o Injunctions and specific performance
      o Not monetary damages
    o Trial/fact-finding: by judge
    o Pleading called a “bill,” judgment called a “decree”

What to write down in your notes

As you will quickly learn during the first few weeks of law school, every professor has his or her own preferred teaching style. Some give a straight lecture, occasionally taking student-initiated questions. Some use lecture interspersed with questions posed to students. Some like the traditional Socratic method, pulling the day’s information from students through intense dialogue. Other skills-based classes, like Legal Analysis, Research, and Writing, will consist of some lecture but more discussion and hands-on group activities.

The way in which a class is structured will dictate the types of notes you are able to take. It is probably easiest to take notes when the professor gives a straight lecture and expects little to no audience participation. Stay active and alert in such classes by evaluating whether you agree with what the professor is saying, and don’t be shy about asking questions. In lecture classes, you should generally write down the following categories of information:

• Editing your case briefs/notes (information about each case)
  • Legal terms of art – your new vocabulary
  • Rules, definitions, tests, standards, exceptions (as stated by the professor)
  • Analytical frameworks (does a particular rule have multiple “categories” or “elements”?)
  • Important facts or background that you missed or that the professor is providing for extra context

• Big-picture overview information
• Flow charts or diagrams
• Majority/minority views on the law
• Legal theories
• Policy considerations (judicial economy, etc.)
• Comparisons to other areas of law or points covered earlier in the course; introductory or summarizing statements

For seminar/discussion courses, in which student participation is required or strongly encouraged through hypothetical questions or examples presented by the professor, it can be a bit more difficult to take notes. Many UW Law courses fit into this category. To the list above, add the following type of notes you should try to take:

• Application of legal rules from your case readings
• Brief notes about hypothetical questions posed by the professor
• Insightful student comments responding to those questions

Jot down quick notes to let your future self (the one who will be reviewing your notes days, weeks, or months later) know when you are writing about a hypothetical from the professor. What is the basis for the professor’s question? Is she changing a particular fact from one of the cases in your assigned reading to see if that impacts the outcome? Is he trying to get you to sort out which facts are relevant and which are irrelevant? Is she trying to help you explore how the court’s reasoning would have to change in response to a change in the facts? These types of hypothetical questions are a gold mine of information. Why? Because they test your ability to apply a rule you’ve learned from one case to a new set of facts. Sound familiar? This is precisely what you’ll do on your exams. Treat all hypothetical questions as mini-exams that give you the chance to practice legal analysis.

Also, treat every question as if it was asked of you personally. Even if you’re not the student in the hot seat, try to answer the professor’s question in your head, and compare your answer to the one your classmate gives.

Here is an example of how you might take notes about a professor’s hypothetical question and your classmates’ answers: “Hypo: π wears baseball cap, Δ knocks it off – battery? Yes, hat is extension of person, offends sense of dignity.”

Finally, what type of notes should you take in a skills-based class like Legal Analysis, Research, and Writing (or, in your 2L and 3L years, courses like Trial Advocacy, Interviewing and Counseling, Advanced Legal Research, etc.)? In these courses, it is especially important to put away the laptop most of the time (unless you’re using it to do research or writing as part of a class exercise, or to look at electronic course materials). You want to make sure you are actively engaged in any in-class activities, and you can do this best by having your eyes away from the screen. You might take notes during the professor’s introduction at the start of class, or during a summary at the end of class, but otherwise you should try to be an active participant instead of a passive note-taker. These are classes in which you learn best by doing. These are also classes in which you don’t necessarily have to master a large body of legal doctrine; instead, your grades will be based on how well you can perform particular lawyering skills.

Reinforcing your learning after class

Note-taking shouldn’t end when the bell rings. Remember, you’re trying to build connections in your brain so you can more easily understand and recall the legal principles you’re learning. Those connections between the neurons in your brain are very fragile and tentative at first; to become stronger, they need lots of repeated use.

Here’s a quick technique you can use to reinforce what you learned from your reading and during class. After class, as soon as possible but hopefully within about 24 hours, do something to transform your notes into something more useful. Don’t just let that ever-lengthening Microsoft Word document lie dormant on your computer until right before exams. Many students find that it is extremely beneficial to review notes shortly after class, while the material is still fresh in their minds.

To see if this technique works for you, try this easy checklist and take just a few minutes per class each day:

• Complete your notes (1 minute)
  • Did you miss something important? Check in with a classmate right after class to get information you might have missed.

• Transform your notes into something useful (6 minutes)
  • Print them out (if typed). Highlight the most important points.
  • Try to divide your notes into logical topic sections. Jot down a heading in the margin for each main division of the material.
  • Summarize the main point or legal principle of each logical topic division of your notes. Try to state it in one sentence.
  • NOTE: Quickly summarizing your notes in this manner will make it very easy to create a course outline! You’re basically creating the structure of the outline as you go, doing the work in small bits over time so it won’t become overwhelming at
the end of the quarter.

- **Answer any remaining questions** (3 minutes – or more as needed)
  - Is anything still unclear to you? (visit your professor’s office hours, or skim a secondary source to gain some background or perspective).
  - How does the information from today’s class fit in with what you’ve already covered, or with material from your other classes? (no need to write anything here, just remind yourself to think about it periodically).
  - How could your knowledge of and ability to apply this information be tested on an exam? (try to identify areas of tension in the law, minority/majority views, competing policy concerns, and other topics professors love to test).

(This post-class review checklist is from Dennis J. Tonsing, *1000 Days to the Bar But the Practice of Law Begins Now* 56-58 (2003)).
Example case briefs

Prof. Leah Christensen’s case brief guide

I. CONTEXTUALIZE THE CASE
Where is this case from?
[Which court wrote the opinion? In which year was the opinion written? How will this case act as precedent for your issue?]

Why are you reading the case?
[What is your purpose for reading the case? What should you focus on?]

II. OVERVIEW
Briefly skim the synopsis of the case.
[What is the subject matter? What are the headnotes? What are the main issues?]

III. READ THE CASE
What’s the procedural posture?
[What is the summary of legal proceedings?]

Outline the facts.
[Who are the parties and what do they want? Create a picture of the facts.]

Identify the key issues.
[What issues is the court deciding and/or reviewing?]

What did the court decide?
[Identify the holding and the rule(s) applied by the court. Why did the court so hold? What occurred in the case procedurally? Is the judgment reversed or affirmed, or is the motion denied?]

IV. REREAD TO GET THE BIG PICTURE
Make sure you understand all the legal terms.

Distinguish relevant from irrelevant facts.
[Using the issue and holding, note which facts are legally relevant to the court’s decision.]

Understand the court’s rationale. Can you write it out in your own words?
[What is the court’s reasoning? What is dicta? What rules is the court applying? What is the policy behind the rules?]

V. EVALUATE THE CASE
Do you agree with the decision?
[Was it well-written? Well-reasoned? Why are you reading the case, i.e., why is it in your case book? Why did the court come to this conclusion?]

VI. MAKE NOTES
Summarize the case in your own words.
[In the margin or in a separate case brief, use your own words to summarize the case, its facts, the law, and the law as applied to the facts. Why is this case important? Is the judge correct? What influenced the judge’s decision? Were the facts or law more important to the outcome? How will this decision serve as precedent for future cases?]

Prof. Sarah Kaltsounis’ case brief guide

Case Citation: ____________________________ Case book page _________   {Area of law}
{Brief reminder phrase about the case}

[Anything interesting about geography, author, court, year?]

Procedural History:
π:
Δ:
[Where is the case pending and how did it get there? Try to connect with what you’ve learned in Civ Pra.]

Facts:
[Draw a picture if necessary]

Issue:

Rules:

Holding:

Reasoning:
[Based primarily on precedent, statute/regs, constitution, logic, analogy to other cases, policy reasons, legislative intent?]

Disposition: □ Affirm. □ Reverse. □ Remand. □ Other: ________________________________

Anything else interesting about the opinion?
[Concurrences, dissents, notable dicta, rhetorical techniques employed by the judge?]

New legal vocabulary:
[Look words up in Black’s Law Dictionary if they are unfamiliar and seem important]

Notes:
[Are you persuaded? Imagine the losing party’s argument. Is it dealt with fairly in the opinion? Does the judge gloss over an important fact or policy concern? Are precedents dealt with honestly? Could you write the opinion to come out the other way, or was it a slam-dunk?]

[Why did the author include this case in the book? Is it an example of an old, abandoned rule or a modern rule? Is it an example of poor reasoning or a bad result? What facts could you change that would justify a different result—how far does this rule go?]

[How does this case connect with other ones that you’ve read in this class, or in other classes?]

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Prof. Sarah Kaltsounis’ case brief guide (filled-in example)

Robinson v. Lindsay, 92 Wn.2d 410 (1979) (p. 159)

{Negligence—standard of care}
{Child/snowmobile—dangerous activity}

Procedural history:
π: Kelly Robinson (11 years old – via dad? as guardian ad litem)
Δs: Billy Anderson (13 years old); Anderson’s parents; John Lindsay (owned snowmobile)

- Trial ct: jury found for Δ
- Trial ct realized hadn’t instructed jury about adult standard of care, so ordered new trial
- Δs appealed (Appellants: Δs / Respondent: π)

Facts:
- Δ-Anderson driving snowmobile. Δ had operated snowmobiles for 2 years. Snowmobile – powerful engine, capable of high speeds.
- Δ pulling π on inner-tube attached by rope to snowmobile. Π’s thumb tangled in rope and severed.
- Damages: Drs. able to reattach thumb, but π did not regain full use. (see Ct. App. decision on Westlaw)

Issue: Should a minor operating a snowmobile be held to an adult standard of care?

Rule: Wash. rule from prior case law: compare child’s conduct to that expected of a reasonably careful child of the same age, intelligence, maturity, training and experience in same or similar experiences. Overruled; court relied on persuasive precedent from other jurisd. and adopts rule that many other states were adopting at same time.

Holding: Yes, minors engaging in inherently dangerous activities are held to adult standard of care

Reasoning: Wash. rule from prior case law didn’t deal with kid doing an adult activity like operating a motor vehicle.
Some courts impose adult standard if activity is one adult would engage in. Robinson court decides better rule is that when child engages in activity that is inherently dangerous (e.g., operation of powerful mechanized vehicles), child should be held to adult standard. (cases from other jurisd. that court found persuasive: tractors, motorcycles, cars, minibikes)

Perceived benefit of rule: improved safety b/c discourages minors from engaging in dangerous activities.
Disposition: **Affirm** tc’s grant of new trial with correct jury instr. (Who won at new trial? Settled?)

**Anything else interesting about the opinion?**
Court didn’t talk much at all about facts – had to read Ct. App. opinion to find those out. Focused solely on law, establishing new standard for future trial courts. Broad holding.

**Notes:**
- Court didn’t address impact of overruling prior settled Wash. case law.
- Court’s policy rationale (improve safety) is dubious – how will kids know they face tort liability and be discouraged from doing dangerous things?
- Also – mountains near Spokane – everyone uses snowmobiles. Not like a car/boat, easier to steer and operate. How decide which activities “adult” or “inherently dangerous”?
- Who pays if child is N – parents? Parents legally responsible for children’s torts? Parents’ insurance pays? What if child had no prior training to operate snowmobile (Anderson – 2 years riding snowmobiles) – hold to same standard?
- Similar to rule about holding mentally ill person to RP standard – Breunig case. Same type of reasoning and result. Mentally ill/children dangerous activities – what other situations would have similar rule?
How to Read a Statute

By Prof. Deborah Maranville, Sarah Kaltsounis, and Tom Cobb
Portions of this handout were originally created by Prof. Maranville for a Civil Procedure course handout titled “How to Read a Statute: MAP It!”

For the past century and more, the dominant approach to legal education has been the “case method” in which students are said to learn the law, and the glory of the common law system of precedent and stare decisis, by reading appellate cases. Because of this emphasis on appellate cases, especially in the first year of law school, many students graduate with skewed instincts for approaching a legal research task: they start their research by looking for appellate cases. Yet we live in what former Yale Law School Dean and Commissioner of Major League baseball Guido Calabresi termed “The Age of Statutes.” Statutes are everywhere, regulating ever-increasing portions of modern life. Few legal areas are now immune from statutes. Thus, for the vast majority of legal problems, the primary source of law is statutory. As a result, learning how to read a statute has become at least a co-equal task with learning how to read a case. Yet, although a veritable cottage industry has developed that purports to teach students how to “brief” cases, introductory resources on how to read a statute are more limited. Legal education lacks a short, snappy, introductory overview of the skill. The following pages attempt to fill that gap.

Overview

The basic stages of reading a statute can be summarized in three steps, easily remembered using the acronym MAP:

- M Method
- A Ambiguity
- P Purpose, Policy, Protocols

But before you proceed to these three stages, you need to take a deep breath and remember the cardinal rule of statute reading: SLOW DOWN. Or, to emphasize the point in a different way: Sllllloooowwwww Dwwwwwwwwwn.

Many issues of statutory interpretation revolve around extremely picky questions concerning how the statute is organized, or just which word the legislature used, or even the punctuation! A classic example is “did the legislature mean ‘and’? Or did it mean ‘or’?” Thus, while you should always use your skimming skills to understand where a specific statutory provision fits into the larger whole, save your speed-reading efforts for another occasion.

M—Method

The first step in reading a statute is the method you employ to aid your reading. If you are lucky, you will have one or more professor in the first year who will go through this process with you in detail and demonstrate his or her own method for reading a statute. Approaches to statute reading vary, just as approaches to briefing cases vary. Any method is fine, if it gets you pulling the statute apart in a way that you can understand it accurately.

Below is an exercise that will walk you through different methods an attorney might use when reading a statute. Imagine you represent a public school district in Washington State. The superintendent tells you that the school district recently fired a middle-school math teacher who insisting on teaching his students to use slide rules and abacuses instead of calculators. The superintendent hand-delivered to the teacher a “notice of probable cause for discharge” to let the teacher know about the firing decision. Nine days later, the teacher delivered a written request for a hearing to the secretary of the school district’s board of directors. When you look at the teacher’s hearing request, you see that he cites Section 28A.405.300 of the Revised Code of Washington (RCW). You need to figure out if the teacher’s hearing request is lawful, and, if so, what the school district is obliged to do in response.

Step 1. Orient yourself—Put your specific statutory provision in context by browsing the table of contents

Before you even begin to read a particular statutory provision, first engage in a very quick “pre-reading” exercise by skimming the code’s table of contents. You will be able to understand a specific statutory provision much more easily if you have a sense of how it fits into the broader statutory scheme. If you are given an out-of-context excerpt of a statute in a case book, quickly type in the citation in Lexis or Westlaw so you can see the table of contents surrounding that excerpted section.

The statute cited by the teacher in our hypothetical situation is in Title 28A of the RCW. The RCW is comprised of laws enacted by the Washington Legislature and is divided into “titles” that govern different areas of law (represented by the first numbers in the statutory citation). The first level of index for the entire RCW shows that Title 28 is divided into three parts that cover different types of public
We can see that two parts of Title 28 deal with higher education (colleges and universities) and vocational education (trade schools). Therefore, we can make an educated guess that Title 28A will be focused primarily on the K-12 education system and local school districts (like our hypothetical client).

Let’s move further into the statute’s divisions. Turn to the organization of the chapters of Title 28A (the middle numbers in the statutory citation):

28A.350 School district warrants—Auditor’s duties
28A.400 Employees
28A.405 Certificated employees
28A.410 Certification
28A.415 Institutes, workshops, and training

Just browsing through this part of the index also tells us valuable information. We can see that Chapter 405 is focused on “certificated” employees, which seems to be a special group of employees who might not be covered by Chapter 400 (which is more generally titled “Employees”). It will probably be important for us to figure out whether this teacher is a “certificated” employee, so we know whether he can rely on this chapter. It looks like the next chapter, Ch. 410, deals generally with certification, so maybe we can find some guidance there.

Moving even further into the subdivisions of Chapter 405 of Title 28A, we can now put the statute cited by the teacher into its more specific context:

CONDITIONS AND CONTRACTS OF EMPLOYMENT

HIRING AND DISCHARGE

28A.405.300 Adverse change in contract status of certificated employee—Determination of probable cause—Notice—Opportunity for hearing
28A.405.310 Adverse change in contract status of certificated employee, including nonrenewal of contract—Hearings—Procedure
28A.405.320 Adverse change in contract status of certificated employee, including nonrenewal of contract—Appeal from—Notice—Service—Filing—Contents
28A.405.330 Adverse change in contract status of certificated employee, including nonrenewal of contract—Appeal from—Certification and filing with court of transcript
28A.405.340 Adverse change in contract status of certificated employee, including nonrenewal of contract—Appeal from—Scope
28A.405.350 Adverse change in contract status of certificated employee, including nonrenewal of contract—Appeal from—Costs, attorney’s fee and damages
28A.405.340 Adverse change in contract status of certificated employee, including nonrenewal of contract—Appellate review
28A.405.370 Adverse change in contract status of certificated employee, including nonrenewal of contract—Appeal from—Other statutes not applicable
28A.405.370 Adverse change in contract status of certificated employee, including nonrenewal of contract—Appeal from—Other statutes not applicable

Again, looking over the table of contents to see what this particular statute is titled and what is covered by its neighboring provisions can help orient you before you even read a word of the statute itself. Notice how the “Hearing and Discharge” portion of Chapter 405 is divided up into two basic parts, which you can learn from reading the section titles; the first two sections talk about a “hearing,” while the remaining sections talk about an “appeal” and filing documents with a court. So, you might guess (once you’ve taken your Administrative Law course, that is!) that the hearing allowed under this statute is some sort of administrative proceeding handled by the school district, and then the teacher can appeal in state court if he’s disappointed with the results of the hearing.
Step 2. Read the statute. Reread the statute. Diagram the statute. Take the statute apart and work with it word by word until you are confident you understand what it says.

Based on our review of the table of contents, we can already know that this statute gives certificated public school district employees the right to have an administrative hearing in certain circumstances where they've been discharged from their positions. Now we have to look at the specific statutory section our teacher has cited to see whether he is entitled to have a hearing to review our client's decision to fire him.

RCW 28A.405.300  Adverse change in contract status of certificated employee—Determination of probable cause—Notice—Opportunity for hearing

In the event it is determined that there is probable cause or causes for a teacher, principal, supervisor, superintendent, or other certificated employee, holding a position as such with the school district, hereinafter referred to as “employee”, to be discharged or otherwise adversely affected in his or her contract status, such employee shall be notified in writing of that decision, which notification shall specify the probable cause or causes for such action. Such determinations of probable cause for certificated employees, other than the superintendent, shall be made by the superintendent. Such notices shall be served upon that employee personally, or by certified or registered mail, or by leaving a copy of the notice at the house of his or her usual abode with some person of suitable age and discretion then resident therein. Every such employee so notified, at his or her request made in writing and filed with the president, chair of the board or secretary of the board of directors of the district within ten days after receiving such notice, shall be granted opportunity for a hearing pursuant to RCW 28A.405.310 to determine whether or not there is sufficient cause or causes for his or her discharge or other adverse action against his or her contract status.

In the event any such notice or opportunity for hearing is not timely given, or in the event cause for discharge or other adverse action is not established by a preponderance of the evidence at the hearing, such employee shall not be discharged or otherwise adversely affected in his or her contract status for the causes stated in the original notice for the duration of his or her contract.

If such employee does not request a hearing as provided herein, such employee may be discharged or otherwise adversely affected as provided in the notice served upon the employee.

Transfer to a subordinate certificated position as that procedure is set forth in RCW 28A.405.230 shall not be construed as a discharge or other adverse action against contract status for the purposes of this section.

Ugh. That first sentence is a bit of a beast, grammatically speaking, but the rest of the statute seems fairly manageable. Let’s see if we can make sense of it all.

**Step 2a. Identify words like “and,” “or,” “may,” and “shall.” These critical words will help you figure out how the parts of the statute relate to one another.**

Below is our statute with critical connecting terms (e.g., and, or), directive terms (e.g., may, shall), or other important words like “except” or “other than” highlighted. You can generally skip the words “and” or “or” when they’re used to give relatively insignificant alternatives (e.g., “cause or causes,” “his or her”), but always be aware of whether those terms might be significant in another factual situation.

“Shall” means an actor must do something (i.e., the action is mandatory), while “may” means that the actor can do something but it is not required (i.e., the action is discretionary).

Be on the lookout for lists of any kind, and try to figure out how the items in the list are related. They may be factors the court may or must consider and balance. They may be elements that must all be present in order for the court or an actor to take action (“and” means all elements of a series are required). Or they may be items that, each taken individually, could provide a sufficient ground for action (“or” means that only one of the elements is required). Here’s our statute with these important words highlighted:

In the event it is determined that there is probable cause or causes for a teacher, principal, supervisor, superintendent, or other certificated employee, holding a position as such with the school district, hereinafter referred to as “employee”, to be discharged or otherwise adversely affected in his or her contract status, such employee shall be notified in writing of that decision, which notification shall specify the probable cause or causes for such action. Such determinations of probable cause for certificated employees, other than the superintendent, shall be made by the superintendent. Such notices shall be served upon that employee personally, or by certified or registered mail, or by leaving a copy of the notice at the house of his or her usual abode with some person of suitable age and discretion then resident therein. Every such employee so notified, at his or her request made in writing and filed with the president, chair of the board or secretary of the board of directors of the district within ten days after receiving such notice, shall be granted opportunity for a hearing pursuant to RCW 28A.405.310 to determine whether or not there is sufficient cause or causes for his or her discharge or other adverse action against his or her contract status.
In the event any such notice or opportunity for hearing is not timely given, or in the event cause for discharge or other adverse action is not established by a preponderance of the evidence at the hearing, such employee shall not be discharged or otherwise adversely affected in his or her contract status for the causes stated in the original notice for the duration of his or her contract.

If such employee does not request a hearing as provided herein, such employee may be discharged or otherwise adversely affected as provided in the notice served upon the employee.

Transfer to a subordinate certificated position as that procedure is set forth in RCW 28A.405.230 shall not be construed as a discharge or other adverse action against contract status for the purposes of this section.

Step 2b. Using those key connecting words as a guide, rewrite the statute in simpler terms or create a diagram of the different parts of the statute.

This statute has a lot of different topics mixed in together. It would have been much easier to read if the legislature had broken it down into subparts or provided headings. But if the legislature doesn’t do that work for you, you have to do it for yourself. First, figure out the main chunks of information crammed into the statute. In RCW 28A.405.300, the first paragraph seems to describe steps the school district must take when it determines that there is probable cause to discharge a teacher. The second part of the first paragraph shifts gears and talks about what the employee can do once he receives notice of probable cause from the school district. The second paragraph seems to outline the consequences for the school district if it fails to give notice to the employee or doesn’t provide an opportunity for a hearing in a timely manner. The third paragraph is a sort of companion to the second—it describes the consequences to an employee who fails to request a hearing. Finally, the last paragraph seems to be a little side note about a special situation, when a teacher is demoted to a subordinate position.

Based on that overview, it seems that this statute covers four main topics:

1. Notice of probable cause for discharge
2. School district’s failure to provide timely notice or hearing
3. Employee’s failure to request a hearing
4. Effect of transfer to a subordinate position

We can further subdivide the first topic into two, and maybe separate out the definition the statute provides for the term “employee”:

1. Definition of “employee”
2. Notice of probable cause for discharge
   a. School district’s obligation to provide notice
   b. Employee’s opportunity to seek a hearing
3. School district’s failure to provide timely notice or hearing
4. Employee’s failure to request a hearing
5. Effect of transfer to a subordinate position

Now we have a sense of what this statute covers. This is a fairly straightforward statute, but hopefully you can see how this exercise could help you parse a more complicated one. You can make these organizational notes either directly on a photocopy or printout of the statute, or you can jot them down on a separate piece of notepaper. Some attorneys will use different colors of highlighter to try to group together different sentences or concepts in a long, complicated statute.

Many attorneys find it helpful to “rewrite” the statute in their own words, as a way to understand the key connections or requirements of the statute (all the “or” and “and” and “shall” and “may” words we highlighted above). Engaging in a little reorganization or rewriting can also help you break apart convoluted sentences, identify parts of the statute that are ambiguous or undefined, and understand the “if...then” consequences of certain situations for different actors. For especially complicated statutes, doing this sort of rewriting is often the only way you can understand what’s going on! Below is one example of how an attorney might rewrite RCW 28A.405.300 to make it more understandable and to place each sentence in a logical, chronological order. Noted in brackets are a few questions that this exercise might bring to mind. Also, because our client’s situation involves discharge from employment, it helps to move the other situation covered by the statute—any action less severe than discharge that adversely impacts an employee’s contract status—into parentheses so it will be out of our way.

(a) Definition of “employee”

For purposes of this section, an “employee” is a teacher, principal, supervisor, superintendent, or other certificated employee, holding a position as such with a school district.
(b) Notice of probable cause for discharge

(1) School district’s obligation to provide notice

(i) Determinations of probable cause to discharge (or otherwise adversely affect the contract status of) an employee must be made by the superintendent. However, if the superintendent happens to be the very employee being discharged, the superintendent cannot make that decision [and the statute does not specify who should make the decision in that circumstance; perhaps the school board?]

(ii) When a superintendent [or school board?] determines that there is probable cause(s) to discharge (or otherwise adversely affect the contract status of) an employee, it must notify the employee of that decision in writing. The written notice to the employee must specify the probable cause(s) for the action.

(iii) The written notice of probable cause must be served:
   (A) upon the employee personally;
   (B) by certified or registered mail; or
   (C) by leaving a copy of the notice at the employee’s house of usual abode with some person of suitable age and discretion who is residing in the house at that time.

(2) Employee’s opportunity to seek a hearing

(i) Every employee who receives a notice of probable cause must be given the opportunity to have a hearing (governed by RCW 28A.405.310). The purpose of the hearing is to determine whether there is sufficient cause for his discharge (or for any other adverse action against the employee’s contract status.

(ii) The employee must request a hearing by filing a written request with the school district’s president, chair of the board, or secretary of the board of directors.

(iii) The employee must file a request for a hearing within ten days after the employee receives a notice of probable cause.

(c) School district’s failure to provide timely notice or hearing

If a school district...

(i) does not give the employee (A) a notice of probable cause or (B) opportunity to have a hearing in a timely manner, or
(ii) cannot establish cause for discharge (or other adverse action) by a preponderance of the evidence at the hearing,

then the school district...

(iii) cannot discharge (or adversely affect) the employee’s contract status for the causes stated in the original notice of probable cause, for the duration of the employee’s contract.

(d) Employee’s failure to request a hearing

If an employee...

(i) does not request a hearing under this section,

then the school district...

(ii) may discharge (or otherwise adversely affect the contract status of) the employee as provided in the notice of probable cause that the school district served on the employee.

(e) Effect of transfer to a subordinate position

Transferring an employee to a subordinate certificated position (as that procedure is set forth in RCW 28A.405.230) is not considered to constitute a discharge or other adverse action against an employee’s contract status for the purposes of this section.

Note that your rewriting process is a personal exercise that forces you to read and understand the significance of every word in the statute. But always remember to go back to the original statutory text when you need to refer to or cite the precise language that the legislature enacted.
A—Ambiguity

Many lawsuits involve a dispute over the meaning of a statute. Typically these disputes arise either because the language of the statute is ambiguous in some way, or because the result reached through a literal application of the statute seems absurd or inconsistent with what the legislature seems to have intended. Thus, when reading statutes the second step is to look for ambiguities. Did the legislature use what might be uncharitably termed “weasel words,” that is, words like “reasonable” or “substantial” or “timely” that will predictably generate disagreement (and litigation) over their meaning? Is the statute grammatically ambiguous, perhaps because it is not clear what word a phrase modifies? For instance, in the Florida election cases from 2000, a significant question was how to interpret a statute that provided: “If [a] manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall . . . .” Was the statute directed at all errors in the vote tabulation, because any errors might affect the outcome? Or was it aimed at limiting relief to a limited subset of errors so significant that the outcome could predictably be affected? (This problem and the quoted language are taken from Alex Blashausser, From the Electoral College to Law School: Research and Writing Lessons From the Recount, Perspectives: Teaching Legal Research & Writing (2001).) In our statute above, the statute is grammatically ambiguous because it does not specify which person or entity must make a probable cause determination for firing a superintendent.

Predicting when a court will find a statute to be ambiguous takes both experience and good judgment. As you read cases, be alert to the arguments parties make about when statutes are ambiguous, and how the courts respond, so you can hone your skills in this area.

Let’s turn back to our example problem involving RCW 28A.405.300. In addition to the ambiguity marked in brackets in the rewritten statute above (regarding which entity or actor at the school district is responsible for making a probable cause determination when the superintendent him- or herself is being discharged), you may have noticed other ambiguities: specifically, fuzzy undefined standards or “weasel words.” For example, the statute uses the terms “probable cause” and “sufficient cause.” Do these terms mean the same thing? Take a look at our rewritten statute in section (b)(1); the term “probable cause” is used when describing actions that a school district must take. Perhaps this part of the statute is directed at the school district, to let it know what standard of cause it must find before firing or demoting an employee. Next look at (b)(2)(i) of the statute in the problem above. This part of the statute discusses the hearing that employees have a right to request. It states that the purpose of the hearing is to determine whether there is “sufficient cause” to discharge an employee. Why did the legislature use a different term here? Perhaps this part of the statute is directed at the hearing officer, to let him or her know what standard to apply when reviewing a school district’s decision. Do you think probable cause is a higher, more difficult standard for a school district to meet than sufficient cause? Because these terms are left undefined in our statute, a careful attorney would research case law applying or interpreting the statute to try to figure out what the terms mean. See, e.g., Hoagland v. Mt. Vernon Sch. Dist. No. 320, 95 Wn. 2d 424, 428, 623 P.2d 1156 (1981) (holding that “sufficient cause,” though not statutorily defined, means a showing of conduct that materially and substantially affects a teacher’s performance). In our hypothetical problem, an attorney would research the governing standards and evaluate whether the math teacher’s actions constitute a “sufficient” or “probable” cause to justify firing him.

As the hypothetical attorney for our school district, you now know at least a few things about this statute and are ready to give some tentative advice to your client. More importantly, you also know what you don’t know: you are aware of the potential ambiguities in the statutory language and thus are able to identify where you need to conduct further research.

First, you know that the math teacher seems to be covered by this statute, because the statute defines an “employee” as a “teacher, principal, supervisor, superintendent, or other certificated employee, holding a position as such with a school district.” (If you really wanted to make sure, you could research the chapter on “certification” that we saw earlier, Chapter 28A.410 RCW, and you would learn that “certificated employees” include those who hold teaching or administrative certificates offered through the Washington Professional Educator Standards Board. You might also research the administrative regulations promulgated by the Board, at Title 181 of the Washington Administrative Code.)

Second, you know that the teacher filed his request for a hearing with a proper party (the secretary of the school district’s board of directors) within the applicable timelines (within 10 days after he was given a notice of probable cause).

Finally, you also know something important about the next steps your client must take. If the school district fails to give the teacher a hearing in a timely manner, it will not be allowed to discharge him for the reasons the superintendent outlined in the notice of probable cause. “Timely” is another one of those ambiguous weasel words that legislatures love to use. What does “timely” mean in the context of RCW 28A.405.300? A week? A month? A year? Maybe another part of the statute, or possibly a case, defines that term more precisely, so there’s another research task to add to your list. See, e.g., RCW 28A.405.310(4)–(7) (establishing hearing timelines).

P—Protocols: Plain Meaning, Precedent, Purpose, Policy, etc.

The third step in reading statutes is to learn the protocols, or “codes of correct conduct,” that courts use when resolving ambiguities in statutes. Entire books are written on this subject, entire courses taught on it, and within the legal profession, we lack agreement on
which approaches are “correct” or permissible. Thus, any brief introduction will inevitably oversimplify. The U.S. Supreme Court is divided as to which “protocols” are legitimate, but most advocates and lower courts will draw on all of them, as they seem useful. At this stage, you should become familiar with the following protocols, and the sources relied on by followers of each approach.

Protocol: The plain meaning rule (also known as “textualism”)

Sometimes a court will simply announce, by fiat, that no ambiguity exists, and claim that the “plain meaning” of the statute, typically using dictionary definitions, is unambiguous. (This can be amusing in a case that reaches the U.S. Supreme Court, where the court splits 5-4 and reverses the lower courts.) Justice Scalia is particularly fond of this protocol.

Sources: Dictionaries and canons of construction. When arguing about “plain meaning,” attorneys often resort to rules of interpretation, known as canons of construction, that are usually referred to by their Latin names. These are rules of thumb that judges have developed in case by case, over the years, as aids to understanding statutory language. A widely used example is expressio unius est exclusio alterius (“the expression of one specific thing is the exclusion of another”). Karl Llewellyn, the famous legal realist theorist of the mid-twentieth century, argued that these canons are indeterminate, because they come in matched and contradictory pairs. See Karl Llewellyn, The Common Law Tradition App. C (1960).

Protocol: Legislative Intent (also known as “originalism”)

A second approach is to interpret the statute in the fashion that will best further the legislature’s intent. When trying to determine the legislature’s intent, a court will often look at the statute’s legislative history.

Sources: Legislative history materials. What did the committees that drafted or considered the statute say in committee reports? What claims did supporters make in legislative hearings, or debate on the floor of the legislature, about how the statute should be interpreted?

Protocol: Precedent

Sometimes, the court will interpret a statute in a particular way, because that’s the way it’s been done in the past. In other words, the court will rely on prior precedents that have already interpreted the statute, and will be bound to follow a prior court’s interpretation.

Sources: The cases in all those opinions you’re reading.

Protocol: Purpose

Often the court will engage in “purposive reasoning,” trying to identify the purpose for the statute by asking, “What was the goal the legislature was trying to accomplish?” and “What interpretation will best further that purpose?”

Sources: Historical context. What were the issues of the day when the legislature enacted the statute? What social problems was the legislature trying to address?

Protocol: Policy (often relied on by proponents of “dynamic” interpretation)

Courts (and law professors asking their students to be pretend-judges) often ask “Which interpretation will lead to the ‘better’ result?” with “better” being evaluated in light of “policies” such as certainty, predictability, efficiency, or fairness.

Sources: Current contexts and public values. When evaluating policy considerations, courts will look at the current social context and evolution of societal values. For instance, they might evaluate how social and technological changes have altered the way a statute operates in the real world. Should statutes or rules that specify how a attorney must deliver court papers to an opposing attorney be read broadly to permit delivery by e-mail or fax technology? Or would that require a new or amended statute or rule?
### Parties and Courts

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<td>Δ or D</td>
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### Types of Proceedings and Dispositions

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### Parts of a Judicial Opinion

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### Legal Authorities

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<th>Abbreviation</th>
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<tr>
<td>FRCP</td>
<td>Federal Rules of Civil Procedure</td>
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<td>FRCrP</td>
<td>Federal Rules of Criminal Procedure</td>
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<td>FRAP</td>
<td>Federal Rules of Appellate Procedure</td>
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<td>SCR</td>
<td>Supreme Court Rules</td>
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<td>FRE</td>
<td>Federal Rules of Evidence</td>
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<td>R, R2</td>
<td>Restatement of Law, Restatement (Second Series)</td>
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<td>UCC</td>
<td>Uniform Commercial Code</td>
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<td>MPC</td>
<td>Model Penal Code</td>
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<td>Const.</td>
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### Other Common Legal and Other Abbreviations

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<td>K</td>
<td>Contract(s)</td>
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<td>J or Jdx</td>
<td>Jurisdiction</td>
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<td>Subject Matter Jurisdiction</td>
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Some professors may lead case-briefing exercises or provide handouts with suggestions for reading and working with course materials. You can use this space to store study skills handouts or example case briefs so you can have them available in future classes.

You can also use this space to take notes and record ideas during the Academic Support Program presentation on note-taking and case-briefing techniques.
Additional Resources

Guides

The attached article by Prof. Orin S. Kerr explains what information legal opinions contain, important terminology you must know, and the types of information professors expect students to get out of their assigned case readings.

Orin Kerr - How to Re...

Websites

- Case Briefing Workshop Handout (Brooklyn)
- Sample Case Brief – Contracts (UC Berkeley – Boalt Hall)
- Sample Case Brief – Criminal (UC Berkeley – Boalt Hall)
- Sample Case Brief – Property (UC Berkeley – Boalt Hall)
- Sample Case Brief – Torts (UC Berkeley – Boalt Hall)
- Tips on Getting the Most Out of Your Classes (Chicago-Kent)

The Law School Academic Success Project - Student Resources website contains two e-learning modules (podcast accompanying a slideshow) that address legal reading skills. One was created by Prof. Leah Christensen of Thomas Jefferson School of Law, and the other was created by Ruth Ann McKinney of the University of North Carolina School of Law:
  - Legal Reading and Law School Success: Students (14 minutes)
  - Reading Like an Expert (19 minutes)

There are many commercial and online sources for "canned" case briefs (one popular one is CaseBriefs.com). These types of resources deprive you of experiencing the mental effort of evaluating a case's facts, discerning the court's holding and rule, figuring out the litigation's procedural history, and assesses the court's reasoning. The best-performing law students know that having perfect case briefs is not what's important—the real value of case briefs lies in the learning that takes place when you create them yourself.

Books

- Dennis J. Tonsing, 1000 Days to the Bar, But the Practice of Law Begins Now (2003)
- Ruta K. Stropus and Charlotte D. Taylor, Bridging the Gap Between College and Law School: Strategies for Success (2001) (contains great examples of notes you might take in a class in which the professor uses Socratic dialogue to guide discussion)
- Albert J. Moore and David A. Binder, Demystifying the First Year of Law School: A Guide to the 1L Experience (2009)

Resources about reading statutes and statutory interpretation

- Linda Holdemann Edwards, Legal Writing: Process, Analysis and Organization (3rd ed. 2002), Chapters 2 and 3 (her analysis applies to judicially created rules as well as statutes; an example given is the ABA model code of professional responsibility, which is structured similarly to many statutes)
- Deborah A. Schmedemann and Christina L. Kunz, Synthesis: Legal Reading, Reasoning, and Writing (1999), Ch. 5, Reading a Statute, especially pp. 56-63
- William P. Statsky, Legislative Analysis and Drafting (2d ed. 1984), Ch. 4, Elements, Issues, and Memos
Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 Harv. L. Rev. 616 (1949) (classic article using a case about cave explorers who had to resort to cannibalism to demonstrate how different jurisprudential approaches lead to different interpretations of a murder statute).


**Reading speed resources**

There are a few well-known online/computer speed reading programs that are used successfully at several colleges and law schools around the country. Two that I have heard the best reports about are EyeQ and Speed Reader X. EyeQ is relatively expensive (about $250 for the personal version), so Speed Reader X would be a good alternative; it’s more bare-bones but affordable at $30. [You can order it on Amazon.com.](https://www.amazon.com)

If you’d prefer to have a book with exercises instead of reading online, a great book is Peter Kump’s *Breakthrough Rapid Reading*, which is also available on Amazon.com.

I usually recommend that students start by reading Peter Kump's book. Once you understand some of the basic techniques, you may find that an online/computer program will help you practice more consistently and then you could look into purchasing one of those programs if you wish. You could probably find used copies for a fraction of the cost.

**Research references**


If you find a link that doesn't work or you want to suggest a resource to add here, please email Prof. Sarah Kaltsounis at [sarahfk@uw.edu](mailto:sarahfk@uw.edu).
Academic Support Program

Reading Speed Diagnostic Test

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Director, Academic Support Program
Room 309 · 206.543.4947
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Reading Speed Diagnostic Test

Read the following passage (Emily Bazelon, *The Big Kozinski*, *LEGAL AFFAIRS* (Jan/Feb 2004)) for five minutes. When time is up, mark in the text where you stopped.

There are, on average, 15 words per line in this passage as it is printed below. Count how many lines you were able to read in five minutes, counting any partial line as a full line.

Total Lines = ______________________

Multiply your total lines by the average number of words per line, to determine how many words you were able to read in five minutes. This may require a calculator!

Total Lines x 15 = __________________

Now divide that amount by the number of minutes you took to read those words.

_________________ ÷ 5 =

The final number indicates the average number of words you can read in one minute.

Note that the article below is quite long – don’t be dismayed if you don’t get very far into it in five minutes! I included the entire article just in case you were interested in reading the whole piece. It is a profile of Chief Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit, the federal appeals court with jurisdiction over Washington State.
At 10:30 ON A WEDNESDAY EVENING IN LATE SEPTEMBER, Judge Alex Kozinski, the high-flying conservative of the Ninth Circuit Court of Appeals, bounded into his San Francisco chambers wearing black Keds, cargo pants, and a stretched-out blue polo shirt. Kozinski headed for the computer. His law clerks usually read and send out his court-related e-mail, but they had already left the bare-bones visiting chambers—not for home, but for the judge’s home base in Pasadena, 400 miles to the south. Kozinski, who builds computers for fun, logged onto their terminal without a password, gleeful about having rigged it to bypass court security. His e-mail rewarded him. The inbox held two new briefs opposing the decision recently issued by three other Ninth Circuit judges to stop the election to recall California governor Gray Davis. Kozinski ripped open a package of printing paper and thumped the stack against a table to align the edges. While the printer hummed, the 53-year-old judge leaned back, happy to digress for a moment. He told me about Karl May, the 19th-century pulp fiction writer whose many books the judge has read in German. ‘Hitler was a big fan,’ he said archly.

May is known for his oddly imagined version of the American Wild West, in which an über-cowboy and his Apache blood brother gallop along, slaying their foes. The image was a fitting one that night, because Kozinski was in the midst of leading the charge in his circuit’s own version of cowboys and Indians. The Ninth Circuit is the country’s most notorious federal appeals court, and for Kozinski, the recall case was the season’s showdown, a chance to head off an expansive approach to voting rights he saw as ‘very dangerous.’

When he had learned of the three-judge panel’s decision earlier that week, Kozinski made the call for en banc review, in which the Ninth Circuit’s 26 judges would draw an 11-judge panel to rehear a case. The briefs that Kozinski received on Wednesday night came from two minor candidates for governor, members of the horde that had signed up to replace Davis. Both were apoplectic about the possibility of the election being delayed (as were California’s election officials and, wisely or not, Davis himself). With the vote about whether to rehear the case just 34 hours away, Kozinski decided to spend the evening (and early morning) bombarding his colleagues with all the reasons why the election should go on as scheduled.

At 11:15 p.m. he got a law clerk on the phone and handed off a research question about absentee ballots. It was the first of many such deployments. Between 1:30 and 3:30 a.m., Kozinski sent three memos to the Ninth Circuit’s e-mail list. When the judge checked his e-mail at 10:15 the next morning, after hearing oral arguments in a different case, he was disappointed that no one had responded.

It’s not entirely clear what Kozinski’s exuberance accomplished. Judge Stephen Reinhardt, the leading liberal on the circuit and a friend of Kozinski’s, had his doubts. ‘I called him after the first round of e-mails and I said, ‘Alex, what are you doing? Why are you sending all these memos? Don’t you have anything better to do with your time?’’ he said.

Back in Pasadena on Friday morning, Kozinski sat at his computer keeping a tally as the judges’ votes rolled in over e-mail. Three judges had recused themselves, and rehearing the case would require the support of a majority of the remaining 23. When the count reached the magic number, Kozinski couldn’t conceal his pleasure. ‘It’s pretty much a clean sweep!’ he called to his clerks, stepping from his office into one of theirs for a high five.
Getting the recall election back on track was serious business for Kozinski. The three-judge panel had relied on *Bush v. Gore*, the Supreme Court’s decision on the 2000 presidential election, to find that six California counties were violating the constitutional
dights of voters by using old punch-card voting machines, which would likely fail to count
as many as 40,000 votes cast mostly by minorities. Kozinski thought the three-judge panel
had gotten the law wrong. While *Bush v. Gore* had halted a recount, it did so only after it
was clear that each miscounted vote mattered in an extremely close contest; the Ninth
Circuit panel had taken the unprecedented step of stopping an impending election.
Kozinski pointed out that the Supreme Court has tended in other cases to allow elections
to go forward in the face of undisputed constitutional violations. ‘I don’t like *Bush v. Gore*
much, but there’s a great temptation to stick it to the Supreme Court,’ he said. ‘They
clearly did not create this whole jurisprudence whereby federal courts are supposed to be
comparing different voting systems.’

In this as in many other cases, Kozinski was leading with his libertarian instincts. An
immigrant who was born in Communist Romania and lived there until he was 12 (his
accent turns ‘the right to vote’ into ‘zah rlide to vode’), he is deeply suspicious of
government power. He is a prominent defender of the right of owners to use their private
property as they see fit, at the expense of environmental regulations, and he thinks the
Second Amendment broadly protects an individual’s right to bear arms, a position that’s
anathema to gun control advocates. Like Justice Antonin Scalia of the Supreme Court, he
believes that courts should rarely (if ever) read broad new rights into the text of the
Constitution and should generally stick closely to statutory language. He has called
Critical Legal Studies, the leftist academic movement that minimizes the importance of
legal rules, ‘horse manure.’

But displayed in Kozinski’s office next to photos of Ronald Reagan, who appointed him to
the appeals court in 1985, and former Supreme Court chief justice Warren Burger, for
whom he clerked, is a shot of young Alex with the liberal icon William Brennan. Justice
Brennan has his arm draped around Kozinski’s shoulder; both men are in their
shirtsleeves, grinning. The photograph may be there for sentiment’s sake, but when he
writes about fair trials and freedom of speech, Kozinski can sound like a Brennan disciple.
When his court denied the request by the Unabomber, Theodore Kaczynski, to represent
himself at trial, Kozinski penned a withering dissent. ‘There is, I suggest, something
worse than being tried and punished for one’s crimes,’ he wrote, ‘and that is being treated
by our legal system as less than human, a thing to be manipulated, supposedly for one’s
own good.’

There’s also nothing conservative about Kozinski in the stuffed-shirt sense; he’s a
troublemaker. The judge is zany and bawdy, a high-pitched giggler and an anything-goes
storyteller. Kozinski takes his law clerks paintballing and snowboarding. (E-mails from
his personal account are addressed from ‘The Easy Rider,’ a reference to his snow boarder
identity.) He has written video game reviews for *The Wall Street Journal* and an account
of a Malibu pajama and lingerie party for the online magazine *Slate*. Six pet chickens have
the run of his property in the beachfront community of Palos Verdes, where he lives with
his wife and three sons. When Kozinski gives surplus eggs as gifts, he names which
chicken (Veronica or Heckle) laid each one. At one oral argument in September, after
listening to the Drug Enforcement Agency argue for a ban on the use of hemp seed and oil
in food products, Kozinski leaned forward solicitously. ‘Before you sit down, can you tell
me how you’re going to save the poppyseed bagel?’ he asked the government’s lawyer, to
the delight of the Vote Hemp deadheads in the audience.
Kozinski’s open-to-anything mindset means that as a judge he relishes the opportunity to shred a piece of received wisdom. That doesn’t mean he’s a judicial activist in the ends-justify-means sense. Though he often makes mincemeat of poor reasoning in a previous judicial holding, Kozinski doesn’t ignore or brush off precedential rulings that don’t go his way; he insists on letting the language of a statute set the course of his analysis. ‘If you, as a judge, find yourself too happy with the result in a case, stop and think,’ he has written. ‘Is that result justified by the law, fairly and honestly applied to the facts? Or is it merely a bit of self-indulgence?’

But sometimes, when there is no clear legal precedent to bind him, Kozinski seems to do exactly what he pleases. If he gets caught up in fierce intellectual combat, he can forget, or purposefully disregard, the human cost of his decisions, standing up for procedural formalities at the expense of people. Then, when you think you’ve pegged Kozinski as heartless and chillingly indifferent to real-life consequences, there he is siding with a sympathetic defendant, the letter of the law be damned. Kozinski is one of the smartest judges on the federal bench—and one of the most willful.

NOWHERE IS KOZINSKI’S MERCURIAL STREAK MORE EVIDENT than in his record on the death penalty. He proclaims that ‘vicious killers deserve to be executed,’ yet he has voted to stay execution in almost half of the published decisions about death row cases in which he has participated. He has also called for the death penalty to be reserved for the most heinous criminals—mass murderers, hired killers, airplane bombers. Kozinski’s argument for scaling back capital punishment is pragmatic rather than moral: Despite support for the death penalty in the political arena, he argues, we’re stuck with a cumbersome appeals process created by the courts, which means that the death penalty in its current form wastes resources and robs victims’ families of closure.

In a 1997 article he wrote for The New Yorker, Kozinski embraced the role of avenger. ‘Whatever qualms I had about the efficacy or the morality of the death penalty were drowned out by the pitiful cries of the victims screaming from between the lines of the dry legal prose,’ he wrote. The article prompted a convicted murderer named Michael Hunter to give Kozinski a sense of what California’s death row looks like from the inside by writing him a letter. Finding the killer to be smart and articulate, Kozinski wrote back and later arranged to visit him. The California attorney general’s office was outraged. In a letter to the Ninth Circuit, the office asked the court to investigate Kozinski for impropriety and, in the meantime, to bar him from hearing capital appeals. Kozinski released the attorney general’s letter to the press. ‘It was intimidation,’ he said, seeming to enjoy the unlikely role of bleeding heart. ‘At the attorney general’s office, they consider prisoners their animals. They don’t like it when anyone considers them human beings.’

All of which testifies to Kozinski’s intellectual curiosity, his capacity for nuance, and his humanity. And then there’s the case of Thomas Martin Thompson.

In 1981, Thompson, then 26, moved into an Orange County apartment with his friend David Leitch, also 26, who was involved with a 20-year-old woman named Ginger Fleischli. The three went out for drinks one night. The next morning, Fleischli was found dead. She’d been stabbed in the head, her right wrist was crushed, and there were bruises on her arms and legs, possible signs of rape. The state arrested and jailed Leitch and Thompson.
At a preliminary hearing, the deputy district attorney in the case said that Leitch ‘was the only person’ with a motive to kill Fleischli, because he’d feared that she would prevent him from reconciling with his ex-wife. Reinforcing that theory of the crime, four jailhouse informants testified that Thompson had confessed that Leitch had recruited him to help with the murder and the disposal of the body. One of the four said that Thompson admitted he’d had sex with Fleischli, but said the sex had been consensual.

Thompson was tried first. The prosecutor didn’t call any of the four informants as witnesses, however. Instead, he produced two new informants, both of whom had long records of making up confessions in other cases and being rewarded for it. The pair said that Thompson had confessed to killing Fleischli by himself after raping her. Thompson’s court-appointed lawyer didn’t try to impeach the informants, so the jury never knew there was reason to doubt them. The lawyer also didn’t attack the evidence that Fleischli had been raped, even though he’d consulted with a pathologist who said that Fleischli’s bruises were several weeks old at the time of her death. The jury convicted Thompson of rape as well as murder, which meant he was eligible for the death penalty. The vote was for execution.

Two years later, the same prosecutor tried Leitch for Ginger Fleischli’s murder. This time around, he called the original four informants to the stand, and they testified that Leitch was the mastermind. In response to the defense’s argument that Thompson had killed Fleischli, the prosecutor said, ‘No, it didn’t happen that way.’ Leitch was convicted of second-degree murder and sentenced to 15 years to life. Seven former California prosecutors would later file a friend-of-the-court brief on Thompson’s behalf, condemning the use of different sets of informants to convict Thompson and Leitch on incompatible theories. The inconsistent presentations demonstrated ‘how easy it is to manipulate facts when the prosecutor’s goal is to win at all costs,’ the lawyers wrote.

The California Supreme Court rejected Thompson’s appeal. In a petition for habeas corpus filed in 1988, he turned to the federal courts, where he drew Judge Richard Gadbois. Thompson argued that he deserved a new trial because of his lawyer’s poor performance and the prosecution’s unethical tactics. Gadbois spent five years on the case and ultimately wrote a 101-page opinion granting Thompson a new trial.

On appeal, three conservative Ninth Circuit judges reversed Gadbois, saying that the errors of Thompson’s lawyers hadn’t affected the outcome of his trial. It was the kind of decision that the liberal judges on the circuit normally ask the court to rehear. Sending the internal signal that a judge has concerns about an opinion, Judge Betty Fletcher, one of the court’s liberal veterans, requested that the three-judge panel send the other judges a 5.4(b) notice. According to a law review article that Stephen Reinhardt later wrote about Thompson’s case, once the 5.4(b) request is made, other like-minded judges ‘ordinarily assume that the judge who made the request will take responsibility for the case.’ But Fletcher didn’t make the call to ask the court as a whole to rehear the case, apparently because she and her law clerks missed the e-mail or fax in which the three-judge panel circulated the 5.4(b) notice. When Reinhardt and Fletcher learned through the legal press that the execution was on, they were horrified. They wrote to the panel that had ruled against Thompson, asking for more time to request the vote. The panel refused.

E-mail messages flew back and forth among the Ninth Circuit judges debating what the court’s next steps should be. Meanwhile, Thompson filed another habeas petition in the California courts based on new evidence. Denied again by the state supreme court,
Thompson’s petition came back to the full circuit a week before he was scheduled to be executed. This time, a majority of the judges agreed to rehear the case en banc.

Four days before the scheduled execution, the court voted 7 to 4 to give Thompson a new trial. Because federal courts are restricted in reviewing successive habeas petitions, the court didn’t consider Thompson’s new evidence. Instead, it took the unusual step of opting on its own accord to scrutinize Thompson’s initial claims. Fletcher’s opinion for the majority explained that the court had failed to act when the case first came before it because ‘our normal en banc process did not function in the intended manner’ due to ‘procedural misunderstandings.’

Judge Kozinski wrote a dissent—the kind of dissent that other judges refer to as a ‘cert petition,’ because it practically begged for Supreme Court intervention (which is formally requested in a petition for writ of certiori [sic]). There had been no ‘procedural misunderstandings,’ Kozinski asserted. Two judges had simply regretted their failure to ask that the case be reheard en banc. And even if there had been a breakdown in the process, so what? En banc review is for ensuring consistency among a circuit’s rulings, not for correcting a run-of-the-mill procedural error like a missed deadline, Kozinski said—and that principle mattered more than whether Thompson would be executed. ‘If the en banc call is missed for whatever reason, the error can be corrected in a future case where the problem again manifests itself,’ Kozinski wrote. ‘That this is a capital case does not change the calculus. The stakes are higher in a death case, to be sure, but the stakes for a particular litigant play no legitimate role in the en banc process.’

Though they often duel on the bench, Reinhardt and Kozinski are old friends. But in the Thompson case, Reinhardt called Kozinski’s dissent ‘bizarre and horrifying’ and ‘unworthy of any jurist.’ ‘Reading Judge Kozinski’s strange dissent,’ he wrote, ‘one would think that justice is irrelevant in this nation and that all that matters in our system of law is whether a single piece of paper was misplaced in a judge’s chambers.’

On appeal, however, the Supreme Court was receptive to Kozinski’s attack. In a 5-4 split between the court’s conservatives and liberals, the justices reaffirmed Thompson’s death sentence. Justice Anthony Kennedy, for whom Kozinski clerked, wrote an opinion accusing the Ninth Circuit of ‘a grave abuse of discretion.’

What explains the icy vehemence of Kozinski’s dissent? I asked the judge about the case on the flight from San Francisco to Burbank, en route to his chambers in Pasadena.

Kozinski was in a good mood, the only kind of mood I saw him in during the three days I spent with him, and he energetically defended his dissent in the Thompson case. He’d tried to get the Supreme Court’s attention because he couldn’t let pass Fletcher and Reinhardt’s attempt to make an end-run around the court’s internal procedures. ‘We have rules and they weren’t followed in this case,’ he said. ‘They said, ‘Death is different’—I guess I don’t buy that. Formalism is important.’

Yet Kozinski also argued that he felt confident insisting on strict adherence to procedural rules because he was sure that Tommy Thompson had murdered Ginger Fleischli. ‘I sort of think everyone is guilty,’ he said. ‘But occasionally, I find cases where I think the guy might not be. If I think this could be one of the innocent guys—could be—then I am a lot less anxious to apply procedural bars. But there were many details in the record. And I read the press about the trial. The journalists who were there said it was absolutely clear
that Thompson was lying.’ It’s unusual, to say the least, for a judge to say he made a
decision based even in part on the media’s account of a case.

Kozinski may have been convinced that Thompson had murdered Fleischli, but in his
dissent he nevertheless attacked the prosecution’s approach at Leitch’s trial. He wrote
that by presenting to two juries contradictory versions of the same murder, the state had
cast doubt on its belief in Thompson’s guilt. ‘Whether or not the United States
Constitution allows them to argue inconsistent theories to different juries, it surely does
not inspire public confidence in our criminal justice system for prosecutors to leave
themselves open to charges of manipulation,’ he wrote. ‘The danger is particularly grave in
capital cases, where the manipulation could well cause the execution of an innocent
person.’

Given his concern about the way in which Thompson’s prosecution was conducted, I asked
Kozinski if he was sure that Thompson was guilty not only of murder but also of rape, the
crime that qualified him for the death penalty. ‘I have no doubt that he committed the
murder,’ Kozinski said. He paused. ‘I think, beyond a reasonable doubt, that he committed
the rape. If I had a doubt, I might have done something differently at one of many
discretion points. I might not have written that dissent.’

Kozinski told me that Reinhardt would agree with him about Thompson’s guilt. ‘He’s
smart enough, he reads the record closely enough—he thinks the guy did it.’

That wasn’t what Reinhardt said when he spoke to me in his Los Angeles chambers the
next day. At 72, he moves slowly and speaks quietly, but the Thompson case brought out
the vigor he’s known for. ‘I think probably [Thompson] had some participation [in the
murder], though not the major role, and even that is only probable,’ Reinhardt said.
‘Which to me is not important. What’s important is that he had an unfair trial, one of the
worst trials ever. What makes it much worse is that this is not the kind of person we
normally execute. He had no prior convictions. If he did something, it was probably the
result of drugs or alcohol on that one night. So whether Alex has decided as a sort of extra
juror that Thompson was guilty, well, that is really not a proper consideration.’

Tommy Thompson was executed in July 1998. He was the first person in California since
the reinstatement of capital punishment in 1977 to go to his death insisting on his
innocence.

Thinking about that outcome, Reinhardt sighed. On his desk were pictures of him and
Kozinski horsing around on a fall day. Kozinski is trying to kiss Reinhardt and Reinhardt
is recoiling in mock disgust. ‘He occasionally goes off half-cocked, and it can be hard for
him to admit that he’s wrong,’ Reinhardt said of his friend. ‘Here there was never a chance
to correct it.’

IN HIS WRITINGS, KOZINSKI HOLDS PROCEDURAL RULES and consistency over the
heads of his fellow judges. In a dissent last May, he derided Reinhardt for narrowly
reading the Second Amendment’s right to bear arms while broadly reading other parts of
the Constitution that protect individual rights. ‘It is wrong to use some constitutional
provisions as springboards for major social change while treating others like senile
relatives to be cooped up in a nursing home until they quit annoying us,’ he wrote. ‘As
guardians of the Constitution, we must be consistent in interpreting its provisions.’
Kozinski, however, hasn’t always followed his own directives about consistency. Almost every year, the judge accepts an assignment in trial court so his law clerks can see lawyers and litigants in action. In 1988, he had to sentence 23-year-old Catherine Ponce, who had pleaded guilty to possessing five kilograms of cocaine. At her sentencing hearing, Ponce sobbed out her story: She met a well-dressed man on a cross-country plane trip. He promised her $50,000 and a Mercedes to set up a cocaine deal. She did. The man turned out to be a federal agent.

Ponce had never been in trouble with the law before, but five kilos is a lot of cocaine. Kozinski could have sentenced her to anything from probation to life. The prosecution asked for 10 years. In a 1997 law review article, Kozinski described his thoughts as Ponce stood before him. About a week before the sentencing, he’d been working at home when the doorbell rang. A young couple stood at the door holding a toddler—Kozinski’s son Clayton, whom they’d found sitting in the middle of the road. Kozinski had forgotten to close his front door, and Clayton, who had just learned to walk, had wandered outside.

Catherine Ponce ‘was not the only one in that courtroom who had made a big mistake,’ the judge wrote. ‘Only a week earlier I, too, had made a big mistake and, as a consequence, put my young son’s life in danger. I am not a deeply religious man, but in that instance I was convinced that God had taken pity on me and spared me and my family the tragic consequence of my error. Something inside me made a connection between the two events and told me that I would not go wrong if I, too, erred on the side of forgiveness.’

Kozinski sentenced Ponce to six months in jail plus community service and probation. The judge admitted feeling uncertain about whether he was right to be ‘influenced by something wholly extraneous to the case.’ But he noted that he had wide discretion because the case preceded the federal sentencing guidelines.

Except that it didn’t, entirely. Kozinski initially sentenced Ponce after Congress had enacted the guidelines, which narrowed the range of punishment for each federal crime, but before the Supreme Court had approved the new rules. When the court did so in 1989, the prosecutor in Ponce’s case went back to Kozinski and asked for nine years. Kozinski said no. He deviated from the guidelines to uphold his original sentence, on the grounds that Ponce had already done her community service. ‘I thought it was a stretch,’ he told me, shaking his head. ‘But maybe I’d get away with it.’

But you’re a formalist, I said. What about the sentencing guidelines?

‘I’d had my epiphany,’ Kozinski said with a fleeting smile. ‘It’s more complicated, though. There she was in front of me with her family. I just felt like, having set her on this track, I had a responsibility to her.’ The prosecution did not appeal the sentence a second time. Catherine Ponce stayed clean, got married, and had a baby.

BY SELECTIVELY APPLYING THE RULES in order to withhold mercy from Tommy Thompson and grant it to Catherine Ponce, is Kozinski ‘calling ‘em as I see ‘em,’ as he puts it? Or is he playing God? Those who have been on the wrong side of the judge’s wrath tend to think it’s the latter. Kozinski doesn’t reserve his rhetorical beatings just for his fellow judges, nor does he wield his power only over appellants and defendants. The judge has unleashed vengeful attacks on members of the bar for reasons both professional and personal. In 1993, he reversed the conviction of two drug dealers because of a prosecutor’s misconduct in a case called U.S. v. Kojayan. Courts almost never cite lawyers by name,
especially if they're criticizing them. Kozinski named the assistant U.S. attorney who tried
Kojayan throughout his opinion, accusing the young Los Angeles prosecutor of the flagrant
ethical violation of making a false statement in court.

When I asked why he had used the prosecutor's name, Kozinski looked surprised. ‘We took
his name out before we published the opinion,’ he told me. Informed that the opinion
available on the popular database Lexis included the prosecutor's name, his eyebrows shot
up. ‘His name is all through it?’ The judge winced. ‘Ouch.’ He paused and then leapt to his
own defense. ‘Well, I thought that what he did was improper. And I thought that it was
really, really important for lawyers, particularly from the government, to ask themselves
when they’re in the courtroom in the Ninth Circuit, ‘Am I going to get that crazy guy
Kozinski on appeal, and is he going to quote my words back at me?’

According to Ron Nessim, a defense lawyer in the Kojayan case and a former federal
prosecutor in Los Angeles, Kozinski’s opinion has had precisely that effect. The opinion
‘caused tremendous discomfort in the U.S. attorney’s office,’ he said. ‘Everyone who is
trained there is given that case to read, because it really teaches a good lesson.’ Nessim
credited Kozinski for blowing the whistle. But he also said the prosecutor in Kojayan—
who left the U.S. attorney’s office a year later—was ‘a good guy’ who got carried away ‘in
the heat of the moment or out of inexperience.’ ‘I don’t know that it was necessary to name
him,’ Nessim said. ‘The guy suffered a great deal.’

Kozinski has also used the power of the bench to attack the lawyer and writer Edward
Lazarus, though for a different type of transgression. Lazarus is the author of Closed
Chambers, a 1997 book about the Supreme Court term he spent clerking for Justice Harry
Blackmun. While most of the book offered sophisticated legal analysis, the book also
dished dirt. Lazarus derided a right-wing ‘cabal’ of law clerks, some of whom were
Kozinski’s former charges, for delighting in executions and for manipulating Anthony
Kennedy—‘not a dazzling intellect,’ Lazarus wrote—into going along with the result
preferred by Scalia in an important racial discrimination case.

Reasonable people argued over whether Lazarus bent the court’s ethical rules and
breached Blackmun’s trust by writing about what he’d learned while working at the court.
Kozinski, who treats confidentiality in chambers as sacrosanct and remains close to
Kennedy, didn’t argue; he excoriated. ‘I have nothing but contempt for him,’ he said of
Lazarus in the press. He asked to review Closed Chambers in the Yale Law Journal at a
time when the journal’s editor was on the way to a clerkship with him. Kozinski used the
review to accuse Lazarus of violating the Supreme Court’s code of conduct and, ‘possibly,’
federal criminal law for allegedly taking internal documents out of the court building.
Lazarus says that the judge tried to have him fired from his job as an assistant U.S.
attorney in Los Angeles and disbarred in California. Kozinski denies the accusations.

The judge’s harsh stance left some of his friends shaking their heads. ‘I genuinely like Alex
and respect him a great deal, but I was enormously troubled by his behavior toward
Eddie,’ said Erwin Chemerinsky, a law professor at the University of Southern California
who wrote a response to Kozinski’s attack on Lazarus in the Yale Law Journal. ‘Much of
what he did was inappropriate for a judge to do. It was far too personal.’ Chemerinsky’s
support for Lazarus cost him Kozinski’s friendship. He said the judge hasn’t spoken to him
for five years and refuses to serve on academic panels with him or even shake his hand.
Kozinski, for his part, now seems relatively conciliatory about the episode. ‘I’m really sorry to have had a basic disagreement with [Lazarus] about a question of honor,’ he said. ‘In retrospect, he did educate a lot of people about the court.’ Lazarus isn’t moved. ‘He still holds a seminar during the orientation of the Ninth Circuit law clerks in which he bashes the hell out of me,’ he said.

SITTING IN HIS LARGE, SUNNY PASADENA OFFICE the afternoon before the en banc vote in the recall case, Kozinski called to one of his clerks, ‘Do you have a draft for me?’

Another memo was in the works. But by the time the clerk, Theane Evangelis, came in to discuss her draft, Kozinski had gotten distracted. He was reading an opinion piece by Slate’s Dahlia Lithwick that mocked the three-judge panel’s decision to delay the recall. Slate specializes in irreverent commentary, and Lithwick’s court coverage hardly stands on ceremony: The subtitle of her piece on the recall was ‘The 9th Circuit moons the Supreme Court.’ Kozinski loved it. ‘This is pretty brutal,’ he said. ‘Let’s send it out.’

Kozinski excerpted the best bits (‘Reading the opinion, you can almost hear the panel saying: ‘Hey, let’s not just halt the recall, let’s have a little fun with the thing!’) and added a note to his colleagues: ‘This is not nice stuff. But serious legal commentators are deriding our panel’s opinion, and consequently our panel. As Lithwick says, the fun has to stop now. Vote early, vote often, but definitely vote yes.’

Evangelis came in to read over the judge’s shoulder. ‘What do you think?’ he asked. ‘Send it,’ she said.

Kozinski told her to get the e-mail ready to send. Then he hesitated. ‘You’re my easy clerk,’ he said. ‘You’re too much like me. Go check with Kathy.’ Evangelis left to show the e-mail to her co-clerk, Katherine Ku.

A few minutes later, Ku hurried into Kozinski’s office. ‘Judge, this is offensive,’ she said, waving a printout of the draft e-mail. ‘You can’t send this. It’s not as if we’re not being listened to! Come on, Judge, it’s just too much.’

Kozinski looked rueful. He wadded up the draft and tossed it into the trash. ‘She’s right,’ he said, ‘There’s no reason to be—’ He got to his feet and strode down the hallway to Ku’s office. ‘Can I at least send out the link?’ he asked.

KOZINSKI PROBABLY COULDN’T STOP MAKING TROUBLE if he wanted to. He was born in 1950, the first and only child of two Holocaust survivors. Sabine, his mother, spent the war in a Romanian ghetto; Moses, his father, was held for four years in the Transnistria concentration camp with about 150,000 other Jews. Tens of thousands died of overwork or ill health, but Moses turned his experience there into humorous stories for his son, who now enjoys telling them himself. There is the story about Moses posing as a master ‘presser’ (that is, ironer) to get work in the laundry and be spared more difficult labor, and the story about him tying the bottoms of his pant legs while harvesting so he could stuff his trousers with potatoes. This one Kozinski acts out.

A staunch Communist, Moses became manager of a textile factory when a Soviet-backed government took over after the war. As a 7-year-old, Alex asked the workers at his father’s weaving plant why the country’s official newspaper was called Free Romania, when there were so many people in prison. Moses nearly lost his job. He started using hand signals to tell Alex when to keep quiet.
Four years later, the family was disillusioned with the Communist regime and ready to emigrate. They planned to go to Israel, but first managed to arrange a yearlong stay in Vienna, where, as German speakers, they would be able to work and earn money. While there, the Kozinskis befriended a Romanian family named Fried. The Frieds were having difficulty arranging to leave Romania permanently, because Mr. Fried, who was paralyzed from the waist down, was in danger of failing the medical exam required to emigrate. He asked Moses to go to the exam in his stead. Kozinski revels in describing his father’s surprise at the frank stare his father got from Mrs. Fried when he took off his pants for the medical examiner.

In 1962, the Kozinskis got their own visas for America. After spending five years in Baltimore, Alex and his parents moved to West Hollywood in search of warmer weather. Moses, who’d gone from being a Communist to a proud Republican, opened a small grocery store. Alex completed his senior year of high school in L.A. and improved on the C’s and D’s he’d gotten previously. Aided by an 800 on the German Achievement Test, he squeaked into UCLA. He wasn’t a star there, either. The problem wasn’t the language barrier, he insists, it was the time he spent chasing girls. (In 1968, he went on The Dating Game and won, though his date stood him up.)

Alex decided to go to law school because he’d been a terrible engineering major and because he liked the movie 12 Angry Men. He got into UCLA’s law school after he dropped his engineering load for architecture courses, which he says were ‘guaranteed A’s.’ Still, he spent the first year of law school on academic probation. Kozinski says that he had always followed the advice of his mother, who had urged him since childhood never to be either the best or the worst at anything, since ‘the ones on the end are the ones who get shot.’ Then he read a magazine article about how difficult it could be to find a job after graduation. The article advised hard-up law students to try the FBI. ‘I said, ‘Oh shucks. No Jewish boy with a thick Romanian accent is going to be an FBI man,’’ Kozinski remembered. ‘So I’ll have to finish first.’ He did. But after applying to 20 big Los Angeles firms, he got only two offers. Students with lesser records had far better results. ‘I think it was because I was sort of weird,’ the judge said. It was 1973, and along with his accent Kozinski had long hair and a beard, what he calls ‘the Jesus look.’ ‘I didn’t fit the model of the downtown firm. They may have thought I wouldn’t be very good with clients. They were probably right.’

At the last minute, Kozinski decided to apply for a clerkship with Kennedy, who had just been appointed to the Ninth Circuit. He got the job and loved it. ‘I’d learned in law school that you can tell how a judge will vote based on his politics,’ he remembered. ‘So I was very pleasantly surprised by how Judge Kennedy would go back and forth on a close case and really think about it and try to get it right.’ Kozinski was nervous about spending his life in a law firm, and he wasn’t drawn to academia, which seemed too disconnected from real-world concerns. His year with Kennedy opened his eyes to a career in the judiciary.

Justice William O. Douglas, the irascible civil libertarian, selected Kozinski for his Supreme Court chambers in November 1975, only to retire before the clerkship could begin. Chief Justice Warren Burger agreed to interview the disappointed candidate. He and Douglas were hardly ideological or intellectual soulmates, and at the interview the chief justice asked whether he’d be well served by a clerk selected by Douglas. Kozinski replied that he expected to disagree with Burger about as often as he would have with
Douglas. ‘It turns out that the Chief Justice and I agreed far more often than I had anticipated,’ he later wrote in a memorial tribute to Burger.

Kozinski went on to secure a job in the White House counsel’s office during the Reagan Administration. It was a heady moment for young conservative lawyers in Washington. ‘We were gung-ho Reaganites, all very enthoused about cutting back government, which we thought was like fungus,’ recalled Loren Smith, then a close friend of Kozinski’s and now a senior judge at the U.S. Court of Federal Claims. Kozinski contributed to the esprit de corps by throwing parties. People from different agencies brought their kids, played Trivial Pursuit, and ate ‘Kozinski squares’—brownies laced with caramel candy.

In 1981, Kozinski became special counsel to the Merit Systems Protection Board, the federal agency charged with protecting whistleblowers. It was a credential-building job in a low-status agency. Riding the Washington Metro one morning, he read an article about a new U.S. Claims Court, which was slated to hear cases against the government involving federal contracts and tax refunds. ‘I said ‘Shazam! That’s my job!’ Kozinski said, pounding the table. ‘I called some friends in the Administration and said, ‘How about me for chief justice?’ They laughed. So I waited a few days, and I called again. Pretty soon they forgot the idea came from me.’ The court opened in 1982 with Kozinski as its first chief.

Kozinski had cannily seen what most of Washington had missed: the new court’s potential as a showcase for talent. Kozinski’s job as chief judge didn’t come with life tenure, but it allowed him to handle big and complex cases, across the street from the White House, in front of lawyers from the Department of Justice. ‘Alex was probably one of the few people in the administration who realized that this court existed and what it could be,’ said Richard Willard, then assistant attorney general in the civil division of DOJ, and Kozinski’s co-clerk from his days with Kennedy. ‘Otherwise, that job would have gone to someone older and more politically connected.’

It didn’t take long for Kozinski to map out his next step up: an appointment to the Ninth Circuit to fill a new judgeship created in 1985. When he talked to Kennedy about the idea, his mentor tried to dissuade him. ‘The isolation, the serenity, the quiet of an appellate court for a younger man is a risky undertaking,’ he recalled recently, introducing Kozinski at an awards dinner. ‘It’s risky because you miss so much of life’s experience, which should shape you as a person and as a judge.’ But Kozinski was determined, and he had a growing reputation.

Edwin Meese III, Reagan’s powerful attorney general, backed Kozinski’s nomination to the Ninth Circuit and then fought for his man. As Meese remembers it, ‘Anyone who was a very good potential judge who believed in the Constitution was a target for the left-wingers.’ Kozinski was a lightning rod target for Senate Democrats. They were frustrated by the Republicans’ success in appointing conservative judges and nervous about approving a 35-year-old who would be the youngest appeals court judge since William Howard Taft—and who was already being talked about for the Supreme Court. In a preview of the confirmation battles that have since become routine, Kozinski was attacked by Senators Carl Levin of Michigan and Howard M. Metzenbaum of Ohio as ‘too arrogant and insensitive’ to serve on the federal bench. Former employees of the Merit Systems Protection Board came forward, some to praise Kozinski and others to charge that he had been a ‘cruel' and 'humiliating' boss. It was alleged, for example, that Kozinski had prematurely announced the departure of a long-time worker who had cancer without telling her he was doing so. Kozinski called the announcement ‘an unfortunate clerical
error.’ He squeaked by the Senate on a 54-43 vote, one of the closest splits ever over a judicial nominee.

THE NINTH CIRCUIT, WHOSE JURISDICTION SPRAWLS over nine western states, is often called the country’s most liberal appeals court. Seventeen of the judges on the court—there are now 27—have been appointed by Democratic presidents. (The court is allotted 28 seats, one of which is unfilled.) But these numbers are misleading. Five of the 14 Clinton appointees (Barry Silverman, Susan Graber, Ronald Gould, Richard Tallman, and Johnnie Rawlinson) are solid conservatives. Several others are moderates. And it was a Republican appointee, Alfred Goodwin, who wrote the decision to omit ‘under God’ from public school recitations of the Pledge of Allegiance that so enraged conservatives last year.

There are now 12 liberals and moderates on the court and 15 conservatives. ‘It’s not a liberal court. It’s an ideological court,’ said Ben Wizner, a lawyer with the Los Angeles branch of the American Civil Liberties Union. ‘You have these titans doing colossal battle with each other.’

Being one of the titans doesn’t always get Kozinski far with his colleagues. ‘There is a certain amount of eye rolling, a feeling that he inflates his importance,’ one former Ninth Circuit clerk said. He and Reinhardt are famous (or infamous) for memos like the ones Kozinski sent about the California recall. ‘I think a lot of the judges generally don’t particularly care for his memos or for mine,’ Reinhardt said. ‘I think they think we ought to be more sedate and reserved and act more like their idea of a judge.’

Still, Kozinski is a skillful politician, as his boy-wonder rise to prominence attests. The evening I spent with him in San Francisco, we had dinner with Carlos Bea, a 69-year-old superior court judge who was then awaiting confirmation to the Ninth Circuit. As Bea sipped white wine and listened intently, Kozinski advised him about everything from dealing with a senator’s hold on his nomination to choosing law clerks. They joked that when Bea joined the court (as he did two weeks later), en banc votes would be that much easier to win. Kozinski mentioned that he is next in line to be the Ninth Circuit’s chief judge but said that he’s not terribly excited about the prospect because of the administrative work involved. Bea reminded him of a traditional perk of being chief: ‘You’ll get to sit on all the en banc panels!’

Kozinski keeps his profile high outside the circuit as well. He’s a regular on law school campuses, often as a speaker for the Federalist Society, the résumé-builder of choice for conservative law students. Kozinski also likes to write scholarly articles, many of them about constitutional history and interpretation. But he’s not particularly respected by academics in that field. ‘His scholarship is just another way to draw attention to himself,’ one constitutional law professor said. ‘It’s fine, but it’s not that penetrating. It’s more clever than it is profound.’

Kozinski has made his mark with his judicial opinions. The judge is one of the best stylists on the bench, routinely working through 50 or more drafts. ‘He would often ask, ‘Does it sing?’ said Eugene Volokh, a UCLA law professor who is a loyal former clerk and the coauthor with Kozinski of ‘Lawsuit, Shmawsuit,’ an essay about the increasing use of the word ‘chutzpah’ in judicial opinions. (Kozinski and Volokh offer two explanations: ‘a dramatic increase in the actual amount of chutzpah in the United States,’ which they consider unlikely, or the supplanting of Latin with Yiddish as the ‘spice in American legal argot.’) Kozinski is a master of marshalling facts to support an argument and of letting
zingers fly. Professors love to quote his opinions in their casebooks, and Kozinski loves being quoted. ‘How important do I think casebooks are?’ the judge has written. ‘So important that, once in a while, I write an opinion precisely for the purpose of getting into one.’

Law students line up to clerk for Kozinski because of his writing prowess, his network, and his pull. ‘Within three hours of accepting my clerkship, I got five calls from former clerks welcoming me aboard,’ recalled Steven Engel, now a lawyer at Kirkland & Ellis in Washington. This year’s clerks—three women, a Kozinski first—are all ‘going upstairs,’ as the judge puts it, to work at the Supreme Court.

The downside of clerking for Kozinski is that he owns you. The hours are 9:30 a.m. to 1:30 a.m., with Friday nights and some Saturday nights off. There have been clerks who have been chewed up and spit out by the pressure. ‘He goes around telling clerks ‘You’re the gold medal clerk, you’re the silver medal, you’re the bronze medal,” one professor said. ‘You subordinate yourself to him and maybe he gets you to the Supreme Court. It’s a Faustian bargain.’

Kozinski hasn’t succeeded in getting himself to the Supreme Court, though he was frequently mentioned as a likely nominee in the early 1990s. According to former clerks and conservative court-watchers, his name is not on anyone’s short list now for several reasons: He doesn’t have friends in the right places; he has written too many off-the-wall articles; he’s not regarded as reliably right-wing; and he has pissed off the wrong people in the Bush Administration. Whatever the explanation, Kozinski hasn’t tried to tame himself in hopes of getting a nomination. ‘You might wonder with some of the moderates, whether they’re being cautious because they have ambitions,’ said Reinhardt. ‘I don’t think Alex has ever let that affect either his judicial decisions or his personal life.’

Kozinski used to joke about being a member of OOPPSSCA, the Organization of People Patiently Seeking Supreme Court Appointments, but now he seems to accept that he’s likely to stay right where he is. ‘I decided a long time ago that it ain’t worth it,’ he said. ‘If I don’t live the job for all its worth, I cheat myself and the public. So I write my opinions and I try to say something.’ The judge leaned back in his scuffed leather chair and took a stab at modesty. ‘If I got to choose the next appointee, I’d say Judge Posner,’ referring to Richard Posner of the Seventh Circuit. ‘Well, if I were being honest rather than ambitious, I would.’ He giggled. ‘If I thought I could really get it, I’d probably say me.’ Kozinski laughed some more, tossed his hair off his forehead, and went back to work.

THE JUDGE’S SECRETARY, DONNA SALTER, who has been with him since his Washington days, made banana bread on the Friday morning of the vote to rehear the recall case. There was a loaf with chocolate chips for the clerks and a loaf without for the judge. Kozinski was eating a piece as he watched the e-mails come in. After celebrating the outcome of the vote, he settled in for the announcement of the en banc panel. On other federal appeals courts, every judge hears each en banc case. But the Ninth Circuit is considered too large for this practice, so the names of 11 judges are picked out of a jewelry box. When the e-mail announcing the selection arrived, two of Kozinski’s clerks came into his office to read over his shoulder. ‘Oh, my God,’ the judge said. ‘It’s a bone-breaking court.’ There were two liberals, one moderate, and eight conservatives, including Kozinski, on the list.
Oral argument in the case was held in San Francisco the following Monday. Kozinski needledd both sides with his favorite kind of questions, uncomfortable hypotheticals, and he otherwise dominated the proceedings. When Mark Rosenbaum, the ACLU’s chief counsel, looked overwhelmed after learning that he had just 30 seconds left to rebut his opponents’ arguments, Kozinski encouraged the lawyer, calling him a ‘fast talker.’ Rosenbaum proceeded to race through his argument, saying, in sum, that this was ‘the strongest case that has ever been in this circus. Um, circuit.’ The gaffe broke up the courtroom.

The next day, the 11-judge panel issued a short, unsigned opinion clearing the way for the October election in which voters recalled Davis and replaced him with Arnold Schwarzenegger. The decision conceded that the plaintiffs, a consortium of civil rights groups, were ‘legitimately concerned’ that the punch-card machines would deny the right to vote to some voters. The public hardship of postponing the election outweighed that consideration, however. The decision was unanimous.

For Kozinski, more than for most judges, the job is about these moments of triumph. One of the judge’s favorite images of himself is a photograph by Helmut Newton. It was taken for Kozinski’s *New Yorker* article, though the magazine didn’t end up running it. A print of the photo hangs on the wall of his chambers and a scanned version adorns the desktop of his computer. In it, Kozinski is standing on the roof of his chambers. Behind him is a huge fan, but it’s out of the camera’s range. What you see is the judge, dramatically backlit against a gray sky, his robe billowing out behind him. He is carrying a great, grand book of statutes. It’s the image of a man wielding power with a thrill.
HOW TO READ A LEGAL OPINION

A GUIDE FOR NEW LAW STUDENTS

Orin S. Kerr

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HOW TO READ A LEGAL OPINION

A GUIDE FOR NEW LAW STUDENTS

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This essay is designed to help new law students prepare for the first few weeks of class. It explains what judicial opinions are, how they are structured, and what law students should look for when reading them.

I. WHAT’S IN A LEGAL OPINION?

When two people disagree and that disagreement leads to a lawsuit, the lawsuit will sometimes end with a ruling by a judge in favor of one side. The judge will explain the ruling in a written document referred to as an “opinion.” The opinion explains what the case is about, discusses the relevant legal principles, and then applies the law to the facts to reach a ruling in favor of one side and against the other.

Modern judicial opinions reflect hundreds of years of history and practice. They usually follow a simple and predictable formula. This

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section takes you through the basic formula. It starts with the introductory materials at the top of an opinion and then moves on to the body of the opinion.

The Caption

The first part of the case is the title of the case, known as the “caption.” Examples include Brown v. Board of Education and Miranda v. Arizona. The caption usually tells you the last names of the person who brought the lawsuit and the person who is being sued. These two sides are often referred to as the “parties” or as the “litigants” in the case. For example, if Ms. Smith sues Mr. Jones, the case caption may be Smith v. Jones (or, depending on the court, Jones v. Smith).

In criminal law, cases are brought by government prosecutors on behalf of the government itself. This means that the government is the named party. For example, if the federal government charges John Doe with a crime, the case caption will be United States v. Doe. If a state brings the charges instead, the caption will be State v. Doe, People v. Doe, or Commonwealth v. Doe, depending on the practices of that state.

The Case Citation

Below the case name you will find some letters and numbers. These letters and numbers are the legal citation for the case. A citation tells you the name of the court that decided the case, the law book in which the opinion was published, and the year in which the court decided the case. For example, “U.S. Supreme Court, 485 U.S. 759 (1988)” refers to a U.S. Supreme Court case decided in 1988 that appears in Volume 485 of the United States Reports starting at page 759.

The Author of the Opinion

The next information is the name of the judge who wrote the opinion. Most opinions assigned in law school were issued by courts

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1 English criminal cases normally will be Rex v. Doe or Regina v. Doe. Rex and Regina aren’t the victims: the words are Latin for “King” and “Queen.” During the reign of a King, English courts use “Rex”; during the reign of a Queen, they switch to “Regina.”
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with multiple judges. The name tells you which judge wrote that particular opinion. In older cases, the opinion often simply states a last name followed by the initial “J.” No, judges don’t all have the first initial “J.” The letter stands for “Judge” or “Justice,” depending on the court. On occasion, the opinion will use the Latin phrase “per curiam” instead of a judge’s name. Per curiam means “by the court.” It signals that the opinion reflects a common view among all the judges rather than the writings of a specific judge.

The Facts of the Case

Now let’s move on to the opinion itself. The first part of the body of the opinion presents the facts of the case. In other words, what happened? The facts might be that Andy pulled out a gun and shot Bob. Or maybe Fred agreed to give Sally $100 and then changed his mind. Surprisingly, there are no particular rules for what facts a judge must include in the fact section of an opinion. Sometimes the fact sections are long, and sometimes they are short. Sometimes they are clear and accurate, and other times they are vague or incomplete.

Most discussions of the facts also cover the “procedural history” of the case. The procedural history explains how the legal dispute worked its way through the legal system to the court that is issuing the opinion. It will include various motions, hearings, and trials that occurred after the case was initially filed. Your civil procedure class is all about that kind of stuff; you should pay very close attention to the procedural history of cases when you read assignments for your civil procedure class. The procedural history of cases usually will be less important when you read a case for your other classes.

The Law of the Case

After the opinion presents the facts, it will then discuss the law. Many opinions present the law in two stages. The first stage discusses the general principles of law that are relevant to cases such as the one the court is deciding. This section might explore the history of a particular field of law or may include a discussion of past cases (known as “precedents”) that are related to the case the court is de-
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ciding. This part of the opinion gives the reader background to help understand the context and significance of the court’s decision. The second stage of the legal section applies the general legal principles to the particular facts of the dispute. As you might guess, this part is in many ways the heart of the opinion: It gets to the bottom line of why the court is ruling for one side and against the other.

Concurring and/or Dissenting Opinions

Most of the opinions you read as a law student are “majority” opinions. When a group of judges get together to decide a case, they vote on which side should win and also try to agree on a legal rationale to explain why that side has won. A majority opinion is an opinion joined by the majority of judges on that court. Although most decisions are unanimous, some cases are not. Some judges may disagree and will write a separate opinion offering a different approach. Those opinions are called “concurring opinions” or “dissenting opinions,” and they appear after the majority opinion. A “concurring opinion” (sometimes just called a “concurrence”) explains a vote in favor of the winning side but based on a different legal rationale. A “dissenting opinion” (sometimes just called a “dissent”) explains a vote in favor of the losing side.

II. Common Legal Terms Found in Opinions

Now that you know what’s in a legal opinion, it’s time to learn some of the common words you’ll find inside them. But first a history lesson, for reasons that should be clear in a minute.

In 1066, William the Conqueror came across the English Channel from what is now France and conquered the land that is today called England. The conquering Normans spoke French and the defeated Saxons spoke Old English. The Normans took over the court system, and their language became the language of the law. For several centuries after the French-speaking Normans took over England, lawyers and judges in English courts spoke in French. When English courts eventually returned to using English, they continued to use many French words.
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Why should you care about this ancient history? The American colonists considered themselves Englishmen, so they used the English legal system and adopted its language. This means that American legal opinions today are littered with weird French terms. Examples include plaintiff, defendant, tort, contract, crime, judge, attorney, counsel, court, verdict, party, appeal, evidence, and jury. These words are the everyday language of the American legal system. And they’re all from the French, brought to you by William the Conqueror in 1066.

This means that when you read a legal opinion, you’ll come across a lot of foreign-sounding words to describe the court system. You need to learn all of these words eventually; you should read cases with a legal dictionary nearby and should look up every word you don’t know. But this section will give you a head start by introducing you to some of the most common words, many of which (but not all) are French in origin.

Types of Disputes and the Names of Participants

There are two basic kinds of legal disputes: civil and criminal. In a civil case, one person files a lawsuit against another asking the court to order the other side to pay him money or to do or stop doing something. An award of money is called “damages” and an order to do something or to refrain from doing something is called an “injunction.” The person bringing the lawsuit is known as the “plaintiff” and the person sued is called the “defendant.”

In criminal cases, there is no plaintiff and no lawsuit. The role of a plaintiff is occupied by a government prosecutor. Instead of filing a lawsuit (or equivalently, “suing” someone), the prosecutor files criminal “charges.” Instead of asking for damages or an injunction, the prosecutor asks the court to punish the individual through either jail time or a fine. The government prosecutor is often referred to as “the state,” “the prosecution,” or simply “the government.” The person charged is called the defendant, just like the person sued in a civil case.

In legal disputes, each party ordinarily is represented by a lawyer. Legal opinions use several different words for lawyers, includ-
“attorney” and “counsel.” There are some historical differences among these terms, but for the last century or so they have all meant the same thing. When a lawyer addresses a judge in court, she will always address the judge as “your honor,” just like lawyers do in the movies. In legal opinions, however, judges will usually refer to themselves as “the Court.”

**Terms in Appellate Litigation**

Most opinions that you read in law school are appellate opinions, which means that they decide the outcome of appeals. An “appeal” is a legal proceeding that considers whether another court’s legal decision was right or wrong. After a court has ruled for one side, the losing side may seek review of that decision by filing an appeal before a higher court. The original court is usually known as the trial court, because that’s where the trial occurs if there is one. The higher court is known as the appellate or appeals court, as it is the court that hears the appeal.

A single judge presides over trial court proceedings, but appellate cases are decided by panels of several judges. For example, in the federal court system, run by the United States government, a single trial judge known as a District Court judge oversees the trial stage. Cases can be appealed to the next higher court, the Court of Appeals, where cases are decided by panels of three judges known as Circuit Court judges. A side that loses before the Circuit Court can seek review of that decision at the United States Supreme Court. Supreme Court cases are decided by all nine judges. Supreme Court judges are called Justices instead of judges; there is one “Chief Justice” and the other eight are just plain “Justices” (technically they are “Associate Justices,” but everyone just calls them “Justices”).

During the proceedings before the higher court, the party that lost at the original court and is therefore filing the appeal is usually known as the “appellant.” The party that won in the lower court and must defend the lower court’s decision is known as the “appellee” (accent on the last syllable). Some older opinions may refer to the appellant as the “plaintiff in error” and the appellee as the “defendant.”
in error.” Finally, some courts label an appeal as a “petition,” and require the losing party to petition the higher court for relief. In these cases, the party that lost before the lower court and is filing the petition for review is called the “petitioner.” The party that won before the lower court and is responding to the petition in the higher court is called the “respondent.”

Confused yet? You probably are, but don’t worry. You’ll read so many cases in the next few weeks that you’ll get used to all of this very soon.

III. WHAT YOU NEED TO LEARN FROM READING A CASE

Okay, so you’ve just read a case for class. You think you understand it, but you’re not sure if you learned what your professor wanted you to learn. Here is what professors want students to know after reading a case assigned for class:

Know the Facts

Law professors love the facts. When they call on students in class, they typically begin by asking students to state the facts of a particular case. Facts are important because law is often highly fact-sensitive, which is a fancy way of saying that the proper legal outcome depends on the exact details of what happened. If you don’t know the facts, you can’t really understand the case and can’t understand the law.

Most law students don’t appreciate the importance of the facts when they read a case. Students think, “I’m in law school, not fact school; I want to know what the law is, not just what happened in this one case.” But trust me: the facts are really important.

If you don’t believe me, you should take a look at a few law school exams. It turns out that the most common form of law school exam question presents a long description of a very particular set of facts. It then asks the student to “spot” and analyze the legal issues presented by those facts. These exam questions are known as “issue-spotters,” as they test the student’s ability to understand the facts and spot the legal issues they raise. As you might imagine, doing well on an issue-
Know the Specific Legal Arguments Made by the Parties

Lawsuits are disputes, and judges only issue opinions when two parties to a dispute disagree on a particular legal question. This means that legal opinions focus on resolving the parties’ very specific disagreement. The lawyers, not the judges, take the lead role in framing the issues raised by a case.

In an appeal, for example, the lawyer for the appellant will articulate specific ways in which the lower court was wrong. The appellate court will then look at those arguments and either agree or disagree. (Now you can understand why people pay big bucks for top lawyers; the best lawyers are highly skilled at identifying and articulating their arguments to the court.) Because the lawyers take the lead role in framing the issues, you need to understand exactly what arguments the two sides were making.

Know the Disposition

The “disposition” of a case is the action the court took. It is often announced at the very end of the opinion. For example, an appeals court might “affirm” a lower court decision, upholding it, or it might “reverse” the decision, ruling for the other side. Alternatively, an appeals court might “vacate” the lower court decision, wiping the lower-court decision off the books, and then “remand” the case, sending it back to the lower court for further proceedings. For now, you should keep in mind that when a higher court “affirms” it means that the lower court had it right (in result, if not in reasoning). Words like “reverse,” “remand,” and “vacate” means that the higher court though the lower court had it wrong.

Understand the Reasoning of the Majority Opinion

To understand the reasoning of an opinion, you should first identify the source of the law the judge applied. Some opinions interpret the Constitution, the founding charter of the government. Other cases
interpret “statutes,” which is a fancy name for written laws passed by legislative bodies such as Congress. Still other cases interpret “the common law,” which is a term that usually refers to the body of prior case decisions that derive ultimately from pre-1776 English law that the Colonists brought over from England.³

In your first year, the opinions that you read in your Torts, Contracts, and Property classes will mostly interpret the common law. Opinions in Criminal Law mostly interpret either the common law or statutes. Finally, opinions in your Civil Procedure casebook will mostly interpret statutory law or the Constitution. The source of law is very important because American law follows a clear hierarchy. Constitutional rules trump statutory (statute-based) rules, and statutory rules trump common law rules.

After you have identified the source of law, you should next identify the method of reasoning that the court used to justify its decision. When a case is governed by a statute, for example, the court usually will simply follow what the statute says. The court’s role is narrow in such settings because the legislature has settled the law. Similarly, when past courts have already answered similar questions before, a court may conclude that it is required to reach a particular result because it is bound by the past precedents. This is an application of the judicial practice of “stare decisis,” an abbreviation of a Latin phrase meaning “That which has been already decided should remain settled.”

In other settings, courts may justify their decisions on public policy grounds. That is, they may pick the rule that they think is the best rule, and they may explain in the opinion why they think that rule is best. This is particularly likely in common law cases where judges are not bound by a statute or constitutional rule. Other courts will rely on morality, fairness, or notions of justice to justify

³ The phrase “common law” started being used about a thousand years ago to refer to laws that were common to all English citizens. Thus, the word “common” in the phrase “common law” means common in the sense of “shared by all,” not common in the sense of “not very special.” The “common law” was announced in judicial opinions. As a result, you will sometimes hear the phrase “common law” used to refer to areas of judge-made law as opposed to legislatively-made law.
their decisions. Many courts will mix and match, relying on several or even all of these justifications.

**Understand the Significance of the Majority Opinion**

Some opinions resolve the parties’ legal dispute by announcing and applying a clear rule of law that is new to that particular case. That rule is known as the “holding” of the case. Holdings are often contrasted with “dicta” found in an opinion. Dicta refers to legal statements in the opinion not needed to resolve the dispute of the parties; the word is a pluralized abbreviation of the Latin phrase “obiter dictum,” which means “a remark by the way.”

When a court announces a clear holding, you should take a minute to think about how the court’s rule would apply in other situations. During class, professors like to pose “hypotheticals,” new sets of facts that are different from those found in the cases you have read. They do this for two reasons. First, it’s hard to understand the significance of a legal rule unless you think about how it might apply to lots of different situations. A rule might look good in one setting, but another set of facts might reveal a major problem or ambiguity. Second, judges often reason by “analogy,” which means a new case may be governed by an older case when the facts of the new case are similar to those of the older one. This raises the question, which are the legally relevant facts for this particular rule? The best way to evaluate this is to consider new sets of facts. You’ll spend a lot of time doing this in class, and you can get a head start on your class discussions by asking the hypotheticals on your own before class begins.

Finally, you should accept that some opinions are vague. Sometimes a court won’t explain its reasoning very well, and that forces us to try to figure out what the opinion means. You’ll look for the holding of the case but become frustrated because you can’t find one. It’s not your fault; some opinions are written in a narrow way so that there is no clear holding, and others are just poorly reasoned or written. Rather than trying to fill in the ambiguity with false certainty, try embracing the ambiguity instead. One of the skills of top-flight lawyers is that they know what they don’t know: they know
How to Read a Legal Opinion

when the law is unclear. Indeed, this skill of identifying when a problem is easy and when it is hard (in the sense of being unsettled or unresolved by the courts) is one of the keys to doing very well in law school. The best law students are the ones who recognize and identify these unsettled issues without pretending that they are easy.

Understand Any Concurring and/or Dissenting Opinions

You probably won’t believe me at first, but concurrences and dissents are very important. You need to read them carefully. To understand why, you need to appreciate that law is man-made, and Anglo-American law has often been judge-made. Learning to “think like a lawyer” often means learning to think like a judge, which means learning how to evaluate which rules and explanations are strong and which are weak. Courts occasionally say things that are silly, wrongheaded, or confused, and you need to think independently about what judges say.

Concurring and dissenting opinions often do this work for you. Casebook authors edit out any unimportant concurrences and dissents to keep the opinions short. When concurrences and dissents appear in a casebook, it signals that they offer some valuable insights and raise important arguments. Disagreement between the majority opinion and concurring or dissenting opinions often frames the key issue raised by the case; to understand the case, you need to understand the arguments offered in concurring and dissenting opinions.

IV. Why Do Law Professors Use the Case Method?

I’ll conclude by stepping back and explaining why law professors bother with the case method. Every law student quickly realizes that law school classes are very different from college classes. Your college professors probably stood at the podium and droned on while you sat back in your chair, safe in your cocoon. You’re now starting law school, and it’s very different. You’re reading about actual cases, real-life disputes, and you’re trying to learn about the law by picking up bits and pieces of it from what the opinions tell
you. Even weirder, your professors are asking you questions about those opinions, getting everyone to join in a discussion about them. Why the difference?, you may be wondering. Why do law schools use the case method at all?

I think there are two major reasons, one historical and the other practical.

The Historical Reason

The legal system that we have inherited from England is largely judge-focused. The judges have made the law what it is through their written opinions. To understand that law, we need to study the actual decisions that the judges have written. Further, we need to learn to look at law the way that judges look at law. In our system of government, judges can only announce the law when deciding real disputes: they can’t just have a press conference and announce a set of legal rules. (This is sometimes referred to as the “case or controversy” requirement; a court has no power to decide an issue unless it is presented by an actual case or controversy before the court.) To look at the law the way that judges do, we need to study actual cases and controversies, just like the judges. In short, we study real cases and disputes because real cases and disputes historically have been the primary source of law.

The Practical Reason

A second reason professors use the case method is that it teaches an essential skill for practicing lawyers. Lawyers represent clients, and clients will want to know how laws apply to them. To advise a client, a lawyer needs to understand exactly how an abstract rule of law will apply to the very specific situations a client might encounter. This is more difficult than you might think, in part because a legal rule that sounds definite and clear in the abstract may prove murky in application. (For example, imagine you go to a public park and see a sign that says “No vehicles in the park.” That plainly forbids an automobile, but what about bicycles, wheelchairs, toy automobiles? What about airplanes? Ambulances? Are these “vehicles” for the purpose of the rule or not?) As a result, good lawyers
How to Read a Legal Opinion

need a vivid imagination; they need to imagine how rules might apply, where they might be unclear, and where they might lead to unexpected outcomes. The case method and the frequent use of hypotheticals will help train your brain to think this way. Learning the law in light of concrete situations will help you deal with particular facts you’ll encounter as a practicing lawyer.

Good luck!

GB
Law students are famous (infamous?) in popular culture for the elaborate and lengthy course outlines they create while studying for exams. If you've ever seen the classic 1970s movie *The Paper Chase*, you can probably recall the scene where Mr. Bell brags to his 1L study group about creating an 800-page handwritten outline that is "better than the case book...anyway, it's going to be longer." He then accidentally drops that outline from a high window and the pages flutter to the ground like snow right before exams. The best advice about exam prep that you can draw from this movie comes from one of Mr. Bell's fellow study group students, Mr. Anderson: "The outline is a tool, Bell, a tool; not an end in itself." The tips and ideas below will help you understand what a course outline is, how to create one, and what other types of study tools you can create to prepare for exams.

What is a course outline, and why should I make one?

A course outline is basically a summary and synthesis of your course as taught by your professor. The word “outline” is misleading; you may think an outline must look like this:

```
Duty
  a. Objective Standard
  b. Subjective Standard
Breach of Duty
  b. Cause
    1) Proximate (legal) cause
    2) Causation
Damages (harm to plaintiff)
```

It's visually pleasing to see the Roman numerals lined up just so, but creating a superficial outline like this will not help you (1) learn the material in the deep sense required for the successful practice of law, or (2) review the material in preparation for your exam. Instead, you should create a useful, rich summary of the course in your own words as a way to master the body of law on which you will be tested. Only by reviewing all your readings and notes, organizing the information in them, and identifying the key points can you truly begin to “own” the information and to become fluent in this new legal language. Creating an outline is another way to reinforce and strengthen the tentative, newly-formed networks of neurons in your brain that represent your understanding of the material.

Think of outlines as something you DO, not objects that you HAVE. As Mr. Anderson put it so well in *The Paper Chase*, the value of an outline lies not in possessing a end product, but in having gone through the labor-intensive process of creating one. Because the work of creating the outline is what is most important, you may discover that you are less likely to do well if you use another student’s outline or a commercial course outline.

UW Law's rules about use of course outlines

Speaking of commercial outlines or other students’ outlines, you should be aware that many UW Law professors forbid you from using such materials while taking your exams. The UW Law Honor Code states that students must follow any restrictions set by their individual professors:

**Sec. 2-205.** A student may not use during an examination period materials not authorized by the instructor giving the examination. A student may not improperly use during an examination period materials authorized for limited use by the instructor giving the examination.

Here is one example of a professor’s specific restrictions, set forth on the first page of an exam (from a past exam given by Professor Lou Wolcher):

```
This is a limited open book examination: You may (and in the case of the casebook you should) bring with you and consult (a) the casebook, (b) the supplement, (c) class handouts, (d) class notes and outlines that you have personally prepared, and (e) a dictionary. You are not permitted to consult any other materials or resources.
```

(Emphasis added.) Therefore, not only will relying on another student’s outline or a commercial outline cheat you out of the mental exercise you’d gain by creating your own study materials, it may also violate our Honor Code. Carefully read any instructions provided by your professors regarding the types of materials you may use during an exam. A professor’s guidelines may change from year to
year, so do not rely on statements like the one above that are found on past exams in the UW's exam archive.

With those caveats in mind, sometimes it can be helpful and appropriate to look at another student's outline as a way to fill in gaps in your understanding or to seek inspiration for different ways to organize your material. UW Law's Student Bar Association maintains a small archive of past students' 1L outlines.

**When to create a course outline**

According to many students, the best time to begin creating a course outline is after approximately one month of the quarter has elapsed. After about four weeks, you should have enough notes and course materials to work with and you will have begun to develop a sense of the main topics covered by the course. For the remainder of the quarter, you may then find it helpful to schedule dedicated outlining time into your week on a regular basis, so that you will have most of it done by exam time. There is nothing worse than the feeling of panic that sets in when you’ve procrastinated until the week before the exam, so if you are diligent about your work now you can avoid that stressful situation.

**How to create a course outline**

To create a course outline, you may find it helpful to follow the basic steps listed below. (More detailed descriptions of these steps are available in **Dennis J. Tonsing, 1000 Days to the Bar, But the Practice of Law Begins Now 64–71 (2003).**)

- **Gather your materials.** Collect your casebook and any course supplements, your class notes, your case briefs, and any other commercial study aids you’ve found helpful.

- **Organize the subject matter.** Lawyers rely heavily on the categorization of claims, defenses, and legal principles. You can find the main categories of information covered in your course by reviewing your syllabus or the casebook’s table of contents. Once you have those main topical headings identified, divide them into further sub-headings as necessary to account for the complexity of the material. The Example Course Outlines and Study Materials page in this section of the guide contains a sample table of contents from a former student's Contracts outline, which shows how you might organize the main topics and sub-topics of an area of law.

- **Identify the fundamental rules and their elements.** Drawing from your casebook, class notes, and case briefs, identify the main legal principles for each heading or subheading category. You may find it helpful to refer to commercial outlines as you identify these “black-letter” laws. Next, identify the elements of each rule or principle: what specific elements must a plaintiff or defendant prove to prevail on this type of claim? The Example Course Outlines and Study Materials page in this section of the manual contains a sample page from a former student's Contracts outline, which shows the main rules or principles in bold, followed by explanatory notes.

- **Identify alternative or minority rules.** Remember, not every case in your case book represents the prevailing rule across the United States. Your casebook author or professor may have included a case that illustrates how a minority of jurisdictions deals with a particular type of claim, or the way courts used to handle claims in the past. Try to identify areas in which the law has forked into two or more directions or if there are interesting variations in the way courts handle certain cases.

- **Illustrate these principles with examples.** You can draw examples from significant hypothetical situations your professor discussed in class, and also from the significant cases addressed in class. Many students find that their outlines become burdensome if they insert case briefs verbatim into the outline; instead, you gain more practice with your developing legal skills if you take the time to distill the case down to its essential points. The Example Course Outlines and Study Materials page in this section of the manual contains a sample page from a former student's Contracts outline, which shows how short notes about the case book’s cases can be used to illustrate the way courts apply legal principles to various real-world situations.

- **Identify important policies.** Throughout the quarter, your professor has been alerting you to the underlying policies (judicial efficiency, finality, the competing desire by plaintiffs to get before a jury and by defendants to have cases dismissed early by judges as a matter of law, etc.) that animate the development and adoption of legal principles. Note any key policy reasons that support a change or extension of the law.

- **Format the outline to reflect a logical hierarchy.** Every student prefers to have an outline that looks a certain way on the page – no one method is correct. Some students use colored ink, some use numbered and lettered headings, some use different sized fonts, some like bullet points. Experiment until you find a method that works for you, but try not to spend a lot of time tinkering with the formatting – ultimately, it’s not a productive use of your time (although it is a good way to feel like you’re working hard, even though you’re procrastinating!).
Finally, consider how you will ultimately use your course outline, not just while studying from it but while actually taking your exam. You will be sitting at a table with your computer or pen and paper, exam to one side and allowed materials (case book, notes, outline) to the other. Your outline must be easy to flip through in the heat of battle during a timed exam. Many students put their outlines in three-ring binders, or a copy shop can bind the edges with a sturdy spiral or comb binding for a small fee. These methods make it easier for you to quickly flip through the outline. Many students advise that you avoid oversized clip binders, staples, or paperclips in the corner of an outline, as they easily pop off or wear out.

Another way to make your outline easy to navigate quickly is to include a table of contents in the front (see the example in the former student’s Contracts outline on the Example Course Outlines and Study Materials page in this section of the manual, which lists topics and the page numbers on which they appear), and to tab the key divisions of the outline along the top or right margin. The 3M company makes a variety of inexpensive but sturdy tabs under the Post-it brand that you can use to mark the main sections of the outline. During my 1L year, I (Prof. Kaltsounis) included cross-references in my outline to the corresponding pages of my notes and the case book (N24, C348), so I could quickly locate additional information on a topic.

How to create other study tools

In addition to or in lieu of an outline, many students have found the following types of course summary/study materials useful.

Pre-written answers

It’s perfectly acceptable to pre-write portions of your exam answers. How can you do this if you don’t yet know what the questions will be? Easy! Take a look at past exams and your syllabus. It’s a good bet that your professor will want to assess your understanding of each major concept, and you can figure out in advance what those are. For example, in a Civil Procedure course, you can pretty much guarantee that every professor will want to test if you know when a court can exercise personal jurisdiction over a party and subject matter jurisdiction over a claim. You can save yourself a lot of time on an exam if your outline contains a sketch or a fleshed-out sentence or paragraph that states the relevant rules for those concepts. Having portions of your outline written in a way that can be easily copied into your exam answer can save you valuable time. (Note that most professors do not allow you to "copy and paste" language from an electronic outline directly to a typewritten exam answer. You’ll need to retype any relevant passages from your printed outline into your exam answer. But you’ll have done the hard work of coming up with the right wording well before the exam, so you’ll be more familiar with the rule’s language and it will save you time to simply rewrite something you crafted earlier."

Flowcharts

If you are a visual learner, creating a flowchart is a wonderful way to study. Flowcharts can help you visualize the steps in an analysis or identify where the “issue-resolving questions” are located within a complex analysis. The Example Course Outlines and Study Materials page in this section of the manual contains an example of a torts flowchart from Dennis J. Tonsing, 1000 Days to the Bar But the Practice of Law Begins Now, 80 (2003). Also included is a sample chart about an area of constitutional law, which contains more detail and less “flow,” along with examples of a few other flowcharts created by former top student Caitlin Imaki (’11).

Here’s how to create a flowchart: First, brainstorm by creating a list of all the key words, phrases, and rules in a defined area of law. Second, group these terms into different sections or categories so similar concepts are grouped together. Third, figure out how the analysis “flows”—identify the relationship between the rules and then turn those relationships into issues and questions that lead logically from one to the next. Start charting the broadest concepts, adding more detail as you go. In most flowcharts, each major step or fork in the analysis is posed as a question. For lots of concrete examples of how you can use each of these steps in different courses, see Ruta K. Stropus and Charlotte D. Taylor, Bridging the Gap Between College and Law School: Strategies for Success, Ch. 6 (2001).

Checklists

Condensing a course into a one-page checklist is an excellent way to get a birds-eye view of an entire body of law, and it can help you review your exam answers to ensure you’ve covered all possible topics that could be implicated by the professor’s exam question. The Example Course Outlines and Study Materials page in this section of the guide contains a checklist of claims and defenses that Prof. Kaltsounis created for her final Torts exam during her 1L year. You can print out several copies of your checklists to bring to your exams; use them to write notes on while reading an exam question and to check that you have spotted all the possible issues.

Diagrams

Sometimes a set of legal principles can be best understood if presented in the form of a drawing or diagram. The Example Course Outlines and Study Materials page in this section of the guide contains a sample diagram from a popular commercial study aid (Joseph...
W. Glannon, Civil Procedure: Examples and Explanations (6th ed. 2008) that illustrates the “minimum contacts” rule for personal jurisdiction from the International Shoe case. You can create similar diagrams for other areas of law, and you may find this type of study tool especially useful in Civil Procedure I.

**What to do with these study materials after you make them**

Remember that your outline or other course summary is just a tool to help you do your best on the exam. The act of creating one helps you study and review, of course, but after it’s been created you should put it through one or more test drives before you actually sit for your real exam. Top students know that one of the secrets to success in law school is to gain as much practice as possible with the types of tasks you’ll be asked to do on a final exam. The UW School of Law maintains an extensive exam archive, including several with model answers. You should print out some practice exams and try taking a few, simulating exam conditions to the extent possible. I got over my test-taking anxiety as a 1L by going to campus in the evenings, sitting in an empty classroom, and taking practice exams with my in-progress draft outlines. This is a great way to evaluate whether your outline format will work for you in a real test situation; you may discover that a table of contents or some index tabs will help you navigate through it more quickly, or that a checklist will help you spot issues more thoroughly, or that pre-writing portions of predictable exam answers saves you a lot of time. You may also learn the value of keeping a watch handy and creating a schedule so you can pace yourself through several questions.

Students often complain that it’s hard to do a practice exam in the middle of the quarter, because they haven’t learned everything that was intended to be tested on a final exam from the archive. Those exams are still useful, though; you can try to spot as many issues as you’re aware of, and simply ignore the rest. Students are also often frustrated when an exam in the archive lacks a model answer. But you can discuss your practice answer with Professor Kaltsounis and learn whether your answer was well-organized and readable, whether it neglected to state the governing rule or was a little slim on analysis, and other general feedback. You can also send your practice answer to your professor in that class and ask to go over it during office hours, if you want substantive feedback about whether your analysis was accurate.
Example Course Outlines and Study Materials

The attached PDF contains the examples mentioned in the Studying for Exams page of this section. They include:

- Contracts Outline: Table of Contents
- Contracts Outline: Substantive Contents
- Flowchart Examples
- Diagram Example
- Checklist Example

Below are examples of the more elaborate flowcharts made by Caitlin Imaki ('11), using Microsoft PowerPoint, a program that makes it easy to create and adjust simple drawings and text:

- Can the State Do T...
- Admin Horizontal
You can use this space to store good examples of course outlines and other study aids that you find in the UW SBA's outline bank or that you receive from other students.

You can also use this space to take notes and record ideas during the Academic Support Program presentation on outlining and creating study aids.
Additional Resources - Studying for Exams

Websites

- UW SBA Outline Bank
  Outline Bank (UC Berkeley)
- Study Skills and Outlining Workshop Handout (Brooklyn)
- Outlining: An Introduction (UC Berkeley)
- Outlining: for Open-Book Exams (UC Berkeley)
- Outlining: For Closed-Book Exams (UC Berkeley)
- Do’s and Don’ts of Exam Preparation (Chicago-Kent)
- Creating an Outline (Suffolk)

The Law School Academic Success Project - Student Resources website contains two e-learning modules (podcast accompanying a slideshow) that addresses how to outline course materials. They were created by Laurie Zimet of Hastings College of Law:
  - Outlining Course Materials - The Essentials (18 minutes)
  - Outlining Course Materials - Practice Exercise (22 minutes)

Books

Dennis J. Tonsing, 1000 Days to the Bar But the Practice of Law Begins Now 59–81 (2003) (chapters on creating course outlines and flowcharts)

Herbert N. Ramy, Succeeding in Law School, Ch. 6 (creating a course outline) (2006)


Ruta K. Stropus and Charlotte D. Taylor, Bridging the Gap Between College and Law School: Strategies for Success, Ch. 5 (outlining), Ch. 6 (flowcharting) (2001).

Charles R Calleros, Law School Exams: Preparing and Writing to Win, Ch. 6 (outlining course material) (2007)

If you find a link that doesn't work or you want to suggest a resource to add here, please email Prof. Sarah Kaltsounis at sarahfk@uw.edu.
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| Order of Performance | 13 |

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IV. PERFORMANCE PROBLEMS AND EXCUSES

A. Introduction: Good Faith Performance

- Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. Restatement §205. A party may not purposefully do anything to prevent the other party from carrying out the agreement on his part. Patterson v. Meyerhofer (holding that prospective seller of property could enforce the contract against a buyer who purchased property to be sold out from under at auction and caused her to lose the benefit of the bargain).

- Conduct which merely frustrates but does not completely prevent performance is permitted. Iron Trade Products v. Wilkof Co. (holding that purchaser of rails could enforce contract against seller even though purchaser had driven up the price of rails through large purchases prior to the time of performance). Distinguish from Patterson because of the uniqueness of items to be sold. Courts are reluctant to let parties out of agreements unless there are extreme circumstances.

- Covenant of good faith and fair dealing extends to at-will employment contracts. An employee who is terminated in bad faith may be due damages for breach. Fortune v. National Cash Register (holding that salesman who claimed employer fired him under an at-will employment contract in order to deprive him of sales commissions he would have gotten if he stayed on could sue for breach of contract). See also Chambers v. Valley National Bank (holding that covenant of good faith and fair dealing protects an employee from a discharge based on the employer’s desire to avoid payment of benefits already earned by the employee, because the right to receive these benefits was a part of the employment agreement).

B. Express Conditions

Definition
A condition is an event, not certain to occur, which must occur, unless its performance is excused, before performance under the contract comes due. Restatement §224. No performance is due if there is any failure to satisfy the condition. Brown-Marx Assn. v. Emigrant Savings Bank (holding that bank had no obligation to loan developer money because he did not meet condition of loan, even though he was within $15,000 of the required 2.4 million appraisal amount).

Generally No Obligation to Satisfy a Condition
- Failure to satisfy a condition makes an agreement voidable, but does not allow for recovery of damages, because there is generally no obligation to satisfy a condition. Merritt Hill Vinyards Inc. v. Windy Heights Vinyards (holding that purchaser of vinyard could get deposit back after seller failed to satisfy a condition, but could not recover damages, because seller had no obligation to make attempts to satisfy the condition).

- Note: Court could have interpreted “unless” language as both a promise and a condition, in which case there would have been a claim for breach of promise and failure to satisfy a condition. In general, court is not going to imply a promise, even when the condition is under the control of one party.

Court may Imply a Promise to Satisfy a Condition
- Where there is a condition under the control of one of the parties, however, the court may imply a promise to use reasonable efforts to satisfy
Step one: Construct your flow chart as a series of questions. Why? This impels you to think like a lawyer.

This flow chart provides an example of how a flow chart may be constructed entirely of questions—which, when answered by a perceptive analysis of the facts presented in the hypothetical (examination question) will lead to resolution of the problem posed by your professor.

(This chart is illustrative only, and is not meant to represent a complete analysis of the tort of negligence. Your completed flow chart for this tort may cover several pages.)
Priv. and Imm. Clause

Art. 4, §2: "Citizens of each state shall be entitled to P and I of Citizens in the several states" Promotion of interstate harmony.

Intermediate Scrutiny Test:
1. Substantial reason for difference in treatment of citizens from non-citizens (i.e. non-cit is peculiar source of evil)
2. Less restrictive alternatives are considered
3. Protects only fundamental rights (private sect employment, not government employment)
4. Protects Citizens, not corporations

Hughes v. OK: statute prohibiting out of state fishermen struck (out of state not peculiar source of evil)

Camden: statute making contractors for city projects have 1% of in state workers struck (private emp)

Tomlin: higher licensing fees for comm. fisherman struck

Intermediate Scrutiny Test:
1. compelling state interest
2. narrowly tailored to ends
3. no less restrictive alternative BOP on gov't to show action is constitutional and no less restrictive alternatives.

FACIALLY DISCRIMIN.

Strict Scrutiny Test:
- Philadelphia: NJ tax on steel and safety grounds; ct found reasonable alternatives existed (uniform regulation) so law invalid
- Carbon: CT built waste transfer station and required all local waste producers to process waste at the site and pay fee. Ct found fac. disc. even though BOTH in state and out of state producers affected.
- Dean Miller: Ct or d says no milk can be sold in Mad unless produced within 5 miles, to ensure sanitary bottling. court held that this was fac. disc. even though in state producers harmed too, so applied SS test because or d was fac. disc. and found that reasonable non-discriminative alternative existed.

Market Participant

Proprietary: Alexxandra Soap: Ct upheld MD program which paid junkyards for in state junked cars but would not accept out of state junked cars.

Regulatory: Wurman: Ct struck Alaska contract with timber purchaser requiring purchaser to purchase timber in Alaska before leaving state.

FACIALLY NEUTRAL

Constitutional

Exxon: MD statute prohibited petroleum producers from running retail outlets in state; court upheld statute even though there were no in state petroleum producers (there were however out of state retailers). How are we to tell?

Cleverleaf: MD statute prohibited sale of milk in disposable plastic containers in state; although plastic resins used to make these is all made out of state and pulp industry is in state. Plastic will still be used in returnable bottles, pouches etc. and because out of state pulp prod will get some of ew business too. So burden not high, state interests legit (environment).

Barnwell: S.C statute barring heavy, wide trucks from state highways upheld because state concern was legit, and means was reasonably adapted to ends (safety) and statute was not discriminatory even though it burdened interstate commerce. State highways are a particularly local concern.

Unconstitutional

Hunt; NC statute requiring packages with only USDA approval held unconstitutional because although safety end is legitimate, statute placed a heavy burden on Washington apples, which were at a higher standard than USDA and was discriminatory in purpose and effect. There were also less discriminatory alternatives.

Kassel: Iowa law prohibiting double decker buses in state, with some exceptions held unconst. Court said safety benefit trivial compared to burden on Int. Com. Looked deeply into record, did not invalidate law because of intent alone.
From Joseph W. Glannon, Civil Procedure (3d ed. 1997)

Figure 1-1: The Shoe Spectrum

<table>
<thead>
<tr>
<th>Extent of Contacts</th>
<th>Jurisdictional Consequences</th>
</tr>
</thead>
<tbody>
<tr>
<td>No contacts</td>
<td>No jurisdiction</td>
</tr>
<tr>
<td>Casual or isolated</td>
<td>No jurisdiction</td>
</tr>
<tr>
<td>Single act</td>
<td>Specific jurisdiction</td>
</tr>
<tr>
<td>Continuous but limited</td>
<td>Specific jurisdiction</td>
</tr>
<tr>
<td></td>
<td>General jurisdiction</td>
</tr>
<tr>
<td>Increasing contacts</td>
<td>Substantial or pervasive</td>
</tr>
<tr>
<td>Decreasing contacts</td>
<td></td>
</tr>
<tr>
<td><strong>π’s Claims</strong></td>
<td><strong>Elements</strong></td>
</tr>
<tr>
<td>------------------</td>
<td>------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Negligence</td>
<td>Duty, breach, causation, damages</td>
</tr>
<tr>
<td>Battery</td>
<td>Intent, harmful or offensive contact to π’s “person”, direct or indirect contact</td>
</tr>
<tr>
<td>Assault</td>
<td>Intent, reasonable apprehension of imminent battery</td>
</tr>
<tr>
<td>False Imprisonment</td>
<td>Intent, restraint w/o justification, in bounded area</td>
</tr>
<tr>
<td>Trespass to Land</td>
<td>Intent to go on land, physical invasion of π’s land</td>
</tr>
<tr>
<td>Trespass to Chattels</td>
<td>Intent, minor interference, with π’s property</td>
</tr>
<tr>
<td>Conversion</td>
<td>Intent, substantial interference, with π’s property</td>
</tr>
<tr>
<td>IIMD (Outrage)</td>
<td>Intent, extreme or outrageous conduct, cause π to suffer severe emotional distress</td>
</tr>
<tr>
<td>NIMD</td>
<td>As above but no intent. Limits on mode of injury.</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Failure to Act</td>
<td>No general duty; if you have relationship to π or control risk.</td>
</tr>
<tr>
<td>Unborn children</td>
<td>Born alive, die later, claim for wrongful death</td>
</tr>
<tr>
<td>Strict liability – animals</td>
<td>Trespassing animal, owner SL; wild animal, owner SL; domestic, only if know of vicious propensitites.</td>
</tr>
<tr>
<td>Strict liability – ADA’s</td>
<td>Common usage, context</td>
</tr>
<tr>
<td>Product liability</td>
<td>Article placed on market, no inspection by buyer, has defect which causes harm.</td>
</tr>
</tbody>
</table>
Can the State Do That?

If NO, then question if the state's action is within their police powers, does it violate 13, 14, 15th amendments.

Could Congress Regulate this Activity under their Commerce Power? If Yes, Move Down

Has Congress expressly or impliedly Approved? If Yes, then state action may continue barring any other constitutional claim.

Has Congress expressly or impliedly Disapproved? If Yes, look at Preemption.

Can the State Do That?

Could Congress Regulate this Activity under their Commerce Power? If Yes, Move Down

Is this a Permissible Quarantine?

Philadelphia v. NJ majority factors to determine a quarantine include:
- Is the movement alone dangerous?
- Must the waste be disposed of immediately, as soon as possible and as close to the source as possible?
- Is the concern greater than economic/aesthetic issues?

Philadelphia v. NJ dissent
- Time lag should not make a difference if the [waste] is dangerous when accumulated.

If YES then the state may proceed unless barred by another reason under the constitution. (14th A equal protection or Article IV Privileges & Immunities)

Is the State a Market Participant?

• Usually key when a state/city owned business or program favors its own state/city (Camden) citizens.
• Answer may depend on if the government is a market participant or regulator. (Camden)
• Are restrictions placed on the initial disposition of goods, or do they affect people farther down the distribution chain? If Initial Only, then okay. If post purchase regulation, not okay - i.e. can’t regulate outside their market (Wunnicke)

If the quarantine is not permissible, If the state is not a market participant, then follow DORMANT COMMERCE CLAUSE ANALYSIS

Was the Law facially Discriminatory? (Granholm – wine; Philadelphia v. NJ – no solid waste import)

If the Law is NON-Facially Discriminatory, then was there surreptitious discrimination?

• Was there a protectionist purpose (like Kassel Iowa truck
• Was there actual substantial discriminatory impact? (Kassel)
• Carbone establishes a discriminatory principle that favoring one party at the expense of everyone else is discriminatory BUT SEE United Haulers that makes a distinction between private and public parties; if the single party is the government, then that is not discrimination

If PASS Balancing test, then the state may proceed unless barred by another reason under the constitution. (14th A equal protection or Article IV Privileges & Immunities)

If there is no discrimination at all, then use a straight BALANCING TEST

- Compare the burdens on commerce with how much the law actually achieves/advances a legitimate state purpose (a discriminatory purpose is not legitimate).
- Here we also look at other options, but just because there are some is not dispositive on the outcome.
- Judges may defer less to state policy compared with federal policy

STRICT SCRUTINY

The legislation is presumed invalid (Granholm – no out of state wine shipment) unless the state can prove that it acted to address a legitimate state purpose and that there was no other means to the end.
- Philadelphia v. NJ majority and dissent disagree over whether there is another means to the end.

If YES then the state may proceed unless barred by another reason under the constitution. (14th A equal protection or Article IV Privileges & Immunities)
Courts have read in a “general” procedural requirement under 706(2)(A) requiring Agency to provide an adequate record upon which the court can review its actions and determine if the Agency acted in an arbitrary & capricious manner.

Overton Park – Where Secretary of Transportation didn’t make any findings before approving a project, USSC remanded for him to make findings. Otherwise, how could a court tell whether the Secretary complied with statutory requirements? (Secretary's post-hoc rationalizations are inadequate.)

Pension Benefit Guaranty Corp – USSC reconciles Overton Park and Vermont Yankee (where USSC said that court’s can’t add procedures). The two cases are consistent because APA judicial review standard in 706 implies that Agency must provide at least enough information for court to review. (How can court do arbitrary/capricious review under APA unless it has some information to review?) However, courts cannot impose specific procedural requirements unless required by other sources (Constitution, statute, agency regulation).

If record is inadequate, courts generally remand to Agency to create a record.

Direct discovery of Agency decision-makers (i.e., depositions, etc.) is usually not allowed absent a showing of significant bias, bad faith, or improper influence. (Ex: Tummino – Court allowed Agency discovery where there was a strong showing of improper political influence.)
IS THE AGENCY EXEMPT FROM NOTICE & COMMENT PROCEDURES?

Two-Part Test for Substantive Rule
(USSC in American Mining)

A rule is substantive only if:
1. Congress delegated legislative authority to make the rule; and
2. The Agency intended to promulgate a legally binding rule.

Agency intent is indicated if:
• There is no basis for Agency enforcement without the rule;
• The rules is published in the CFR (not a factor anymore);
• The Agency explicitly invokes legislative authority;
• The rule is inconsistent with (overrides) a prior legislative rule. (Most arguable factor.)

Does the rule amend, or just clarify?
• A rule doesn’t amend just because it sets forth “crisper” or “sharper” lines. (Am. Mining)
• The use of numbers doesn’t automatically mean an amendment, but jumping from “secure containment” to “8-foot fence” isn’t interpretive. (Hoctor)

Substantive Rules Alter Primary Conduct.
(D.C. Circuit’s test from Hurson)

• Procedural rules cover agency action that don’t alter the primary rights or interests of parties, although they may alter the manner in which the parties present their viewpoints to the Agency (JEM Broadcasting)
• Procedural rules don’t alter substantive criteria, but just change the procedure for applying substantive standards. (National Whistleblower)
• Just because a rule has substantial impact doesn’t mean it’s substantive.
• Just because a rule is based on a value judgment doesn’t mean it’s substantive. Procedural rules can include procedural value judgments.

AG Manual Definitions:
• Interpretive Rule: Advises public on how agency interprets the statute. Clarifies—but doesn’t create—new law. Construes but doesn’t supplement.
• Statement of Policy: Advises prospectively on how the Agency plans to exercise its discretion; lists motivating factors.
• Questions to ask:
  • How much discretion is left, based on (1) the text of the rule and (2) Agency’s actual practice/treatment of the rule?
  • Does the rule include hedging language? (Ex: Obama’s policy on medical marijuana – “This guidance . . . does not “legalize” marijuana or provide a legal defense to a violation of federal law, nor is it intended to create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party or witness in any administrative, civil, or criminal matter.”)

Procedural rules cover agency action that don’t alter the primary rights or interests of parties, although they may alter the manner in which the parties present their viewpoints to the Agency (JEM Broadcasting). Procedural rules don’t alter substantive criteria, but just change the procedure for applying substantive standards. (National Whistleblower) Just because a rule has substantial impact doesn’t mean it’s substantive. Just because a rule is based on a value judgment doesn’t mean it’s substantive. Procedural rules can include procedural value judgments.
Taking Exams

If is difficult to generalize about the types of things professors are looking for in your final exams. Some professors like to focus on high-level policy issues and will expect you to discuss how broad legal doctrines have changed over time and why. Others like to focus less on the forest and more on the trees, so to speak; they will expect you to know details of the cases you've read and to identify holdings and rules very clearly. Some professors use traditional issue-spotting exams, while others use a mix of short-answer, essay, and multiple choice problems.

Your professor should tell you what type of exam you will have and what types of answers are expected; if he or she doesn't, ASK! It is perfectly okay to ask your professor early on, either in class or in office hours, to describe the type of exam he or she will give. You can also look at past exams from your professor in the UW’s exam archive. Another good source of information is the 2L/3L students who had your professor in the past.

The advice below is quite general and superficial, and I’ve written it that way deliberately; to truly prepare to do your best on exams, you should invest in (or check out from the library) one of the excellent, comprehensive books listed on the Additional Resources page in this section of the guide. A one-page handout of tips here is no substitute for your own deep reading and thinking about how you will be evaluated here and how you can best prepare for it. Please remember to defer to any specific advice a professor gives you about how to approach his or her exam, which takes precedence over any advice you learn in a book.

**Practical tips for preparing for exam day**

- Get enough rest the night before. Mom was right—8 hours really make a difference!
- Set a loud alarm (and maybe a backup) if you are a heavy sleeper.
- Mental activity requires lots of energy! Eat something before and during the exam so you can fuel your brain for the endurance event it is about to embark upon. Your brain runs exclusively on glucose from carbohydrates; brain cells cannot store glucose and they rely on your bloodstream to deliver a steady supply. Stock up before exam week on easy-to-carry snacks to bring with you (water bottles, granola bars, trail mix, apples, bananas, etc.). Avoid refined sugar and refined carbohydrates, which can cause your energy to crash; healthy whole foods are best.
- Double-check before you leave for campus: do you have your case book, course supplements, class notes, outline, laptop and/or exam booklets, a watch, storage device for computer-written exams (CD or thumb drive, plus a backup), and extra pens?
- Give yourself enough time to travel through traffic or bad weather to campus.
- Review the UW’s general academic policies on taking exams.
- If you will type your exam answer on a laptop, do a practice run with any required software programs. Practice printing your exam on a UW printer, and saving it to a CD or thumb drive. Make sure you bring backup supplies to write out your exam (an exam booklet called a "bluebook," available for purchase at the UW Bookstore and pens) in case of a computer malfunction. Review the UW’s policy for use of computers on exams.
- Relax! Take some deep breaths and do your best. That’s all you can ask of yourself.

**What to do when you first sit down to an exam**

You’ll have some time before the exam begins when you are not allowed to flip past the cover sheet. That’s a great time to read the cover sheet carefully. The cover sheet is a basic form that every professor customizes to reflect his or her specific restrictions or guidelines for your exam, so don’t fall into the trap of thinking that every cover sheet is the same. Note any restrictions on the types of outside materials you can use or the settings you must use on the UW’s exam software program.

One of the most important uses of those few minutes of pre-exam time is to set a schedule to allocate the time you’ll spend on each question. You can do this on a scratch sheet of paper while waiting for your exam to begin. First, take a look at the exam cover sheet. Ideally, it should tell you:

- How much time you are allowed to spend on the exam,
- How many questions the exam will contain, and
- How many points each question is worth.

With that information, you can estimate how much time you should spend on each question. Here is an example of how to do this calculation, based on an old Constitutional Law exam from Prof. Craig Allen:

- Starting time: 1:00 p.m.
Total Exam Time: 3 hours (180 minutes)
Four required questions, 2 optional (extra credit) questions
180 points total
- Question 1 = 30 points
- Question 2 = 50 points
- Question 3 = 50 points
- Question 4 = 50 points

You can see that Prof. Allen has made the number of points in the exam (180 points) match the number of minutes you've been allotted (180 minutes). This nice convenience makes your calculation easy:

- Question 1 = 30 minutes
- Question 2 = 50 minutes
- Question 3 = 50 minutes
- Question 4 = 50 minutes

If your professor uses a different point scale, you may need to do a little math or use a calculator to figure out how much time to spend on each question. Let's say these same four questions were worth 100 points total, with Question 1 worth 10 points, and Questions 2, 3, and 4 each worth 30 points. For Question 1, 10 points is 10% of 100 points. So you'd spend 10% of your 180 minutes (18 minutes) on Question 1. Questions 2, 3, and 4 are each worth 30% of 100 points. So you'd spend 30% of 180 minutes (54 minutes) on each of those questions.

Going back to our example from Prof. Allen's past exam, you can now translate those minutes into time on the clock. In our example, the exam began at 1:00. So at 1:30, after 30 minutes have elapsed, you'll need to move on from Question 1 if you want to reserve enough time to spend on the other questions. Here is the schedule you might sketch out for yourself:

- 1:00 – 1:30 Question 1
- 1:30 – 2:20 Question 2
- 2:20 – 3:10 Question 3
- 3:10 – 4:00 Question 4

You may realize midway through the exam that you'd rather deal with Question 3 first instead of Question 1, but then it will be easy to jot down some quick adjustments to your schedule. Remember too that these are rough guides — some questions make take more or less time than you have estimated. However, it's still useful to have a guide so you don't completely lose track of your time.

**Taking the exam**

Most students who do well on exams recommend spending about a quarter to a third of your allotted time reading a question and outlining an answer, reserving the remaining time for writing out your answer.

**Reading exam questions carefully**

When you are finally allowed to open your exam and see the questions, it can be tempting to read through the questions quickly and just begin writing the first ideas that pop into your head. This is a recipe for disaster. Instead, slow down and approach each question with deliberation.

One important thing to note about each question is the last line or two, which is known as the "call of the question." This is where your professor lays out the boundaries of what you should discuss. Sometimes a professor will pose a very narrow question: "Can Patty Plaintiff state any claims against Debbie Defendant, and are those claims likely to survive Debbie's motion for summary judgment?" Other questions will be quite broad: "Discuss all parties' possible claims and defenses against one another" or, simply, "Discuss." Sometimes your professor will lay out three hypothetical situations and ask you to choose one to discuss; if you skip over that direction, you'll do more work than you have to and will lose valuable time.

Many students find it helpful to skim through a question once, jotting down the main issues that jump out immediately. On a second, slower read-through, students will try to identify important facts, make more detailed notes, and perhaps compare the question against a checklist to make sure no issues have been overlooked.

**Organizing your answer**
After you spot the issues and have some idea of what your answer will entail, try to resist the temptation to just begin writing. Even with strict time limits, your time will be well spent if you write a very brief outline of your answer. This will help ensure that your written answer is easy for your professor to read, which makes it easier for your professor to locate your correct answers and give you points for them. Depending on what type of question or fact pattern you’ve been given, your answer can be organized by party, claim, or by other concepts. If you can, jot down the main issues, parties, claims, facts, and rules/authorities you will use. Then, it’s time for triage. Start by addressing all the main or most important issues, so you can get the maximum number of points possible. If you have time, you can then address minor or subsidiary issues. For example, in a Torts exam, don't spend 20 minutes describing every nuance of an obscure area of product liability and miss out on the points that you could have easily gotten on the basic negligence questions. Remember, your professor hopes to assess both the depth and the breadth of your knowledge.

**Writing your answer**

A strong exam answer will show that you can recognize legal issues, understand and articulate which legal rules apply, and analyze how those rules might apply to a set of facts. And bear in mind that your professor will not be able to spot all the brilliant things you write and award you credit for them unless you also make that information easy to read, through the judicious use of headings or textual emphasis like bold, italics, or underlining. Most professors award more points to your analysis than to merely spotting an issue and remembering what rule applies. Anyone can look up a rule in an outline or memorize a few phrases. Instead, your professors are looking for your ability to assess arguments and counterarguments. Though you must ultimately come to a conclusion, your professors often test on situations that will have good arguments on both sides; often, getting the correct conclusion is worth fewer points than having a thorough analysis that came before it. It’s a lot like elementary school mathematics class: teachers didn’t want you to simply write the correct answer to a long-division problem, they wanted you to "show your work" so they could assess how you reached your answer. The process was as important (or more important) than the answer.
Additional Resources - Taking Law School Exams

Websites

General exam advice

- The Basics of American Law Exams Handout (for international students) (Chicago-Kent)
- General Exam Tips (Suffolk)
- Organizing Your Answers (Suffolk)
- Taking a Law School Examination Handout (UC Berkeley)
- Exam Skills Handout (Brooklyn)
- Do's and Don'ts of Exam Taking (Chicago-Kent)
- Exam Prep Resources (Harvard)
- Writing Law Examinations (Yale)

CALI interactive lesson on Writing Better Law School Exams: The Importance of Structure (by the UW's own Prof. Bill Andersen)

Multiple choice exam advice

- Multiple Choice Exam Tips (Suffolk)
- Multiple-Choice Exam Strategies (Chicago-Kent)

Books


*** There is an excellent chapter at the end of this book with lots of example exam answers and critiques illustrating how a professor might grade them. Highly recommended! ***


Charles R. Calleros, Law School Exams: Preparing and Writing to Win (2007)


Herbert N. Ramy, Succeeding in Law School, Ch. XI (Law School Exams) (2006)

Michael Hunter Schwartz, Expert Learning for Law Students, Ch. 16 (Strategies for Preparing for and Taking Law School Exams) (2005)

Ruta K. Stropus and Charlotte D. Taylor, Bridging the Gap Between College and Law School: Strategies for Success, Ch. 7 (Law School Examinations) (2001)

If you find a link that doesn't work or you want to suggest a resource to add here, please email Prof. Sarah Kaltsounis at sarahfk@uw.edu.
You can use this space to store old exams and your practice answers.

You can also use this space to take notes and record ideas during the Academic Support Program presentation on exam-taking skills.
You may be ready to try some of the techniques in this guide or the other books and resources mentioned here. Maybe they’ll speed you up a little bit, or will help you understand what you’ve read a bit more. But there’s still so much to read every day! How can you fit it into your life without giving up time to relax with family and friends?

Here’s the best advice your professors can give you: **treat law school like it’s a full-time job**. Try to get up at the same time every morning and come to school. Use the time before and between classes during the day to do some reading. If you get done with classes early, head down to the library and get some work done before going home, because you’re more likely to do the work here than at your home with all its distractions. Make your reading time more enjoyable by getting together with friends who genuinely want to get some work done. Consider giving up your car and start taking the bus; you can use your commute time to read every day when you don’t have to pay attention to the road. Take a critical look at your weekly schedule and try to find small chunks of time that might be wasted throughout the day, and start trying to use them more efficiently. An hour here or there adds up, and before you know it you’ll have more free evenings or weekends to enjoy.

Most law schools recommend that you spend about 3 (some recommend 3.5 or 4) hours studying for each hour of class time. If you take a course load of 15 credits (15 hours per week of class time), that means spending about 45 hours per week of study time, for a total of 60 hours per week of class attendance and study time. That number may surprise you, but it is an amount of time many professionals spend working at full-time jobs each week.

One technique many law students find useful is to **create a study schedule**, a general one for each quarter or more detailed ones for each week. To figure out how to make the most of your available study time, first block out time each day for sleeping and getting ready, eating, socializing, commuting, exercising, attending class, participating in student group meetings, and any other commitments. The remaining time is the amount you have available to study during the week. Divide up that time to allocate it to your different classes – during some weeks a particular class may need more time devoted, like when a legal writing assignment is due or when you’re working on a group project or studying for a midterm exam. On your weekly calendar, block out that time and indicate what topics you’ll be studying then. Having a set “study date” with yourself on your calendar may make it more likely for you to keep on track. You are also welcome to meet with Prof. Sarah Kaltsounis to brainstorm ideas for making a livable, workable schedule.

**Websites**

- Weekly Schedule Planning Handout (UC Berkeley)
- Time Management (Suffolk)

**Books**

Dennis J. Tonsing, *1000 Days to the Bar But the Practice of Law Begins Now* 109-23 (2003) (contains a full chapter on time management, with detailed advice for creating a weekly study calendar)
Stress Management

The UW School of Law has an website of resources about how to handle stress and where/how to seek help. In addition to those outside resources, UW Law has a mental health professional on call. His name is Dr. Andy Benjamin, J.D., Ph.D., and he specializes in counseling for lawyers and law students. Dr. Benjamin has been to law school and has been in your shoes, so you will find him to be a helpful and understanding resource. You can meet with Dr. Benjamin by requesting a referral from Associate Dean of Students Mary Hotchkiss.

Websites

The Warning Signs of Stress (Suffolk)
Quick Relaxation Techniques (Suffolk)
A Breathing Relaxation Exercise - I Am Relaxed (Suffolk)

The Law School Academic Success Project - Student Resources website contains an e-learning module (podcast accompanying a slideshow) that addresses stress management. It was created by Marty Peters of Elon University School of Law.

Stress Basics: Understanding Stress to Craft Effective Interventions (37 minutes)

Books


Start of 1L Winter Quarter - Special Considerations

The start of Winter Quarter can be a difficult time for 1L students, because it’s when the first round of mid-term and final exam grades are released. While some of you will perform extremely well, others perform below their hopes or expectations. This is the time of year when many students begin stopping by their professors’ (and Legal Writing Fellows’, and Academic Support Program director’s, and SBA peer mentors’) office hours to discuss ways to improve their academic performance. This page of the guide addresses some of the most common reasons for less than stellar academic performance so you can get a head start on making changes.

Making changes

First and foremost, you must be willing to change your approach to law school if you expect to improve your performance. Too often, students continue their approach from Fall Quarter, which inevitably leads to similar disappointing results. Below are a few of the most common issues that may have to be addressed during Winter Quarter.

Resolve time-sapping obstacles

In some instances, lower grades can be attributed to factors outside of law school. Working long hours at a job (which the law school strongly discourages during the 1L year), a lengthy illness, or a bad roommate situation can all divert valuable time and energy that should be directed to your studies. Issues like these may have come up in the past, but law school is such a rigorous environment that you cannot afford too many distractions.

The most important thing you can do is address problems like these directly and immediately. If possible, reduce the number of hours you are working or get a new roommate (an illness is harder to resolve, but good basic self-care—adequate sleep, exercise, and nutrition—goes a long way). It may not be easy to address problems like these, but you must take the long view. You are here to receive a legal education and, eventually, to become a lawyer. Standards are high at the UW, and your professors will not be aware of your personal problems when they are grading your final exams anonymously.

Keep in mind that you are not alone. You can contact your SBA peer mentors, Associate Dean of Students Mary Hotchkiss, or you can access the law school’s counseling program (see additional information on the Stress Management page in this section of the guide).

Study more

One of the most common reasons for poor performance on law school examinations is devoting an insufficient amount of time to the study of law. It should take most students approximately 60 hours per week (including class time) to complete their studies. Take a look at your schedule from last quarter to see if you achieved this benchmark; often it is easy to overestimate the amount of time you are actually devoting to law school.

Please note that I am not accusing anyone of being lazy...in fact, most students spend more time on their studies here than they did in their undergraduate programs or even many graduate programs. However, while 40 hours per week devoted to your classes and studies might have guaranteed your valedictorian status in college, it places you behind in law school. Think of law school as your professional full-time job; get here at the same time every day instead of sleeping in, get work done in small increments of time throughout the day, and then you will have time to relax in the evenings.

Study differently

Whether or not you are spending enough time on your law school studies, many students need to reevaluate what they are actually doing with that time before and after class in order to adequately prepare for exams.

Reading and taking notes (briefing or other form) about the main cases for each class are certainly essential, but these pre-class tasks are only one part of your law school studies. Reviewing material after class is just as important to your ultimate success on exams. Necessary post-class work includes reviewing your notes, creating outlines or other course summaries, and practicing with sample exams and hypothetical questions.

This post-class review process helps you commit important ideas to memory on a rolling basis, as opposed to trying to memorize everything in a big lump at the end of quarter. In addition, an honest review of your notes can tell you how well you understood that day’s topic. If you do not understand Monday’s topic as well as you should, you are in no position to understand the material covered on Wednesday. And reviewing your notes is a necessary first step in creating an outline (where you try to fit the various topics covered in
class into a single coherent narrative).

Finally, the review process should include identifying the factual scenarios that might raise various legal issues. For example, every torts student knows that awareness of an “imminent” battery is part of the test for an assault, but knowing that definition only gets you so far (and may earn you few to no points on an exam). What goes into determining the “imminence” of a battery? Defendant’s physical proximity to the victim? Timing of the defendant’s actions? What kind of factual scenarios might a professor use to test your understanding of this concept? You should be playing with these ideas and factual scenarios that test your ability to analyze them well in advance of exam time. One of the best ways to work with legal ideas is to create your own hypotheticals and then try to solve them (or use high-quality commercial aids like the Examples and Explanations series). In addition, writing out answers (under real exam conditions!) to sample questions provided by your professors or purchased on your own will help prepare you for the stress of exams. This is the type of work that can often be done effectively with a study group.

Review your exams

Some professors review a midterm exam with the entire class. Typically, these reviews will consist of the professor discussing the various issues contained within the exam and providing students with a sample good (and possibly weak) answer. At first, you might fall into the trap of believing that you found all of the same issues in your exam answer and that your grade was a mistake. If you pay careful attention, however, you will notice that identifying most of the issues and correctly stating the law results in only a modest amount of points. What differentiates the best exam answers from all the rest is the strength of the legal analysis. Legal analysis requires you to identify and discuss which facts in the question raise particular legal issues, and then determine the likely outcome based on the information provided and the rules and cases you learned about in class.

If your professors offer an opportunity to meet and discuss your exam, take advantage of it. Even if a professor does not openly advertise individual meetings, most are more than happy to review an exam during regular office hours. However, be sure to prepare! Reread your examination answers, and the exam questions if they are available. Consider everything your professor had to say during the review session and have specific questions ready. Do not be defensive during your meeting with your professor, and don’t try to complain your way into a higher grade; be a sponge for information, listen carefully, and try to leave the meeting with a clear sense of the specific areas where you should work to improve.

Looking backwards or forwards

One of the more common questions 1Ls have in January about their two-quarter classes is whether they should spend time improving their outlines from last quarter or whether they should concentrate on the new material from winter quarter. The answer lies somewhere in the middle. While your final exams are likely to be cumulative in nature, your professor may cover more material during winter quarter than he or she did in the fall, because you are now gaining fluency in legal language, concepts, and procedure, and your professors do not need to spend as much time on basic background information. Therefore, the best use of your time may be to focus more on the material from winter quarter. However, you won’t be discarding your old outlines. In fact, you will be integrating new material into your existing outlines throughout winter quarter. This integration process, which is the essence of outlining, is essential to understanding the law.

Dealing with your first law school grades

Most students who enter law school are extremely high achievers who have never received a B-, much less a C or C-, in their academic lives. The reality of law school is that some students will receive grades they are unaccustomed to. Using a low grade to motivate yourself to do more or different types of studying is great. On occasion, though, a student might be so devastated by grades that they affect his or her ability to function in class.

Remember, your grades are simply a very narrow measure of how you performed during a few hours on few days of your life. Your grades do not define you as a human being. Students with B’s (or lower) on their transcript go on to graduate from law school, pass the bar exam, and have fantastic, fulfilling careers that benefit the communities they serve.

Instead of focusing on receiving straight-A grades (something that is not entirely within your control, since you are graded on a curve in comparison to how other students in your class did), focus on working up to your full potential. If you walk into your exams knowing that you have done everything in your power to succeed, then you must be satisfied with the results. While your personal best might not result in straight As on your transcript, it means you have given law school all you have to give and you can be proud of your performance.

Where to go for assistance
• **ASP Director** — To talk with Prof. Sarah Kaltsounis about study skills topics (evaluating your study habits and exam performance from last quarter, making the most of a meeting with your professors to discuss exams, incorporating outlining into your schedule, etc.), email sarahfk@uw.edu.

> Legal Writing Fellows — Every Legal Analysis, Research, and Writing class is paired with a 2L or 3L Legal Writing Fellow. These students were selected by faculty because of their excellent research and writing skills and their ability to work with 1Ls. If you are struggling in your LARW class and want to improve, your LWFs are available to meet with you to review and critique drafts, to work on practice memos or short writing exercises (Bryan Garner’s *Legal Writing in Plain English* has helpful exercises if you want to focus more attention on your writing), or even to give feedback on career-related writing like cover letters, resumes, writing samples.

• **Counseling Resources** — See the information on the Stress Management page of this section of the guide for more information.
Students with Disabilities - Special Considerations

Seeking accommodations

To seek an accommodation for a disability, contact Disability Resources for Students (DRS) at uwdss@u.washington.edu (phone: 206-543-2894, TTY: 206-543-8925). There is a two-step process for requesting accommodations:

1. You must submit documentation of your disability or disabilities from a qualified treatment provider. (There are several treatment providers in the Seattle area who specialize in learning disability assessment and evaluation; Stixrud Group and Family Psychological Services of Kirkland are examples.)

2. A DRS Counselor or Director will then interview you to determine your specific needs and appropriate accommodations.

The suggested accommodations will then be given to our Academic Services Office, which will work with you (and your professor(s), if necessary) to implement your accommodations.

Types of academic accommodations

Academic accommodations are determined for each student on an individual basis. Requested accommodations must be supported by the documented effects of your disability. Below are some common accommodations available through or provided by the UW's DRS:

- Accessible furniture in classrooms
- Alternative print format, i.e. audio, e-text, enlarged print, Braille
- Alternative testing services, e.g., additional time, scribes, use of computers
- Assistive listening devices
- Classroom relocations
- Culture course substitution for foreign language requirements
- Disability parking and/or campus shuttle service
- Early/priority registration
- Note-taking services
- Real-time captioning
- Sign language Interpreters

More information is available from the UW's Disability Resources for Students (DRS) Office.

Tips for requesting an accommodation

- Contact DRS before submitting documentation of your disability. DRS staff can tell you what kinds of records they need to help them identify your needs and reasonable accommodations.

- Do not wait until the end of the quarter right before exams; DRS needs some time to process your request.

- If your request is denied, but you believe you requested a reasonable accommodation, contact the UW School of Law's Disability Law Alliance (DLA) for resources to help you advocate for your needs. DLA is a registered student organization of law students with disabilities and their allies, working together on advocacy and education/awareness projects.

Websites

Information about Academic Accommodations for UW Students with Learning Disabilities
Information about Academic Accommodations for UW Students with Psychiatric Disabilities
Learning Disabilities Association of Washington
LDA-Washington's Referrals to local service providers
Disability Pride
List of Washington State disability resources
University of Washington DO-IT (Disabilities, Opportunities, Internetworking, and Technology)
Disability Rights Washington
Books

Leah M. Christensen, *Learning Outside the Box: A Handbook for Law Students Who Learn Differently* (2010) (highly recommended; this is the only book on the market geared toward law students with disabilities, and it was written by one of the leading scholars in this field)

Research references

Leah M. Christensen, *Legal Reading and Success in Law School: The Reading Strategies of Law Students With Attention Deficit Disorder (ADD)*, 12 The Scholar: St. Mary’s L. Rev. on Minority Issues 173 (2010)


If you find a link that doesn't work or you want to suggest a resource to add here, please email Prof. Sarah Kaltsounis at sarahfk@uw.edu.