U.S. LEGAL WRITING

Writing for Exams and Memos

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Why Are We Here?

1. **Writing a U.S.-style legal analysis – including issue-spotter exams & memos – is a special skill.**
   - It is a separate skill from "getting the right answer," and it has nothing to do with language fluency.

2. **Learning this will improve your grades.**
   - **Directly:** Examiners can't reward what they do not see. "The answer" isn't enough!
   - **Indirectly:** Shows sophistication & encourages the benefit of the doubt.

3. **I think it increases success (in school and practice) more than any other learnable thing.**
   - **Law school:** force multiplier in exams. My rough guess: 0-2 half-steps.
   - **Getting and doing a legal job:** US employers, and some others, demand and reward this skill.

I'm here as: (1) an NYU law prof; (2) a former LLM (Harvard '07) who Americanized; (3) and a former legal writing teacher.

Disclaimer!

People disagree, often reasonably. Law school and the legal profession are composed of individual humans with their own views about all this stuff. Courses, exams, expectations, and humans all differ widely.

What follows is general advice from a personal perspective. So what I tell you today may or may not be consistent with what you hear from other profs, supervisors, books, etc. No doubt some would disagree!

Everything here is subject to course-specific instructions, which may differ.

What We Will Cover

1. The Big Picture: Legal Reasoning
2. Presenting a Legal Analysis on Paper
    a. Where People Go Wrong
    b. Spotting the Issues
    c. Basic CRuPAC
    d. Beyond the Basics
    e. Using Cases


The Big Picture:
Legal Reasoning

The Big Picture: Legal Reasoning

1. Many of us were initially trained to think of legal questions as having a single "correct" answer that follows deductively from a set of coherent principles.
2. But it is often helpful to think about US-style legal reasoning in a different way: as a **system of better or worse arguments and reasons, not right or wrong answers**.
3. **This doesn't mean nihilism!**
    - For some purposes we may want to make things sound easy and binary (e.g., in advocacy; or when dealing with genuinely easy issues)
    - And in presenting our conclusions we will take a bottom-line view about what answer is "better." (Avoid aimless "on the one hand X, on the other hand Y"!)
4. But it may help to realize that there's often **no single right answer**. You are (often) being judged on the quality of your reasoning, not the bottom line.

The Big Picture: Legal Reasoning

1. **You may find US legal style more tractable if you think of it as an art of good arguments and good reasons, not a science of correct answers. This is liberating!**
2. **In any analysis problem, most credit is likely to be available for some combination of:**
    1. **Issue spotting.** Understand what legally salient issues are raised by a problem.
    2. **Rule statement.** Understand what legal tests ("elements") will determine each issue.
        - The rule may be found in one easy place, or you may have to "synthesize" it from cases.
    3. **Rule application.** For each element, explain whether it is satisfied, in terms of affirmative and explicit reasons of your own. The application of the rule should reflect its nature and purpose.
        - This will often involve factual comparisons to key previous cases, explaining why similarities and differences are relevant given the nature and purpose of the rule.
    4. **Counter-arguments.** Address any important counter-arguments (including adverse cases) head-on: show that they are not good reasons or that they are outweighed by other considerations.

You will take a position on which view is better, say why (with as much specificity as possible), acknowledge any strong counterarguments, and say why they don't prevail.

Common Mistakes

Common Mistakes

1. **Fail to spot issues.** If you don't see an issue or how a fact might be used, you can't get credit for it.
   - For EACH fact, ask yourself: why is this fact in here? What did I learn that it relates to?
2. **Terrible structure!** A confused structure = confusion for both writer and reader.
   - Starting in the middle rather than in a logical order (this fuels problem 1)
   - Talking only about the "most interesting" issue and ignoring the rest
   - Massive run-on paragraphs that blur together separate issues.
3. **Garbled or inaccurate rule statements.**
4. **Unreasoned arguments on rule-application (the "because clause" is weak or missing).**
5. **Poor or thin use of cases.**

Spotting the Issues

Spotting the Issues

1. **Spot the big questions that your problem raises and separate them clearly (*e.g.*, subtitles).**
2. **In general, address each relevant issue with a crisp and concise discussion.**
   - **In general, do this for <u>each issue where you think the reader will value (and credit) you having considered it</u>, even if the answer is no liability or a defense doesn't apply.**
     - E.g.: suppose a fact pattern comes close to meeting the criteria for some special legal treatment (e.g., a violation, a defense, or a special analytical category). But you analyze it and conclude that the facts don't quite satisfy the test.
     - **Do not leave this off the page!** State the issue and give it the CRuPAC treatment.
   - **Obviously this is a judgment call. Don't follow every speculative red herring; but also don't forget that <u>you cannot get any credit for what you don't write down on the exam</u>.**
     - If you don't mention the issue above, the reader doesn't know whether you considered it and correctly concluded that it doesn't apply, or whether you missed it completely.
     - **Remember that more credit is usually available for good reasons than for correct answers.**


CRuPAC

Meet CRuPAC

1. **For each issue:**
    1. State your **Conclusion** up front to orient the reader.
    2. State the **Rule** including all elements and any elaborations of the rule.
    3. Identify "**Proof**" of the rule (i.e., identify support for your view about what the rule is).
    4. State, starting with the strongest or most important, your arguments about **Application** of the rule.
        - **"Because" is the most important word here. And compare to other cases.**
        - After you have set out your own view, tackle any prominent counter-arguments.
    5. (Optionally restate your **Conclusion** at the end if you like / if helpful for clarity.)

One CRuPAC per issue.

This structure may occupy one paragraph or many.

You will need to use judgment to decide the level of generality at which to use this lens.

Basic CRuPAC

Conclusion

Rule

Under Tennessee law, Ms. Swift is guilty of murder. Tennessee law defines the offense of murder as the intentional killing of another person. *State v. Cash*, 43 S.W.3d 185, 191 (Tenn. 1953). Here, the evidence at trial showed that Ms. Swift planned and executed an elaborate plan to kill Mr. Victim and dispose of his body. *See, e.g.*, Tr. 12-90. Under cross examination, Ms. Swift admitted doing so, repeatedly (and [illegible]y) asserting "no body, no crime." Tr. 34-36. Ms. Swift argues that the absence of a body precludes criminal liability, but the physical availability of the deceased victim's body is not an element of murder in Tennessee law. *See, e.g.*, *State v. Evil*, 54 S.W.3d 32, 35 (Tenn. 2000) (sustaining murder conviction in the absence of a body when evidence showed a victim had been eaten by an alligator as part of an evil plan). As a result, Ms. Swift is guilty of murder under Tennessee law.

Proof

Application

Conclusion

Counterargument

(This excerpt uses full, correctly formatted citations: that is standard for a memo, not an exam! Law profs differ about citation expectations: usually a case name is enough! Check w your prof if needed.)

Basic CRuPAC

Here is a brief and imperfect CRuPAC. Can you reassemble it? (See handout.)

A. Here, the evidence at trial showed that Mr. Lasso maintained a firmly optimistic demeanor over a period of more than a year in his workplace and during multiple press conferences. *See*, *e.g.*, Tr. 123–28.

B. English courts have held defendants liable for similarly annoyingly cheerful utterances (*see*, *e.g.*, *R. v. Dory*, 89 A.C. 45 (2003) ("Just keep swimming."); *R. v. Flanders*, 23 A.C. 34 (1989) ("okeley dokeley"))).

C. As a result, Mr. Lasso is guilty of excessive cheerfulness under English law.

D. Whether an expression is "unreasonable" is assessed in light of the contemporaneous practices and expectations of a reasonable English person. *R. v. Gradgrind*, 16 A.C. 22, 45 (1854).

E. *R. v. Fotherington-Smythe*, 12 A.C. 34, 56 (1702).

F. Under English law, Mr. Lasso is guilty of excessive cheerfulness.

G. English law defines the offense of excessive cheerfulness as the unreasonably repeated or intense public expression of positive emotions.

H. On at least one occasion, he was heard to utter the phrase "Knock-a-doodle-doo!" to an adult human. Tr. 392.

Basic CRuPAC

Here it is back together.

Under English law, Mr. Lasso is guilty of excessive cheerfulness.

English law defines the offense of excessive cheerfulness as the unreasonably repeated or intense public expression of positive emotions. *R. v. Fotherington-Smythe*, 12 A.C. 34, 56 (1702). Whether an expression is "unreasonable" is assessed in light of the contemporaneous practices and expectations of a reasonable English person. *R. v. Gradgrind*, 16 A.C. 22, 45 (1854).

Here, the evidence at trial showed that Mr. Lasso maintained a firmly optimistic demeanor over a period of more than a year in his workplace and during multiple press conferences. *See, e.g.*, Tr. 123–28. On at least one occasion, he was heard to utter the phrase "Knock-a-doodle-doo!" to an adult human. Tr. 392. English courts have held defendants liable for similarly annoyingly cheerful utterances (*see, e.g.*, *R. v. Dory*, 89 A.C. 45 (2003) ("Just keep swimming."); *R. v. Flanders*, 23 A.C. 34 (1989) ("okeley dokeley")). As a result, Mr. Lasso is guilty of excessive cheerfulness under English law.

Conclusion

Rule (with some elaboration)

Proof of rule

Application (note comparison to the facts of previous cases)

Conclusion

F G E D A H B C

Beyond the Basics

Advanced Rule and Proof Work

1. **Not always just one.** May need to explain multiple rules / elaborations / exceptions (RuP1, RuP2, etc.).
2. **Not always brief.** May need some detailed explanation, if your rule-statement (or your view about what the rule "really" is) is non-obvious.
3. **Ask what your reader is looking for.** Figure out what is necessary to support your view of the rule.

    a. Your proof might be a **simple citation** if the rule is obvious (just stating the case name is usually enough for most law school exams) or a **detailed explanation** of why your proposed rule is the best way to understand a statute or a mess of cases.

    b. For some classes / profs, there is no need to cite anything, just state the rule correctly.

Some profs expect you to know case names and cite them in exams; some profs do not expect this but will reward it; others do not care and do not reward it at all. If in doubt, ask.

Example Rule & Proof from Real Exam

MARKET DEFINITION

Where is the Proof?

There are several candidate markets here. The two methods of defining a market are the quantitative HMT, which asks if a hypothetical monopolist in the candidate market could raise prices by ≥5% on one of the products owned by the merging firms (HMGs § 4.1.2), and the qualitative *Brown Shoe* test, which sets the outer boundaries of the market according to "reasonable interchangeability." In practice, courts often mix the methods (HRB) as the same evidence (e.g., natural experiments, distinct customers, peculiar product characteristics/uses) inform both analyses.

Advanced Application

1. **Often crucial.** This is where you show **why** your conclusion is the better view.
   - **Lots of exam credit is often won or lost here.**

2. **You will often have multiple separate arguments here.** May need multiple arguments to support your conclusion (A1, A2, etc.); may need to separately analyze individual elements (A1, A2).

3. **Use paragraph breaks and thesis sentences.** Generally, give each argument a separate paragraph, starting with a crisp thesis sentence that expresses your point briefly (*e.g.*, "First, the practice is anticompetitive because it increases prices."). And then explain as concisely as you can each reason WHY the rule is or is not satisfied. **The "because clause" is your friend.**

4. **Read the fact pattern carefully and make sure you get all the juice out.** Some facts may be red herrings, but many are there because they imply one answer or the other. When you use a fact correctly, you earn credit!

5. **Counterarguments.** After setting out your affirmative view, tackle only strong counterarguments. Take them head-on, acknowledging the relevant facts, and explain why you go the other way.

Extract from Real Exam

What would make this argument on application better?

As a preliminary matter, all markets should be confined within the boundaries of Staughton. The fact that the nearest down is 90 minutes away by car strongly suggests that residents would strongly prefer to not travel from inside the market to buy games outside, or vice versa with respect to nonresidents, satisfying even the conservative Elzinger-Hogarty test. See Penn State Hershey.

Extract from Real Exam

HMGs § 9 consider entry as vitiating anticompetitive risks of a merger if it is timely (rapid enough to make a SSNIP unprofitable), likely (profitable), and sufficient (must replicate the scale/strength of one of the merging firms). We have no information on potential entry outside of A, C, and D, which would have to be the theory for entry into the general board game market (A/C/D have already entered). Arguing that "Amazon is coming" probably wouldn't be helpful, as courts are rightly skeptical of fetishizing the entry of big tech. Compare Staples II with Google/Admob. Within A, C, and D, it's possible that A and/or D might want to enter the video game space or cafe space in the event of price increases (see potential competition discussion). But considering that D entered just a year ago and has already "established a great reputation," sufficiently scaled entry could at least be accomplished within less than 3 years ("timely" in Staples II). Likelihood is more problematic--we have little information to work with.

What elements of CRuPAC do you see here?

What would make this better?

Extract from Real Exam

What would make this better?

We can argue that E is a failing firm, but this would almost definitely fail. The HMGs § 11 reserve this for "extreme" scenarios. Among other things (unable to meet financial obligations, can't continue business after reorganizing), we would have to show that E has made a good-faith effort to find a less anticompetitive buyer, which we have no indication that E has done.

Analogy is Critical

A central part of rule Application (and a KEY source of exam credit) is Analogical reasoning.

1. **Analogize to previous cases.** Applying a rule to facts often centrally involves comparing your case to what other courts did with other facts, and showing why the same (or a different) legal outcome is appropriate in your case.
2. **Multiple cases.** In practice you will usually have multiple cases to work with, and you must explain why your case is more like *A* than *B*. Make an argument about similarity or difference grounded in the purpose of the rule.
3. ****The facts are critical**.** A common mistake is to focus your arguments on the rule statement and to forget the facts of previous cases. Say which facts matter and why.
4. **A good rule statement is half the battle.** Rule statements are just as important.

So let's talk about cases.


Using
Cases

Dealing with Previous Cases

A judge confronted with a previous decision asks something like the following.

Is it on point?
Does the previous decision seem to deal with a point or issue or rule that I need to decide in the case before me?

NO → It's not "on point" so I don't have to worry about it.

YES ↓

Is it from a court I am bound to follow?

NO → At most, the previous decision is "persuasive" authority – I <u>might choose to deal with it</u> (*i.e.*, discuss it) but I don't formally have to.

YES ↓

Is it actually binding on <u>this</u> point? (See next page)

NO → At most, the previous decision is "persuasive" authority – I <u>might choose to deal with it</u> (*i.e.*, discuss it) but I don't formally have to.

YES ↓

So now I know that there's a <u>binding authority</u> that deals with one of the issues in my case. I have to **follow it** (do what the court did in the previous decision) or **distinguish it** (explain why the case before me is on the other side of the line from the previous decision). = *do here what the other court did, <u>or</u> explain why it's consistent to do something else here*

Is It Binding On This Point?

If we have got an earlier case that is from a court that binds our judge, when is that specific decision not actually binding in our case? We might offer any of at least four reasons (in roughly descending order of strength):

1. **Earlier decision has been "overruled."** This means that the earlier case has been totally nullified as precedent and is generally worthless as authority (it is "no longer good law"); but note that a decision may be overruled on some points only and left intact on others.
2. **There is another binding authority that directly conflicts with the first binding authority *and is superior to it!*** But first make very sure that they cannot be "reconciled" (*i.e.*, made compatible because of some relevant difference between them).
3. **Holding v. dicta.** Sometimes scholars or courts will dismiss as "**dicta**" (= non-binding commentary) text in an opinion that is not necessary to the outcome of the case. The further the text is from what the first court was required to decide (*i.e.*, outcome and necessary reasoning), the better the argument that it's "mere dicta." Use with caution!
4. **Earlier decision very *very* old (*i.e.*, 75 years+ and, ideally, heavily criticized in the meantime by appellate courts).** Even this is generally not enough (*stare decisis*); something fundamentally important must have changed in the meantime. But in rare cases one can succeed with an argument like this ("It wouldn't be followed today because…"). Very great caution.

If it's from a court that binds you AND it's binding on this point, you must follow or distinguish the earlier case. This is where rules and analogies come in.

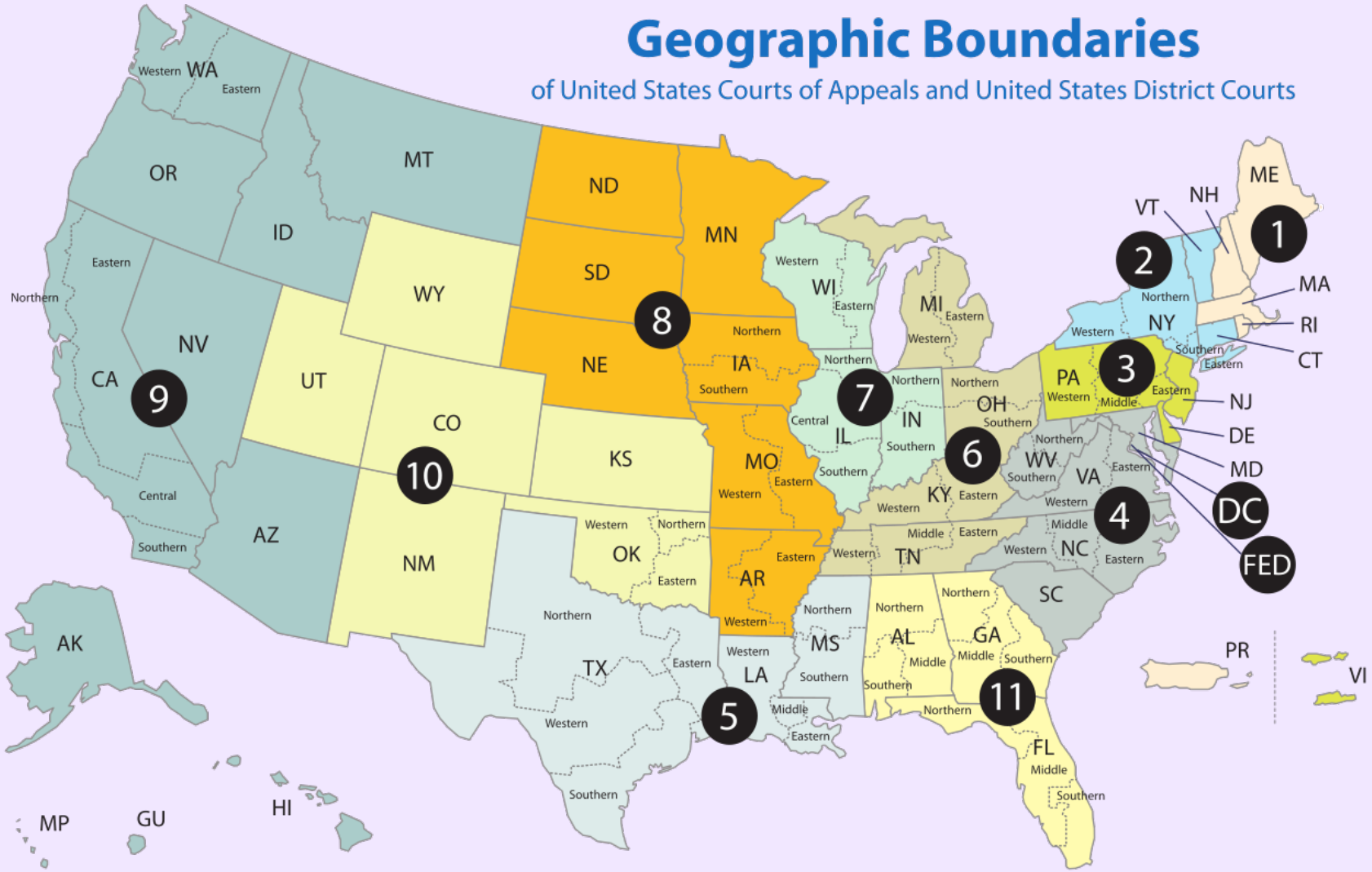
Authority and Authorities

When is a court decision binding on a subsequent court? You will just have to learn the following (fairly logical) general rules.

1. **U.S. Supreme Court decisions** are binding on all lower federal courts. They are binding on all state courts with respect to issues of federal law only. They are not binding in later U.S. Supreme Court cases (the Court can "overrule" previous decisions), but there is a principle of *stare decisis,* of variable strength.
2. **Federal Court of Appeals decisions** are not binding on federal courts in other circuits, but are binding on district courts in the same circuit. They are generally binding, in principle, on later panels of the same Court of Appeals (varies a bit by circuit) *but not* the same Court of Appeals later sitting *en banc*.
3. **Federal district court decisions bind no one.** Not even that same district court.
4. **Federal courts generally don't bind state courts EXCEPT that the U.S. Supreme Court binds state courts on issues of federal law only.**
5. **State courts generally don't bind federal courts EXCEPT that state Supreme Courts bind federal courts on issues of their own state's law only.**
6. **State court decisions bind inferior state courts in that state (only).**

Any federal or state court decision can always be PERSUASIVE in any other court.

Authority and Authorities



Distinguishing a Case: Key Exam Skill

Assuming the decision is really binding, a judge can distinguish it if it's different enough in relevant respects to be on the other side of the line that the rule creates.

1. **"Distinguishing" one or more earlier decisions** means giving a principled, compelling account of the relevant underlying rule that explains why the earlier cases are on one side but our current case is on the other.

2. The idea is to show that the logic of that earlier case does not require us to do the same thing here.

Distinguishing a Case: Key Exam Skill

What factors are relevant when distinguishing cases?

a) factors that the earlier court **expressly** relies on;

b) factors that are **plausibly implicit** in what the earlier court did (*i.e.*, the earlier court would have considered it relevant, given the nature / purpose /context of the rule it was applying, even though the court didn't say so);

c) factors that are **independent** of what the earlier court did and said but are not inconsistent with it and are appealing on their own account ("policy arguments" – use with some caution!).

This can be a place where great exams shine: making an interesting argument about a plausibly implicit limitation of a key case or a principle that can be extracted from it.

How different, really, are b) and c)?

Five Final Thoughts

1. **Exams aren't everything.** We spent a lot of time today talking about exams, but don't forget that there are many more important things in life *and in law school*.

2. **Spotting that something matters will often get credit.** Even if you don't get the rule or application quite right, there is often credit for seeing that an issue is raised or that a particular fact pulls in a particular direction.

3. **Be clear and use "because."** Just say what you mean as specifically as possible. What *specific facts* or *specific principle* supports your conclusion? Use "because"!

4. **Don't forget the facts.** A common trap is treating a legal rule as if it had never been applied before. Compare your fact pattern to key cases on either side of the line, and say why the similarity with one side is more important, given the nature and purpose of the rule.

5. **Paragraph breaks and subtitles can really help.** Long run-on paragraphs confuse you and your reader. Break it up.