

# LEGAL METHODS AND ARGUMENTATION

CLASS 5 – COMPLETING THE DRAFT OF THE OFFICE  
MEMO

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SEPTEMBER 20, 2018



# Drafting the heading

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To:        *[Name of requesting attorney]*

FROM:        *[Your name]*

DATE:        *[Date]*

RE:            *[Include client's name, the particular legal matter, and a phrase identifying the particular issue]*

# Drafting the question presented

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Format 1: Can Carrollton enforce the Watson covenant-not to compete when the covenant prohibits Watson from making sales contacts for three years and applies to the three counties closest to Carrollton's headquarters?

Format 2: Whether Carrollton can enforce the Watson covenant-not to compete when the covenant prohibits Watson from making sales contacts for three years and applies to the three counties closest to Carrollton's headquarters.

Format 3: Under the Georgia common law rule that allows covenants-not-to-compete only when the area restrained, the activities restrained, and the duration of the restraint are reasonable, can a covenant-not-to-compete be enforced when the covenant prohibits the covenantor from (1) making sales contacts, (2) for three years, and (3) applies to the three counties closest to the headquarters of the covenant's beneficiary? – (generic)

# Drafting the brief answer

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Probably yes. A covenant-not-to-compete is enforceable under Georgia law if the activity restrained, the geographic area of the restraint, and the duration of the restraint are all reasonable. Several Georgia courts have held that covenants restraining *sales contacts* are nearly always reasonable as to the activity restrained. Georgia courts have also held covenants reasonable when the *duration of the restraint was up to three years* and when the *area restrained included up to ten counties*.

# Drafting the fact statement

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Primary tasks are:

1. selecting which facts to include
  - legally significant facts
  - contextual facts
2. organizing those facts in an effective way
  - chronological
  - topical
  - combination of both
3. remembering your predictive role

# Drafting the conclusion

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- Ties together and summarizes the Discussion
- Increases reader's options for deciding how much attention to invest in understanding the details of the analysis

# Citation in legal writing

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Use citations:

1. When you assert a legal principle
  - Intent is a required element of the Plaintiff's claim. [citation]
2. When you refer to or describe the content of an authority
  - In an earlier opinion, the court had held that intent was irrelevant. [citation]
3. When you quote

# Citation sentences versus citation clauses

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## ***Citation clauses***

The Supreme Court has observed that employers and unions must have significant freedom in the creation of seniority systems, *California Brewers Assn. v. Bryant*, 444 U.S. 598, 608 (1980), but this freedom is not unlimited, see, e.g., *Nashville Gas Co. v. Satty*, 434 U.S. 136, 141 (1977).

## ***Citation sentences***

The Supreme Court has observed that employers and unions must have significant freedom in the creation of seniority systems. *California Brewers Assn. v. Bryant*, 444 U.S. 598, 608 (1980).

# Basic components of a citation to a case

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1. Case name
2. Case's location:
  - a) Volume
  - b) Abbreviation for name of reporter
  - c) Page where the case begins
  - d) Page where the cited material appears
3. Court abbreviation
4. Year

## State Court Example

*Watzek v. Walker*, 485 P.2d 3, 6 (Ariz. Ct. App. 1971)

## Federal Court Example

*Staron v. McDonalds Corp.*, 51 F.3d 353, 357 (2d Cir. 1995)

# Basic components of a citation to a statute

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1. Title number (if the code uses title numbers)
2. Abbreviation for name of code
3. Section number
4. Year the code was published

## Example

11 U.S.C. 523 (1994).

\*United States Code – compilation of federal statutes

# Basic components of a citation to a book

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1. Author's name(s)
2. Title of book
3. Volume number, if any
4. Section, paragraph, or page number
5. Edition number, if more than one
6. Publisher
7. Year

## Example

Richard H. Chused, *A Property Anthology* 149 (2d ed., Anderson 1997).

# Citing with style and grace

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## *Compare*

A majority of the Court in *General Electrics Company v. Gilbert*, 429 U.S. 125, 136 (1976), followed *Geduldig v. Aiello*, 417 U.S. 484 (1974), and held that pregnancy classifications were not gender classifications.

and

In *General Electrics Company v. Gilbert*, 429 U.S. 125, 136 (1976) (following *Geduldig v. Aiello*, 417 U.S. 484 (1974)), a majority of the Court held that pregnancy classifications were not gender classifications.

and

In 1974, a majority of the Court held that pregnancy classifications were not gender classifications. *General Electrics Company v. Gilbert*, 429 U.S. 125, 136 (1976) (following *Geduldig v. Aiello*, 417 U.S. 484 (1974)).

# *Short citations*

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Once you have provided one full citation to an authority, you may use “short form” citations in later citations to the same authority, so long as:

1. It will be clear to the reader from the short form what is being referenced.
2. The earlier full citation falls in the same general discussion.
3. The reader will have little trouble quickly locating the first citation.

## *Example*

**“*Id.*”** is the short form used to refer to the immediately preceding citation.\* - may only be used when the preceding citation cites to only one source.

\*To refer to a different page or footnote within the immediately preceding authority, add “at” and the new pincite.

# When to quote?

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1. Quote when the issue will turn on the interpretation of particular words of a statute, rule, or key case. Limit the quotation to those particular words so your reader will understand the issue and your analysis of it.
2. Quote key language from an authority with a great deal of precedential value.
3. Quote key language when the author has found a particularly effective way to express the idea you want to convey.

# The mechanics of quoting

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1. Fifty and more words – indented from both sides, single-spaced
2. Less than fifty words – enclosed within quotation marks
3. Place end punctuation within the quotation marks if it is part of the material you are quoting. For added punctuation, place commas and periods inside the quotation marks, but place other added punctuation outside the quotation marks.
4. Show changes in the quotation by using brackets and ellipses.
5. Use a parenthetical clause after the citation to signal citations or footnotes you have omitted from inside the quotation or to signal emphasis you have added or deleted:
  - (citations omitted, emphasis added)

# Professional tone and level of formality

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Legal writing calls for the degree of formality appropriate for traditional business and professional writing.

Avoid using contractions (won't, doesn't), slash constructions (either/or) and abbreviations (etc.):

...The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and ***other incapacity to work***...

(excerpt from Article 11 of the Convention on the Elimination of All Forms of Discrimination against Women)

# Legal usage and customs

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Some of the most common legal usage questions:

1. Courts “find” facts and “hold” rules.

The court *found* that the officer had not advised the defendant of his right to remain silent.

The court *held* that the failure to advise the defendant of his right to remain silent violated the defendant’s Constitutional rights.

2. The verb “held” must be reserved for the court’s holding. When describing dicta, we use “observed” or “stated.”

# Legal usage and customs

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3. Capitalize court when referring to a particular court in full or when referring to the United States Supreme Court.
4. Capitalize a party's procedural designation when referring to the particular parties of your case, but not when referring to a party in another case.
5. When referring to legal materials, use "in which" rather than "where."
6. It is customary to refer to judges as "the court."
7. A criminal defendant may "be found guilty" or may "be convicted" of a crime. In civil litigation, the comparable term is "liable".

...was convicted of murder

...was held liable for \$50,000

# Focusing on strong subjects and verbs

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1. Passive voice vs. Active voice: writing in active voice helps write clearly and is more forceful.

## *Using Passive*

Use passive voice when the law is the actor.

*Example: If you do not pay the royalty on your mineral production, your lease will be terminated.*

# Focusing on strong subjects and verbs

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2. The second technique for focusing on strong subjects and verbs is to *avoid nominalizations* (nouns that began life as a verb).

enter into an agreement – agree

contains a provision – provides

have a collision – collide

give consideration to – consider

make an assumption – assume

effect a termination - terminate

places emphasis on – emphasizes

had knowledge that – knew

# Focusing on strong subjects and verbs

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## 3. Avoid throat-clearing!

*It is interesting to note that ...*

*It is important to remember that ...*

*It seems that ...*

*It is clear (or obvious) that ...*

*It is widely understood that ...*

*As noted above ...*

# Focusing on strong subjects and verbs

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4. Placement of modifying phrases: Keep the subject and verb close together (not at the expense of clarity).

Example: If any member of the board retires, the company, at the discretion of the board, and after notice from the chairman of the board to all the members of the board at least 30 days before executing this option, may buy, and the retiring member must sell, the member's interest in the company.

5. Avoid beginning sentences with forms of “it is” or “there is.”

# Avoid wordiness

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Watch for phrases that can be replaced by a single word:

at the time when – when

for a period of one week – for one week

for the purpose of – to

for these reasons – therefore

inasmuch as – since

due to the fact that - because

it was formerly the case that – formerly, previously

by reason of the fact that – because

# Avoid wordiness

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## Avoid matched pairs!

<i>full and complete</i>	<i>alter and change</i>
<i>true and correct</i>	<i>bind and oblige</i>
<i>covenant and agree</i>	<i>cease and desist</i>
<i>each and every</i>	<i>stipulate and agree</i>

## Avoid redundancies!

<i>advance planning</i>	<i>past experience</i>
<i>final outcome</i>	<i>point in time</i>
<i>first and foremost</i>	<i>reason is because</i>
<i>honest truth</i>	<i>whether or not</i>

# Avoid wordiness

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## Avoid intensifiers!

<i>clearly</i>	<i>very</i>
<i>extremely</i>	<i>quite</i>
<i>obviously</i>	

## Avoid unnecessary qualifiers!

<i>“hopefully”</i>	<i>probably</i>
<i>in my opinion</i>	<i>rather</i>
<i>maybe</i>	<i>somewhat</i>
<i>perhaps</i>	

# Exercise 3. Reconciling Opinions

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*Bell v. Grackin* (1959)

Rule: The doctrine underlying the attractive nuisance cases applies only where **the instrument or artificial condition** is within itself **inherently dangerous** even while being used properly.

*Andersonville v. Goodden* (1961)

Rule: The attractive nuisance doctrine is applicable to situations in which the **dangerous instrument** is found to be one of **actual and compelling attraction** for children.

# Exercise 3. Reconciling Opinions

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*Newcomb v. Roberts* (1982)

Rule: A landowner is liable for physical harm to trespassing children by an artificial condition (1) if the place where the condition exists is one upon which the possessor **knows or has reason to know** that **children are likely to trespass**; (2) if the **risk** posed by the condition is one that children, because of their youth, will **not realize**; *and* (3) if the landowner **fails to exercise reasonable care** to eliminate the danger or otherwise protect the children.

# Exercise 3. Reconciling Opinions

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*McDaniels v. Lanier* (1987)

An owner is liable under the doctrine of attractive nuisance for injuries sustained by a child (1) if he has **reason to know that children are likely to trespass**; (2) if the **risk** is one that children **will not appreciate**; and (3) if the owner has **failed to exercise reasonable care** to protect the child, *except for cases* where the condition causing the injury is a naturally occurring condition rather than an artificial condition.