

Introduction to Lawyering Skills/Torts

Class Policies and Syllabus

Law 610, Section 339B

Fall 2021

Professor Amy Sloan

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Office Hours:

Monday, noon–1:00 p.m. and by appointment.

Course Meeting Times:

Monday and Wednesday, 1:30 p.m.–4:15 p.m.

Friday 9:00 a.m.–10:15 a.m.

Please check MyUB for the classroom assignments.

Required Texts that you must obtain:

- Dobbs, Hayden, & Bublick, *Torts and Compensation, Concise Edition* (West 8th ed.), ISBN: 9781634608183. **There are two versions of this text. Please be sure to get the *concise 8th edition*.**
- Coughlin, Rocklin, & Patrick, *A Lawyer Writes* (Carolina Academic Press 3d ed.), ISBN 978-1-5310-0876-5.
- *The Bluebook* (21st ed.), ISBN 978-0-578-66615-0

Required Materials that will be provided to you:

- Sloan, *Researching the Law: Finding What You Need When You Need It* (Aspen Publishers 3d ed.)
- Anthon, *The Bluebook Uncovered: A Practical Guide to Mastering Legal Citation*
- *Core Grammar for Lawyers* (Carolina Academic Press). You must register for *Core Grammar* by Friday, August 27.

You will receive instructions for accessing these resources **during orientation week (not earlier)**. If you have questions or lose the instructions, please contact Savannah Long at slong@ubalt.edu or CJ Pipins at cpipins@ubalt.edu **on or after Friday August 20.**

Recommended Texts:

- Glannon, *Examples & Explanations: Torts* (Aspen Publishers 5th ed.).
- Schechter, *A Short and Happy Guide to Torts* (West).

Course Description:

Introduction to Lawyering Skills/Torts integrates rigorous instruction in legal analysis, research, and writing with the substantive law of torts to give beginning law students an opportunity to combine skills and doctrine the way lawyers must in the practice of law. The course is taught by full-time, tenured and tenure-track legal writing professionals in sections of approximately 30 students with one-on-one conferences. Students will learn the law of imposed liability for personal, property, and economic harm, through case analysis and rule synthesis, print and online legal research, and legal writing projects. Doctrinal topics will include negligence (including professional malpractice); strict liability (including products liability) and intentional torts; causation and elements of damages; and affirmative defenses and limitations of duties including: assumption of the risk, contributory negligence, comparative negligence, immunity, and limited liability of property owners. Legal analysis, research, and writing skills will be developed through course-work that includes critical case reading, analysis and briefing; common law principles and processes; factual analogy and distinction; rule synthesis and application; objective/predictive writing (office memo); case law and statutory research, print and electronic; citation form; and professional norms and ethics.

Learning Outcomes:

Students who successfully complete the course will be competent in:

1. articulating tort doctrine and policy;
2. conducting effective legal research in commonly used secondary sources, as well as statutes and cases;
3. applying tort law to new factual scenarios; and
4. producing written legal analysis of a client's problem.

Course Expectations:

Workload—American Bar Association Standards for Law Schools establish guidelines for the amount of work students should expect to complete for each credit earned. Students should expect approximately one hour of classroom instruction and two hours of out-of-class work per week for each credit earned in a class, or an equivalent amount of work for other academic activities, such as simulations, externships, clinical supervision, co-curricular activities, and other academic work leading to the award of credit hours.

Attendance—Class attendance is a primary obligation of each student whose right to continued enrollment in the course and to take the examination is conditioned upon a record of attendance satisfactory to the professor. A student who exceeds the maximum allowed absences may be compelled to withdraw from the course or may be barred from sitting for the final exam. Students who are forced to withdraw for exceeding the allowed absences may receive a grade of FA (failure due to excessive absence). This policy is consistent with American Bar Association Standards for Law Schools.

In accordance with the law school's attendance policy, students who have more than **five** absences (excused and unexcused combined) in each part of the course (ILS and Torts) will not be eligible to complete the course and will receive a grade of FA (failure due to excessive absences).

Most instruction this semester will occur in class. Some will be provided through asynchronous prerecorded material provided through Panopto. Some may be provided through live Zoom sessions. Attendance is taken at all class sessions, including TA classes.

You will be counted absent if you:

- arrive late to, leave early from, or are significantly distracted during in-person or Zoom class
- fail to complete assigned asynchronous instruction
- are unprepared for class (as explained more fully below).

Course Website—The LAW610A.339B ILS/Torts Sakai site is the official source of information about the course. It contains the course syllabus, announcements, class assignments, and other materials. Any changes to the syllabus, assignments, course deadlines, and the like will be posted on Sakai and supersede any information previously posted or announced elsewhere. I will use the Sakai site to communicate with the class, and you will use it to submit work. You are responsible for checking it regularly for course information.

Zoom and Panopto—All class recordings are for the sole use of the class and may not be reproduced by students for any other purpose. Faculty cannot reproduce students' voices or images from the class for any other purpose without additional student consent. All such recordings are protected by a UB login process based on where they are posted. For classes conducted via Zoom, students may mute their microphones or turn off their cameras if they do not consent to be recorded, but this may mean they need to find additional ways to participate in the class discussion. Students may be required to turn on their cameras and participate in graded class activities. In addition, students who turn off their cameras and do not remain present for the class session may be subject to the Honor Code for misrepresenting attendance. Review the Zoom guidelines posted on Sakai for additional policies regarding Zoom classes.

Computers—You are permitted to use laptops or notebooks for notetaking and for the exam. You will perform better in this class if you take curated notes during class and transfer them to an outline later on. Many students perform better if they take handwritten notes. You cannot succeed in this class simply by memorizing rules. Typing a transcript will divert your attention from the analysis of the material that is the focus of this class.

Participation—Students are expected to come to class prepared to participate in the discussion or activities taking place.

If you are unprepared, please send me an email to that effect at least 15 minutes before class or give me a note before the start of class. *If you do not notify me in advance and you are*

unprepared when I call on you, you will be counted absent for that class period. Please be aware that being unprepared for class may negatively affect your final grade (as explained more fully below).

Methods of Evaluation:

You will earn two grades in this class, one for Torts and one for ILS.

Your Torts grade will be based on the Sakai Torts quizzes, the midterm examination, and the final examination: Sakai Torts quizzes = 3%; Midterm = 10%; Final = 87%.

Your ILS grade will be based on assignments over the course of the semester:

ILS assignments	
Core Grammar Exercises (Units A, B, C, D, and F)	10 points total
Research and Citation Modules Module 1—Civics Module—2 points Module 2—Secondary sources—5 points Module 3—Case law—5 points Module 4—Statutes—5 points Module 5—Federal legal research—3 points	20 points total
Battery hypothetical	10 points
Memo #1	30 points
Research plan for Memo #2	5 points
Research and citation exam	20 points
Memo #2	35 points
Memo #2 rewrite	35 points
<i>Total points available</i>	<i>165 points</i>

Core Grammar Units, Research and Citation Modules, and Sakai Torts Quizzes are not accepted late. All other work is penalized heavily if submitted late, as detailed in the instructions for individual assignments.

Core Grammar: You must test out of or pass each assigned exercise (Units A, B, C, D, and F) to get credit for the work.

Research and Citation Modules: Assignments are graded based on good faith completion. Incomplete work or significantly deficient work that fails to demonstrate good faith effort will be penalized.

Sakai Torts Quizzes: Quizzes are graded on a pass/fail basis.

I reserve the right to raise or lower a student's grade in Torts, ILS, or both by one half step (e.g., raise the grade from B to B+ or lower the grade from B to B-) based on class participation and preparedness. This includes participation in class discussion, in-class activities, and asynchronous activities.

Class Cancellation:

If I must cancel a class, a notice will be sent to students via UB email. If there is inclement weather, students should visit the University of Baltimore web site or call the University's Snow Closing Line at (410) 837-4201. If the University is open, students should presume that classes are running on the normal schedule.

Academic Integrity:

Students are obligated to refrain from acts that they know or, under the circumstances, have reason to know will impair the academic integrity of the University and/or the School of Law. Violations of academic integrity include, but are not limited to: cheating; plagiarism; misuse of library materials; use of another's book or study materials without consent; unapproved multiple submissions; material misrepresentation of one's academic history or standing; misrepresentation of any academic matter; intentionally giving another student false or inaccurate information about class requirements; inappropriate discussion of exams; and misrepresenting or falsifying class attendance reports. You can find the School of Law Honor Code here: https://law.ubalt.edu/academics/policiesandprocedures/honor_code/index.cfm.

You are permitted to consult with me, the TAs, a librarian, or the Law School Writing Center to complete your ILS work. You may not otherwise discuss assignments or work with anyone inside or outside the law school on ILS assignments unless I give specific instructions authorizing collaboration.

Title IX Sexual Harassment and Sexual Misconduct Policy:

The University of Baltimore's Sexual Harassment and Sexual Misconduct policies are compliant with Federal laws prohibiting discrimination. Title IX requires that faculty, student employees and staff members report to the University any known, learned or rumored incidents of sex discrimination, including sexual harassment, sexual misconduct, stalking on the basis of sex, dating/intimate partner violence or sexual exploitation and/or related experiences or incidents. Policies and procedures related to Title IX and UB's nondiscrimination policies can be found at: <http://www.ubalt.edu/titleix>.

Disability Policy:

If you are a student with a documented disability who requires an accommodation for academic programs, exams, or access to the University's facilities, please contact Ms. Keri Hickey, Director of Student Support in the Law School's Office of Academic Affairs, at khickey@ubalt.edu.

Course Evaluations:

It is a requirement of this course that students complete a course evaluation. The evaluation will be available later in the semester and is entirely anonymous. Faculty members will not have access to the feedback provided on course evaluations until after all grades are submitted.

Syllabus:

The outline below sets out the anticipated assignments for the semester. Assignments may be adjusted from time to time depending on our progress through the material. Assigned reading that is not in one of the assigned texts will either be distributed in class or posted on Sakai. The abbreviation ALW refers to *A Lawyer Writes*.

We will discuss the requirements for **Work to be Submitted** on the date it is **Assigned**. Work must be submitted when it is **DUE**. Sakai Torts Quizzes are assigned for all torts topics. All assigned reading, videos, and Sakai Torts Quizzes are to be completed before class.

Date	Topic	Reading/Videos Assigned	Work to be Submitted
Aug. 23	Introduction to ILS and Torts Fault	Class policies and syllabus Handout on case briefing (see below, following this syllabus) Dobbs 1–24 (<i>Van Camp v. McAfoos</i> ; <i>Dillon v. Frazer</i>) ALW Introduction & Chapters 2 & 3	DUE at the beginning of class: <ul style="list-style-type: none">▪ 2 hard copies of a case brief for <i>Van Camp v. McAfoos</i>▪ Syllabus Quiz (on Sakai) Assigned: Core Grammar Pretest; ILS Research Module 1 (Civics)
Aug. 25	Battery Organizing a legal analysis	Dobbs 27–33 (<i>Snyder v. Turk</i> ; <i>Cohen v. Smith</i>) ALW Chapters 4 & 6	DUE at the beginning of class: Battery Quiz
Aug. 27	Weight of Authority	Assigned by TAs	DUE by 5 p.m.: ILS Research Module 1 (Civics)
Aug. 30	Intent Battery hypothetical	Dobbs 33–37; 39–44 (<i>Garrett v. Dailey</i> ; <i>Wagner v. State</i> ; <i>Baska v. Sherzer</i>) Battery hypothetical materials (posted on Sakai) ALW Chapters 5 & 7, §§ 7.1 & 7.2 only	DUE at the beginning of class: <ul style="list-style-type: none">▪ Core Grammar pretest▪ Intent Quiz▪ Battery Hypo Entrance Ticket 1 Assigned: Battery hypothetical; Core Grammar units A, B, C, D, & F
Sept. 1	Assault False Imprisonment IIED Battery hypothetical	Dobbs 44–51; 475–481 (<i>Cullison v. Medley</i> ; <i>McCann v. Wal-Mart</i> ; <i>Chanko v. ABC</i> ; <i>GTE Southwest v. Bruce</i>) ALW Chapters 8 & 9	DUE at the beginning of class: <ul style="list-style-type: none">▪ Assault, False Imprisonment, and IIED Quizzes▪ Battery Hypo Entrance Ticket 2

Sept. 3	Using citations to locate authority	Assigned by TAs	
Sept. 6	No Class — Labor Day		
Sept. 8	Property Torts Defenses to intentional torts Memo #1	Dobbs 51–58; 61–74 (<i>School of Visual Arts v. Kuprewicz; Grimes v. Saban; Katko v. Briney; Brown v. Martinez; Gortarez v. Smitty's Super Valu</i>) Memo #1 materials (posted on Sakai) ALW Chapter 1	DUE by 10 a.m.: Battery hypothetical DUE at the beginning of class: Property Torts and Defenses Part 1 Quizzes Assigned: Memo #1
Sept. 10	Citations for Memo #1	ALW Chapter 7, § 7.3	DUE by 5 p.m.: Core Grammar unit A
Sept. 13	Defenses to intentional torts Memo #1	Dobbs 75–79 (<i>Robins v. Harris; Kaplan v. Mamelak</i>) ALW Chapter 12 (parts I & III only; skip part II)	DUE at the beginning of class: ▪ Memo #1 Entrance Ticket 1 ▪ Defenses Part 2 Quiz
Sept. 15	Defenses to Intentional Torts Memo #1	Dobbs 82–88 (<i>Surocco v. Geary; Ploof v. Putnam; Vincent v. Lake Erie</i>) ALW Chapters 12, 14, & 15	DUE at the beginning of class: ▪ Memo #1 Entrance Ticket 2 ▪ Defenses Part 3 Quiz
Sept. 17	TBA		
Sept. 20	Legal research: Secondary sources	Research & Citation Module 2 (Secondary Sources): Video & Reading	DUE by 10 a.m.: Memo #1 Assigned: Research & Citation Module 2 (Secondary Sources)
Sept. 22	Exam-taking	TBA	DUE by 5 p.m.: Core Grammar unit B
Sept. 24	Citing secondary sources	Assigned by TAs	
Sept. 27	Midterm Exam Asynchronous lesson: Intro to Negligence	Dobbs 91–93 Intro to Negligence video	The quizzes for the asynchronous lesson are embedded in the video, not posted on Sakai. Be sure to use the option to Review the quizzes after you complete them to see my comments.
Sept. 29	Cases & Citators General duty of care	Research & Citation Module 3 (Case Law): Videos & Reading Dobbs 93–98 (<i>Stewart v. Motts; Posas v. Horton</i>)	DUE by 10 a.m.: Research & Citation Module 2 (Secondary Sources) DUE at the beginning of class: Intro to Negligence and Duty Part 1 Quizzes Assigned: Research & Citation Module 3 (Case Law)

Oct. 1	Citing cases	Assigned by TAs	DUE by 5 p.m.: Core Grammar unit C
Oct. 4	Statutory Research General duty of care (continued)	Research & Citation Module 4 (Statutes): Videos & Reading Dobbs 99–108 (<i>Shepard v. Gardner Wholesale; Creasy v. Rusk; Hill v. Sparks; Stevens v. Veenstra</i>)	DUE by 10 a.m.: Research & Citation Module 3 (Case Law) DUE at the beginning of class: Duty Part 2 Quiz Assigned: Research & Citation Module 4 (Statutes)
Oct. 6	Statutory standards of care Breach	110–118; 120 (FN2 and Notes only); 123–126; 128–132; 135 nn.4–5; 140–144 (<i>Martin v. Herzog; O’Guin v. Bingham County; Pipher v. Parsell; Ind. Consol. Ins. v. Mathew; U.S. v. Carroll Towing</i>)	DUE at the beginning of class: Negligence Per Se and Breach Part 1 Quizzes
Oct. 8	Citing statutes	Assigned by TAs	DUE by 5 p.m.: Core Grammar units D & F
Oct. 11	Multiple Tortfeasors Proving Breach Memo #2	Dobbs 137–139; 145–149; 150 (notes)–155 (<i>Bernier v. Boston Edison</i> facts; <i>Forsyth v. Joseph</i> ; Kibler v. Maddox problem) Skim <i>Bernier’s</i> facts to follow later material; we will not discuss the case. <i>Gift v. Palmer</i> (posted on Sakai) Memo #2 materials (posted on Sakai)	DUE at the beginning of class: Multiple Tortfeasors and Proving Breach Part 1 Quizzes Assigned: Memo #2
Oct. 13	Proving Breach Actual Harm Memo #2 research check in	Dobbs 155–158; 159–163; 165–169; 177–179 (<i>Thoma v. Cracker Barrel; Duncan v. Corbetta; The T.J. Hooper; Byrne v. Boadle; Right v. Breen</i>)	DUE by 10 a.m.: Research & Citation Module 4 (Statutes) DUE at the beginning of class: Proving Breach Part 2 Quiz
Oct. 15	Memo #2 research	Assigned by TAs	
Oct. 18	Factual Cause	Dobbs 179–188; 192–195 (<i>Hale v. Ostrow; Salinetto v. Nystrom</i> ; Multiple Causes & Apportionment; <i>Landers v. E. TX Salt Water; Summers v. Tice</i>) <i>Joshi v. Providence Health System of Oregon</i> (posted on Sakai)	DUE by 10 a.m.: Research Plan for Memo #2 DUE at the beginning of class: Factual Cause Quiz
Oct. 20	Proximate Cause Memo #2	Dobbs 205–220 (<i>Thompson v. Kaczinski; Abrams v. Chicago; Palsgraf v. Long Island Railroad</i>) Review ALW Chapter 14	DUE at the beginning of class: ▪ Memo #2 Entrance Ticket 1 ▪ Proximate Cause Part 1 Quiz

Oct. 22	Citations for Memo #2	Assigned by TAs	
Oct. 25	Proximate cause Memo #2	Dobbs 221–226 (<i>Hughes v. Lord Advocate</i> ; <i>Doughty v. Turner Mfg.</i> ; <i>Hammerstein v. Jean Dev.</i>)	DUE at the beginning of class: <ul style="list-style-type: none"> ▪ Memo #2 Entrance Ticket 2 ▪ Proximate Cause Part 2 Quiz
Oct. 27	Proximate cause Memo #2	Dobbs 228 (Notes)–229; 231–234; 236–239 (Notes; <i>Derdiarian v. Felix Contracting</i> ; <i>Marshall v. Nugent</i>)	DUE at the beginning of class: Proximate Cause Part 3 Quiz
Oct. 29	Writing workshop	ALW Chapter 16	
Nov. 1	Federal Legal Research	Research & Citation Module 5 (Federal Legal Research): Video & Reading	DUE by 10 a.m.: Memo #2 Assigned: Research & Citation Module 5 (Federal Legal Research)
Nov. 3	Defenses to negligence	Dobbs 241–252; 266–272 (<i>Butterfield v. Forrester</i> ; <i>Pohl v. County of Furnas</i> ; <i>Duggar v. Arredondo</i>)	DUE at the beginning of class: Negligence Defenses Part 1 Quiz
Nov. 5	Review for Research & Citation Exam		DUE by 5 p.m.: Research & Citation Module 5 (Federal Legal Research)
Nov. 8	Defenses to negligence Memo #2 Rewrite Research & Citation Q&A	Dobbs 237–275; 280 (Notes)–285; 288–292 (<i>Stelluti v. Casapenn</i> ; <i>Tunkl v. Regents</i> ; <i>Gregory v. Cott</i> ; <i>Coomer v. KC Royals</i>) Memo #2 Rewrite materials (posted on Sakai)	Assigned: Memo #2 Rewrite DUE at the beginning of class: Negligence Defenses Part 2 Quiz
Nov. 10	Duties of landowners	Dobbs 314–332; 335–339 (<i>Gladon v. Greater Cleveland RTA</i> ; <i>Rowland v. Christian</i> ; <i>Scurti v. City of NY</i> ; <i>KY River Med. Center v. McIntosh</i> ; <i>Minnich v. Med-Waste</i>)	DUE at the beginning of class: Landowners Quiz
Nov. 12	Research & Citation Exam		
Nov. 15	Duties of medical professionals	Dobbs 309; 341–354 (<i>Walski v. Tiesenga</i> ; <i>Vergara v. Doan</i> ; <i>Hirpa v. IHC Hosp.</i> ; <i>Harnish v. Children’s Hosp.</i>)	DUE at the beginning of class: Medical Professionals Quiz Individual conferences will be scheduled during part of class time

Nov. 17	No live class. Asynchronous lesson: Nonfeasance Third persons	View Nonfeasance and Third Persons videos Dobbs 407–410; 415–416; 418 (Notes); 447–452; 458–466 (<i>Posecai v. Wal-Mart Stores</i> ; <i>Tarasoff v. Regents</i> ; <i>Estate of Cilley v. Lane</i>)	Individual conferences will be scheduled during class time The quizzes for the asynchronous lesson are embedded in the video, not posted on Sakai. Be sure to use the option to Review the quizzes after you complete them to see my comments.
Nov. 19	Research & Citation exam review		
Nov. 22	Vicarious liability Wrongful death	Dobbs 515-516; 519–520 (Notes) 522–524 (Notes 2, 3, 4, & 10); 537 (Notes)–542; 546–552 (<i>Edgewater Motels, Inc. v. Gatzke</i> ; <i>Mavrikidis v. Petullo</i>)	DUE by 10 a.m.: Memo #2 rewrite DUE at the beginning of class: Nonfeasance and Third Persons and Vicarious Liability Quizzes
Nov. 24	Asynchronous lesson: Common law strict liability Nuisance	View Common Law Strict Liability video Dobbs 553–557; 564–573 (Note on Nuisances Today; <i>Dyer v. Maine Drilling & Blasting</i>)	The quizzes for the asynchronous lesson are embedded in the video, not posted on Sakai. Be sure to use the option to Review the quizzes after you complete them to see my comments.
Nov. 29	TBA		DUE at the beginning of class: Common Law Strict Liability and Nuisance Quizzes
Dec. 1	TBA		

Case Briefing

Adapted from materials by Professors Byron Warnken and Elizabeth Samuels

What is a Case Brief?

A case brief is an analytical summary of a judicial opinion. It is a method of taking notes on cases assigned for class. (A case brief should not be confused with a legal brief submitted by an attorney to a court.) The process of preparing a case brief can help you understand the case, and the completed brief can be a valuable document for preparing for class, analyzing cases in class, reviewing after class, making outlines in preparation for exams, and studying for exams.

The appropriate length of a case brief is a function of the complexity of the case, the sophistication of the briefer, and the purposes for which the brief is made. Briefing style and briefing length evolve rapidly during the first semester of law school. During the first month of law school, in particular, you should review briefs that you prepare for quality and length. If upon subsequent review, you need to “brief the case brief” in order to have a workable study tool, then the case brief is too long. On the other hand, if upon subsequent review, the case brief does not contain enough information to permit sufficient recall of the case, the case brief is too short.

There may be as many briefing techniques as there are briefers. This document discusses one briefing technique. You may hear about other techniques during orientation, from your other professors, or from fellow students. This is fine. There is no single right way to brief a case. You should experiment with different briefing styles until you find a method that helps you understand the assigned cases and follow and participate in class discussion.

For the most part, briefs will be your notes for your use to help you understand the material. Unless specifically instructed to do so, you are not expected to submit case briefs for this class.

The Components of a Case Brief

A comprehensive brief of a case contains the following eleven components:

(1) **Citation:** At a minimum, every case brief should note (1) name of the case, (2) the jurisdiction and name of the court, and (3) the year of decision. Depending on the purpose of the brief, you may also want to include a complete legal citation, which is an abbreviation identifying where the case is published.

(2) **Parties:** The parties to the case are the litigants. Each party can usually be identified by one or more factual categorizations, e.g., employee, agent, landlord, offeree, the State. In addition to identifying the parties’ factual status, you need to determine their litigation status. For example, at the trial level, it is usually a plaintiff versus a defendant, or the State (or Commonwealth or People) versus a defendant. At the appellate level, it is appellant versus appellee or petitioner versus respondent.

(3) **Relief sought:** What was the legal objective or result sought by the party seeking relief? This could be money damages or dismissal of the suit or remand for a new trial. If you are reading an appellate case, the party seeking relief may not be the party who initiated the suit in the first instance. In an appellate case, the party seeking relief usually seeks a reversal of the decision of a lower court, either a vacating of the judgment or a modification of the legal result at the trial level.

(4) **Procedure:** Understanding the procedural history and current procedural posture of every case is essential. The case brief should list all procedural steps, from the initial proceeding through the present proceeding. Each step in the procedural history of the case should be identified by (a) the nature or type of proceeding, e.g., a civil tort case, a divorce action, a suit for an injunction, a criminal case, (b) the party initiating that step in the proceeding, and (c) in an appellate case, the tribunal that resolved the matter below.

There may be many steps in the procedural history of the case, or there may be only one. Most judicial opinions you read in law school are written by appellate courts. Thus, there is usually at least one prior level in the procedure, i.e., the trial level below, plus the current procedural posture, i.e., the current appeal. Many of the terms used to describe procedural steps in the litigation may be unfamiliar to you, so don't be surprised if you need to use a legal dictionary to try to understand the procedural steps that led to the opinion you are reading.

(5) **Legal theories:** Any time that a party seeks relief, that litigant must have a legal basis for his or her objective. At the trial level in a civil case, the party seeking relief must have one or more "causes of action." The legal theory of the other party, in either a civil or criminal action, is referred to as a defense, which is usually in the form of a general denial (e.g., "I did not commit the offense," or "I did not breach the contract,") or in the form of an assertion of one or more affirmative defenses (e.g., "If I committed the offense, it was done in self-defense or was done under duress").

At the appellate level, the party seeking relief, who is the appellant or petitioner, usually bases the appeal upon a claim that the trial court has made one or more errors of law. The party seeking to uphold the lower court's decision, the appellee or respondent, usually contends that the trial judge made no legal errors or that if the trial judge did make a legal error, the error does not require reversal.

(6) **Legally significant facts:** Because like cases should be decided in like manner under the principle of stare decisis, it is necessary to understand the facts of the case to which the law has been applied. You must determine which facts were significant to the court in reaching its result. Legally significant facts are also referred to as operative facts, key facts, material facts, and salient facts.

Facts are determined at the trial level. Evidence is produced by the litigants, and the facts are ascertained by the "finder of fact," also referred to as the "trier of fact." If three prosecution witnesses testify that they saw the defendant shoot the victim, and three defense alibi witnesses testify that the defendant was playing pool with them at Joe's Bar and Grill at the time of the murder, it is the finder of fact who will decide where the defendant was and what he

did. The finder of fact will be either a jury, in a jury trial, or a judge, in a non-jury trial. A non-jury trial is also referred to as a court trial or bench trial.

As you read an appellate opinion, you will learn the facts solely from the appellate court, which is not the fact finder. To determine what facts were found below, the appellate court relies on the record of the case, including the evidence submitted by the parties and the written decision of the lower court. Your understanding of the appellate court's understanding of the facts is crucial. Certain signals in the court's opinion will help you understand what the court understands to be the facts found below: (a) The appellate court states that the record directly supports certain facts. (b) The appellate court states that certain facts can be inferred from the record. (c) The appellate court states that certain facts were agreed upon or stipulated to by the parties. (d) The appellate court accepts allegations of one of the parties that certain facts exist.

It is also helpful to consider indications of what facts the appellate court determines the court below found did not exist: (a) The appellate court expressly states or implies that certain facts do not exist. (b) The appellate court rejects allegations made by one or more of the parties that certain facts exist.

A fact is legally significant if altering or eliminating that fact would change the legal conclusion or result of the case. Because facts gain their legal significance only in light of the controlling law, the relevant factual categories depend upon the legal issues. Thus, the same facts may acquire or shed their legal significance depending upon the issue. Assume that a case involves a green 1981 Chevrolet Camaro, with the serial number 6857109. "Green," "1981 Chevrolet Camaro," and "serial number 6857109" may all be irrelevant, and the legally significant fact may be "automobile," if the issue is the automobile exception to the requirement for a search warrant under the Fourth Amendment. "Green" and "serial number 6857109" may both be irrelevant, and the legally significant fact may be "1981 Chevrolet Camaro," if the issue is an automobile recall. "Serial number 6857109" may be irrelevant, and the legally significant fact may be "green 1981 Chevrolet Camaro," if the issue is an eyewitness identification of the getaway vehicle in a robbery. When evaluating facts for legal significance, you must evaluate the facts of the case as a totality to the extent possible.

(7) **Issue(s):** An issue is a question of law. It is usually a question that asks, "What is the result when you apply this rule of law to these facts?" A case will always present at least one issue and may contain multiple issues. Sometimes, but not always, the court will specifically identify the issue or issues it is addressing in the opinion.

An issue can usually be framed in the form of a question that can be answered "yes" or "no." In order to yield a legal conclusion that can be applied under the principle of stare decisis to future similar situations, the issue must be stated neither too narrowly nor too broadly. An example is included below to illustrate this point.

Issues should have two components -- one legal and one factual. The legal component should identify the relevant rule of law. The factual component includes facts legally significant to the issue. Depending on the nature of the legal question, the issue might read as follows:

“Do [legally significant facts] constitute [particular portion of the rule of law] within the meaning of [the rule of law]?” Two examples follow.

- A. **Well-framed issue:** Is a person who does not register brain waves a human being for purposes of common law murder, which is the felonious killing with malice of a human being?
- B. **Inadequate factual component (no factual category or factual category too narrow):** Is Mr. Jones is a human being for purposes of common law murder, which is the felonious killing with malice of a human being?
- C. **Inadequate factual component (factual category too broad):** Is a person with no chance of recovery is a human being for purposes of common law murder, which is the felonious killing with malice of a human being?
- D. **Inadequate legal component (no rule of law):** Is a person who does not register brain waves alive?

In examples B and C, the rule of law is provided but nothing is known about Mr. Jones. An answer of “yes” or “no” will not be helpful because there will be no way to consider whether the next set of facts is sufficiently similar to dictate the same answer. In the second example, the facts are stated too broadly. Even if the answer is “yes” to the well-framed issue, it could only be “maybe” to this issue because “an individual with no chance of recovery” is broad enough to include a terminally ill person, who also has no chance of recovery but who is a human being for purposes of common law murder and in every other legal context.

In example D, the person may no longer be a human being from the standpoint of common law murder, but he may still be a human being and still be very much alive from the standpoint of contract law or the law of trusts and estates. While he may no longer be a potential murder victim, his life insurance policy beneficiary may not be able to collect and his estate may not be subject to probate.

(8) **Holding(s):** A holding is a conclusion of law. It is generally the affirmatively stated “yes” or “no” answer to the legal issue, to the question that asks, “What is the result when you apply this rule of law to these facts?”

(9) **Court’s rationale:** The court’s rationale consists of both its reasons and its policy considerations. While the holding provides the “what,” the rationale provides both the “how” and the “why.” If every case that arose thereafter were exactly the same as the case being briefed, then knowing the “what” would probably be enough. However, because later cases will not be exactly “on point,” or “on all fours” with the present case, it is necessary to understand the court’s rationale in order to consider how the law of the case may be applied to future cases.

(10) **Dictum:** Obiter dictum, usually shortened to dictum, is Latin for “a remark by the way.” It is “an observation or remark made by a judge in pronouncing an opinion upon a cause, concerning some rule, principle, or application of law, or the solution of a question suggested

by the case at bar, but not necessarily involved in the case or essential to its determination; any statement of the law enunciated by the court merely by way of illustration, argument, analogy, or suggestion. Statements and comments in an opinion concerning some rule of law or legal proposition neither necessarily involved nor essential to determination of the case in hand are obiter dicta, and lack the force of an adjudication." Black's Law Dictionary 541 (6th ed. 1990) (citation omitted).

Dictum often takes one or more of the following forms. (a) The court may analyze facts different from those before the court, e.g., "Had the bicycle been a motor bike, our conclusion would be different." (b) The court may analyze rules of law not necessary to resolve the issues before the court, e.g., "Had this cause of action arisen today, under the amended statute, the claimant would be entitled to benefits." (c) The court may analyze an issue not before the court, e.g., "Although the question is not raised by this case, it appears that the statute would have precluded coverage had the injury occurred on the first day of employment." (d) The court may analyze an issue not necessary to resolve in light of the resolution of one or more threshold issues, e.g., "While reversing the judgment below and remanding for a new trial because of the erroneous admission of evidence, we note that the award of punitive damages could not have withstood appellate review because this is not a case of pure tort but a case of tort arising out of contract." It is essential to distinguish holding from dictum -- the former is the law, the latter may or may not be the law but is certainly not the law of the case.

(11) **Separate opinions:** Separate opinions are extra opinions that are written by individual judges and are not the opinion of the court. These opinions are either concurring or dissenting ones and do not contain the court's holding. The author of a concurring opinion agrees with the majority's disposition of the case but for different reasons, for additional or more expansive reasons, or for fewer or more limited reasons. The author of a dissenting opinion disagrees with the majority's disposition of the case. If the case you are reading has any separate opinions, they should be summarized and analyzed.

Quotations from Cases

When you are first learning to brief cases, it is tempting to quote extensively from the court's opinion. After all, what could be better than the court's own words? Quoting extensively from the case, however, defeats the purpose of a case brief. A case brief should summarize and analyze the opinion in a way that helps you understand the principles of law. Cutting and pasting from an opinion does not require the same degree of intellectual work that explaining the case in your own words does. You should use quotations sparingly, only when it is absolutely necessary to repeat the court's language, such as when you must note the exact wording of a legal test or standard.

Often, students quote the language of the opinion when they don't really understand what the opinion means and are, therefore, unable to put the ideas in their own words. If you find yourself quoting extensively, ask yourself whether you really understand the case. If you do, try to put the elements of the case into your own words. If you don't, keep reading the case until you do understand it.